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LawNow

relating law to life in Canada

How We Make Our Laws

Parliament at Work

Workplace Addiction

Carding

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Contents

In This Issue

Crafting new laws is a complex and lengthy undertaking. This issue of LawNow looks at how it happens.

Departments

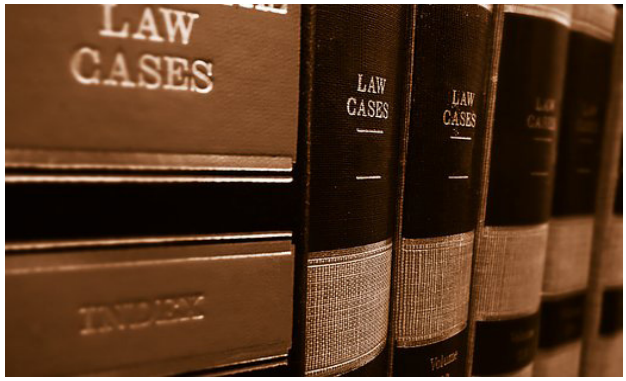
6 Featured

How We Make Our Laws

Feature: How We Make Our Laws

The Legislative Process: How We Make Our Laws

Charles Davison



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

Except when something particularly noteworthy occurs – such as the implementation of a radical new law or the defeat of a government over legislation it is trying to get passed – many Canadians are not aware of the details of our legislative process. In this article, I will sketch out an overview of the process by which Canada makes its laws. While I will describe our national Parliamentary process, much the same process is followed at the provincial and territorial levels, and often even at the municipal levels in many communities across the country.

After an election, the party which has won the most seats in the House of Commons is asked to form a government. Upon convening the new Parliament, the Governor General delivers a Throne Speech. Although read by the Queen's representative, the Prime Minister (the leader of the party which won the election) actually writes the Throne Speech. The speech highlights the aspects of the government's election platform which it will now attempt to enact as law. Sometimes, this means:

- enacting new laws to accomplish positive change;
- amending existing laws to bring them into conformity with the values and promises of the party which won the election; and, in some cases,
- repealing old laws completely.

> *"We sometimes forget that the necessity of Royal Assent makes the Queen (in the person of the Governor General) an essential and necessary part of the legislative process."*

Whatever the expected outcome, the legislative process is essentially the same for each situation.

The Cabinet ministers begin by enlisting the input and assistance of the government's legislative drafters. These persons (often lawyers) are skilled and knowledgeable about the wording and framing of legislation, and begin to write the

bills which will ultimately be placed before Parliament. The drafts are circulated and discussed internally within Cabinet until they properly reflect the ideas the government wants to present to the country.

> *"The House - because its members have been democratically elected - will always have the final say about any piece of legislation, and it can vote to remove or reject the suggestions made in the Senate."*

Then, the Minister responsible will present the Bill to the House of Commons (in rare cases, the initial presentation can take place in the Senate) where, after a brief introductory debate, it is considered to have undergone its "first reading". According to the House of Commons website, the term "reading" comes from ancient times when reproducing multiple copies of a bill was difficult and time-consuming. Back then, the Clerk would read the bill out loud at each stage so Parliamentarians knew what they were being asked to consider.

After First Reading, the Bill moves to the "second reading" stage, and this is where it is likely to come under the closest scrutiny. At Second Reading (sometimes just before, and sometimes just after), the Bill is referred to a House of Commons committee for careful, line-by-line review and discussion. Which committee undertakes this task will depend upon the subject matter of the bill. In the case of budgetary ("supply") bills, and in other situations where proposals are particularly important, the entire House will sit as a "Committee of the Whole" to consider and discuss the proposal. During committee hearings, parliamentarians discuss and debate the meaning and impact of each aspect of the proposed legislation. They may call outside witnesses and interested parties to offer their opinions and thoughts upon the Bill. The Committee makes and votes on proposals for amendments. The government might accept some amendments and reject others. The scope of possible amendments is usually broader if the Bill has been referred to the committee before Second Reading. At Second Reading, it is considered that the House of Commons approved at least the principle of the legislation. So, if referral to the committee takes place after Second Reading, the ability to offer amendments is somewhat more restricted.

> *"The Cabinet ministers begin by enlisting the input and assistance of the government's legislative drafters. These persons (often lawyers) are skilled and knowledgeable about the wording and framing of legislation."*

When the responsible committee has finished its study of the Bill and voted on any possible amendments, the proposal returns to the House of Commons for Third Reading. Further Parliamentary debate takes place upon the merits and shortcomings of the Bill and again, amendments may be offered. At the end of this process, the House of Commons votes upon the proposal (including any amendments) and either accepts or rejects the proposed legislation.

If the proposal is rejected, depending upon the nature of the legislation this can be devastating to the government because it can reflect a lack of confidence on the part of the House. Especially if the legislation has to do with the government's proposed Budget, a defeat of the government can lead to another party being asked to take power, or a new election taking place.

If the House of Commons adopts the legislation, it moves to the Senate for further review. The Senate has often been called "the Chamber of sober second thought" because senators are not elected and therefore are thought to be immune to the lures and attractions of purely political posturing based upon winning elections. At least in theory, it is in the Senate where a more careful, dispassionate review takes place. The actual practice is not quite as non-partisan as this: very often Senators owe their seats to one party or the other, so they may direct their loyalty and their votes accordingly. However, such allegiances have been less the case recently, because the Liberal government of Justin Trudeau appoints persons as independent Senators, freed from the old partisan expectations and obligations.

"Especially if the legislation has to do with the government's proposed Budget, a defeat of the government can lead to another party being asked to take power, or a new election taking place."

"In the case of budgetary ("supply") bills, and in other situations where proposals are particularly important, the entire House will sit as a "Committee of the Whole" to consider and discuss the proposal."

In the Senate, the legislative process mirrors that of the House of Commons: It subjects Bills to three readings, and again, during the Second Reading stage, the responsible Senate committee reviews the proposal exhaustively just as was done during the committee review in the House. Once again, committees call witnesses to comment upon the merits and shortcomings of the legislation, and the Senate considers amendments which might improve – or otherwise change – the proposal being advanced.

The Senate has the authority to suggest changes to the legislation, but if after Third Reading it makes any amendments to the Bill, it must return the Bill to the House of Commons for its approval. The House – because its members have been democratically elected – will always have the final say about any piece of legislation, and it can vote to remove or reject the suggestions made in the Senate and return the Bill to its form when it left the House the first time. After the House has voted again, the Bill must again pass through the Senate where, by tradition, it will usually accept the will of the Commons and adopt the Bill. However, the Senate is not required to accept the direction of the House of Commons, and if the two bodies cannot ultimately agree upon the proposal, they

may convene a formal Conference to make an attempt to negotiate the points of difference remaining. This process is used very rarely. According to the House of Commons website, all 36 Conferences in Canada took place between 1903 and 1947 (suggestions for Conferences made since 1947 have not been accepted).

After the legislative process through the houses of Parliament, the final step in order for a Bill to become law is of Royal Assent: the approving of the legislation by the Governor General (on behalf of the Queen). We sometimes forget that the necessity of Royal Assent makes the Queen (in the person of the Governor General) an essential and necessary part of the legislative process. In fact, all legislation passed by the houses of Parliament bears the same introductory words upon becoming law: "Her Majesty, by and with the advice and consent of the Senate and House of Commons, enacts as follows".

> *"At least in theory, it is in the Senate where a more careful, dispassionate review takes place."*

However, while it is a necessary step to enacting a law, under our written *Constitution* (mainly, the *Constitution Act, 1867* and the 1947 *Letters Patent* which set out the details of the powers of the Governor General) Royal Assent is not mandatory. The Governor General has the authority to refuse to sign legislation placed before her for any reason she considers fit and proper, or to reserve assent to await an indication of the Queen's wishes. Although the reservation power was used a number of times in the years following Confederation, it and the disallowance option have fallen into disuse. Now, they are virtually theoretical and are no longer real options. In fact, it would provoke a constitutional crisis and be considered an affront to the democratic nature of Canada for the (appointed) Governor General to refuse (or even hesitate) to give her assent to a law passed through the democratically elected House of Commons and the Senate under the sponsorship of the government of the day.◆

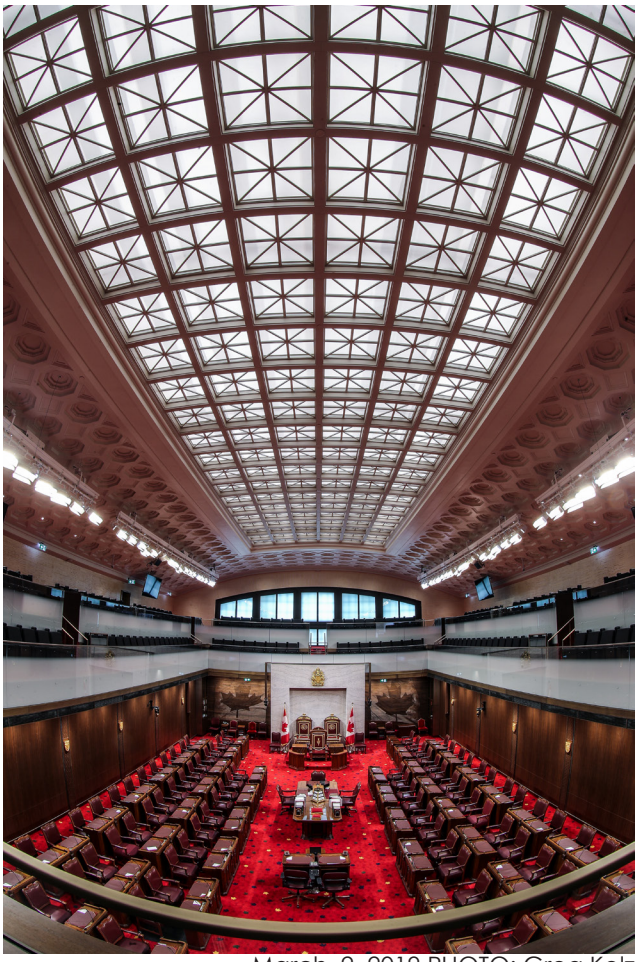
Moving Toward a New and Improved Senate

Paul G. Thomas

The following is the summary of a study completed by Paul G. Thomas on the Senate of Canada.

The Senate of Canada has changed significantly as a result of the 2014 decision by Justin Trudeau, then leader of the Liberal party, to remove Liberal senators from the parliamentary caucus; and by his introduction, as prime minister, of a new procedure for the selection of senators. The Independent Advisory Board for Senate Appointments now proposes candidates from pools of interested Canadians who have applied. Almost all those appointed since March 2016 have joined the Independent Senators Group (ISG), which now has 58 members in the 105-seat second chamber.

The Senate has not been completely transformed, but enough change has occurred to allow us to contrast what author Paul Thomas refers to as the "old, partisan, government-controlled" Senate with a "new, non-partisan, independent Senate." When it was a highly partisan body composed almost entirely of Liberal and Conservative senators, the Senate was constrained in the performance of its three main constitutional roles of representing regions, providing sober second thought on



March 2, 2019 PHOTO: Greg Kolz

bills and upholding the rights of minorities. The "new" Senate has demonstrated a greater willingness to propose amendments to government legislation, but so far has stopped short of an actual veto. Whether intended or not, the Trudeau changes have meant that the Senate has become a curb on prime ministerial power and the use of majority power in the House of Commons.

Although the ISG has become the dominant presence in the Senate, it is not a caucus that takes direction from the government. The traditional clash between organized government and opposition sides has waned but not disappeared entirely because Conservative senators continue to act as an opposition. In addition, spontaneous coalitions in opposition to elements of certain government bills have emerged within the ISG.

The new Senate operates on the basis of a dispersed, horizontal and shared form of leadership that depends on "soft power" techniques such as consultation, persuasion and negotiation. The leadership skills of the Government Representative and his two deputies have become key to advancing Senate business. Senate rules, procedures and resource allocations have been gradually modified to reflect the new realities. As a result, a new institutional culture that is more collegial and constructive than the often-adversarial culture of the past is developing.

Thomas concludes that further changes are needed to carry forward the present renewal. These include the establishment of a business committee to plan and organize the work of the Senate and the development of a set of criteria, perhaps enshrined in the Senate's rules, to guide it in determining whether to delay, amend or defeat a government bill.

This summary was first posted by the Institute for Research on Public Policy on March 28, 2019 and is reprinted with permission.

The full study can be found here: http://irpp.org/research-studies/moving-toward-new-improved-senate/ ◆

Paul G. Thomas is professor emeritus of political studies at the University of Manitoba.

The Continuing Relevance of International Law in Canada

Marjun Parcasio

To some Canadians, international law may be perceived as an amorphous body of law with little, if any, direct impact on their day-to-day life. After all, international law was historically referred to as the "Law of Nations": the laws which governed the conduct of sovereign states as actors on the international plane. What relevance could international law possibly have to a farmer harvesting crops for export just outside of Lethbridge, an immigrant living in the Edmonton suburbs or a member of the Kapawe'no First Nation?

A surprising amount, in fact. International law is received into the Canadian legal system in a number of different ways, which can have important consequences on commerce, the development of infrastructure, the protection of civil liberties, and so on. For instance, the trade agreements that the Government of Canada signs with other nations may provide Canadian businesses with access to new products and markets. Moreover, international law is no longer just concerned with state-to-state interactions; it is well-accepted that individuals are also subjects of international law, which has implications on their treatment under international human rights law. The place of international law in Canada and in litigation before the Canadian courts is certainly not insignificant and should not be understated.

> *"The Supreme Court of Canada's decision on these important issues will undoubtedly have a significant impact on the liability of Canadian multinational corporations operating abroad and the avenues through which humans rights violations which occur in other states can be resolved in Canadian courts."*

Marjun Parcasio is an associate practicing in international arbitration and business and human rights at Hogan Lovells International LLP in London, England.

Sources of International Law

It is perhaps first worth considering what we mean when we talk of "international law". The sources of international law are set out fully in Article 38, paragraph 1 of the *Statute of the International Court of Justice*, but for our purposes we will consider the two main sources:

- treaties, i.e. agreements between states; and
- international custom, also known as customary international law, which requires the existence of a general practice of states that is accompanied by a belief by states that they are bound by that practice as a legal obligation (known as *opinio juris*).

Sometimes a rule of international law is readily apparent – for instance, one can turn to the *UN Convention against Torture* and identify the obligation requiring states to prevent acts of torture in their respective jurisdictions. In other respects, it can be difficult to determine whether international law even exists. For example, scholars and legal experts may sometimes dispute whether the practice of states is sufficiently consistent so as to constitute a rule of customary international law, or may have difficulty demonstrating the subjective intention of states in relation to a particular state practice.

Canada's Hybrid Approach to the Reception of International Law

The rules of reception refer to the means by which international law takes effect in domestic law, and Canada takes a different approach depending on the source of international law in question.

Treaties are effectively agreements which are signed by the executive branch of government (i.e. the Government of Canada) with other states and subsequently ratified so as to create binding legal obligations on Canada as a matter of international law. However, signature and ratification are not sufficient for the treaty to apply as a matter of domestic law. The treaty must undergo a process of "transformation", whereby the treaty is implemented, generally by means of legislation in the relevant Canadian legislature, for it to form part of Canada's domestic law.

In contrast, customary international law is simply "adopted" as part of Canadian law and does not require legislative

> *"The place of international law in Canada and in litigation before the Canadian courts is certainly not insignificant and should not be understated."*

implementation. In *R v Hape* [2007] 2 SCR 292, the Supreme Court of Canada considered that "the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation." It also held that "[a]bsent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."

Two Live Examples: Current Issues of Customary International Law and Treaty Law

By way of illustration, two recent developments highlight some of the ways that both these sources of international law have been considered in Canada.

> *"...signature and ratification are not sufficient for the treaty to apply as a matter of domestic law. The treaty must undergo a process of "transformation"..."*

(i) Customary International Law: The case of *Nevsun Resources Ltd. v Gize Yebeyo Araya, et al.*

The case of *Nevsun v Araya* originated in the courts of British Columbia. Three Eritrean nationals sued Nevsun Resources Ltd, a B.C.-incorporated company, alleging that the company was complicit in human rights violations committed by the Eritrean state and military which occurred at the Bisha mine in Eritrea. Nevsun raised a number of jurisdictional objections against the claim in the lower courts, which were dismissed by the Supreme Court of British Columbia and subsequently the Court of Appeal of British Columbia. Nevsun appealed to the Supreme Court of Canada, who heard oral arguments earlier this year in January.

> *"...customary international law is simply "adopted" as part of Canadian law and does not require legislative implementation."*

The case raises complex questions of both private and public international law, but of particular interest is one of the key issues on appeal: whether the court should recognise a private law remedy for a breach of a rule of customary international law. The plaintiffs raise serious allegations of breaches of customary international law, including torture, slavery and forced labour. They refer to the doctrine of adoption as expressed in *Hape* and argue that the rules of customary international law serve as a source for the development of the common law thereby allowing the court to fashion new common law torts for breaches of customary international law. Nevsun, on the other hand, contends that customary international law does not extend to the provision of a civil remedy and that doing so would require legislative intervention.

The Supreme Court of Canada's decision on these important issues will undoubtedly have a significant impact on the liability of Canadian multinational corporations operating abroad and the avenues through which human rights violations which occur in other states can be resolved in Canadian courts.

> *"What relevance could international law possibly have to a farmer harvesting crops for export just outside of Lethbridge, an immigrant living in the Edmonton suburbs or a member of the Kapawe'no First Nation?"*

(ii) Treaty Law: NAFTA revamped? The new *Canada-United States-Mexico Trade Agreement (CUSMA)*

On November 30, 2018, Canada, the United States and Mexico signed a new multilateral trade agreement which is intended to replace the *North America Free Trade Agreement (NAFTA)*. Although many of the *NAFTA* provisions remain intact, the treaty overhauls a number of rules, including in relation to regional content and labour standards requirements in automobile supply chains, access to the Canadian dairy market, among others. Additionally, CUSMA completely rewrites the investor-state dispute settlement (ISDS) mechanism previously established in Chapter 11 of *NAFTA*, replacing it with a patchwork of bilateral dispute resolution mechanisms. Under *CUSMA*, investor-state arbitration will be eliminated between Canada and the United States, but will continue between the United States and Mexico on a more circumscribed basis. As between Canada and Mexico, investors will still be able to make claims under the traditional ISDS mechanism, albeit under an entirely separate trade agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which came into force at the end of last year.

However, as noted above, signature is not the end of the road. As a multilateral treaty, each of Canada, the United States and Mexico must ratify and implement the treaty in accordance with their respective laws, a process which is far from concluded particularly in light of the political controversy surrounding the treaty in the United States Congress. Moreover, in Canada, with Parliament rising for recess in June and a federal election on the horizon in the autumn, it remains to be seen whether *CUSMA* will see the light of day as an implemented treaty in Canadian law, at least in the immediate future.

> *"The rules of reception refers to the means by which international law takes effect in domestic law, and Canada takes a different approach depending on the source of international law in question."*

Conclusion

These are only two examples of ongoing issues of international law in Canada, and there are of course a plethora of other examples – the impact of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) and the efforts to implement it in Canada on the rights of Aboriginal peoples, the implementation of the Paris Agreement on climate change, and the high-profile extradition proceedings of Huawei's CFO Meng Wanzhou, to name but a few. Suffice to say, Canada continues to be an active player in the international community and as such, international law will remain of continued relevance in Canada and its legal system in the years to come. ◆

How Are Environmental Laws Made?

Jeff Surtees

Written environmental laws come in all different sizes and shapes. For example, the *Canadian Environmental Protection Act, 1999* has 356 sections, six schedules and fifty-seven sets of regulations. Other environmental laws are only one page long. Big or small, they all have a few things in common. They must be put in place by a government that has the constitutional authority to create a law about whatever it is that is being regulated. (We looked at the issue of jurisdiction in the March/April 2017 issue of LawNow.) Also, for every law there will some kind of process that was followed to put it in place.

Laws are usually defined as rules that are enforceable using state power. If you break a law, there is at least the possibility that you will face a penalty. The penalty could be a fine, loss of a licence or privileges, or even jail. Laws are different from policies. Government policy can be defined many ways but essentially it is the plan of action the government wishes to take. Governments often need to pass laws to put their policies into effect.

Much of the debate about environmental law creation takes place during the policy formation stage. A government will formally and informally seek input from the public about things it is thinking about doing. It may release a 'green

> *"A federal or provincial statute can also say that rule-making authority is delegated to an agency or to a government official (often called a 'director') who is appointed under the authority of the Act. These officials have only the rule-making power that the statute or regulation gives them."*

paper' setting out possible alternatives for discussion or a 'white paper' showing the alternative that the government likes the best. It is the job of the opposition parties in the federal Parliament or in the legislature of the province creating the policy to point out all the potential negative effects of the proposed laws. The federal, provincial and territorial governments have broad duties to consult if proposed legislation affects Aboriginal or treaty rights. Sometimes, as with the creation of Regional Plans in Alberta under the *Alberta Land Stewardship Act*, the law requires consultation. The government in power may adjust its policies depending on what it hears. In recent years, the public has come to expect that there will be consultation on bigger environmental and planning matters.

Once the policy the government wants to adopt becomes more firm, laws can be created. The ways environmental policy becomes environmental law are the same as the ways other laws are created in Canada. The federal, provincial and territorial governments can create statutes or regulations. Municipalities can create bylaws.

> *"Much of the debate about environmental law creation takes place during the policy formation stage."*

The creation of a statute follows a formal process which can vary depending on what happens along the way. The outline for the federal process when a law is proposed by the party in power is this: A government agency will be asked to prepare a proposal for legislation. Legal experts in the civil service will review the draft to make sure it complies with the Canadian Constitution. If the policy has environmental implications (good or bad), a review must be conducted to ensure it complies with the federal Sustainable Development Strategy. The proposal is then submitted to Cabinet for review by the Cabinet Committee on Environment, Climate Change and Energy. If there are no concerns, legal staff prepare a 'bill', which is the first draft of the actual wording of the proposed new law. Now the bill enters the process of being approved, modified or rejected by Parliament. The Environment Minister introduces it in the House of Commons. This is called 'first reading'. The bill isn't debated at this stage, just circulated so Members of Parliament and their constituents become aware of it. It may get referred to a parliamentary committee for study. The government will later reintroduce the bill for 'second reading'. At this stage there will be a debate in the House of Commons. There is another opportunity after second reading for a study of the bill by a parliamentary committee. Committees can hold hearings, call witnesses, recommend changes and will eventually send a report back to the House of Commons with recommendations. The bill then goes to the House of Commons for a final vote, where it can be passed with or without the recommended changes. If the government does not have an absolute majority of seats in the House of Commons, they may be forced to accept changes proposed by the opposition. Federal bills then go through a similar process of three readings and committees in the Senate. (Processes in the provinces follow a similar path up to this point, but differ here because no province has a Senate). Once passed by the Senate the bill receives the formality of 'Royal Assent' from the Governor General (or the Lieutenant Governor of the province) and becomes law on the date set out in the bill (this is called 'coming into force').

> *"The federal, provincial and territorial governments have broad duties to consult if proposed legislation affects Aboriginal or treaty rights."*

A statute can say that the government can pass regulations. The statute may provide limits about what can be included in the regulations and each government has a process that has to be followed. The process will provide for legal review, approval by the federal or provincial cabinet through an Order in Council, publication in the Canada Gazette or its provincial equivalent, then registration as a regulation to make sure it is accessible to everyone. Regulations are supposed to fill in blanks left by the legislation or deal with things that change comparatively often. The process is simpler but doesn't offer as many opportunities for public review and input.

> *"Committees can hold hearings, call witnesses, recommend changes and will eventually send a report back to the House of Commons with recommendations."*

A federal or provincial statute can also say that rule-making authority is delegated to an agency or to a government official (often called a 'director') who is appointed under the authority of the Act. These officials have only the rule-making power that the statute or regulation gives them. Environmental organizations have complained in recent years about the increasing number of environmental approvals that can be made using the discretionary powers of cabinet or delegated to government officials.

Municipal governments create many bylaws which could be considered to be environmental laws, often in the process of land use planning. Municipal governments only have the powers given to them by their province. A provincial statute will establish the process they must follow to pass bylaws.

A common complaint about environmental law is that it is too complex. Environmental law is complex because human interaction with the environment is complex. It is important to understand how laws are made about the environmental things you care about so you can take advantage of the opportunities that do exist to have input into their creation. This applies whether you are opposed to a potential new rule or for it. You may not be able to have a say in every case, but there are more opportunities than most people realize. ◆

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Where the Monarchy Meets the State: Canada's Vice-Regal Offices

John Cooper

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

It is a role that straddles several worlds – political, royal, legal and diplomatic – and combines tact, careful judgment, discretion and wisdom. Welcome to the offices of the governor general of Canada and the provincial lieutenant governors.

As a constitutional monarchy, Canada's Parliament has two well-known components, the House of Commons and the Senate, as well as a third entity: the Queen's vice-regal representative, the governor general. In a role that is sometimes not as well-known, the governor general nonetheless plays an important part in the national scene. Sometimes, the public views the role through the lens of pomp and circumstance, royal visits, ribbon cuttings and soft-focus meet-and-greets. But vice-regal officials at both the federal and provincial levels are also very much activists in their own rights. They advocate for essential Canadian causes and quietly keep an eye on the political balancing act at play in Ottawa and the provinces and also

Governor General Flag
Credit: MCpl Vincent Carbonneau, Rideau Hall OSGG

between Canada and Buckingham Palace. In the words of former Governor General David Johnston, it is an "awe-inspiring role" that demands diplomacy and leadership, and brings with it a dose of humility as well.

The Queen has executive power under Canada's 1867 *Constitution Act,* applied through the prime minister and the prime minister's cabinet. Canada's provinces each have their own lieutenant governors. While the governor general is appointed by the Queen on the advice of the prime minister, lieutenant governors are appointed by the governor general on the prime minister's recommendation, generally

> *"We are considered the country with the best brand, with a remarkable reputation," says Johnston. "Canada is a social innovation, premised on the belief that diversity can really work for you."*

for a term of five years. While in the past governors general were British citizens, since 1952 the law has stipulated that they must be Canadian. They are chosen to represent the plurality of Canadian identities and are drawn from all walks of life.

Though some might consider the role to be little more than vice-regal window-dressing, the role has considerable power. According to Alfred Thomas Neitsch, in *A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta,* "A contemporary misconception exists in Canada that the Governor General and the Lieutenant Governors are politically impotent. In fact, they have considerable power both of a legal and political nature."

So just what are the powers of the governor general? In a non-partisan role, the governor general exercises the Queen's responsibilities and powers, under advice of the Privy Council, the federal cabinet secretariat responsible for supporting the federal government's agencies. These powers include:

- provision of guidance to the prime minister's office;
- ensuring that the government is operating in a way conducive to a positive and forward-looking administration;
- presiding over swearing-in ceremonies for officials such as the prime minister, cabinet and Canada's chief justice;
- signing official documents;
- appointing the provinces' lieutenant governors; and
- opening and dissolving Parliament.

At the provincial level, the lieutenant governor's role is similar across Canada:

- ensuring the continuity of provincial government;
- appointing ministers on the advice of the premier;
- opening and dissolving the provincial legislature;
- giving Royal Assent to bills passed by the legislature;
- approving public appointments and regulations;
- signing off on other government business; and
- meeting regularly with the premier and with the governor general.

Additionally, the vice-regal role at both federal and provincial level involves in-depth diplomacy, hosting heads of state and members of the royal family when necessary, and reaching out to communities across their jurisdictions.

> *"...in 2013, Onley made the unprecedented move to invite members of provincial parliament from the three major parties to a dinner to discuss ways to make the Ontario legislature - at the time a toxic place of sniping and angry remarks back and forth - a more civilized place."*

A very real significance of the vice-regal office is in ensuring that there is an entity (the governor general or lieutenant governor) who can determine – clearly – which political party has the democratic mandate to run the country or province, says Jeremy Webber, a professor of constitutional law at the University of Victoria.

Webber says the vice-regal role is significant enough that if Canada did away with it, a substitute would have to be found. "For instance, in meeting foreign dignitaries, one doesn't want that event to have a partisan flavour to it. (While) most of the business is run by the elected officials, there are circumstances where you have to have some distance from the partisan give-and-take."

A place where the role is essential is in handling contested elections. "If you have no majority, there is uncertainty as to who really carries the mandate," says Webber. "You need someone who can manage that process," a stabilizing force so that you don't have people wrongly claiming to have power, essentially "someone who can really carry the support of the majority of people … the governor general at the federal level and lieutenant governor at the provincial level make sure that process works."

The power of the lieutenant governor's office in listening (and being responsive) to the collective concerns of the people – and even sparking controversy as a result of having their thoughts broadcast – is well known. Neitsch, in *A Tradition of Vigilance: The Role of Lieutenant Governor in Alberta*, writes of Lieutenant Governor Lois Hole (who served Alberta from 2000-2005) making a public comment in March 2000 concerning the potential passage of a health bill that would permit the privatization of some health care services. A very public political debate raged over the appropriateness of Hole's comments, and the aptness of the holder of the vice-regal office inserting herself into political matters. However, Neitsch says "Hole's comments were merely conveying to the public that, as lieutenant governor, she would be ensuring that the premier realized that the legislation was controversial and that there was widespread opposition to it." That role – to bring to light issues of concern to the public, on behalf of the Canadian people – is seen as an essential component of the vice-regal role.

> *"According to Johnston, the vice-regal role brings with it a depth of responsibility that can be humbling. "No matter how good the office was when you arrived, you want to make it better."*

However, "when the lieutenant governors or governor generals are exercising their non-partisan representative function, they have to be very careful," cautions Webber. "It's not that they have to remain silent (but) they have to be really careful (in stating an opinion) that they don't end up doing so in a way that is seen as partisan."

David Johnston, who served Canada for seven years (2010 – 2017) as the country's 28th governor general, came to his position with an established track record in the law, business and government. A lawyer and graduate of the University of Cambridge and Queen's University, he was an academic for several years and had served as dean of the University of Western Ontario's faculty of law, principal

and Vice-Chancellor of McGill University and president of the University of Waterloo. Following his service as governor general, he became an advisor with the consulting firm Deloitte and currently volunteers with a charitable organization he created: the Rideau Hall Foundation, which has a goal of inspiring Canadians through recognizing innovation, giving, learning and leadership.

In an interview, Johnston says his most memorable role was as Commander-in-Chief of the military, a vice-regal function involving leadership and morale boosting for Canadian forces, "and that is something I treasured". He enjoyed being the liaison between Canada and the international community, making more than 50 official international visits, and celebrating Canadian excellence, honouring the vitality and innovation of Canadians by engaging in up to 650 events per year. In promoting Canada, he signed letters and certificates (up to 50,000 a year) recognizing Canadian courage, ingenuity and originality, delivered speeches across the country, and handed out the Canadian Sovereign's Medal for Volunteers, an award given to citizens who make significant unpaid contributions to their communities. This was in addition to building and maintaining a trusting relationship between the vice-regal office and the prime minister, and offering the prime minister and cabinet confidential advice and counsel.

> *"...the vice-regal role at both federal and provincial level involves in-depth diplomacy, hosting heads of state and members of the royal family when necessary, and reaching out to communities across their jurisdictions."*

As one of 43 constitutional monarchies in the world (16 of them under Queen Elizabeth II), Canada enjoys a connection to the monarchy while also possessing its own singular *Charter of Rights and Freedoms*, and "while the idea of constitutional monarchy around the world might be seen as a bit archaic, there are significant issues of trust in the constitution. We have been able to make a thousand years of constitutional history …work in a variety of institutions," says Johnston. "You have stability, a longer-term view and you have a reinforcement of the very fundamental values that make your country special."

David Onley, who served as Ontario's 28th Lieutenant Governor (2007-2014), came to his position from a background in television journalism and was an author and advocate for persons with disability issues. Stricken with polio as a child, he required the use of mobility devices throughout his adult life and became a strong promoter of accessibility for the physically challenged.

Onley appreciates the legal role played by the lieutenant governor. "God forbid there would be a situation where a government would act in an unconstitutional way or pass legislation that was unconstitutional, there would be outcries from the media and others, but somebody has to have the power to blow the whistle," he says. "So far that hasn't been used, but for me, it was a reassuring reality." For Onley, his three decades of experience as a television journalist and reporter prior to becoming lieutenant governor helped ease him into the role. He was already comfortable speaking to large audiences, though he admits that "it can be overwhelming when you are speaking to crowds of 5,000 or more." He also credits his academic

background in political science with helping him understand the political nuances of the office.

> *"In the words of former Governor General David Johnston, it is an "awe-inspiring role" that demands diplomacy and leadership, and brings with it a dose of humility as well."*

According to Johnston, the vice-regal role brings with it a depth of responsibility that can be humbling. "No matter how good the office was when you arrived, you want to make it better. You are always moving from data to information to knowledge … and you do that by gathering the wisdom of other people." Good judgment is essential, "and having confidence without arrogance." In making vice-regal appointments, whether they are for commissions or the office of provincial lieutenant governor, "you aim for integrity, wise judgment and a capacity to work".

The breadth of experience in serving as a governor general can be awe-inspiring. Johnston uses the repatriation of Canadian soldiers who died in combat as an example of how his job of supporting and comforting Canadian families struck an emotional chord in him. The process of repatriating a soldier's body changed over time, from a private, family-only ceremony to the now well-known procedure of transporting the soldier's body along Highway 401 from Canadian Forces Base Trenton to Toronto, Ontario. In a public display of grief, crowds of onlookers stand on overpasses to show their respect as the cortege passes. This is underscored by a campaign to plant trees along Highway 401 in memory of fallen soldiers – one for each of the 117,000 who have died. For Johnston, being part of these events served to reinforce the caring of Canadians for their military. The greater participation of Canadians was a profound statement on what it meant to be a citizen, and Johnston says he was moved to be a part of that experience.

For Onley, poignant memories from his time in office are contained in letters, comments, or, in one unforgettable case, a small Ontario community's legion hall event honouring a local hero, a woman dying of cancer. There was recognition and a celebration. After the woman died, Onley was touched to see that her obituary mentioned him. Her memorial stated that "it had been the most significant moment in her life to meet the Queen's representative in Ontario," he says. "I thought that was really significant – meeting not just me as David Onley but meeting the Queen's representative." It impressed upon him the significance of the vice-regal role.

> *"Johnston says his most memorable role was as Commander-in-Chief of the military, a vice-regal function involving leadership and morale boosting for Canadian Forces, "and that is something I treasured."*

Spanning the worlds of Queen's representative, being the eyes and ears of the populace, and keeping tabs on the political sphere, can bring challenges – and it can spark innovation. For instance, in 2013, Onley made the unprecedented move to invite members of provincial parliament from the three major parties to a dinner to

discuss ways to make the Ontario legislature – at the time a toxic place of sniping and angry remarks back and forth – a more civilized place. As reported by Toronto Star columnist Martin Regg Cohn, Onley was concerned that "the bitter divide in the legislature is turning off the voting public: As the sniping increases, voter turnout decreases … when fewer than half of all eligible voters bothered to cast a ballot, 'It should be a concern to all of us' (said Onley) '… I don't think there's a 10-step blueprint to everyone being nicer with each other, and that therefore people are going to always be talking policy.'"

While this was a slight departure from the normally above-the-fray position of the lieutenant governor, Onley says he made the move because it would shed light on an area that the public needed to know about. "I fully support the idea of (political) confidentiality, but I think the vice regal office has a responsibility to explain (the way things are) and that's what I did in that situation."

> *"While the governor general is appointed by the Queen on the advice of the prime minister, lieutenant governors are appointed by the governor general on the prime minister's recommendation, generally for a term of five years."*

As for the future of the vice-regal offices, Johnston reflects for a moment on the history of constitutional law, dating back to *Magna Carta* in 1215, then to the 1931 *Statute of Westminster*, which clarified Canada's parliamentary powers, and on to the 1960 Canadian *Bill of Rights* and the 1982 *Canadian Charter of Rights and Freedoms*. In 1982 the country was "saying to each Canadian, 'you have that constitution and that serves to underscore your rights as a Canadian,'" he says. That was an important step for the country to take in recognizing its citizens' individual rights, and "something that will become even more important in the future".

Also essential is the building of relationships that the vice-regal office represents, both within the country and with Canada's international partners. "We are considered the country with the best brand, with a remarkable reputation," says Johnston. "Canada is a social innovation, premised on the belief that diversity can really work for you." Webber agrees. "The governor general and the lieutenant governor must be focused on the inclusion of people within the symbolism of Canada." As a result, a stable, caring and forward-looking national vision can be nurtured – one that recognizes, honours, and celebrates the achievements of all Canadians. ◆

Building the New Jerusalem, One Clause at a Time

Rob Normey

The *Saskatchewan Bill of Rights*, 1947, was landmark legislation that inaugurated a new era in Canadian law. The Bill, which contained a clear description of the rights and freedoms to be protected by the provincial government, anticipated the much better known document of the United Nations, which was declared a year after this bill of rights. The *Universal Declaration of Human Rights* inaugurated a new era of respect for and attention paid to fundamental rights and how they might best be protected and sustained.

The *Saskatchewan Bill of Rights* represented the refreshing new and innovative thinking of a relatively new party, the Cooperative Commonwealth Federation (CCF). From the outset, the party proclaimed the need for an entrenched bill of rights in the Canadian Constitution. The leader of Saskatchewan's CCF, the fiery yet humorous and engaging former Baptist minister, Tommy Douglas, had long had a commitment to the protection of fundamental rights. Despite his diminutive stature, he would, over his long career, forge an impeccable record as champion of fundamental rights and freedoms. Douglas and the CCF took on the powerful federal Liberal government, that had been in power for many years, by offering an innovative platform that placed the equality of all members of society at its heart. He followed through with a direction to develop a bill of rights, designed to ensure that the rights of all would be respected, without discrimination based on race, ethnicity, creed or religion.

> *"Philosophers such as Hobbes and Locke and their political followers saw "rights" as something granted to citizens through their political masters and the state. Declaring that individuals have rights changes the calculus."*

The *Saskatchewan Bill of Rights* marked the first time fundamental rights were enshrined in a statute within the British Commonwealth of nations since the original bill of rights was enacted by the English Parliament in 1689. Taken together with the United Nation's *Universal Declaration of Human Rights,* the passage of the European *Human Rights Act*, and later rights legislation in Canada and other countries

committed to overturning the status quo, it can be seen as the inauguration of an Age of Rights.

> *"The Bill included the right to vote, and in the context of the times therefore sounded a clarion call for democratic rights."*

The Douglas government faced two challenges: the consensus that any entrenchment of rights in legislation represented a threat to Parliamentary or legislative supremacy; and the social and legal views of the day. In the 1940s there was little or no legal protection for racial minorities from even the most blatant acts of discrimination. Many, perhaps most, Canadians were quite content with that state of affairs. Certainly they were ready to pour scorn at any radical initiatives to protect the right to equality of various races and ethnic minorities.

Throughout the first half of the twentieth century (and to a lesser degree for some decades beyond that), Canadians to a high degree subscribed to notions of racial superiority. In his superb book, *"Race," Rights and the Law in the Supreme Court of Canada*, James W. St. G. Walker quotes the fatuous words of the prominent English scholar and humanitarian, Gilbert Murray. The sentiment he expressed was considered unchallengeable in 1900:

> *There is in the world a hierarchy of faces… [some] will direct and rule the others, and the lower work of the world will tend in the long run to be done by the lower breeds of men. This much we of the ruling colour will no doubt accept as obvious.*

Politicians and activists who proclaimed freely on the differences between the races often drew on the "leading" scientific studies of the early and middle twentieth century. In the last years of World War II, the more reprehensible acts of racial discrimination finally garnered widespread disapproval. Nonetheless, it would take decades to perceive the development of progressive views on matters of racial and ethnic equality. In 1956, one of Canada's finest mainstream magazines, *Saturday Night,* published an article, "The Myth of White Supremacy", explaining that racial prejudices were the result of illogical, discredited views. Still, these views persisted and only a concerted effort would bring about an unequivocal commitment to equality.

> *"The Supreme Court of Canada confirmed that the tavern was well within its right to exclude members of a given race. Freedom of commerce was the almighty principle that the Court considered swept all other considerations aside."*

Some readers may be surprised to learn just how complicit our legal system was in the acceptance of racial prejudice and widespread acts of discrimination. While courageous activists and their lawyers attempted to challenge the discrimination suffered by Afro-Canadians, Japanese-Canadians, and Chinese-Canadians, these were invariably rejected by judges. Precedent favoured the liberty of commerce and the right to contract with whomever one wished over the claims of racial minorities to receive fair and equal

treatment. Common law equality only meant entitlement to equal treatment "under the law or before the courts or as against the Crown and the government." It had no application whatsoever as between private individuals. In the 1940s and beyond, swimming pools, hotels, taverns, sports centres and other venues prevented various races from entry. A Calgary dance hall barred blacks "because the parents of white girls attending dances would have objected." Restaurant owners, to take another example, in various cities simply refused to serve black customers.

It is fascinating, disheartening, but ultimately instructive to study the Supreme Court of Canada's decision in *Christie v York Corporation* (1940). On the evening of July 11, 1936, Fred Christie and two friends entered the Montreal Forum to watch the Montreal Canadiens in action. Christie was a black man, originally from Jamaica, a chauffeur, a member of the United Church and long-time Montrealer who wished to share a drink with his buddies on the ground floor of the Forum. The man had an impeccable dress sense and was quite likely the best dressed, would-be patron in the establishment. He was nonetheless surprised to learn that his request for three steins of beer, having put his 50 cent piece on the table, would be met with a flat rejection – African Canadians were certainly not welcome.

The Supreme Court of Canada confirmed that the tavern was well within its rights to exclude members of a given race. Freedom of commerce was the almighty principle that the Court considered swept all other considerations aside. The Christie Defence Committee , who had rallied to provide support and raise funds for the appeal on behalf of Fred, was further required to hand over monies to pay York Tavern's legal costs.

Frank Scott, the extraordinary democratic socialist, rights activist, poet and legal scholar, wrote an article on *Christie,* expressing disappointment at the narrowness of the decision. He concluded, however, that "the great principle of equality must prevail at some point over the other value of freedom of conscience." He issued a plea for legal reform. Scott would go on to be a key constitutional law advisor to Tommy Douglas' government.

> *"The Saskatchewan Bill of Rights marked the first time fundamental rights were enshrined in a statute within the British Commonwealth of nations since the original bill of rights was enacted by the English Parliament in 1689."*

The Douglas government not only acted on long-standing commitments to enact laws to promote and protect equality but exemplified its wide-ranging dedication to this cause by hiring a number of key public servants who were members of racial minorities. Particularly noteworthy were the embrace of Japanese Canadians like Tommy Shoyama and Kiyoshi Izumi. These Japanese Canadians had been part of a persecuted group that suffered forced removal from their homes and confiscation of their property during the war. The CCF party opposed the racial discrimination practiced against them and the efforts of Mackenzie King's Liberal government to deport some citizens to Japan at war's end. In the context of such shocking actions in the late 1940s, Frank Scott was quick to point out the significance of the United Nation's *Universal Declaration of Human Rights*. He emphasized that Parliament

and the legislatures would come under an obligation, moral if not legal, to bring our laws into line with the requirement to protect rights that is at the heart of the *Declaration*. In Saskatchewan, Canadians could take pride in legislative actions that were consistent with a commitment to fundamental rights. Many years later, other provinces would follow suit.

It was exemplary in its way that Douglas assigned a young, rising lawyer in the province, Morris Shumiatcher, to draft the *Saskatchewan Bill of Rights*. Morris had initially intended to do graduate work in English literature at the University of Alberta. He was the son of middle class Jews from Poland and well aware of the devastating treatment of fellow Jews in Germany and elsewhere in Europe. He was not an individual to shrug off discriminatory actions or anti-Semitic remarks. So, when a professor made such a remark, he was impelled to enroll in law school and combat racial discrimination through his legal practice.

A week before the summer election of 1944, Morris told his parents that a CCF victory would "lay the foundations for a better society…more interested in the welfare of the human beings of the country than the ledgers and profits of monopolistic enterprise." Douglas thereafter enticed the young lawyer to help with the building of the "New Jerusalem" by serving as legal counsel to the Executive Council, with particular emphasis on labour issues (rights to collective bargaining and labour rights generally being nonexistent in the province). The idealistic concept of building a new, progressive society was given an emotional charge by the Premier, when he recited from memory the stirring lines from William Blake's poem "Jerusalem."

Shumiatcher acted on the guidance that Douglas and his team provided and included affirmation of fundamental freedoms (of conscience, religion, expression, peaceful assembly and association, and freedom from arbitrary imprisonment). The Bill included the right to vote, and in the context of the times therefore sounded a clarion call for democratic rights. The Bill further prohibited various forms of discrimination, on grounds of race, creed, religion, colour, and ethnic or national origin. It included enforcement provisions, fines, and allowed injunctions to be obtained against the government or against any private individual who attempted to deprive a person of any rights included in the Bill.

> *"The Saskatchewan Bill of Rights represented the refreshing new and innovative thinking of a relatively new party, the Cooperative Commonwealth Federation (CCF)."*

In subsequent years, there were only a limited number of actions taken by citizens under the *Saskatchewan Bill of Rights* and a later bill included a more extensive enforcement mechanism. But have no doubt, the Bill was a beacon and a model for later human rights statutes, the *Canadian Bill of Rights*, and less directly but no less importantly, for the *Canadian Charter of Rights and Freedoms*. It represented nothing less than a Copernican revolution in Canadian society and within the hitherto staid legal structure. Together with the *Universal Declaration of Human Rights*, it genuinely offered hope and a willingness to conceive of individuals as

being at the foundation of the legal and political order. Philosophers such as Hobbes and Locke and their political followers saw "rights" as something granted to citizens through their political masters and the state. Declaring that individuals have rights changes the calculus. It was the philosopher Immanuel Kant who glimpsed that a declaration of rights could be viewed as a prophetic sign of a better world to come. In pondering the implications of the French Revolution and particularly the revolutionary introduction of the *Declaration of the Rights of Man,* he perceived the entrance onto the historical scene of a "people's right not to be obstructed by other forces from giving itself a civil constitution which it considers to be good."

Obstacles were placed in the way of the successful implementation of the "Rights of Man" once the French Revolution took a bloody and violent turn. Nonetheless, the last days of World War II and the victory over fascism presented the world with a brilliant opportunity to begin anew. The *Saskatchewan Bill of Rights* represents Canada's contribution to, and awareness of, the beginning of an Age of Rights. The process of affirming and protecting fundamental rights has been gradual. Without the initial efforts of the bold pioneers in Saskatchewan, the country would have continued for some time to adopt an impoverished stance on what some of us believe to be the great cause of our times.◆

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

Special Report:

Employment Law

5 Basics Every Startup & Growing Business Should Know About Employment Law

McInnes Cooper

McInnes Cooper's Labour and Employment Law Team provides innovative and strategic advice to employers. We pride ourselves on our ability to provide you with insight into human resources issues and thier effect on your startup, growing, or mature business.

Growing a business takes people. In early days, many startups have just one "employee": the founder. At some point, the founder might retain the services of independent contractors to perform certain services. And eventually, many startups and growing businesses hire employees and become, for the first time, an employer. But creating an employer-employee relationship carries consequences: the law grants "employees" certain benefits and protections – and imposes on employers certain obligations and liabilities. There's a lot to know about being an employer. Here are five employment law basics to get you started.

1. Know and comply with employment standards laws, but remember: they're just minimums.

Every employer should get a copy of the employment standards laws that apply to them, read them and keep them handy for reference. Every province has employment standards laws and there is a federal law that applies to federally-regulated employers (which is different than federally-incorporated employers, and includes: banks; marine shipping, ferry and port services; airports and airlines; railway and road transportation that involves crossing provincial or international borders; telephone and cable systems; and radio and television broadcasting). Employment standards laws are generally

comprised of a statute in addition to one or more regulations, and are typically called employment or labour standards acts or codes. For example:

- The N.B. Employment Standards Act.
- The N.S. Labour Standards Code.
- The P.E.I. Employment Standards Act.
- The N.L. Labour Standards Act.
- The Canada Labour Code (applicable to federally-regulated employers)

Employment conditions. Employment standards laws apply to most employees and set minimum standards for certain employment conditions. The employment conditions the law covers vary between provinces for provincially-regulated employers, and federally for federally-regulated employers, but common ones include minimum wages, hours of work, public holidays, vacation time and pay, and termination notice. They also often set out restrictions, such as on the employment of children, or on the ability to terminate employees that have reached a specified amount of service (as in N.S.). And they typically mandate certain employee leave entitlements, including for maternity and parental, sick, bereavement and, most recently in some provinces such as New Brunswick, domestic violence, leave.

Enforcement. A government agency, division or department is generally charged with enforcing the laws, investigating potential violations of the laws, providing information to employers and employees, and resolving employee complaints about violations. An employer can call the relevant governmental agency with questions, but it's important that employers understand that the agency's response isn't legal advice nor a defence to a complaint or employment lawsuit.

Just the minimum. It's also extremely important that employers remember that the laws only set the minimum requirements: an employee could be entitled to more under the terms of an employment contract or at "common law" (the law that results from judges' decisions). For example, the laws typically establish the minimum termination notice to which an employee is entitled. However, the common law generally presumes an employee is entitled to "reasonable notice": an individual assessment that's based on a range of relevant factors (like the employee's age, years of service, education, training and experience) that's often greater than the minimum set out in the employment standards law.

2. You have an employment contract with every employee – so put it in writing.

Every employer has an employment contract with every employee – even when there's "nothing in writing". The issue when it's not in writing, however, is ascertaining the terms of that contract. And that can lead to disagreements, lawsuits and expense – many of which can be avoided by putting the employment contract in writing.

Written contracts. A well-drafted and implemented written employment contract can be instrumental to avoiding and resolving disputes during or at the end of the employment relationship, saving the employer time and money (and no small amount of stress). But since courts carefully scrutinize employment contracts and

interpret any ambiguity in an employee's favour, it's good practice to have legal counsel draft them.

Terms. A standard form employment agreement is useful, and there are some terms that should be in just about every employment contract. But employers should always review the employment contract (ideally with legal counsel) and, if required, customize it to the circumstances.

Timing. It's also important that the terms of the employment contract be set at the time of hiring or before the worker is given a promotion or transfer – not after. An employer can't unilaterally impose new employment conditions that fundamentally change the employment relationship during the employment relationship without giving the employee either sufficient prior notice or consideration (something of value in exchange). If it doesn't, the employer could face a wrongful dismissal lawsuit.

3. You need to accommodate employees' human rights.

As with employment standards laws, every province has human rights laws (variously called human rights acts or codes), and there is a federal human rights law that applies to federally-regulated employers. For example:

- The N.B. Human Rights Act.
- The N.S. Human Rights Act.
- The P.E.I. Human Rights Act.
- The N.L. Human Rights Act.
- The Canadian Human Rights Act (applicable to federally-regulated employers).

No discrimination. Human rights laws apply to all employees, both non-unionized and unionized. And all universally prohibit employers from discriminating, either directly or indirectly (often called "adverse effect discrimination", meaning a particular policy, rule or practice appears neutral on its face but has a discriminatory impact), against their employees in employment (which includes in hiring, promoting and terminating) based on certain personal characteristics set out in the applicable law. These protected characteristics vary depending on the applicable law, but generally include age, colour, creed, physical disability, mental disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex (which includes sexual harassment, if it's not separately named), sexual orientation, and source of income of any individual or class of individuals.

Duty to accommodate. Human rights laws also impose an obligation on employers to accommodate their employees' membership in a group with a protected personal characteristic: a legal duty to take steps to ensure a workplace condition doesn't have a discriminatory effect on an employee, if it can do so without 'undue hardship'. Undue hardship is a high standard that depends on several factors, including: financial cost; disruption of a collective agreement; problems of morale of other employees; interchangeability of the work force and facilities; the size of the employer's operation; and safety concerns. Employers often find it a challenge to understand and to satisfy their duty to accommodate, and failure to do so is a regular source of human rights complaints against employers.

Enforcement. Human rights commissions are generally charged with enforcing human rights laws, investigating potential violations, providing information to employers and employees, and resolving employee complaints about violations. If a complaint isn't resolved, there may be a hearing before, and ultimately a decision by, a human rights tribunal. Human rights tribunal hearings can be less formal than a trial in a court. However, human rights tribunals typically have more options when it comes to the type of orders they can make to remedy discrimination. Courts are essentially limited to ordering monetary compensation to a victim, but human rights tribunals are often also empowered to make other orders against employers, such as training, policy implementation or revision, and reinstatement of an employee whose employment was terminated – a power that's significant, and not frequently exerted in some provinces, but still available.

4. Every employer – even "white collar" ones – needs to take workplace health & safety seriously.

Provincial and federal occupational health and safety laws apply to all "employers" and "employees" – not just those in "high risk" sectors like construction or oil and gas, for example. Occupational health and safety laws are generally comprised of a statute and often numerous regulations, though the name and specific contents of each law vary by province (or federally). For example:

- The N.B. Occupational Health and Safety Act.
- The N.S. Occupational Health and Safety Act.
- The P.E.I. Health and Safety Act.
- The N.L. Occupational Health and Safety Act.
- The Canada Labour Code (applicable to federally-regulated employers).

A "safe" workplace. Occupational health and safety laws universally impose a general duty on employers to provide a safe workplace for all their employees. This includes ensuring a work environment free from harassment and violence, including sexual harassment and bullying . While many consider this to be included in the general obligation to provide a safe workplace, governments that haven't already done so are increasingly imposing specific obligations in relation to workplace violence and harassment. For example, as of April 1, 2019, employers of New Brunswick employees face new obligations to assess and mitigate the risks of workplace violence and harassment – and liability exposure under occupational health and safety laws for failing to do so. And the Newfoundland and Labrador government recently announced that effective January 1, 2020, N.L. employers will also face new obligations to address workplace harassment and worker-on-worker violence. Employers must also warn employees about hazards, such as safety hazards in the operation of machinery and physical hazards such as cold or heat and ergonomic hazards, and provide adequate training. In turn, employees have the right to refuse dangerous work. Occupational health and safety laws also typically impose a duty on employers to investigate and deal with employee complaints.

Personal liability exposure. Corporations have occupational health and safety obligations and risk corporate liability for violating them – but corporate directors, officers and supervisors share many of those health and safety obligations and liability risks personally. Those risks include personal liability under occupational health and safety laws and criminal laws, and resulting personal exposure to fines and even jail time. So everyone, and particularly directors, officers and supervisors, need to take occupational health and safety seriously.

Enforcement. Each province (and federally) charges a department or agency to administer and enforce its occupational health and safety laws, as well as to educate employers and employees on their rights and obligations under those laws. Most make a large amount of information available to employers.

5. Record-keeping is critical.

The issue for employers is often not what happened or what was done, but what it can prove happened or was done. When an employer faces an employment-related lawsuit, a complaint or an investigation under employment standards laws, human rights laws, occupational health and safety laws, or otherwise, its records are critical to its ability to respond with proof of what it did.

Document, document, document. Ideally, employers will document everything. This includes, for example: training initiatives, policy and procedure reviews of all kinds whether that training or review is mandated by law or not; employee performance discussions and evaluations, both formal and informal; and discipline meetings, including making notes of verbal warnings.

Legal compliance. In addition, various employment-related laws require employers to make certain records. For example, employment standards laws could require, depending on the applicable law, that employers make records of an employee's: name and address; date of birth; social insurance number; start date; hours worked (such as daily and/or weekly); wages and deductions for each pay period; details of vacation and vacation pay; certificates respecting leaves of absence; and dates of suspensions, layoffs and dismissal. Occupational health and safety laws often require employers to make training records, among others. And laws often require employers to keep certain records for a specific period of time.

Record production. Similarly, employment-related laws typically require employers to produce those records to certain members of the government departments or agencies charged with enforcing those laws. So it's key not only to keep the records, but to be able to find them when you need them. ◆

This article has been reprinted with permission. It was originally published April 8, 2019 on the McInnes Cooper website.

Disabilities and Addictions in the Workplace

Myrna El Fakhry Tuttle

Employee alcohol and drug addictions in the workplace can be very difficult issues for employers to manage. Addiction is recognized as a mental disability, which means that employers cannot automatically terminate employees because of their addiction. On the contrary, employers are required to accommodate those employees to the point of undue hardship.

Section 7 of the *Alberta Human Rights Act* *(AHRA)* prohibits employers from discriminating against any person with regard to employment or any term or condition of employment because of a physical or mental disability (among others).

Section 44 (1) of the *AHRA* defines mental and physical disability as follows:

> *(h) 'mental disability' means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;*
>
> *(l) 'physical disability' means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness…;*

The term "disability" includes an actual or perceived (presumed or believed) disability and they are both protected under the law (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 SCR 665, 2000 SCC 27 (CanLII)*).

Since addiction constitutes a disability protected under the *AHRA*, an employer cannot terminate an employee who has an addiction. The situation must be assessed to determine if there is an addiction or not. If so, then the employer

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> *"Employers, with safety-sensitive work environments, should ensure that they have alcohol and drug policies in place."*

must make efforts to accommodate the employee (See: "CPHR Alberta, Addiction=Disability").

Employees using alcohol or other drugs on the job may have a substance use problem and need treatment. Or they may be occasional users making a very poor decision. It is also possible that a worker with an alcohol or other drug problem never shows up for work obviously impaired, but their workplace performance is still affected. Research has shown that drinking any amount of alcohol immediately before or during the workday (including at lunch or company-sponsored events) is associated with work performance problems (See: "Alberta Health Services: It's Our Business, Addressing Addiction and Mental Health in the Workplace" at p 3-52 [Alberta Health Services]).

Duty to accommodate refers to the employer's legal obligation to take appropriate steps to eliminate discrimination resulting from a rule, practice or barrier that has—or can have—an adverse impact on individuals with disabilities. Efforts to accommodate are required up to the point where the person or organization attempting to provide accommodation would suffer undue hardship by doing so. Undue hardship occurs if accommodation would create onerous conditions for an employer or service provider, for example, intolerable financial costs or serious disruption to business (See: "Persons with Mental Health Disabilities" at p 3).

However, employers have a duty under Occupational Health and Safety to provide a safe workplace. Alcohol or drugs can directly and significantly contribute to workplace dangers. A thorough policy can help employers ensure the safety of their employees, as well as defend themselves from potential liability. Ultimately, a policy can foster stability in a workplace and ensure consistency in operations (Alberta Health Services at p 3-55).

> *"Considering the Supreme Court's decision, the mere existence of addiction, which constitutes a disability, does not establish a prima facie discrimination if the employee was terminated."*

In *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30, the Supreme Court of Canada upheld the decisions of the Alberta Court of Appeal, the Alberta Court of Queen's Bench and the Alberta Human Rights Tribunal, which found that the termination of an employee with a cocaine addiction did not constitute discrimination in the workplace.

In this case, Mr. Ian Stewart worked in a mine operated by the Elk Valley Coal Corporation, driving a loader. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the employer and employees. The employer implemented the Alcohol, Illegal Drugs & Medications Policy, aimed at ensuring safety in the mine. Employees were expected to disclose any dependence or addiction issues before any drug-related incident occurred. If they did, they would be offered treatment. However, if they failed to disclose and were involved in an incident and tested positive for drugs, they would be terminated — a policy succinctly dubbed the "no free accident" rule. The aim of the Policy was to ensure safety by encouraging employees

with substance abuse problems to come forward and obtain treatment before their problems compromised safety. Employees, including Mr. Stewart, attended a training session at which the Policy was reviewed and explained. Mr. Stewart signed a form acknowledging receipt and understanding of the Policy (at para 1).

> *"Undue hardship occurs if accommodation would create onerous conditions for an employer or service provider, for example, intolerable financial costs or serious disruption to business."*

Mr. Stewart used cocaine on his days off. He did not tell his employer that he was using drugs. One day, Mr. Stewart's loader was involved in an accident, and he tested positive for drugs. Following the positive drug test, in a meeting with his employer, Mr. Stewart said that he thought he was addicted to cocaine. Nine days later, his employer terminated his employment in accordance with the "no free accident" rule (at para 2).

Mr. Stewart, through his union representative, argued that he was terminated for addiction and that this constituted discrimination under section 7(1) of the Alberta *Human Rights, Citizenship and Multiculturalism Act* (now *Alberta Human Rights Act*).

The Alberta Human Rights Tribunal found that Mr. Stewart had not established a case of *prima facie* discrimination. It held that Mr. Stewart was not terminated because of his addiction, but for breaching the Policy, which required him to disclose his addiction or dependency before an accident occurred to avoid termination. The Tribunal's decision was affirmed by the Alberta Court of Queen's Bench and next by the Alberta Court of Appeal (at paras 4-6).

To make a claim for discrimination under the Act, the employee must establish a *prima facie* case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship (at para 23).

To make a case of *prima facie* discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [*Human Rights Code*, RSBC 1996, c 210, citing *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII)]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact" (at para 24).

> *"Since addiction constitutes a disability protected under the AHRA, an employer cannot terminate an employee who has an addiction."*

Mr. Stewart argued that there was a nexus between his addiction disability and the termination of his employment because denial, which is a recognized feature of addiction, prevented him from disclosing his cocaine use to his employer (at para 37).

The Supreme Court dismissed this argument by stating that:

> *It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence (at para 39).*

The Supreme Court added:

> *The mere existence of an addiction does not establish* prima facie *discrimination. If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation. Again, to take an example given by the majority of the Court of Appeal, if a nicotine-addicted employee violates a workplace policy forbidding smoking in the workplace, no sanction would be possible without discrimination regardless of whether or not that employee had the capacity to comply with the policy (at para 42).*

Moreover, the Supreme Court stated that:

> *In such a workplace, it was crucial to deter employees from using drugs in a manner that could negatively affect their work performance and potentially lead to devastating consequences. Workplace safety is a relevant consideration when assessing whether the employer has accommodated the employee to the point of undue hardship (at para 55).*

Considering the Supreme Court's decision, the mere existence of addiction, which constitutes a disability, does not establish a *prima facie* discrimination if the employee was terminated. Simply having a disability, yet being subject to a workplace policy, does not mean that the employer who terminates the employee has discriminated against him or her, or has a duty to accommodate the employee to the point of undue hardship.

Employers, with safety-sensitive work environments, should ensure that they have alcohol and drug policies in place. These policies should be clear and should encourage employees – in order to get assistance – to come forward if they have addiction problems. Once those policies are established, and if employees are able to comply with these policies, then employees can be terminated without being able to prove discrimination in the workplace. ◆

Political Belief and Discrimination in Employment Law

Troy Hunter

The *Canadian Human Rights Act* sets out prohibited grounds of discrimination under s. 3(1):

> *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

In the federal *Act*, political belief is not an enumerated category. There has been discussion within the Canadian Human Rights Tribunal about it because most of the provinces in Canada have political belief as a prohibited ground for discrimination. Why is this the case?

This omission impacts anyone whose employment falls under federal jurisdiction. It is of particular interest to Aboriginal people where First Nations, or its entities such as tribal councils, are governed by the federal *Act*.

Quebec, Canada – Sep 17th 2018 Native American woman statue in the Place-Royale, a famous cobblestone town square in Old Quebec, Quebec City. Photo credit: Troy Hunter

This omission also seems contrary to Canada's obligations as a signatory to the United Nations' *Universal Declaration of Human Rights* which, in Article 2, includes political or other opinion as a right and freedom:

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

> *"It's time that the Canadian Human Rights Act be amended to include political belief as a further prohibited ground of discrimination."*

When we consider what political belief is, we most likely think of membership in a political party. As Canada has partisan politics as a cornerstone of its foundation, the failure to prohibit discrimination on the basis of political belief by the federal government runs into a deep chasm that should never be.

Political belief can be a tricky thing in many areas of life. In the past, political membership or activity potentially led to discrimination in the realm of economic activity. I heard an anecdote about an entrepreneur from the Edmonton area who was involved in a power project proposal. He attended a meeting where a minister approached him and asked if he was a donor to the Social Credit party. When the entrepreneur replied that he was not, the minister turned around and walked away. The effect of that was to deflate the entrepreneur's balloon where he had sought government support for his project. There would be no government support on the basis that he did not donate money to the political party that was in power at the time. Perhaps, historically, this is why corporations have been major donors to political parties.

> *"The Jamieson decision is often cited on the basis that, "'political belief' in [B.C.'s Human Rights Code] is not restricted to issues of partisan politics" (Siemens at para 17.)*

Others have noticed how partisan politics can affect the economy in this country. In 2017, the *New York Times* quoted Democracy Watch's founder, Duff Conacher: "B.C. is the wild west," in relation to an article about corporate donors to political parties and the ethics involved (Lavin). Since then, the B.C. government has banned union and corporate donations for its provincial and municipal elections.

With regard to the federal government, the Prime Minister of Canada, prior to his taking up that position when he was leader of the opposition party, released all of the Liberal senators and declared them to be independent. Political belief is no longer a consideration for senators appointed to public office in what is often termed, "The Red Chamber", and going forward, senators no longer have to tow a political party line.

No one wants to face discrimination on the basis of political beliefs when seeking employment. Still, it is clear that this does sometimes occur. The British Columbia Human Rights Tribunal, under s. 13 of B.C.'s *Human Rights Code*, prohibits discrimination based on political belief and has examined the issue in employment law cases. A number of these cases have involved Aboriginal people.

In the 2015 case of *Siemens v. District of Vanderhoof and others*, 2015 BCHRT 172 (*Siemens*), Erin Siemens asked the British Columbia Human Rights Tribunal to determine if she was discriminated against on the protected ground of political belief when she was dismissed from her

employment. She alleged that "having been seen in the company of a friend and political rival of the Respondents during a political campaign, and on the basis of direct statements made to her by the District's CAO, she was perceived to be politically allied and aligned against the Respondents" (*Siemens* at para 20). The respondents asked the Tribunal to dismiss her application.

> *"In the federal Act, political belief is not an enumerated category. There has been discussion within the Canadian Human Rights Tribunal about it because most of the provinces in Canada have political belief as a prohibited ground for discrimination."*

Siemens raised the case of *Jamieson v. Victoria Native Friendship Centre* (1994), BCCHRD No 42 (*Jamieson*), where it was determined that "political beliefs are not limited to beliefs about, or involvement in, recognized or registered political parties and beliefs about organizations and governments of First Nations communities are political" (*Jamieson* at para 14). The *Jamieson* decision is often cited on the basis that, "'political belief' in [B.C.'s *Human Rights Code*] is not restricted to issues of partisan politics" (*Siemens* at para 17).

The then-chair of the British Columbia Human Rights Tribunal stated, in the *Siemens* case at para 21, that: "the facts alleged in the complaint could, if proven, engage the protected ground of political belief under s. 13 of the *Code*." The Tribunal allowed Ms Siemens' complaint to proceed for determination.

> *"The British Columbia Human Rights Tribunal, under s.13 of the B.C. Human Rights Code, prohibits discrimination based on political belief and has examined the issue in employment law cases. A number of these cases have involved Aboriginal people."*

In another case before the British Columbia Human Rights Tribunal, political belief was involved in an employment law situation where an employer did not hire the complainant. Sylvia Stephens filed a complaint with the Tribunal against a First Nation development corporation and other individuals alleging that she was not hired because of her family status and political beliefs (*Stephens v. Gitxat'in Development Corporation and others (No.2)* 2006 BCHRT 11 (*Stephens*)). The respondents countered that her opinions as outlined in her filings did not amount to political beliefs. Tribunal Member Lindsay Lyster wrote:

> *The parameters of 'political belief' have not been conclusively defined in the case law, and I am not prepared to conclude that political belief could not include the kinds of opinions stated by Ms. Stephens in the documents she has submitted. In my view, Ms. Stephens has alleged facts with respect to the allegations of discrimination on the basis of political belief which, if proven, could constitute a contravention of the Code (Stephens at para 13).*

In the end, the Tribunal dismissed Ms. Stephens' complaint, concluding that there was "no reasonable prospect that Ms. Stephens would be able to establish the respondents discriminated against her on the basis of either her political beliefs or of her family status in refusing to hire her" (*Stephens* at para 15).

The B.C. Human Rights Tribunal decided the *Stephens* case under a human rights code that recognizes political belief as a human right prohibited ground for discrimination. However, what would happen if such a case fell under the jurisdiction of the federal *Canadian Human Rights Act* where political belief is not a protected ground? In such circumstances, one might consider how international human rights law such as the United Nations' *Universal Declaration of Human Rights* affects the common law system in Canada. In the 1980 case of *Bailey v. Canada (Department of National Revenue)*, 1980 CanLII 5 (CHRT), the Canadian Human Rights Tribunal stated: "Resort can be had to international law and international obligations assumed by Canada, in interpreting the meaning of the *Canadian Human Rights Act*."

Canada should not pick and choose which human rights it wants to implement. It's time that the *Canadian Human Rights Act* be amended to include political belief as a further prohibited ground of discrimination. First Nations people facing discrimination in employment and other areas of Canadian law would applaud such a step.◆

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Teresa Mitchell

1. Discrimination Based on Country of Origin

The Federal Court of Canada has struck down as unconstitutional a provision of the *Immigration and Refugee Protection Act (IRPA)*. In 2012 the *Act* was changed to create two categories of refugees, based on their country of origin. So called "safe countries" were deemed unlikely to produce refugees and other countries were deemed "not safe". Refugee claimants from designated "not-safe" countries were obliged to wait two years longer for a risk assessment of their removal from Canada. A risk assessment looks at risk to life, to torture or to cruel treatment. A group of Romani from Hungary (a non-safe country) claimed that they were discriminated against on the basis of nationality, contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. Justice Boswell of the Federal Court of Canada agreed that they were. He used a two-step analysis:

- does the law draw a distinction based on one of the grounds of discrimination under the *Charter,* and if so,
- does the distinction impose a burden or deny a benefit to the person affected.

On the first step, Justice Boswell stated "the differential treatment is clearly a distinction based on the national origin of the refugee claimant". With regard to the second step, he ruled that discrimination based on national origin perpetuates prejudice or stereotyping. He wrote: "It perpetuates a stereotype that refugees from DCO (designated countries of origin) countries are somehow queue-jumpers or bogus claimants who only come here to take advantage of Canada's refugee system and its generosity."

Justice Boswell ruled that the offending section of the *Immigration and Refugee Protection Act* violated s. 15 of the *Charter* (equality) and it could not be saved under s. 1 of the *Charter* as a reasonable limit on freedoms as justified in a free and democratic society.

Feher v. Canada (Public Safety and Emergency Preparedness), 2019 FC 335 (CanLII)
http://canlii.ca/t/hz7js

2. A No Contest Clause Challenges Fortitude

A no contest clause in a will is a bit like a "double or nothing" bet. It is meant to discourage beneficiaries from contesting a will and says that if a beneficiary unsuccessfully challenges a will, he or she forfeits their gift altogether. In a case recently decided by the Alberta Court of Appeal, the Court considered whether a beneficiary asking the personal representatives of the testator to obtain formal proof of the will, as opposed to a grant of probate in common form, could trigger the no contest clause. The beneficiary in this case had raised the possibility of suspicious circumstances in the signing of the will but argued that this did not amount to challenging the will, thus triggering the clause. She asked the Court to confirm her position. However, the Alberta Court of Appeal ruled that an application by the beneficiary to raise suspicious circumstances about the creation of the will would trigger the no contest clause. The Court wrote: "…the effect of the no contest clause is to test the fortitude of a potential challenger to the validity of the will and how strongly they believe they can successfully challenge the will." The Court concluded: "A declaration shall issue that if Ms. Mawhinney applies… to request the personal representatives to obtain formal proof of the August Will, that will constitute a challenge to the validity of the August Will, or litigation in connection with a provision of the August Will, and will trigger operation of the no contest clause in paragraph 21. Whether that application results in the forfeiture of Ms. Mawhinney's interest under the August Will depends of whether her challenge succeeds."

Mawhinney v Scobie, 2019 ABCA 76 (CanLII)
http://canlii.ca/t/hxqlb

3. Gap in Sex Offender Registration Laws

A man identified as G was accused of sexually assaulting his wife while in a manic state. He was found not criminally responsible at trial because of his mental state and granted an absolute discharge a year later. Still, he was obliged to register as a sex offender for life under a provincial law passed in 2001, called "*Christopher's Law*", and also under the federal *Sex Offender Information Registration Act (SOIRA)* for a period of twenty years. G challenged his registrations under ss 7 (life, liberty and security of the person) and 15(1) (equal treatment under the law) of the *Charter*. He pointed out an anomaly in the law. Persons found guilty of a sexual offence but who receive a conditional or absolute discharge at sentencing are not required to register under either the federal or provincial laws under a *Criminal Code* provision. However, persons found to be Not Criminally Responsible on account of Mental Disorder (NCRMD) can't take advantage of the *Criminal Code* provision because they were never convicted of a *Criminal Code* offence. The Appeal Court noted: "Persons found NCRMD stand in a dramatically different place than those convicted of a criminal offence. They have done nothing wrong in the eyes of the criminal law, and cannot be punished by the state for what they did." It dismissed G's *Charter* s. 7 argument but ruled: "…the equality command of s. 15(1) dictates that NCRMD who have received an absolute discharge must have some opportunity to address both their risk of reoffending and the potentially negative effects of sex offenders' registry orders on their mental health and continued recovery. Neither *Christopher's Law* nor *SOIRA* provides that opportunity. Consequently, both infringe s.

15(1) of the *Charter*." The Court ordered the suspension of the provisions of *Christopher's Law* and *SOIRA* to the extent that they impose mandatory registration and reporting requirements with no possibility of exemption for persons found NCRMD who have received an absolute discharge. The Court gave the two governments 12 months to amend the law.

> *G. v. Ontario (Attorney General)*, 2019 ONCA 264 (CanLII) http://canlii.ca/t/hzjp9

4. Students and Privacy

A high school teacher was charged with voyeurism after he secretly videotaped female students in his school, focusing on their upper bodies and breasts. The offence of voyeurism requires that the persons observed have a reasonable expectation of privacy and that the observation or recording is done for a sexual purpose. The Supreme Court of Canada examined a number of factors giving rise to an expectation of privacy, including:

- the location of the person;
- the nature of the conduct;
- awareness or consent to the potential observation or recording;
- the manner in which the observation or recording was done;
- the subject matter or content of the observation or recording;
- any rules or regulations or policies governing the observation or recording;
- the relationship between the persons involved;
- the purpose of the observation or recording; and
- the personal attributes of the person who was observed or recorded.

The Supreme Court ruled:

> *In this case, when the entire context is considered, there can be no doubt that the students' circumstances give rise to a reasonable expectation that they would not be recorded in the manner they were. In particular, the subjects of the video recordings were teenage students at a high school. They were recorded by their teacher in breach of the relationship of trust that exists between teachers and students as well as in contravention of a formal school board policy that prohibited such recording. Significantly, the videos had as their predominant focus the bodies of the students, particularly their breasts. In recording these videos, the accused acted contrary to the reasonable expectations of privacy that would be held by persons in the circumstances of the students when they were recorded.*

The Court convicted the accused of the offence of voyeurism.

> *R v. Jarvis*, 2019 SCC 10 (CanLII) http://canlii.ca/t/hxj07 ◆

Columns

To Stop or Not To Stop? Police Carding Practices

Melody Izadi

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

In *R. v. Omar*, 2018 ONCA 975 (CanLII), the Ontario Court of Appeal has rubber stamped the illegality of what is commonly referred to as carding, declaring that "[Everyone has] every right to be walking down the street unimpeded by the police" (at para 51).

In a stunning decision where the Crown's case rested solely on the drugs, firearm and ammunition found on Mr. Omar, the Court of Appeal excluded the evidence because of the breaches of the Applicant's rights. Mr. Omar was acquitted on all counts.

"I recognize that the exclusion of a firearm from evidence may be seen from one perspective as producing an unpalatable result" the Court held, "but a difficult result in one case is sometimes an acceptable price to pay for ensuring respect for *Charter* rights…" (at para 60).

> *"Far from being deemed a mere technicality, the right to be free from arbitrary detention is one of our most sound constitutional principles that seperates us from many other countries around the world."*

While there might be frustration or confusion as to the loss of this prosecution, society should be equally outraged at the blatant disregard for our *Charter* rights displayed by the officers in this case. Each and every individual has the right to walk down to the street without police intervention. Far from being deemed a mere technicality, the right to be free from arbitrary detention is one of our most sound constitutional principles that separates us from many other countries around the world. Put simply, the police must have a lawful reason for stopping someone and investigating them.

Thus, the practice of carding, which is essentially what happened in Mr. Omar's case, has no sound legal basis. An officer cannot simply stop individuals, demand identification and then arrest them because they refuse a demand to search their pockets.

The Crown had argued at trial that, because the officers did not believe they had illegally detained Mr. Omar, there was a good faith basis for their actions. The Judge at trial agreed

and allowed the evidence. Mr. Omar was convicted. The Court of Appeal took the opposite position: "The police had no lawful justification to detain the appellant. They have no excuse for not knowing that they violated his *Charter* rights when they did so" (at para 61).

The Court of Appeal's strong words provide a cautionary lesson to all officers to deter them from arbitrarily detaining individuals. As it turns out, their lack of a legal basis for doing so can result in extremely important evidence being excluded by one of the highest courts in the country: *R. v. Grant, 2009 SCC 32* (CanLII).

Importantly, there are parallels between this case and the seminal case of *Grant* where the Supreme Court of Canada outlined the scope of arbitrary detention and the framework for excluding evidence pursuant to the *Charter*. Both Mr. Omar and Mr. Grant were young black men confronted by a larger officer dressed in a police uniform. It is important to note that the relevance of the age and race of the applicants cannot be divorced from the police behaviour in question. Thankfully, the Court of Appeal recognized the importance of this ruling in the greater societal context and has conveyed a clear message that one's *Charter* rights should not be less secure because of the race, age, or ethnicity of the individual. One can only hope that every police officer charged with the duty to protect and serve our communities has the same sentiments, standards and beliefs.◆

The Duty of Unions to Fairly Represent Their Members

Peter Bowal

Introduction: plight of the unionized worker

The average unionized worker is in a weak position at work. In many workplaces he will, as a condition of employment, be required to join the existing union. Or he may have been out-voted in the decision to unionize. Bringing serious concerns and directly accessing the employer is hampered by labour-management formalities. Technically, only union stewards can broker concerns and communications with bosses.

Workers are generally stuck with their union, much in the same way that they are stuck with their federal and provincial governments. They may find that their one voice and one vote carry no sway in influencing union leadership, governance, collective bargaining and other decisions. Workers are captive to their unions unilaterally deducting hundreds, or thousands, of dollars from their earnings each year. Workers and unions are analogous to citizens electing and submitting to government. Yet, one's relationships and conditions at work are much more intensely personal than citizenship in a territory.

If the employer violates the law or collective agreement, only the union can challenge that. Individual workers have no standing in court to complain of mistreatment or wrongful dismissal by the employer. They are totally dependent upon the union, the "exclusive agent" – its good faith and competence – to take up and effectively prosecute grievances against employers. **How** can workers ensure their unions fairly and effectively represent them?

The good news is that the union has some accountability. This is found in the doctrine of "duty of fair representation", which is the topic of this article.

> *"One can also understand the union's duty in terms of what it should NOT do. It should not be negligent or motivated by favouritism, unlawful discrimination, irrelevancies, bad faith, ill will or personal hostility."*

Duty of Fair Representation

The Collective Agreement is the contract between the worker and employer. It can only be enforced by unions filing grievances on behalf of individual workers, alleging an employer breach of some kind or challenging the employer's discipline.

There are several stages through which the parties move in any grievance process, the goal of which is always to resolve the concern. Ultimately, the union may have to take a grievance to arbitration which can be costly in terms of time, effort and resources.

Unions typically have significant discretion in whether to file and how to progress the grievance, regardless of the affected worker's preferences. Given this power over the worker, the *Labour Relations Code* requires unions to treat all the workers it represents fairly.

The Supreme Court of Canada, in the 1984 decision *Canadian Merchant Service Guild v. Gagnon* and again in 2001 in *Noel v. Societe d'energie de la Baie James*, along with a number of provincial labour relations board decisions, has set out the parameters of this union duty of fair representation. Fair representation mostly requires unions to act in good faith to investigate and understand the relevant facts and issues of the case, as well as its significance and impact on the worker. Only then can it properly assess and balance the merits of the grievance.

> *"Workers, other than those covered by the Public Service Employee Relations Act, whose unions have not fairly represented them cannot sue them in court."*

The union must act objectively and honestly, and thoroughly review the matter. Its response must take into account the facts of the case, its significance (for example, a dismissal is more significant than a reprimand), consequences for both worker and union, and probable outcomes. It should apply for an extension of deadlines if this is permitted and appropriate.

The union's representation must be "fair, genuine and not merely apparent, undertaken with integrity and competence". Ultimately, the worker has no absolute right to a grievance or an arbitration. The union need not inform the worker of meetings, but the worker must be informed, and be permitted to attend, any grievance hearings.

One can also understand the union's duty in terms of what it should *not* do. It should not be negligent or motivated by favouritism, unlawful discrimination, irrelevancies, bad faith, ill will or personal hostility. Union decisions cannot be arbitrary. If the union has an LRB-approved internal appeal mechanism of the grievance officer's decisions and actions, it should be used.

Taking Your Union to the Labour Relations Board

Workers, other than those covered by the *Public Service Employee Relations Act*, whose unions have not fairly represented them cannot sue them in court. They have an easier, faster and cheaper recourse option – file a complaint with the Labour Relations Board (LRB) where the fairness of the union's response will be reviewed. Technically, there is a difference between second-guessing or appealing what decision(s) the union made and how the union approached the case (the focus of the LRB review). Collective bargaining

negotiations are separate from this fair representation complaint process.

Workers must file their complaint to the Alberta LRB within 90 days of the union's decision or 45 days from being notified of the outcome of an appeal. The complaint form and procedure are online and the LRB has prepared a very helpful and comprehensive Information Bulletin #18 to guide workers through the review process when complaining about their union's representation of their interests.

Once the complaint is filed on time, and is judged to fit within the fair representation realm, the LRB may attempt to resolve the dispute informally or strike a panel to do a review of documents and submissions from both sides. If the complaint has no merit, it is dismissed. If it appears to have merit, the matter proceeds to a LRB hearing where worker and union present their cases.

LRB Remedies for the Union's Unfair Representation

When the Board concludes the union has breached the duty of fair representation, it can extend the time to grieve (where a grievance was not advanced) or order compensation for actual losses or damages against the union.

Conclusion

Our work touches upon our dignity, ambitions, social interactions, physical and emotional well-being, reputation, economic security and our inherent value as human beings – every aspect of our life fulfillment. It is very important that unions, as exclusive agents, be responsive and effective advocates for the workers in their bargaining unit against improper employer behaviour.

While unions must necessarily enjoy considerable discretion to decide whether to prosecute a worker's grievance against the employer and how far to press it, they must act fairly. If a worker does not believe the union has treated her concern fairly, she can bring take the union to the Labour Relations Board as a fair representation complaint.

The process is streamlined, relatively low stress, without fees and efficient. Most workers should be able to handle these complaints themselves. ◆

> *"Fair representation mostly requires unions to act in good faith to investigate and understand the relevant facts and issues of the case, as well as its significance and impact on the worker. Only then can it properly assess and balance the merits of the grievance."*

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

Alternatives to Court: Mediation

Sarah Dargatz

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In the first column in this series, John-Paul Boyd introduced basic alternatives to resolving family law disputes in court. In the second column, I wrote about the Collaborative process. In the last issue, John-Paul Boyd explained arbitration. In this column, I'm going to talk about mediation.

Mediation is a process where you and the other person involved in a dispute meet with a neutral third-party, a mediator, who assists you to reach an agreement. The mediator's role is to help you and the other person communicate civilly, express ideas in different ways, stay on track, and explore and consider options. You can think of a mediator as a guide, a translator, a coach, or a referee. The goal of a mediation is for you and the other person to reach an agreement. A mediator is not empowered to impose a solution on you and the other person. You are the decision-makers and responsible for the outcome.

Mediators can take a variety of approaches:

- In *facilitative* mediation, the mediator makes informed suggestions to you and the other person to help you problem solve and assess various proposals. The mediator will focus on maintaining a fair process so you and the other person can communicate effectively.
- In *evaluative* mediation, the mediator can give their opinion to you and other person about your positions. If the mediator is a lawyer, they might tell you if your suggestion does not align with the current law and predict the outcome if you took your case to court.
- In *transformative* mediation, the mediator attempts to help you and other person find new ways of communicating and to develop skills to work together. The mediator helps you and the other person transform your interactions from destructive to constructive.

Mediators can have a variety of backgrounds. Many come from a social work or counselling background; others are lawyers. Each background brings a different skill set and you may want to give this some consideration when choosing a mediator. For example, if you are trying to reach a resolution about what kind of parenting schedule is best for your children, you might prefer someone who has training in child development or interpersonal relationships because the law is not complicated in this area; it is to do what is in your child's best interests. However, if you are trying to sort out an issue that does involve more of a legal analysis, such as how to divide matrimonial property, it may be helpful to have a mediator with a legal background who understands the law in this area.

> *"The mediator's role is to help you and the other person communicate civilly, express ideas in different ways, stay on track, and explore and consider options. You can think of a mediator as a guide, a translator, a coach, or a referee."*

Usually mediation is "closed" and done on a "without prejudice" basis, meaning that whatever is discussed in mediation cannot be raised in court. This allows for you and the other person to explore ideas and suggest compromises without being held to them if you do not reach an agreement. Your mediator should confirm whether or not you are proceeding on this basis at the start of your meeting.

Generally, mediators will not have private discussions with you or the other person. This ensures that the process is fair and transparent. However, sometimes it may be beneficial to take time away from the joint session to meet with the mediator to clarify an issue, reflect on the consequences of a decision, or vent your emotions. In this case, the mediator might decide to "caucus", which means to have a private confidential meeting with you or with the other person. You might be concerned that caucusing could be used to sway a mediator to the other person's "side". However, since a mediator cannot make decisions for you, there is little advantage to having a mediator on "your side" or risk that they are on the other person's side. The only person you have to convince is the other person in your dispute. Caucusing is simply one tool to help move forward. If you have concerns with caucusing, you can raise them and discuss the benefits or risks of using this tool.

As John-Paul Boyd noted in the last issue's column, mediation can be combined with arbitration. An arbitrator can start by mediating, but if you cannot reach an agreement, they can make a final and binding decision that you both must follow. You and other person would have to agree to this process in advance and set out the "rules" that the mediation-arbitration process (sometimes called "med-arb") would follow.

Mediation is usually a voluntary process. However, many courts require that you and the other person attempt at least one alternative to court before you can bring a court application or schedule a trial. So, you might try mediation to satisfy this requirement, without being fully invested in the process. This is missed opportunity. Reaching an agreement via mediation would not only save you time and money,

but as with any alternative to court, it also usually leads to better outcomes. When you reach an agreement that works for you, and for your children, rather than leaving it to a stranger (a judge), it is much more likely to meet your needs and other interests. If you and the other person are the parents of children, it is important to preserve your relationship and learn how to communicate in the long term.

There are some situations that are not recommended for mediation. Family violence, substance abuse, poor mental health, or limited cognitive functioning will limit how successful mediation can be. In some cases, mediation may not be safe. Mediators are trained to screen clients to ensure that mediation is appropriate.

In Alberta, free mediation for parenting matters is available through the provincial government so long as one of the people earns less than $40,000 a year. If you do not qualify for this, or have other issues to address, you can hire a private mediator. Anyone can present themselves as a mediator. When choosing one, you may want to ask questions about their background and training. The Alberta Family Mediation Society and the ADR Institute of Alberta both provide a list of their members who have a minimum level of education and designations for those with more experience.◆

Police Demanding Evidence from Journalists: The *Vice Media* Case

Peter Bowal, Carter Czaikowski and Marcus Smith

Introduction

How do police detect crimes? Like us, the police do not see many crimes taking place when they are walking or driving around. They become aware of crimes when people report them. They occasionally detect crimes online.

Some people communicate with journalists to publicize their criminal activities to the world. These are often riveting human interest stories and celebrated journalistic scoops. In those cases, it would be very easy for the police to descend and demand the journalists disgorge every jot and tittle of the crimes about which they have written or spoken. In this way, the journalist – whose interests and objectives differ from the police – could frequently and involuntarily be conscripted into law enforcement duty.

On one hand, we have the constitutional freedom of the press and freedom from reasonable search and seizure. On the other hand, there is a compelling public interest in detecting, investigating and prosecuting crimes. This article is about when, and how, the police can require the press to give up their journalistic secrets in aid of law enforcement.

> *"Far from serving as a "rubber stamp" allowing police access to media records, applications for production orders and search warrants in terrorism investigations remain highly dependent upon the facts and judicial discretion in each case."*

The *Vice Media* Case

Vice Media began as a print publication in Montreal in 1994. It rapidly expanded into digital media and broadcasting and now produces stories and content on multimedia platforms. In 2014, Ben Makuch, a Vice Media journalist, was in contact with a Canadian (originally from Calgary), Farah Mohamed Shirdon, regarding his involvement with the terrorist Islamic State of Iraq and Syria (ISIS) organization. Makuch wrote, and Vice Media published, three news

stories based on exchanges between them in a 2014 documentary. The articles contained statements by Shirdon that, if true, implicated him in numerous criminal offences.

The Royal Canadian Mounted Police successfully applied for a production order to obtain and seize screen captures of the conversations with Shirdon that were in the possession and control of Vice Media. Rather than turning over that evidence, Vice Media applied to court to quash the order. The matter eventually landed in the Supreme Court of Canada.

Decision

On November 30, 2018, a unanimous Supreme Court of Canada issued its decision in *R v Vice Media Inc.* which will support law enforcement officials in criminal investigations and prosecutions. Police can apply to judges, without giving notice to the party holding the evidence, for an order to obtain the content of communications involving suspected criminals. These orders compel journalists and media organizations to produce such texts, emails and other communications from criminals.

The Court tweaked its 1991 *Lessard* framework, so that now, on application for a production order against a media organization, this four-part analysis will be applied:

1. the police may apply directly without the media's knowledge (*ex parte*) for production orders as permitted by the *Criminal Code*, subject to the authorizing judge's overriding discretion to require notice to the media organization where deemed appropriate;
2. all statutory preconditions must be met. Essentially, the police must have reasonable grounds to believe the source has: committed certain offences; the target media organization has in its possession the materials sought; and those materials afford evidence respecting the commission of the alleged offences;
3. the authorizing judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to privacy in gathering and disseminating the news; and
4. the authorizing judge should consider imposing conditions, such as ample time to comply with the order, to ensure the media outlet will not be unduly impeded in the publishing and dissemination of the news.

Production orders to obtain evidence of crimes from media outlets will hang on the critical third stage balancing analysis. Authorizing judges will weigh all circumstances, including any potential chilling effects; the scope of materials sought by police, the order's narrow tailoring, probative value of evidence sought, any alternative sources of the information and whether the police have made all reasonable efforts to obtain the information from those sources, and the effect of prior partial publication of the materials sought.

The Supreme Court noted that the criminal suspect in this case was actually using Vice Media as his spokesperson to publicize his actions. He was not guaranteed confidentiality by Vice Media. The production order would not reveal a confidential source. No "off the record" or "not for attribution" communications were

in play. There was no alternative source from which this evidence could have been obtained.

Conclusion

Far from serving as a "rubber stamp" allowing police access to media records, applications for production orders and search warrants in terrorism investigations remain highly dependent upon the facts and judicial discretion in each case. In *Vice Media*, the Supreme Court of Canada affirmed and simplified the *Lessard* framework to adequately protect the special role in society played by media organizations, which are generally innocent, commercial third parties to criminal law enforcement.

In this case, the suspected terrorist's text messages would not reveal a confidential source and there was no alternative source through which the materials could be obtained. The suspect used the media as a form of spokesperson to publicize his ISIS activities and broadcast its extremist views. The state's interest in investigating and prosecuting crimes weighed more heavily in the balance.

Judges authorizing search warrants and production orders must remember the vital role the media play in a democratic society. While this production order was upheld, there are clear signs it will get more difficult to compel evidence from the media in the future. Federal legislation, the *Journalistic Sources Protection Act*, was enacted in Canada in 2017 after this case arose. It provided enhanced protections for maintaining the confidentiality of "journalistic sources" and set out a new process governing applications for search warrants, production orders and other orders relating to a "journalist," even where no confidential source is involved.

Note also the strong concurring judgment of the four-judge minority in the *Vice Media* case. Although these judges agreed to the production order on the facts of this case, they would have formally carved out a distinct and independent constitutional right protecting the media's core expressive functions — its right to gather and disseminate information for the public benefit without undue state interference — under section 2(*b*) of the *Canadian Charter of Rights and Freedoms*. If this approach to strengthen media autonomy takes hold, law enforcement's use of journalists for evidence gathering will become much more complicated in the future.

The press is a struggling industry in transition, mostly to consolidate and reduce. Investigative journalism is expensive content to generate. Vice Media's independent, cutting-edge approach of obtaining unprecedented access and embedding reports may diminish the more it is used as an instrument of law enforcement.

The Canadian Journalists for Free Expression decried "forcing the essential investigative function of the press to be at the disposal of law enforcement." It added: "If journalists cannot protect their sources, then the information they provide will dry up, leaving Canadians uninformed and democracy impoverished."◆

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State Neutrality Does Not Always Result in Substantive Equality

Linda McKay-Panos

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Recently, Quebec Premier François Legault's government introduced Bill 21 (An Act Respecting the Laicity [Secularism] of the State). Among other things, the Act prohibits public workers in positions of authority (e.g., teachers, police officers, prison guards, Crown prosecutors, government lawyers and judges) from wearing religious symbols (not defined in the Act, but presumably would include turbans, kippahs, crucifixes, hijabs, clerical collars, etc.).

The Act also prohibits receiving government services with one's face covered. This latter provision was previously introduced in Bill 62 (s 10, which required people to remove face coverings when receiving government services), and was the subject of an injunction issued by Justice Marc-André Blanchard. Justice Blanchard held that section 10 appeared to be a violation of both the Canadian and Quebec Charters, "which protect freedom of conscience and religion" (see: "CCLA & NCCM Successfully obtain Renewed Stay Against Quebec's Bill 62" (June 29, 2018)). The Quebec government, in passing Bill 21, seems to be responding to this earlier decision by invoking the *Canadian Charter of Rights and Freedoms'* notwithstanding clause (See: Effects of the Notwithstanding Clause on Human Rights Law).

Finally, Bill 21 seeks to amend Quebec's *Charter of Human Rights and Freedoms* to include the fact that the Quebec nation considers: "state laicity [secularism] to be of fundamental importance." Again, this appears to be an attempt to prevent any court challenges to Bill 21.

The Preamble to Bill 21 explains that the Quebec nation "has its own characteristics, one of which is its civil law tradition, distinct social values and a specific history that [has] led it to develop a particular attachment to state laicity." The Preamble also says that secularity should be "affirmed in a manner that ensures a balance between the collective rights of the Quebec nation and human rights and freedoms." It

notes that Quebec "attaches importance to the equality of women and men" — which is "an apparent reference to the concern expressed by some people that the hijab, the headscarf worn by some Muslim women, and the niqab, a Muslim veil, are symbols of female inferiority" (See: CBC News Benjamin Shingler, (28 March 2019) "What's in Quebec's secularism bill: Religious symbols, uncovered faces and a charter workaround").

> *"However, this Bill demonstrates a very thin interpretation of equality. It harkens back to the days when formal equality required that: "like people should be treated alike."*

Laicity, according to section 2 of the Bill, is based on four principles: the separation of state and religions, the religious neutrality of the state, the equality of all citizens, and freedom of conscience and religion.

There are many people in Quebec who approve of the Bill. They see it as a way to ensure a clear division between religion and the state. At the same time, opposition to Bill 21 is growing, by minority groups and civil liberties groups, for example. One practical implication of Bill 21 is it could force some individuals to leave Quebec or to not enter public professions such as teaching. Some individuals are even advocating civil disobedience (e.g., refusal to remove religious symbols).

In 2007, the (Gerard) Bouchard-Taylor Commission came to several conclusions after investigating a "reasonable accommodation" crisis in Québec. The report noted that there were widespread misperceptions about how institutions and religious minorities usually adapt to each other. Further, Francophones were nervous about the future of their language and cultural minorities worried about their place in Québécois society. Bouchard and Taylor have spoken out against Bill 21.

Although equality is stated to be an important value in Bill 21, it appears to be overshadowed by the value of secularism in the form of state neutrality. The stated aim of Bill 21 is to "enshrine the principles of secularism in Quebec law, and in doing so, protect the fabric of a francophone society in a globalizing and largely anglophone world." However, this Bill demonstrates a very thin interpretation of equality. It harkens back to the days when formal equality required that: "like people should be treated alike". This completely negated consideration of any adverse effects that a neutral law could have on persons who were members of minority groups. However, the advent of the *Canadian Charter of Rights and Freedoms,* s 15(1) has resulted in the wide interpretation that substantive equality is to be the norm in Canada. This means that even laws that appear neutral can be discriminatory if they impose burdens on some people based upon the grounds listed in s 15(1) or analogous grounds.

Applying a substantive equality analysis to Bill 21 could be described as follows: All public servants are prohibited from wearing religious symbols at work. However, there are some religions that require that religious symbols (e.g., turbans or kippahs) be worn in public. Thus, people whose religion requires the wearing of religious symbols are forced to either disobey their religious beliefs or face legal consequences. This apparently neutral rule has an adverse impact on some

minority groups. This is a breach of substantive equality.

What can be done about Bill 21? Aside from political opposition and civil disobedience, many of the traditional avenues of challenge, such as a *Charter* challenge in court, are not available because the notwithstanding clause is included in Bill 21. Because the notwithstanding clause only applies to sections 2 and 7 to 15, some advocates are looking to challenges under other *Charter* sections. The Canadian Bar Association is lobbying Quebec to remove the notwithstanding clause from Bill 21. In addition, some argue that making laws about religion is a federal power such that Bill 21 is *ultra vires* (outside the jurisdiction of the province of Quebec). In the case of *Saumur v City of Quebec,* [1953] 2 SCR 299, four of the nine Supreme Court justices held that religious freedom fell within federal jurisdiction.

Nevertheless, it is clear that this is a law that demonstrates that state neutrality does not always result in substantive equality.◆

Accommodation in Tenancy: Assistance and Support Animals

Judy Feng

Sometimes tenants require the assistance and support of an animal. Are landlords required to accommodate a tenant with an assistance or support animal? Well, part of the answer depends on the type of animal involved: does the situation involve a disabled tenant with a qualified service or guide dog, or is this some other type of animal like a companion, emotional support or therapy animal?

In Alberta, the right of a disabled or blind person to use a service or guide dog is protected by both the *Service Dogs Act* and *Blind Persons' Rights Act*. Landlords cannot discriminate against disabled and blind persons with a qualified service or guide dog, provided that the person can control the dog's behavior. Landlords who discriminate against or deny occupancy of a dwelling unit to a person with a service or guide dog are guilty of an offence and can be fined up to $3,000.

The right of a disabled or blind person to use a service or guide dog is also protected by the *Alberta Human Rights Act*. Landlords have a duty to accommodate disabled persons with a qualified service or guide dog to the point of undue hardship. This means making adjustments or providing alternate arrangements to meet the needs of disabled tenants. Some of the factors that are considered in undue hardship include: financial costs of the accommodation, health and safety concerns and substantial interference with other people. Undue hardship is a difficult standard to meet. Generally, landlords must provide some level of accommodation for disabled tenants with service or guide dogs.

On the other hand, there are also other types of animals that provide assistance and support to people, for example, companion animals, therapy animals and emotional support animals. Companion animals, which are also known as "pets", are a type of animal kept for pleasure. Therapy

> *"Tip: Service dogs are qualified dogs trained as a guide for disabled persons. Guide dogs are a type of qualified service dog trained as a guide for blind people. Both types of dogs must meet qualification requirements under the law."*

animals are animals used by therapists for short-term therapy. Emotional support animals are typically used for providing support to people with mental illness or chronic illness. Companion, emotional and therapy animals can be any type of animal really … you've probably heard about people having therapy or emotional support dogs, cats, hamsters, rabbits and even chickens.

Unlike service and guide dogs though, companion, emotional and therapy animals are not covered by existing provincial legislation in Alberta. However, the law is still developing in this area. For example, under human rights law, there may be a duty to accommodate disabled persons with these other types of animals. Another development to look out for is changes to municipal bylaws. For example, the City of Calgary recently approved amendments to its Responsible Pet Ownership Bylaw to allow individuals (with a permit) to keep livestock as Emotional Support Animals within the city. The City of Calgary expects to implement the permit process in early 2019.

For more information, refer to CPLEA's Renting with Support & Assistance Animals resource: *https://www.cplea.ca/wp-content/uploads/AssistanceSupportAnimals.pdf*

This article is part of the "Accommodation in Tenancy" series, which looks at emerging tenancy issues with a human rights lens. Stay tuned for the next article of the series, which will cover hoarding disorder. ◆

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Alberta Election Legislation and Charities

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.

After years of turmoil around the topic, the federal government moved recently to reform treatment of charities' "public policy dialogue and development activities". The reform was, at least in part, in response to the striking down as unconstitutional of certain provisions of the *Income Tax Act* dealing with registered charities' political activities.

In a 2018 case, the Ontario Superior Court found that the measures violated the Canadian *Charter of Rights and Freedoms*.

One of the outcomes of the reform was clarity on the long troublesome area of the overlap between policy positions of registered charities and those held by political parties.

It is undisputed that charities should not engage in partisanship. However, many charities develop stances on policy matters that are later adopted or adapted by political parties. These positions can originate in a host of ways – among them, in an organization's frontline experience, out of research it does, or, in the case of faith-based groups, from tenets of belief.

Historically, developing policy positions related to their missions that are the same or similar to those taken by political parties or candidates has placed charities at risk of running afoul of the prohibition on partisanship in the *Income Tax Act*. Neither the old legislation nor the old guidance on political activities provided charities with much information on assessing circumstances where positions overlapped or were shared. That is no longer the case.

The explanatory guidance on the new legislation released by the Canada Revenue Agency Charities Directorate (CRA), *CG-027 Public policy dialogue and development activities by charities*, makes clear that policy originating separately from political parties and candidates does not put charities offside the rules against being partisan. Whether positions overlap or

> *"Having just been freed up under the federal regime to fully engage in the public policy process, Alberta charities apparently now have to curtail their activities in the face of the EFCDA measures."*

are later endorsed by parties or candidates is not a determining factor.

The guidance states:

> *The actions a political party or candidate may independently take do not transform the activities of a charity into direct or indirect support of or opposition to that party or candidate. What the CRA considers is the activities of the charity itself.*

Now that this problem has been resolved federally, however, it has arisen again in Alberta provincial law. The province's *Election Finances and Contributions Disclosure Act* (*EFCDA*) regulates spending and other support for political parties or candidates both during and outside election periods.

EFCDA rules during election periods are stricter and are designed to preclude charities from participating in campaigns. Charities cannot register to do any of the types of activities governed by *EFCDA* during election periods.

Among the things the *EFCDA* deals with is certain paid advertising. Specifically it regulates any advertising message "that takes a position on an issue with which a registered party, the leader of a registered party, a member of the Legislative Assembly, a registered nomination contestant, a registered leadership contestant or a registered candidate is associated…" This wording, and lack of guidance on the meaning of "associated", means charities face a risk that promotion of policy positions that have been independently arrived at will be mistaken for advertising linked to a political party or candidate.

> *"It is undisputed that charities should not engage in partisanship. However, many charities develop stances on policy matters that are later adopted or adapted by political parties."*

Outside of election periods, such paid advertising requires registration of the sponsoring organization and is subject to other restrictions. Within election periods, charities cannot carry on this activity because they are not eligible for registration.

How a charity that has an ongoing initiative to promote its policy position – for example a billboard campaign or a sponsored supplement planned for a publication – is supposed to immediately halt the initiative at the onset of an election period is not explained in the statute or the Elections Alberta material on the legislation.

Among representations potentially caught by the law are minimum wage campaigns by poverty charities, health charity information inserts in newspapers, and advocacy of religious stances on medical or educational matters.

Enforcement of the legislation is complaints-based and includes a range of sanctions for non-compliance. The statute does not contain a due diligence defence for charities that err in good faith about whether a position is associated with a party or candidate.

Having just been freed up under the federal

regime to fully engage in the public policy process, Alberta charities apparently now have to curtail their activities in the face of the *EFCDA* measures. If nothing else – as was seen under the old federal regime – vague rules and complex compliance requirements are apt to make Boards of Directors overly cautious in authorizing public policy work by their organizations.

At a minimum, Elections Alberta needs to release guidance indicating that the legislation is not intended to cover promotion of policy positions developed by charities independently of political parties or candidates, then taken up by them routinely without the charity's participation or knowledge. Beyond that, it remains to be seen whether the law will be challenged in the courts and, if so, whether it will survive *Charter* scrutiny.◆

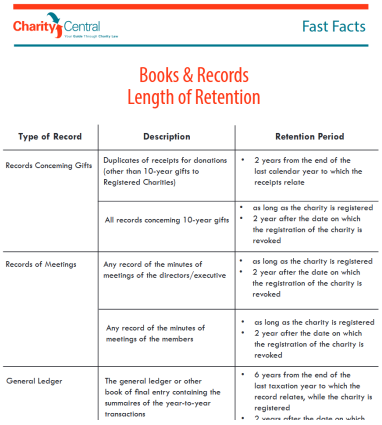
New Resources at CPLEA

In this issue of LawNow we are highlighting four updated publications of interest to non-profits and registered charities. These resources can be found on CPLEA's topic specific Charity Central website at www.charitycentral.ca. Charity Central offers plain language information on not-for-profit and charity law.

Updated Resources:

Books and Records: Length of Retention

This Fast Facts provides an overview of the general requirements around the length of retention for certain types of records for registered charities. (incorporated and not)


Charity Central Fast Facts

Books & Records
Length of Retention

Type of Record	Description	Retention Period
Records Concerning Gifts	Duplicates of receipts for donations (other than 10-year gifts to Registered Charities)	• 2 years from the end of the last calendar year to which the receipts relate
	All records concerning 10-year gifts	• as long as the charity is registered • 2 year after the date on which the registration of the charity is revoked
Records of Meetings	Any record of the minutes of meetings of the directors/executive	• as long as the charity is registered • 2 year after the date on which the registration of the charity is revoked
	Any record of the minutes of meetings of the members	• as long as the charity is registered • 2 year after the date on which the registration of the charity is revoked
General Ledger	The general ledger or other book of final entry containing the summaires of the year-to-year transactions	• 6 years from the end of the last taxation year to which the record relates, while the charity is registered

Filing Checklist for NFPs and Registered Charities Operating in Alberta

This checklist sets out some of the more common and important filings that non-profits and registered charities incorporated in Alberta must make to the government of Alberta and to the Canada Revenue Agency (CRA).


Charity Central Tipsheet

Filing Checklist for Registered Charities and NFPs Operating in Alberta

This checklist sets out some of the more common and important filings that non-profits and registered charities incorporated in Alberta must make to the government of Alberta and to the Canada Revenue Agency (CRA). The list is not comprehensive and is meant for general information only. It does not include the reporting requirements for non-profits or registered charities incorporated under the *Canada Not-for-Profit Corporations Act* and those operating in Alberta but not incorporated under Alberta legislation.

Registered Charities in this checklist refer to organizations that are registered with the CRA under the *Income Tax Act*. Some of the filings are dependent on how a charity is incorporated. **Registered charities should consult their legal counsel, financial advisors, Service Alberta or the Canada Revenue Agency if they have questions or concerns.**

To use this checklist, first determine how your organization was incorporated and choose the filing requirements that are applicable to you.

WHO	WHAT	WHEN	WHY	MORE INFORMATION
Registered Charity / NFP incorporated under the *Societies Act* (Alberta)	Society Annual Return Form REG 3185, along with audited financial statements	Annually, within one month of the registration anniversary date	To maintain the status of the organization as a provincially registered corporation	To be filed with Service Alberta www.alberta.ca/registration-forms-businesses-non-profits.aspx
Registered Charity / NFP	Changes to address, directors,	Within 15 days of making the	To provide up-to-date	To be filed with Service Alberta

Legal Requirements for Non-profit Organizations and Registered Charities

A list of legislation of significance to non-profits and registered charities in Alberta.


Charity Central Tipsheet

Legal Requirements for Non-Profit Organizations and Registered Charities

Both registered charities and non-profit organizations must comply with certain requirements under the *Income Tax Act*. Each province has laws that focus on the legal structure, fundraising and operations of charitable organizations (including those formed as trusts or holding trust assets). In some cases, registered charities or non-profit organizations may be constituted under federal legislation or subject to other federal laws. The charitable sector is very diverse and the associated legal requirements for each entity vary. It is not possible to identify all areas of legislation that groups should be aware of. But there are some common areas that can get you started.

For Registered Charities

- Legal requirements under the *Income Tax Act*

  This includes annual reporting, compliance obligations with respect to issuing of donation receipts, maintaining books and records and devoting all the entity's resources to charitable work (aspects of the charity's operations not directly related to undertaking charitable work, such as fundraising, administration and management and political activities must meet certain criteria to be permissible).

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

Thank You

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