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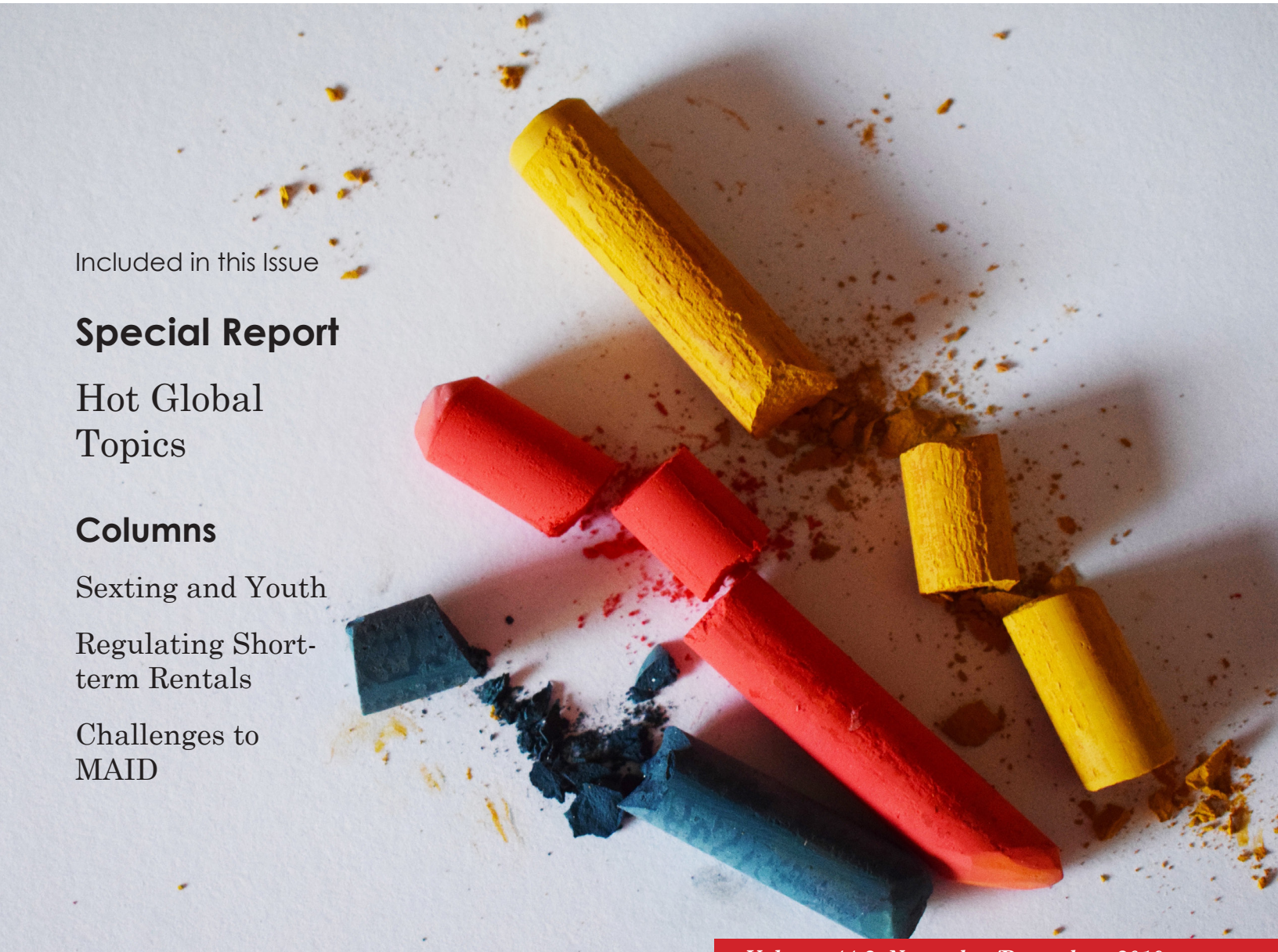
Family Break-ups & the Law



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Publisher Jeff Surtees

Editor/Legal Writer Jessica Steingard

Designer Jessica Nobert

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Family Break-ups & the Law

Important Changes to the Law Are Coming: Mark your calendar!

John-Paul Boyd

Two big changes to the legislation on family law are coming next year: one that's important if you live in Alberta and another that's important if you're getting divorced no matter where you live in Canada.

Canada's *Divorce Act*

The federal *Divorce Act* applies to married couples who are separating and want to get divorced. The Act is getting a pretty thorough overhaul that takes effect on 1 July 2020. The most important changes involve the language the Act uses to talk about the care of children after separation, how the court addresses family violence and what happens when someone wants to move away after separating.

Parenting after separation

The current *Divorce Act* talks about the care of children in terms of custody and access. *Custody* is mostly about how spouses make decisions about their children. Someone with "sole custody" has the right to make these decisions without consulting the other spouse. When spouses have "joint custody", they both have the right to make these decisions and usually have to talk to each other first. *Access* is about how the children's time between the spouses' homes is scheduled and usually refers to the children's schedule with the spouse who has the least amount of time with them.

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On 1 July 2020, however, the *Divorce Act* will start talking about decision-making responsibility, parenting time and contact.

Decision-making responsibility means a spouse's duty to make important decisions about their child's life, including about the child's health, education, culture, language and extracurricular activities. Under section 16.3 of the Act, decision-making responsibilities can be shared between spouses or allocated to just one spouse. Most of the time, I expect, spouses will share decision-making responsibilities. The circumstances that might justify an order for sole custody under the current Act will justify the allocation of decision-making responsibility to just one spouse.

Parenting time means the time a child is in the care of a spouse. Each spouse has the sole authority to make day-to-day decisions affecting their child during their parenting time. *Contact*, on the other hand, means the time someone who isn't a spouse has with a child, including grandparents and other important adults in the child's life. People with contact do not have the right to make day-to-day decisions affecting the child.

Spouses can make *parenting plans* describing their agreement about how they will share decision-making responsibilities and parenting time, and about who can have contact with their child. The court will make *parenting orders* on these subjects if spouses can't agree.

On 1 July 2020, … the* Divorce Act *will start talking about decision-making responsibility, parenting time and contact.

The best interests of the child

The best interests of the child are the only consideration the court may take into account when making a parenting order, just as the best interests of the child are the only consideration when the court makes orders about custody and access under the current *Divorce Act*. Starting 1 July 2020, the court will have a long list of factors to take into account when deciding what is in a child's best interests. These factors include:

1. the nature of the child's relationships with each spouse, with siblings and with other important people in the child's life;
2. each spouse's willingness to encourage the child's relationship with the other spouse;
3. the child's views and preferences;
4. the child's cultural and linguistic upbringing, including the child's Indigenous heritage;
5. the ability of each spouse to care for the child;
6. the presence of any civil or criminal court actions and orders that are relevant to the wellbeing of the child; and
7. the presence of family violence.

When considering these factors, the court must give primary consideration to the child's physical, emotional and psychological safety, security and wellbeing.

Family violence

Where family violence is an issue, the best interests of the child factors require the court to think about how the violence affects the ability and willingness of a spouse to care for the child. The court must also think about the appropriateness of making a parenting order that would require the spouses to cooperate with each other.

The court must also consider a list of other factors, which include:

1. the nature, seriousness and frequency of the family violence;
2. whether the family violence indicates a pattern of coercive and controlling behaviour;
3. whether the violence was directed to the child or the child was indirectly exposed to the violence;
4. the risk of physical, emotional and psychological harm to the child; and
5. any steps taken by the person committing the violence to prevent future violence and improve their ability to care for the child.

Moving with or without a child

Beginning on 1 July 2020, the *Divorce Act* will have new rules about what happens when someone wants to move away, with or without a child. If a spouse wants to move only a short distance away, the spouse will be required to give written notice to anyone who has parenting time, decision-making responsibility or contact with the child. The notice must state the date when the move will happen and the address of the new home. However, the rules change if the spouse wants to "relocate."

Under the updated Act, *relocation* means a change in the home of a child or a person with

The federal Divorce Act applies to married couples who are seperating and want to get divorced.

parenting time or decision-making responsibility that will have a significant impact on the child's relationship with someone who has parenting time, decision-making responsibility or contact. When a move qualifies as a relocation, the person who wants to move must give 60 days' notice of their intention to move to anyone who has parenting time, decision-making responsibility or contact with the child. The notice must say when the move will happen, the address of the new home and contain a proposal about how parenting time, decision-making responsibility or contact will work after the move.

After receiving notice of a relocation, someone with parenting time or decision-making responsibility has 30 days to object to the relocation. It's important to know that:

1. the relocation can happen if the court approves the move;
2. the relocation can happen if someone with parenting time or decision-making responsibility fails to object to the move; and
3. people with contact don't have the right to object to a relocation.

When someone objects to a relocation, the court must consider the best interests of the child and a list of other factors, including:

1. the reasons for the move;
2. the impact of the move on the child;
3. whether there is a court order, an arbitrator's award or an agreement between the spouses that restricts where the child can live; and
4. the reasonableness of the proposal about how parenting time, decision-making responsibility or contact will work after the move.

The court cannot think about whether the person who wants to move would still move if they could not take the child with them.

The court can waive the requirement to give notice of moves that do and do not qualify as relocations if there is family violence.

Resolving problems outside of court

The updated *Divorce Act* will also encourage people to resolve disputes about parenting after separation, child support and spousal support out of court. Options for resolving disagreements outside court include negotiation, mediation and collaborative negotiation.

Lawyers will also be required to encourage their clients to resolve their disagreements outside court.

Legal advice about the changes

It is important to speak to a lawyer to get legal advice if you think that any of the changes to the *Divorce Act* might affect you. This is especially true if you have a court case under the *Divorce Act* that won't be wrapped up by 1 July 2020 (when the changes take effect) or if you might be dealing with a problem that qualifies as a relocation.

Photo from Pexels

You can get more information about the changes to the *Divorce Act* from the Department of Justice, including the explainer prepared by the Department for Parliament. You can also read a more technical overview of the bill changing the *Divorce Act* ("A Brief Overview of Bill C-78") from the library available on my website.

Remember that the changes to the *Divorce Act* only apply to married couples who are separating and want to get divorced!

Alberta's *Family Property Act*

Alberta's *Matrimonial Property Act* also applies only to married couples, but that's all going to change on 1 January 2020 when the Act will be renamed as the *Family Property Act*.

When these changes become law, the new *Family Property Act* will apply to married couples as well as unmarried couples who qualify as "adult interdependent partners." This is a really important change because currently only spouses can use the Act to figure out how property should be divided when they separate. People in unmarried relationships have to rely on the rules of equity and the common law to get an interest in property owned by the other person, and the results of those rules are always hard to predict. The results of claims under the *Family Property Act*, on the other hand, are much easier to figure out and are more easily resolved without having to go to court.

Under the *Adult Interdependent Relationships Act*, an *adult interdependent partner* is someone who has:

1. lived with someone else in a "relationship of interdependence" for at least three years;

2. lived with someone else in the same kind of relationship for *less* than three years if they have had a child together; or

3. signed an adult interdependent partner agreement with someone else.

The Act says that a *relationship of interdependence* exists when two people share each other's lives, are emotionally committed to each other and work together as an economic and domestic team. (This way, people who are roommates never need to worry about becoming adult interdependent partners!) People more commonly describe adult interdependent partners as "common-law" spouses, even though they're not legally married.

Who is affected by the change?

What's even more significant about this change is that it will apply to everyone who qualifies as an adult interdependent partner on 1 January 2020, whether they want it to or not.

Because of the big differences currently in property rights between married couples and unmarried couples, some people decide to avoid getting married in order to avoid having to share their property after separation the way married couples do. However, if you are in an adult interdependent relationship on 1 January 2020, or enter one after that date, the *Family Property Act* will apply to divide your property if your relationship ends.

Dividing property

In Alberta, the property a couple owns when they separate is broken down into three groups.

First, there's the property that you get to keep for yourself, which includes the property you brought into the relationship and some kinds of property you might get during the relationship (including gifts from other people, inheritances and court awards). Someone who brought property into the relationship gets to keep the value of that property at the date the relationship began. Someone who gets a gift, an inheritance or a court award during the relationship gets to keep the value of that property on the date it was received.

Next, there's the property that the couple shares in some way, although not necessarily equally. This includes the increase in the value of property brought into the relationship and the increase in the value of any gifts, inheritances and court awards that were received during the relationship. It also includes new property acquired from the sale of this property as well as gifts received from the other person.

Finally, there's the property that the couple are presumed to share more or less equally. This is all of the other property that the couple acquired during the relationship and is usually property acquired from employment income.

Even though this seems complicated, the law about how these different groups of property are shared – and not shared – is well understood by lawyers and judges. (In a nutshell, you get to keep the value of what you bring into a relationship and have to share the increase in value of that property as well as the new things you get during the relationship.) This will make dividing property between unmarried people much easier than how the rules of equity and the common law currently work.

Legal advice about the changes

It is important to speak to a lawyer to get legal advice if you think that any of the changes to the *Family Property Act* might affect you, especially if you are, or are going to be, living in an adult interdependent relationship when the law changes on 1 January 2020. You should think about asking a lawyer about a cohabitation agreement, also called a living-together agreement, which might help you control the impact of the new plan for dividing property between adult interdependent partners.

You can get more information about the changes to the *Family Property Act* from Alberta's Ministry of Justice. You can also read a more technical overview of the bill changing the *Matrimonial Property Act* ("A Brief Overview of Bill 28") from the library available on my website.

John-Paul Boyd

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

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Common Misconceptions about Family Law

Sarah Dargatz

It's not unusual for someone to come see me and have some misconceptions about how the law or the legal process works. Previous articles and columns in LawNow have addressed many of these misconceptions. In this article, I'll address a few others.

1. I can trade "parental rights" for the obligation to pay child support.

Some parents suggest that the other parent give up their "parental rights" in exchange for not having to pay child support. By "parental rights", they usually mean the rights, responsibilities and entitlements of guardianship and parenting time with the child. This exchange might seem practical in some cases, but it is not in line with the law.

A child has a right to benefit from child support regardless of their relationship with their parents. Even if the child does not have a relationship with one parent, or if that parent is no longer a guardian, the parent should still financially support the child based on the parent's income.

And a child has the right to have a relationship with both of their parents, along as it is in their best interests and regardless of whether or not that parent pays child support.

Parents cannot bargain away their child support or purchase their relationships. Some parents agree to this. However, it's very unlikely that a judge would enforce this kind of agreement.

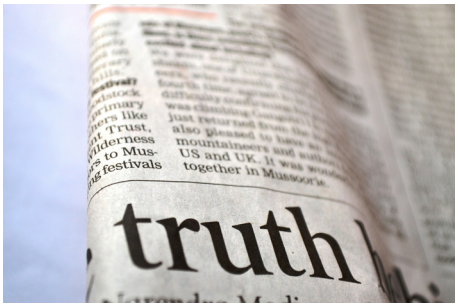
For more information related to child support, see Part One and Part Two of LawNow's "Brief Primer on Child Support".

2. My child can decide where they want to live when they are 12 years old.

Often parents what to know when their child can decide which parent they want to live with. Many have heard that this happens when the child reaches the age of 12. Family lawyers often refer to this as the "Myth of 12".

Children do not have the legal authority to decide where they live until they are adults. In Alberta, this occurs when they are 18 years old. Children do not have the ability to decide if they go to school, if they can eat their vegetables, if they can go on dates or if they can wear make-up. In the same way, they do not get to make such a major life-changing decision as who they want to live with.

Children do not have the legal authority to decide where they live until they are adults.



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As children get older, they develop the ability to make better decisions for themselves. Parents start to give children more independence and decision-making powers in line with their level of maturity. In the same way, children's views have more weight as they age. If they have strong views, a judge may want to know what those views are and what might be influencing those views. However, children don't have the authority to make a final decision. Their views are only part of the assessment about what is in their best interests.

Some parents will choose to empower their children to make this decision. Most psychologists who work with children and parents will caution against this. If you empower your child to make the decision of where they live, they will likely feel empowered to make other major decisions. This erodes the important roles of parent and child. And this can often backfire against the parent who empowers their child in this way: if they can choose to live with you, they can also choose to not live with you when you do something they don't like.

3. We have to be separated for one year before we can file for divorce.

In Canada, you are eligible for a divorce if there has been a "breakdown of your marriage". There are three ways to show a breakdown:

1. living separate and apart for at least one year;
2. the other person has committed adultery; or
3. the other person has treated you with physical or mental cruelty so that it is intolerable to continue to live together.

The vast majority of people (95% in most recent data available) get divorced based on being separated for a year. Even in cases of adultery or abuse, many people find it simpler to use separation as the basis of the divorce.

"Living separate and apart" does not have to mean living in separate houses. Many people decide that they no longer want to live as a married couple but choose to live in the same house (for example, because of finances). However, it is important for the former couple to act in a way that is consistent with this intention to be separated. For example, they do not sleep together, they no longer combine finances and they do not do chores for each other, etc. As long as at least one of the spouses has decided and communicated that they want to live separately and follows through with their actions, the spouses are separated.

"Living separate and apart" does not have to mean living in separate houses.

Often, settling a divorce involves more than just the divorce itself. It also involves settling parenting and support (the *Divorce Act* refers to this as "corollary relief") and dividing property. You can deal with these other issues in the same court action. Many couples cannot wait for one year to address these other issues. So, you can start the divorce action and you can deal with these other issues on an interim (temporary) basis before you have been separated for one year. You can start the divorce process by filing a Statement of Claim for Divorce at any time after the separation has occurred. You will have to wait one year

for the court to grant the Divorce Judgment and Certificate. You cannot remarry until you receive these documents.

Most divorces do not require going to court, as people are able to settle all the issue themselves. In these cases, filing a Statement of Claim for Divorce to get the Divorce Judgment and Certificate is straightforward and uncontentious.

4. If I don't have a lawyer, I can't talk to the other person's lawyer.

Many people are unable to, and some people choose not to, hire a lawyer to help with their family law matters. We refer to people without lawyers as "self-represented". They are their own lawyer.

When the other person has hired a lawyer, many self-represented people avoid talking to that lawyer. This is often counter-productive. Most family law matters settle. But you can only settle a matter if you communicate! Self-represented people should communicate how they propose to resolve the dispute.

... communicating with the other person's lawyer can save time and money.

Also, communicating with the other person's lawyer can save time and money. For example, if a lawyer schedules a court application on a certain date, a self-represented opposing party should let the lawyer know in advance if they will be asking for an adjournment of the application. The lawyer may agree beforehand so that the application can be adjourned online or via letter to the court. In this case, both parties can avoid going to court on the originally scheduled day. If you don't communicate in advance or try to work out an agreement and then you are not successful in court, the judge can award costs against you for failing to try to work things out.

Many lawyers prefer to communicate with self-represented people in writing so that there are no misunderstandings of what was said. This is a good idea for both the lawyer and the self-represented person.

The National Self-Represented Litigants Project has resources for self-represented litigants on its website.

5. I can call the police about any kind of family law dispute.

You should call the police if you believe a crime has been, or will be, committed or if you fear for your immediate safety. However, many people involved in family law disputes will call the police even when a crime is not being committed. This is usually not an effective use of police services.

For example, where parents are separated but don't have a Parenting Order in place, the police cannot determine which parent should have parenting time at any given moment. The police do not have the power or training to make decisions about what parenting arrangement is in a child's best interests. That task is left to the parents themselves, or a judge.

Even in cases where there is a Parenting Order, the police will usually not get involved in enforcing that order unless there is a "police enforcement clause" in the order. If there is a police enforcement clause, the police must do what they can to ensure the parents follow the order. Parents should use these clauses only when absolutely necessary. Many judges do not like police enforcement clauses as they can heighten conflict between parents or teach children that parenting time is frightening. However, these clauses are sometimes necessary when one parent refuses to follow a court order.

Another example: where a couple is fighting about who should live in the family home, the

police cannot decide for them. That is, unless a crime has been, or will be, committed. In cases of reported family violence, the police may assist in separating the couple for a short period or a judge might order one person not to return to the home. However, in the absence of a crime, or suspected crime, both people have property rights to the home and the police do not have the power or training to make decisions about property division. Again, that task is left to the parents themselves, or a judge.

Conclusion

There are many misconceptions out there about the law and legal processes in family disputes. It's best to turn to a lawyer for advice about your specific situation. Many lawyers offer consultations and ongoing coaching to clarify the law and process. Various legal clinics offer these services to low-income individuals. Online resources offer a varying level of accuracy – look for reliable sources such as Legal FAQs, Law*Central* or other CPLEA resources.

Sarah Dargatz

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

From the Trenches of High-Conflict Family Litigation

Erika Hagen

Never have I ever: set out to engage in high-conflict family litigation. And when I say high-conflict, I mean cases where the parties can't put their own emotions aside to make good decisions for themselves and their children. Somehow, though, it finds me. Time and again I have tried to minimize the conflict and look to the parties' broad goals to try to find alignment. On many files this, along with an exchange of voluntary financial disclosure, leads to an amicable resolution. Unfortunately, however, for a few cases this does not work. I am discussing these cases here.

My goal is not to break the family apart but to help the members rise to the occasion and turn their family into a restructured whole – albeit with some new holes.

One might ask: why would anyone, ever, want to do this sort of work? The short answer is: if not me, then who? In other words, if I turn away tough work, will the parties end up with counsel who are less empathetic or realistic (or without counsel entirely)? Will they end up in a worse tangle two years from now because they (or their lawyers) have not addressed tensions? Or will they struggle to resolve the dispute using a civilized mechanism and instead resort to "self-help" remedies, such as absconding with children or scuffling with the opposing party? Possibly. Which is why I do my best to address the conflict myself, as efficiently as possible, and in the best venue that I can persuade the parties to attend. Despite taking on these files, I avoid trials like the plague and assume that even on the most challenging matters the parties will not require a trial.

Why do I avoid trials? They are bad for families. No Mom or Dad should ever have to sit through a day of being cross-examined on the stand about their parenting habits only to go home and make supper for their children, see to their homework and tuck them into bed as if nothing is going on. Realistically, no parent is super-human enough to do so. The tension, stress and exhaustion will of course trickle in to the rest of the parent's activities. The result – the children are disrupted (at best) or damaged (at worst). It is beyond counter-productive to engage in damaging proceedings which are not in the child's best interests while simultaneously arguing about the child's best interests. As the kids say: "I can't even!" Luckily, there is a better way.

Swiss Cheese

If not trials, how do we get people who cannot agree that the sky is blue to settle their file? My approach is what I call the "Swiss cheese" method. A high school science teacher explained it as a way to tackle mounds of homework that seemed overwhelming: rather than worrying about getting it ALL done, worry about making holes in it that gradually reduce the to-do list. The fact is that often in family law files there can never be an "end." Children grow and change, finances change, retirements arrive, health problems crop up, etc.

Hole 1 – Triage: Stop the Hemorrhaging

You know that you have what will likely be a high-conflict file when a court order is necessary right off the bat, possibly on a without notice basis. While going to court out of the gate is not ideal for settling the entire file amicably, there are times when the needs outweigh this drawback:

- There is domestic violence, and a separation is not possible without an order for financial support, exclusive possession of the home or a protection order.
- A child has been removed from the city or province and must be returned.
- A child is in danger.
- A party is at risk of homelessness.
- A parent has been denied access to a child for a prolonged period, and the parent-child bond is in jeopardy.
- A partner is intentionally running their business into the ground.
- A partner is gambling or otherwise depleting funds or running up debts.
- A partner has stopped paying the mortgage all of a sudden.

The court can usually deal with these issues in isolation by granting an interim without prejudice order in regular chambers. An interim order provides short-term remedies that get the parties to a position where they can begin to tackle the bigger picture.

Hole 2 – Strategy and Case Building

Now that the client can begin to see the forest and not only the trees, we assess the file in its totality. The challenge at this point is to transition from disaster control to long-term outlook. It is usually advantageous to rally the troops (engage experts) and make a litigation or other resolution plan. Would a

Photo from Pexels

psychological intervention be helpful? What do we need to properly calculate incomes and property division? Are the parties agreeable to resolving some or all of the issues using mediation or arbitration? Would therapy or parenting co-ordination help to transition the parties out of an antagonistic cycle? Or would court processes be more effective, such as an Early Intervention Case Conference, case management, Questioning or a special chambers hearing? Is this file well-suited to a Judicial Dispute Resolution ("JDR")? Which issues should we address first? Once I have a plan with prioritized issues and action items that my client is happy with, then we work on the next hole.

Hole 2.0 – Coaching and Teamwork

Simultaneously, and throughout the matter, I coach my client to communicate with their ex, to help me build a strong case, to make daily choices that will aid in a favourable outcome, and to work with me as a team member. This cooperation makes my services efficient and cost effective. In particular, I begin coaching my client on how to communicate with a combative individual. Big life changes are sometimes necessary. Perhaps they need to change or seek employment, move homes, pursue vocational training, improve parenting methods, seek mental health treatment or simply start documenting everything relevant. I recently had a case where I resolved the entire matter for almost $10,000 less than I initially budgeted thanks to the amount of work my client was able to do for himself in compiling figures and organizing documents.

Hole 3 – Send an Offer

In high-conflict matters, I do not find 4-way meetings (between both partners and their lawyers) to be productive. Just ask me about the time that two clients nearly came to fisticuffs in my boardroom arguing about sex toys. There is also the issue of an imbalance of power to consider. Often if one party feels intimidated by the other, a 4-way meeting or mediation will worsen their insecurities and heighten anxiety. As such, at this stage I often test the waters with a settlement offer, on all or some of the issues. If the other party responds with even a faint trace of reasonableness, then this can be an opportunity to exit the litigation stream and save the parties untold legal fees. If there is no response, or a complete rejection, then the strategic and case building plans continue.

Why do I avoid trials? They are bad for families.

Hole 4 – Action

The appropriate action will depend on the strategy my client and I have prepared (and reviewed regularly as the matter progresses). Depending on the goals and issues of the parties, this might include: court applications, case management meetings, psychologist interventions, Questioning, valuations or appraisals of property, or other alternative dispute resolution avenues (such as non-binding JDR or arbitration) of some issues. Again, my approach is to "make holes" by starting small and trying to "check off" issues bit by bit. Once it seems that as many issues as possible have been resolved through these avenues, then I will begin discussing "final" resolution options with my client.

Hole 5 – "Final" Resolution

Few high-conflict files "end". However, they can be brought to a nearly- or semi-permanent conclusion. There are many options to do so which are cheaper and less destructive than a full-scale trial, including summary judgment or summary trial, a trial on one issue only, arbitration, special chambers applications, or binding JDR. Deciding what to do is a tricky decision for anybody, but especially for a party under the stress of personal, acrimonious litigation. I provide detailed pros and cons of the available options (including trial) and give my client time to make their choice.

More Holes Make Better Swiss Cheese

Often holes 1 through 4 need to be revisited one or more times before hole 5 makes any sense. Which means, by the time we reach "hole 5", the emotions have had time to reduce from a "boil" to a "low simmer" and the parties are sick of fighting and just want it over with. The family, like Swiss cheese, has matured and become less acidic. My goal is not to break the family apart but to help the members rise to the occasion and turn their family into a restructured whole – albeit with some new holes. There are many reasons why another lawyer might completely disagree with this approach. However, each client whose file I have pursued from beginning to "end" with this method has left happier than they arrived.

Erika Hagen

Erika Hagen is a partner at Crerar Badejo Hagen Family Law Group in Edmonton. Erika practices exclusively in the area of family law and is on the Board of Directors for CPLEA.

Shared Custody Parenting: Income Tax Issues

Photo from Pixabay

Hugh Neilson

Since the introduction of the Federal Child Support Guidelines (FCSG) in 1997, custody arrangements have affected child support obligations for Canadian parents. The greatest flexibility applies to "shared custody" situations. Under the FCSG, a child is in shared custody where each parent "exercises a right of access to, or has physical custody of" the child at least 40% of the time over the course of a year.

Sharing the Income Tax Benefits

As is often the case, the *Income Tax Act (ITA)* was slow to catch up with developments in the child support rules. Before July 2011, only one parent could receive benefits such as the Canada Child Tax Benefit (now the Canada Child Benefit), the Universal Child Care Benefit (now repealed) and additional credits for children under programs such as the GST/HST credit.

In some cases, CRA permitted parents in shared custody arrangements to alternate which of them would receive these benefits over the course of the year. In other cases, the parents agreed on which of them would claim these benefits. As many were, and are, income-tested, directing all benefits to the lower-income parent often resulted in the family receiving significantly greater total benefits for a child.

Effective July 2011, the *ITA* caught up. It provided that each "shared-custody parent" would be entitled to 50% of the child-related benefits they would have been eligible for had the child been in their sole custody. However, the *ITA* did not adopt the FCSG definition of "shared custody". Instead the *ITA* required that:

- the parents "reside with the qualified dependant on an equal or near-equal basis", and
- each parent "primarily fulfil the responsibility for the care and upbringing of the qualified dependant when residing with the qualified dependant".

Typically, the "qualified dependant" is a child, but the term can also apply to other dependants.

The issue here is what "equal or near-equal basis" means.

Canada Revenue Agency

The Canada Revenue Agency (CRA) interpreted the term "equal or near-equal" consistently with the FCSG, although their publications did not refer to percentages. One example provided was a child residing with one parent

three days a week and the other four days a week (so about 43% and 57%). Many people assumed that the same 40% minimum time applied for these purposes, and that basis seemed to be adopted in some Tax Court cases. No Tax Court decision accepted a percentage less than 40% as meeting the requirements for "shared custody".

Federal Court of Appeal

However, in two decisions released on March 27, 2019 (*Lavrinenko v The Queen*, 2019 FCA 51 and *Morrissey v The Queen*, 2019 FCA 56), the Federal Court of Appeal ruled that the *ITA* definition was not the same as the FCSG. Rather, the Court concluded that the *ITA* required a more equal basis, while acknowledging that a precise quantification was not realistic. The Court's analysis suggested that equal or near-equal custody required that the child reside with each parent at least 45% of the time.

This created significant uncertainty. Parents with custody arrangements meeting the FCSG test (40% minimum) had relied on that rule also applying to benefit entitlements and, in some cases, had created child support agreements relying on sharing these benefits.

Department of Finance

On August 29, 2019, the Department of Finance released draft legislation amending the *ITA*'s definition of "shared-custody parent" to align the *ITA* rules with the FCSG rules. It set the minimum requirement at 40% custody by each parent. The proposed legislation also allows for parents to reside with the child on an "approximately equal basis". This was stated to provide flexibility where the child generally resides with each parent in the 40% to 60% range and the parents try to reside with the child on as near an equal basis as possible, but this does not occur in a particular month due to unusual circumstances. Examples such as illness or summer vacation schedules causing a split of 38% to 62% in a particular month were provided.

The ability to split benefits related to children does not extend to credits for an "eligible dependant" for income tax purposes.

The proposal's stated intent is to ensure that CRA's current administrative practice is supported in law, with no change to the benefit payments any family is currently receiving in accordance with CRA's interpretations.

Of course, the government was not in session when this draft legislation was released and was, at the time this article was written, engaged in an election campaign. The draft legislation is to be retroactive to July 2011 – the start of the ability to split these benefits between shared-custody parents. Hopefully, the legislation will be implemented in the fairly near future.

Dependant Claims

The ability to split benefits related to children does not extend to credits for an "eligible dependant" for income tax purposes. The child of a single parent is a common individual for whom this credit is available. The credit requires the taxpayer meet the following criteria at some time in the taxation year:

- be unmarried (including common-law partnerships) or be separated (the taxpayer and their spouse or common-law partner neither live together nor support each other); and
- maintain a "self-contained domestic establishment" (e.g. a house or apartment) where the taxpayer supports a dependant (various relatives, including a child under the age of 18, can qualify) who is dependent on the taxpayer for support.

Because the tests can be met at any time in the year, the credit is available in the year of separation.

This credit is indexed for inflation, reduced based on the income of the dependant, and can save over $1,800 of federal taxes in 2019. All provinces have analogous provincial credits. The Alberta credit can save over $1,900 of provincial taxes in 2019.

For shared custody arrangements, both parents would normally qualify to claim each child. However, two restrictions can cause issues:

1. Only one person can claim a specific dependant. Where two or more taxpayers eligible to claim a specific dependant cannot agree on who will receive the credit, it is denied to all of them. It is not possible to split this claim – one parent must claim the full amount. Parents with more than one child could each claim a different child.

2. A taxpayer cannot claim a dependant for whom they are required to pay a support amount. Basically, this prevents the parent required to pay child support from claiming any of the children for whom support is payable. However, if neither parent would be permitted to claim the child because of this restriction, the restriction does not apply and either parent is permitted to claim the child. In other words, if each parent is required to pay child support to the other at some time in the year, for the same child, either may claim that child as an eligible dependant, provided the other criteria are met.

For shared custody arrangements, the FCSG provides that child support is determined by computing the support each parent would be required to pay if the other parent had sole custody of the child. These amounts are then set off against one another. For example, if the children's mother would be required to pay $1,500 of monthly support to their father if he had sole custody, and the father would be required to pay $1,000 of monthly support if the children's mother had sole custody, typically the mother would be required to pay $500 per month. Some parents have argued that this computation means that both parents are required to pay support, so either can claim the child (or each may claim one child when there are two or more).

On August 29, 2019, the Department of Finance released draft legislation amending the* ITA*'s definition of "shared-custody parent" to align the* ITA *rules with the FCSG rules.

The Tax Court has generally held that only the parent required to make a payment (the mother, in the example above) is required to pay support. As such, only the parent receiving support payments may claim the eligible dependant credit for any of the children. In some cases, where the support amounts are different from the FCSG amounts, the Tax Court has ruled that both parents are required to pay child support, so either may claim credits for the children. For example, in a 2017 Tax Court decision (*Lawson vs. The Queen*, 2017 TCC 131), the FCSG amounts payable by the taxpayer to his former spouse were set off against support payments required from the former spouse in respect of travel costs incurred by the taxpayer in order to facilitate the shared custody arrangement. The courts look closely at the terms of the support obligation in making such determinations.

Claims that both parents are required to pay support typically attract CRA scrutiny. A Tax Court appeal may be required to permit each parent to claim credits for one child where CRA does not consider that each parent is required to pay support.

Conclusion

Availability of income tax benefits for children of former spouses can become complex. The above addresses only a few commonly available tax benefits. These issues should be considered in negotiating arrangements between the parents to avoid future disputes. Unfortunately, this often requires additional professional advice, adding further costs and stress to an already unfortunate situation.

Hugh Neilson

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

Special Report
Globalization

The Impact of Brexit on the Free Movement of Persons

Myrna El Fakhry Tuttle

Citizens of the European Union (EU) are allowed to live and work, without special formalities, in the European Economic Area (EEA). The EEA includes the EU's 28 Member States as well as Switzerland and three non-EU countries – Iceland, Liechtenstein and Norway. This is what we call "free movement of persons".

The 1957 Treaty of Rome established the European Economic Community (ECC) (replaced by the EU). It created a common market based on free movement of people, goods, capital and services.

The 1992 Treaty of Maastricht created the EU and established freedom of movement and residence for persons in the EU. In 2004, the EU adopted Directive 2004/38/EC, on the right of EU citizens and their family members to move and reside freely within the EU. Then, in 2007, the Treaty of Lisbon and the Treaty on the Functioning of the EU (TFEU) confirmed the right to freedom of movement.

Free movement law means that:

> *... EU citizens do not require a visa in order to come to the UK. Those coming to the UK are not subject to rules on English language proficiency. The exclusion of an EU citizen must be justified on the grounds of public policy, public security or public health. (See: Brexit: what impact on those currently exercising free movement rights? ("Brexit Paper") at p 7).*

EU citizens who reside legally for a continuous period of five years in a Member State other than their own acquire the right of permanent residence in their host state. EU citizens acquire this right automatically. They do not need to apply for it. (See Brexit Paper at p 7).

According to migration experts, it is going to be very hard for the UK to end freedom of movement from the EU because it has no system to find out who is legally in the country.

Europeans realized that freedom of movement was the EU's major achievement and rated it above peace, the single currency and student exchanges. According to Eurostat data, at the end of 2017, 3.8% of EU citizens (17 million people along with 1.4 million commuters) resided or worked in Member States other than those of which they are citizens – up from 2.5% in 2007.

The United Kingdom (UK) joined the EEC in 1973 and the EU in the 1990s. But unlike other EU countries, the UK never accepted that its institutions be under the European control. For this reason, the UK did not join either the Schengen Area, which removes internal border checks, nor the common currency.

On June 23, 2016, the UK held a referendum to decide whether it should leave or stay in the EU. Leaving won by 52% to 48%. More than 30 million people voted, and 17.4 million people voted for withdrawal from the EU. The UK's possible exit from the EU became known as Brexit. Globalization, immigration and low wages were the main factors that lead to Brexit.

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Those who voted to leave the EU did not want the UK to be under the EU's freedom of movement rules, due to the number of people moving to the UK under these rules. For the "leavers", leaving was the only way to stop EU citizens from immigrating to the UK since the free movement of persons is a fundamental right guaranteed by the EU.

Former British Prime Minister Theresa May promised that Brexit would end free movement in order to restore UK's sovereignty over its policy regarding EU citizens. She said that the UK "will do what independent, sovereign countries do: we will decide for ourselves how we control immigration" (See: Brexit: UK-EU movement of people at p 20).

Negotiations on how to leave the EU started in September 2016. Among the most important issues was the principle of free movement of EU citizens after withdrawal.

After voting to leave the EU, the British government triggered Article 50 of the Treaty on European Union (TEU). Article 50 allows a Member State to withdraw from the EU and sets out the process by which a Member State leaves the EU. Once a Member State notifies the European Council of its intention, the EU will attempt to negotiate and conclude an agreement with the state in question, setting out in detail the arrangements for its withdrawal.

A draft Brexit withdrawal agreement, negotiated between the UK and the EU, contained these arrangements. In order to be legally binding, both the UK and the EU had to ratify the agreement. The draft dealt with the UK's future financial obligations, the status of EU citizens in the UK and British citizens in the EU, and the Irish border. The draft also provided for a transition period until December 31, 2020, in which the free movement of persons stayed the same. However, the British Parliament rejected this draft, and exiting the EU on March 29, 2019 became impossible.

After Brexit, the UK will stop being a member of the EU. Thus, UK citizens will cease being EU citizens and become third-country nationals (according to the Schengen Border Code, third-country national means any person who is not an EU citizen within the meaning of Article 20(1) TFEU). The EU treats third-country nationals differently when it comes to the Schengen area and residing in the EU for more than 90 days. Today, the EU does not have legislation to determine the residence of third-country nationals from a particular country.

Under the current British immigration system, EU citizens who live and work in the UK do not need any documentation besides a valid passport. The UK does not have a formal government registry of people who moved to live and work in Britain. There is only an estimated figure of 3.5 million EU citizens in the UK. If freedom of movement were to end any time soon, the British government would have no way to differentiate between the EU citizens who are eligible to stay in the UK and

those who have recently arrived in the country. All what we know is that one million EU citizens have already applied for settled status through the EU Settlement Scheme.

On June 23, 2016, the UK held a referendum to decide whether it should leave or stay in the EU.

Former Prime Minister Theresa May's government had planned that freedom of movement would continue until the end of December 2020. If there was no Brexit deal in place, EU citizens living in the UK would have to apply for a new legal status to remain in the country by this deadline. If there was a Brexit deal, the deadline was to be extended until June 2021. However, in August 2019, the British government stated that it would seek to end the immigration of EU citizens to Britain immediately after it leaves the EU on October 31, 2019.

British Prime Minister Boris Johnson previously stated that the UK would leave the EU on October 31, 2019 with or without a Brexit deal. However, he asserted he could make a revised agreement with the EU before that date. It is important to note that the British Parliament rejected the agreement made by former Prime Minister Theresa May three times, leading to her resignation.

Nicholas Hatton, the3million founder (a citizens group that represents the rights of EU citizens in the UK) said: "The idea of ending freedom of movement abruptly on 31 October in case of no deal is reckless politics." He added:

> *Ending freedom of movement without putting legal provisions in place for those EU citizens who have not yet successfully applied through the settlement scheme will mean that millions of lawful citizens will have their legal status removed overnight.*
>
> *We have been calling for the settlement scheme to be a declaratory registration scheme, so all EU citizens who have made the UK their home are automatically granted status, as promised by those in government.*
>
> *Otherwise this will open the door to mass discrimination under the hostile environment, with employers, landlords, banks and the NHS unable to distinguish between those EU citizens with the right to live and work in the UK and those without.*

Joe Owen, the Institute for Government's programme director for Brexit, said it would be "wide open to judicial review." He added:

> *To do that [end freedom of movement on October 31] in any meaningful way would cause major disruption – employers, citizens and universities are completely unprepared for this last-minute U-turn.*

In fact, given the consequences of leaving the EU without a deal on October 31 and despite the promises made by Prime Minister Boris Johnson, Brexit was extended one more time.

On October 28, 2019, and upon the request of Prime Minister Johnson, the EU granted the UK another three-month extension until January 31 to find a way out. The UK will also have an early general election on December 12, 2019. In the meantime, the UK will remain in the EU but can leave before that date if the current withdrawal agreement is agreed upon earlier.

According to migration experts, it is going to be very hard for the UK to end freedom of movement from the EU because it has no system to find out who is legally in the country. EU citizens who are living in the UK will have until December 31, 2020 to apply to the EU Settlement Scheme if there is no deal. The scheme's purpose is to register around

3.3 million EU citizens in order to allow them to continue living and working in the UK after June 30, 2021.

If the UK leaves on January 31, it would be the first Member State to withdraw from the EU. However, as of the date of publication of this article, the UK and the EU have been unable to secure a withdrawal agreement to protect EU citizens in the UK and UK citizens in the EU. Negotiations between the UK and the EU have been extended many times to avoid a no-deal Brexit. Since 2016, the situation of EU citizens living in Britain and UK citizens living in the EU has been contingent on any ratified agreement between the UK and the EU.

The British government has insisted that it wants to secure the rights of EU citizens already living in the UK. That would change only if EU countries do not protect the status of UK citizens living in them. We still have to see how this is going to take place.

Myrna El Fakhry Tuttle

Myrna El Fakhry Tuttle, JD, MA, LLM, is the Research Associate at the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Investor-State Dispute Settlement and Climate Action

David Lark

The recent 2019 United Nations Climate Action Summit brought worldwide attention to the need for countries (or 'states') to take immediate action on climate change. The Summit was aimed at bringing world leaders together to discuss transformative action plans for addressing the potentially catastrophic influences of climate change. During these meetings, there was a growing consensus that governments can no longer pursue "business as usual" if they want to meet international climate targets.

However, governments that are motivated to pursue bold and progressive policies to target climate change may have to grapple with competing obligations. Many governments have signed international trade and investment agreements that give foreign investors certain rights and protections that can be enforced through an investor-state dispute settlement (ISDS) clause. ISDS can impact a state's ability to make policies on climate change, leaving governments to manage competing investment and environmental obligations. This article will look at what ISDS is, as well as Canada's recent experience under the North American Free Trade Agreement (NAFTA).

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What is Investor-State Dispute Settlement (ISDS)?

Investor-state dispute settlement (ISDS) is a legal provision included in over 90% of the 2,667 international trade and investment agreements in force today. In short, ISDS enables foreign investors to sue states whenever the state's laws infringe on the investor's rights set out in these agreements. These claims are then decided within private transnational arbitral tribunals.

ISDS was initially aimed at protecting foreign investors from host governments directly expropriating foreign-funded projects. However, foreign investors are increasingly using ISDS whenever a diverse range of domestic policies conflict with their ability to realize actual (or potential) profits from their investments. This significant broadening of scope is leading to a rising number of controversial ISDS claims. For example, legislation relating to human rights, public health, pollution and climate change have all led to host governments paying legal awards worth millions (and potentially billions) of dollars to foreign investors. These cases should

raise questions as to how ISDS might intersect with a state's objective in pursuing climate action.

How has ISDS impacted Canadians to date?

To date, Canada has responded to a number of ISDS claims, most of which have taken place under NAFTA's Chapter 11 (the Chapter specifically dedicated to investment provisions). As shown in a recent report by the Canadian Centre for Policy Alternatives (CCPA), foreign investors have sued Canada 41 times through NAFTA to date. These claims have cost taxpayers $219 million in awards and settlements and $95 million in unrecoverable legal fees. However, in addition to quantity and cost, ISDS has also directly intersected with Canadian policy-making in a number of areas of public interest, most notably with respect to the environment.

Canada currently faces eight active ISDS cases with claims up to $475 million in damages.

In *Clayton/Bilcon v Government of Canada*, a group of United States' investors submitted a NAFTA claim against Canada in 2008. The investors wanted to build a large quarry and marine terminal in an ecologically-sensitive coastal area of Nova Scotia. However, after public consultation and an environmental impact assessment, the Canadian and Nova Scotian governments rejected permits for the project. In their Joint Panel Review, both governments cited that approving the permits, despite widespread concern over the social and environmental impacts of the project, would go against "community core values". In response, Clayton/Bilcon initiated an ISDS claim demanding US$101 million dollars in compensation. In 2015, the tribunal decided in favor of the investors. The final amount that the Canadian government must pay Clayton/Bilcon is still pending.

A similar ISDS case under review is *Lone Pine Resources Inc v Government of Canada*. In 2011, the Government of Quebec passed Bill 18, titled "An Act to Limit Oil and Gas Activities". The Bill was passed in response to public outcry regarding a number of environmental studies on the significant risks of hydraulic fracturing ("fracking") under the St. Lawrence River. Because of the Bill coming into force (and Quebec's broader moratorium on fracking), all exploration licenses were revoked. Lone Pine Resources Inc., whose subsidiary had planned on fracking for shale gas under the River, submitted an ISDS claim against Canada under NAFTA. It is claiming US$118.9 million in compensation for lost profits and damages. The merits of the case are currently under review by a tribunal.

How might ISDS impact Canadians into the future?

The above cases highlight the risks and roadblocks that governments may encounter if they decide to pursue progressive environmental policies that conflict with their current international trade and investment agreements. According to the same CCPA study, Canada currently faces eight active ISDS cases with claims up to $475 million in damages. These claims, if successful, threaten to bear a continued burden on taxpayers. In addition, the frequency and cost of these claims raise concern that future policy initiatives may be "chilled" (or modified) by governments who fear additional ISDS claims.

An example of this "chilling" effect is reflected in the ongoing debates on the expansion of pipelines and extractive industry throughout Western Canada. If the provincial or federal governments decide to reject the continued expansion of pipelines, or decide to shift their focus from the extractive industry to renewable alternatives, there may be cause for future ISDS claims. What this means in practice is that Canadian governments will have to determine

whether the benefits of pursuing climate action outweigh the potential costs they could face under their existing international trade and investment agreements. This can place governments, and people affected by these policies, in a difficult position. Indeed, it has already been argued that the Liberal government's recent $4.5 billion purchase of the Kinder Morgan pipeline was at least in part to due to fears that continued stalls on the project could lead to costly ISDS claims.

... ISDS can impact a state's ability to make policies on climate change, leaving governments to manage competing investment and environmental obligations.

As recently shown south of the border, these fears are valid. In 2016, TransCanada submitted a NAFTA claim against the United States government. After the highly publicized protests of the Keystone XL pipeline's potential impacts on the environment and Indigenous peoples in the region, then-President Barack Obama suspended the pipeline expansion project. In response, TransCanada began an ISDS claim, seeking $15 billion in compensation. The ISDS claim was later suspended, but only after the Keystone XL project was approved by the newly-elected President Donald Trump. These examples show vividly how the threat of ISDS claims can influence, and may continue to influence, government policy decisions in contentious areas of public concern.

Conclusion: Balancing the demands of globalization with climate action

Canada's experience with ISDS through NAFTA is informative, but not necessarily unique. In the past decade alone, there have been 655 ISDS cases initiated by foreign investors worldwide. Many of these claims have involved some of the most vulnerable states in the world, and many have been in response to government policies concerning the environment. This should raise concern about the impacts that ISDS might have on future climate action.

To respond, governments that are attempting to address the demands of globalization through policies aimed at encouraging international trade and investment should reconsider including ISDS within their future investment and trade agreements. If governments are to make meaningful advances on addressing climate change in the near future, continuing with "business as usual" in international trade and investment agreements is no longer possible. As shown above, the potential risks of doing so are too great.

There is some recent evidence that these risks are being acknowledged. Some of Canada's recent international trade and investment agreements, such as the Comprehensive Economic and Trade Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, provide "carve outs" aimed at allowing policy space for environmental regulation. Further, while still not ratified by all parties, the "new NAFTA" (referred to as the United States-Mexico-Canada Agreement) proposes to remove ISDS entirely from its treaty text. These actions represent steps in the right direction.

David Lark

David Lark is a Ph.D. Candidate and Sessional Lecturer in the Department of Political Science at the University of Victoria

International Child Abduction

Max Blitt, Q.C.

Photo from Pixabay

This article draws on the writer's papers titled "International Child Abduction: How the Hague Convention On The Civil Aspects on International Child Abduction Operates in Canada" and "Case Comment on the SCC Ruling under the Hague Convention". Contact the writer for more information on these papers.

Relationships between individuals from different countries are much more common in our world today. If the relationship breaks down and there are children involved, we can have an issue spanning countries! What happens if one parent takes the child to another country without the other parent's consent? This is international child abduction.

In a recent news article, Global Affairs Canada said it is "currently managing more than 250 cases related to international child abductions." From January to May of 2019, Global Affairs opened 34 new child abduction cases. In 2018, it opened 64 new cases.

To help combat international child abduction, Canada signed the *Hague Convention on the Civil Aspects of International Child Abduction* (the "Hague Convention") on October 25, 1980. Canada ratified the Hague Convention on December 1, 1983. Each province and territory brought the Hague Convention into force in its jurisdiction between 1983 and 1988. This means the Hague Convention has the force of law in all of Canada.

What is the Hague Convention?

The Hague Convention is a multilateral agreement between countries. As of July 19, 2019, 101 countries are contracting parties to the Hague Convention.

The main objectives of the Hague Convention are set out in Article 1:

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

The Hague Convention does not deal with the merits of a custody decision. Instead, it respects the custody decision of a jurisdiction in which the child resided prior to their removal (called the "habitual residence"). The underlying premise of the Hague Convention is that the courts of the child's habitual residence are properly equipped to make the appropriate decisions about the child's welfare.

How does the Hague Convention work?

Each contracting state must appoint a Central Authority. This Central Authority is required to:

- receive applications for the return of children or for access to children;
- attempt to secure the voluntary return of the child;
- provide general information about the child and the contracting state's laws;
- initiate the necessary proceedings for the return of the child;
- help secure legal assistance for the parties;
- make the necessary administrative arrangements to secure the safe return of the child.

In Canada, the federal government and each province and territory have a Central Authority (usually the justice department of government). In Alberta, there are two Central Authorities: one in Edmonton and one in Calgary.

An application made under the Hague Convention is a summary application, not a full trial. The parties present their evidence in a written affidavit. The Hague Convention contains its own rules that courts and parties must follow.

As of July 19, 2019, 101 countries are contracting parties to the Hague Convention.

The Hague Convention sets out a mandatory return policy. If a child has been abducted and a parent starts proceedings under the Hague Convention within one year from the date of abduction, the court must order that the child be returned to their habitual residence. If a year or more has passed, the court must still order that the child be returned unless there is evidence the child is now settled in their new environment.

However, the court does not have to order that the child be returned if the person opposing the return shows that:

- the person who had care of the child was not exercising their custody rights at the time when the child was removed or consented to the child being removed or subsequently acquiesced in the removal or retention (see Article 13(a)). An example of consent is a father making it clear to the mother, when they separate, that he has no objection to the mother returning to her home country with the couple's child; or
- there is grave risk that the child's return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation (see Article 13(b)). For example, if there was evidence that a parent was sexually abusing a child, the court would not order that the child be returned to that parent; or
- the child objects to being returned. If the child has, in the court's opinion, attained an age and degree of maturity, then the court can refuse to order the child be returned (see Article 13); or
- returning the child would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms (see Article 20). For example, prior to the abolition of apartheid in South Africa, our courts would refuse to return a child removed to Alberta back to South Africa.

Article 11 of the Hague Convention reads that a court should make a decision within 6 weeks from the date proceedings were started. In 2015, applications were resolved on average in 129 days in Canada (about 12 weeks over the target). The global average is 164 days.

The Hague Convention does not deal with the merits of a custody decision.

By way of example, I was involved in a high-conflict abduction from Hawaii by the mother of the couple's daughter. The mother and child had been living in Fiji (non-Hague Convention signatory at the time of the application). Through a tip, the father – who was still in Hawaii – learned that the mother was coming with the child to Calgary for a family wedding. The Alberta court gave an emergency order enabling the police to intercept the mother when she arrived at the Calgary airport, and the child was placed into the Central Authority's protective custody pending the Hague Convention hearing. The result: the father was successful in having the child ordered returned to Hawaii. The mother chose to accompany the child back to Hawaii. Due to the high risk to re-abduct, a retired police officer accompanied the mother to Hawaii.

In short, the Hague Convention is intended to be a mechanism for the expeditious enforcement of custody rights. It is not intended to be a forum to determine custody of the child.

Problems with Lack of Uniformity

Problems have arisen with the lack of uniformity in the interpretation and application of the Hague Convention as each country has its own laws and viewpoints on how to interpret it. Contracting states can overcome this with greater cooperation in exchanging "good practices" at international conferences and through the resources of the Hague Convention itself.

One such problem is how contracting states determine a child's habitual residence. The Hague Convention depends on the court determining where a child's habitual residence is. Courts around the world have taken different approaches in making a determination. In 2018, the Supreme Court of Canada clarified its position in *Office of the Children's Lawyer v Balev*.

Contracting states generally use one of three approaches:

1. Parental intention: The court presumes the parents' last shared intent regarding their child's habitual residence to be controlling. A parent can rebut this presumption if the child has acclimatized to their new surroundings.

2. Child-centred: The court looks exclusively at the child's objective circumstances and past experiences. The parents' intent is not relevant.

3. Hybrid: The court looks into the child's circumstances and the shared intention of the parents. A child's habitual residence can change while they are staying with one parent under the time-limited consent of the other parent.

The Supreme Court of Canada adopted the hybrid approach. The European Union, the United Kingdom, Australia, New Zealand and some states in the United States also use this approach. As a practitioner in this area, the hybrid approach will take some getting used to. The shared parental intent model, for the most part, was relatively decisive in reaching a decision. Of course, how the Court's decision plays out in the future will be a matter of

interpretation as future Hague Convention cases come before Canada's courts.

The Hague Convention sets out a mandatory return policy.

In some of my own cases, I have also experienced problems with courts in the jurisdiction of the abductor being biased or sympathetic to the abducting parent who is a national of that country. The exceptions to the mandatory return policy are subject to the interpretation and possible bias of the particular judge hearing the case.

The court has the difficult challenge of balancing the need to protect children from being unlawfully abducted against the need to protect a child from a grave risk of harm should the court entertain a return application where that defence has been raised. At the same time, courts must be careful not to undermine the spirit and philosophy of the Hague Convention where a mandatory return is warranted. Despite the difficulties and challenges in interpreting and enforcing a treaty that applies to diverse societies and cultures of the international community, the Hague Convention is still an effective tool in combatting international child abduction.

Conclusion

The Hague Convention was an unprecedented effort by the international community to prevent thousands of children each year from being uprooted from their homes and hidden away from one of their parents. Despite the Hague Convention, international abductions continue to occur. Effectively combatting international child abductions requires more countries to become contracting parties to the Hague Convention.

Max Blitt

Max Blitt, Q.C. is a senior lawyer at Spier Harben Barristers & Solicitors in Calgary, AB. Max has extensive experience dealing with the Hague Convention on the Civil Aspects of International Child Abductions in addition to international property and support issues.

For more information on child abductions, visit his website: **www.childabduct.com**.

BenchPress

Wines from the West Bank not "Products of Israel"

Kattenburg v Canada (Attorney General), 2019 FC 1003

The applicant, Dr. Kattenburg, is described as a wine lover and activist. He filed a complaint with the Canadian Food Inspection Agency (CFIA) that wines from the West Bank and sold in Canada should not be labelled as "Products of Israel". The West Bank is not within the State of Israel.

CFIA administers and enforces various acts and regulations, including the *Food and Drugs Act*, as it relates to food. Section 5(1) of that *Act* reads:

> *No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.*

The CFIA concluded that the wines could be sold as labelled. Dr. Kattenburg appealed the decision to the CFIA's Complaints and Appeals Office (CAO). The "CAO noted that the *Canada-Israel Free Trade Agreement* … defines Israeli 'territory' as including areas where Israel's customs laws are applied" (at para 3). Israel's customs laws are applied in the West Bank.

The Federal Court found in favour of Dr. Kattenburg. The Court concluded it was not reasonable for the CAO to allow the wines to be labelled as "Products of Israel" when they in fact come from the West Bank. The Court found the labels to be "false, misleading and deceptive" and to contravene both the *Consumer Packaging and Labelling Act* and the *Food and Drugs Act*.

Accommodation Charges for Long-Term Care Residents are OK

Elder Advocates of Alberta Society v Alberta, 2019 ABCA 342

The Elder Advocates of Alberta Society and a group of plaintiffs launched a class action lawsuit against the Government of Alberta. The plaintiffs claimed that the accommodation charge collected by long-term care facilities (nursing homes or auxiliary hospitals) from residents was increased without statutory authorization. The plaintiffs argued that the increased accommodation charge was higher than the actual costs of accommodation and meals. The result, they argued, was that residents were actually subsidizing

health care services which were supposed to be provided free. Among other things, the plaintiffs also claimed discrimination under s. 15 of the *Canadian Charter of Rights and Freedoms*.

The trial judge found that the accommodation charges were within the maximum set by regulation under the *Nursing Homes Act*. The trial judge also found that the legislation does not require a nexus between the accommodation charge and the actual cost of providing accommodation and meals. However, the trial judge noted, if the legislation requires a nexus, there was sufficient evidence of one. Finally, the trial judge found the plaintiffs had not established substantive discrimination and so their *Charter* claim failed.

On appeal, the Court of Appeal dismissed the appeal.

The take-away? Accommodation charges imposed by nursing homes and auxiliary hospitals are legal so long as they stay within the maximum set out in the regulations.

Wife Defames Lawyer over Marriage Contract Advice

Levine v Zed, 2019 NBQB 186

Joan Zed asked her lawyer, Allan Levine, to prepare a cohabitation agreement in 2015. She signed the agreement but her new partner, Kevin Zed, did not. Joan and Kevin then decided to get married on October 21, 2016. A few days before the wedding, Mr. Levine called Joan to tell her he had received a marriage contract for her to sign. A lawyer at the law firm where Kevin's brother worked had prepared the marriage contract. Joan signed the contract on October 20th.

A few months later, Joan realized the marriage contract did not match the cohabitation agreement. The one difference was that the marriage contract stated she would not get anything if Kevin predeceased her. The cohabitation agreement did not say anything about gifts on death.

Joan began posting comments on Facebook and driving by Mr. Levine's office with posters in her car reading "Lawyer Allan Levine misrepresented me as a favour to a fellow lawyer" and "Allan Levine is A Liar & A Thief", among other statements.

Mr. Levine filed a defamation lawsuit against Joan. Joan filed a counterclaim that Mr. Levine was negligent, acted in bad faith, and is guilty of collusion and fraud. She claimed significant financial losses.

Unfortunately for Mr. Levine, he had previously been the subject of an investigation by the Law Society of New Brunswick for improperly using his trust account. Thus, the trial judge had to weigh whether Mr. Levine's past actions were evidence that Joan's defamatory statements were true.

The trial judge ultimately decided that Mr. Levine had been negligent in advising Joan on the marriage contract. However, the trial judge also found that Joan's comments were defamatory. He noted Joan seemed to have a distrust of the judicial system. She had asked for the recusal of all Queen's Bench of New Brunswick's justices and that the file be transferred to the Federal Court. Joan even filed a complaint against the trial judge to the Canadian Judicial Council!

The damage? The trial judge ordered that each party pay the other $2500 in nominal damages.

Jessica Steingard

Jessica Steingard, BCom, JD, is a staff lawyer at the Centre for Public Legal Education Alberta.

New at CPLEA

Lesley Conley

Lesley Conley is a Project Coordinator with the Centre for Public Legal Education Alberta.

Join us for CPLEA's new free Workshop Series!

In this issue of LawNow, we are highlighting our upcoming free workshops. Every year CPLEA leads workshops for front-line service providers, teachers, librarians and other information service providers.

Building on our past successes, CPLEA is pleased to offer **5 new workshops for 2019/2020.**

Workshop registration includes continental breakfast, coffee and tea.

Register online by November 25, 2019.

Date: **Wednesday, November 27, 2019**

Time: **8:30 am – 10:00 am**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Are you unsure of what you can and cannot say about the law to a client? Only certain people are authorized to give legal advice while many other people can provide legal information. It is important to recognize when a client is dealing with a potential legal issue so that they can get the resources and help that they need.

Workshop registration includes continental breakfast, coffee and tea.

Register online by January 13, 2020.

Date: **Wednesday, January 15, 2020**

Time: **8:30 am – 10:30 am**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Are your clients going through separations or divorces? On January 1, 2020, Alberta's *Matrimonial Property Act* becomes the *Family Property Act*. Under the *Family Property Act*, the rules for dividing property when a marriage breaks down have been extended to the breakdown of an adult interdependent relationship.

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

Workshop registration includes continental breakfast, coffee and tea.

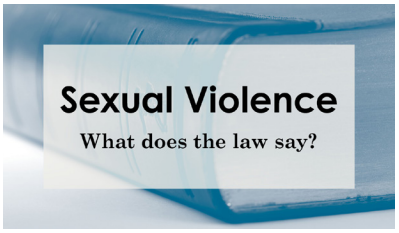
Register online by March 16, 2020.

Date: **Wednesday, March 18, 2020**

Time: **8:30 am – 10:30 am**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Do your clients rent a home? There are a wide variety of issues that may pop up in housing ranging from human rights and public health to privacy concerns. To help your clients get the right help and referrals to deal with a housing problem, it's important to understand the housing (and housing-related) laws that may apply to their situations.



Workshop registration includes continental breakfast, coffee and tea.

Register online by April 20, 2020.

Date: **Wednesday, April 22, 2020**

Time: **8:30 am – 10:30 am**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Are your clients victims of sexual violence? Sexual violence can include domestic violence of a sexual nature, trafficking, exploitation, sexual harassment or assault, and more. This session will provide an overview of the law as it relates to sexual violence – from the *Criminal Code* provisions and human rights law to legal options available to victims.

Workshop registration includes continental breakfast, coffee and tea.

Register online by May 25, 2020.

Date: **Wednesday, May 27, 2020**

Time: **8:30 am – 10:30 am**

Location: **Compass Place Boardroom**
(2nd Floor, 10050-112 Street, Edmonton, AB, T5K 2J1)

Does your work include helping people who occasionally face legal problems? Are your clients navigating a divorce with children? Are your clients subject to court orders dealing with custody and access to children? On July 1, 2020, changes to Canada's Divorce Act will come into effect. These changes modernize the Divorce Act and bring it into alignment with provincial family laws across Canada.

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

Columns

Employment

Peter Bowal and
Christina Tang

Reading Between the Lines: Implied terms in individual employment contracts

In Canada, every *non-unionized* employee has a contractual relationship with their employer. What does that contract look like?

Employment contracts may be written or oral, or both. When you sign and return a letter offering you a job, the terms of the letter are the written elements of the contract. That letter usually "incorporates by reference" employer manuals and policies into the contract.

Other people are hired – and agree to terms – on the telephone or orally in an in-person interview. You can agree to your job title and responsibilities, rate of pay, benefits, supervision and starting date in a conversation with your employer.

Characteristic of written and oral employment terms is that these matters are *expressed*. These terms are identified, highlighted and communicated. The attention of both parties is specifically drawn to them.

As it turns out, there are many things the parties do not express, or even think about. Still, the law will *imply* these unspoken and unwritten terms into an employment contract. These matters may be so obvious that both the employer and employee just assume they are part of the job ("implied in fact"). Alternatively, they are imposed by legislation and are not negotiable in any event ("implied in law").

Since an employer and employee do not discuss or agree upon implied terms, it is important to be aware of them. Implied terms can form the basis of wrongful dismissal lawsuits. This article describes the two different sources and some examples of implied terms in employment contracts.

Photo from Pixabay

Terms Implied-in-Fact

Terms will only be implied if they are necessary to make sense of the employment contract (business efficacy test). The origin of this test can be traced back to the 1889 English contract case called *The Moorcock* which established that judges can read in terms that give business efficacy to the contract. For example, an employer and employee usually agree on a salary but they usually do not say it is in Canadian dollars. The local currency would be implied.

No one can contract out of minimum employment standards.

These terms are the details that were not expressed between employer and employee but something they both likely intended to agree to. To imply an employment term by fact, a judge must be satisfied the employee and employer would have agreed to the same terms *if* they had discussed these using context (officious bystander test). The test asks: if an uninvolved third party had

suggested including the particular term in the employment contract while it was still being negotiated, how would the employer and employee have responded? If their answer was "why, of course … that goes without saying!", then the court will imply the term into the contract. It is clear that both the employer and employee assumed the term already existed.

Examples of employers' implied obligations:

- Permit employees to report to work
- Treat employees with decency, respect and dignity
- Provide a reasonably safe work environment
- Compensate employees for work performed
- Reimburse employees for reasonable and authorized expenses incurred on behalf of the employer
- Provide reasonable notice of termination of work
- Make sure employees are properly trained and equipped

Examples of employees' implied obligations:

- Obey lawful orders of the employer
- Cooperate in advancing the employer's commercial interests
- Protect the employer's confidential information
- Do not be late or absent from work without an excuse
- Do not compete against the employer
- Perform duties completely, competently and safely
- Do not harass others
- No drinking or using drugs at work
- Give reasonable notice of resignation

Well-established historical practices in the workplace may also be implied in new employment contracts. For example, if it is well known that a job requires frequent travelling, location transfers or work outside of regular business hours, these obligations may be implied in the employment contract.

Implied terms, as "default terms", can be changed or excluded by inserting clear express terms. Implied terms only fill in gaps where necessary to give effect to the employment contract.

Terms Implied-in-Law

Terms implied-in-law are legal rights and obligations that are set out in legislation. The primary source of these terms is minimum employment standards legislation which says that these minimum terms form part of every individual employment contract.

The context does not matter nor does what the parties intended. The employer and employee may actually express other terms, but these statutory terms will override them. No one can contract out of minimum employment standards. That is because the government imposes these implied terms as a matter of public policy.

Employment contracts may be written or oral, or both.

These terms implied by law assume employees occupy a weaker position in the employment relationship. The law sets minimum thresholds that employers must meet, such as minimum wage, notice of termination, overtime pay, employment of children, work breaks, leaves, maximum hours of work, etc. Everyone working in a human resources role must know the minimum standards that are implied into each employment contract.

Conclusion

Unionized employees are governed by comprehensive written collective agreements that set out the rights and obligations of the employer and employee. On the other hand, non-unionized workers, which make up about 70% of Canada's workforce, are subject to individual employment contracts. These individual employment contacts can have many different forms and attract more legal protection.

Most people incorrectly assume the oral or written agreement is the complete employment contract. However, rights and obligations are usually both expressed and implied. The individual employment contract has more implied terms than any other type of contract. Employees and employers should know the unexpressed and un-negotiated rights and obligations that apply to them.

Peter Bowal

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

Christina Tang

Christina Tang is a law student at Queen's Law School in Kingston, Ontario.

Famous Cases

Peter Bowal and Christina Tang

Photo from Pixabay

Charter of the French Language: *Quebec v Blaikie*

A recent *LawNow* article outlined the constitutional history and framework of bilingualism in Canada. In this article, we focus on Quebec's 1977 *Charter of the French Language*, popularly known as Bill 101.

This legislation raised the question of whether a provincial government could broadly regulate language across its jurisdiction, namely to mandate one official language. Here we describe the decision in *Quebec (AG) v Blaikie (No 1)*, the first of several court decisions that addressed whether Bill 101 aligned with Canada's *Constitution Act, 1867*.

Background

In the decades leading up to the 1970s, the relationship between Quebec's French and English-speaking communities became more and more strained. When the Parti Québécois won in 1976, the long-standing language conflict reached a tense and pivotal point. Under the leadership of Premier René Lévesque, the new provincial government was determined to make Quebec a sovereign state. Bill 101 was a crucial first step towards this goal. In 1977, Bill 101 declared French to be the official language of Quebec and restricted the use of English in the public sector (courts, civil service and schools) as well as the private sector (shops and workplaces).

Legal Concerns and Arguments

In 1979, three Quebec lawyers – Peter Blaikie, Roland Durand and Yoine Goldstein – challenged the part of Bill 101 which made French the sole official language of Quebec's legislatures, courts and quasi-judicial bodies (sections 7 to 13). Bill 101 said that the government must draft legislation only in French and that only the French version was official. Lawyers, courts and other quasi-judicial bodies were to write all pleadings and decisions in French.

Blaikie *et al* argued that this French requirement directly violated section 133 of the *Constitution Act, 1867*. Section 133 reads:

> *Either the English or the French Language may be used by any person in … the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals … and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any … of the Courts of Quebec.*

Section 133 further directs that Quebec legislation be printed in *both* languages.

In defense of Bill 101, Quebec relied on the division of sovereign powers in the same *Constitution Act, 1867*. Specifically, under section 92(1), provincial governments have the right to amend the "Constitution of the Province". Quebec argued that its legislatures

and courts fell within the "Constitution of the Province" so any province had the legislative power to unilaterally amend section 133 as it pertained to them. It also argued that section 133 did not explicitly require Quebec legislation to be *enacted* in both English and French. Sections 7 to 13 of Bill 101 simply filled in the gaps left by the *Constitution Act, 1867*.

Court Decisions

The courts made their decisions in *Quebec (AG) v Blaikie (No 1)* entirely under the *Constitution Act, 1867*. (The *Charter of Rights* was not enacted until 1982.) At all three levels of trial and appeal, the courts ruled against the Quebec government and declared these provisions of Bill 101 unconstitutional.

In 1977, Bill 101 declared French to be the official language of Quebec …

Though the *Constitution Act, 1867* did not expressly require governments to enact laws in both languages, the Supreme Court of Canada concluded that this requirement was clearly implied. It reasoned that texts do not become "Acts" without enactment. The Supreme Court of Canada dismissed Quebec's claim that this part of Bill 101 was compatible with section 133 in the *Constitution Act, 1867*.

The Supreme Court of Canada went on further to find that a province's ability to modify the use of English and French in its legislatures and courts is "outside of the amending power conferred by s. 92(1)". Administrative agencies with quasi-judicial functions operate parallel to our court system and play a "significant role in the control of a wide range of individual and corporate activities". The Supreme Court of Canada concluded that section 133 protecting English and French in the "Courts of Quebec" extends to provincial adjudicative tribunals.

In the end, the Supreme Court of Canada struck down sections 7 to 13 of Bill 101. The result is that anyone navigating the courts and adjudicative bodies in Quebec has the constitutional right to use English or French.

In retrospect, this case is a head scratcher. Even given the sometimes convoluted and unpredictable reasoning of the modern Supreme Court of Canada, it is hard to imagine – given the precision of section 133 of the *Constitution Act, 1867* – how the Government of Quebec could have constitutionally succeeded in this case.

What Happened Next?

Quebec (AG) v Blaikie (No 1) was a defeat for the newly elected Parti Québécois government. After this decision, the separatist provincial government was forced to amend Bill 101 to allow for both English and French across the legal system.

***Blaikie* et al *argued that this French requirement directly violated section 133 of the* Constitution Act, 1867.**

Blaikie (No 1) is an important language rights case because it was the first shoe to drop on Bill 101. Over the next decade, people challenged other provisions in Bill 101, and the Supreme Court of Canada struck down or amended these provisions. In 1984, the Court ruled that the compulsory use of French on business signs violated Canadians' right to freedom of speech. That same year, it also ruled that the *Charter of Rights* limited Bill 101's ability to require French education in the province.

Bill 101 arguably accelerated the exit of English-speaking residents and corporations out of Quebec. Others support it as a valuable, perhaps essential, policy to ensure the survival of the French language in the Province of Quebec. This language law continues in force today, but with a more limited scope than originally intended.

Peter Bowal

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

Christina Tang

Christina Tang is a law student at Queen's Law School in Kingston, Ontario.

Housing

Judy Feng

An Update on Short-Term Rentals

Photo from Pexels

I've been waiting for years to write this article. In the housing sphere, short-term rentals have been an issue for quite a while. Typically transacted through on-line platforms such as Airbnb, a short-term rental is a type of rental accommodation where a person (often referred to as a "host") rents out a premises or part of a premises for a short duration. For example, the rental accommodation can be an entire home, a condominium, a private room, a shared room or a space in a home where the "host" lives.

The short-term rental market in Canada has grown rapidly. Here are a few fast facts:

- The short-term rental market in Canada was estimated to be worth $2.8 billion in 2018.
- From 2015 to 2018, the market in Canada grew nearly tenfold.
- The largest markets for short-term accommodations in Canada are Ontario, British Columbia and Quebec (in that order). These three provinces account for nearly 90% of total short-term accommodation revenue in 2018. Alberta trails as the fourth largest market, accounting for about 5.5% of total revenue.
- There are over 200,000 short-term rental listings in Canada, with most listings concentrated in three cities: Toronto, Vancouver and Montreal.
- There are 2,239 active short-term rental listings in Edmonton (as of 2019) and 3,364 active short-term rental units in Calgary (as of 2018), posted across various on-line platforms.

Short-term rentals have largely operated in a legally grey area. With the rapid growth of the market, there have been increasing concerns about consistent standards and safety shared by guests, owners and communities. In larger cities such as Montreal, Toronto and Vancouver, there have been additional concerns about short-term rentals impacting housing affordability.

That said, whenever we receive questions about information or resources on short-term rentals in Alberta, my default response has been a wait and see approach. What can you do when there was no legislation, regulations or bylaws directly addressing the issue of short-term rentals? Really, I didn't think there was much to write or talk about. Until now.

Alberta's short-term rental (and related) regulations

In Alberta, we have provincial legislation and regulations relating to specific types of accommodation. For instance, the *Residential Tenancies Act* applies to tenancies of residential premises while the *Innkeeper's Act* applies to hotels/motels, boarding houses and lodges. There is legislation on public health and safety codes for housing. Municipalities have bylaws relating to certain types of concerns related to short-term rentals such as noise and parking. While Alberta's regulatory environment addresses some concerns

related to short-term rental housing, bed and breakfasts and lodging houses, nothing has directly regulated short-term rental housing.

This year, both the City of Edmonton and City of Calgary proposed bylaws licencing short-term rentals. The City of Edmonton voted to amend its bylaw on August 27, 2019. On September 30, 2019, the City of Calgary passed a bylaw, and it will come into effect on February 1, 2020.

Edmonton's short-term rental bylaw

**The information below is based on the proposed wording for the bylaw (current as of October 2019)*

In Edmonton, a short-term rental is defined as rental accommodation in a private residence that lasts for 30 consecutive days or less. To operate a short-term rental in Edmonton, a person must apply for and have a valid City of Edmonton Business Licence, which costs $92. If the City issues a licence to a person, it then notifies Alberta Health Services to follow up regarding compliance with health regulations. Presumably, this may include an inspection of the property. A person cannot operate another business in a premises used as a short-term rental without a licence for that other business.

This year, both the City of Edmonton and City of Calgary passed bylaws licencing short-term rentals.

There are some conditions that people with a valid licence for a short-term rental (the "licensee") must meet under the City's bylaw. For example, licensees must:

- Make sure that they provide guests with an updated copy of the information guide on the City of Edmonton's bylaws. The guide contains information on rules relating to garbage collection and disposal, noise and parking.
- Post their phone number in the rental property.

Under the bylaw, there are fines for operating a short-term rental without a licence and for operating a business in a premises used as a short-term rental. For example, the fine is $400 or two times the licence fee for each business operated without a licence, whichever is greater. Based on our reading of the bylaw, a $2000 fine presumably applies to any other short-term rental bylaw offence—for example, when short-term rental licencees do not follow the conditions under the bylaw.

Calgary's short-term rental bylaw

**The information below is based on the proposed wording for the bylaw (current as of October 2019)*

In Calgary, a short-term rental is the business of providing temporary accommodation for compensation for periods of up to 30 consecutive days. It can be a dwelling unit or portion of a dwelling unit. Unlike the City of Edmonton, the City of Calgary has a two tier classification for short-term rentals: Short Term Rental Tier 1 "STR One" (1 to 4 rooms offered for rent) and Short Term Rental Tier 2 "STR Two" (5 or more rooms offered for rent). Depending on the short-term rental class, business licencing fees, renewal fees and necessary consultations/approvals vary.

To operate a short-term rental in Calgary, a person must apply for and have a valid City of Calgary Business Licence. For STR One, it will cost $100 to apply for a new business licence and $100 for a business licence renewal. On the other hand, for STR Two, it will cost $191 to apply for a new business licence and $146 for a business licence renewal in 2020.

Under the proposed Schedule A of Calgary's bylaw, a fire inspection is required for STR Two. While the proposed schedule says that no consultation or approval is required for STR One, the wording of Calgary's existing business licencing bylaw suggests that the Chief Licence Inspector may consult with other bodies (such as Alberta Health Services) before issuing/ renewing any business licence.

There are a number of conditions that short-term rental licencees in Calgary must follow, for example:

- They cannot offer to provide temporary accommodation or allow a guest to sleep in a room that does not have one or more windows (providing an exit to the exterior of the unit).
- No more than two guests (not including minors) per room.
- No overlapping bookings, where 2 or more unrelated or unassociated persons are accommodated in the unit at the same time.
- The short-term rental advertisement must include the valid business licence number for the rental.
- The name, phone number and e-mail address of an emergency contact person who can be reached 24 hours per day during rental periods must be posted in the unit.
- They must keep a record of information (in English and in a form satisfactory to the Chief Licence Inspector) including:
    - the full name of any person who is a paid guest in the rental (and their e-mail address)
    - the room of the short-term rental in which the person is a tenant
    - the duration of the person's tenancy
- They must provide the Licence Inspector with the guest record upon demand.

There is a $1000 penalty if a licencee does not follow any of the conditions in the bylaw.

Out of the legal grey area?

In recent years, we've seen some expansion in the regulatory environment across Canada to address concerns with short-term rentals. In 2016, Quebec took the lead in regulating short-term rentals by implementing a tiered tax system to recover tax revenues. In 2018, the City of Vancouver implemented a business licencing program for people operating short-term rentals. In 2017/2018, the City of Toronto also approved the regulation of short-term rentals through a business licensing system (the regulations are pending a tribunal hearing decision and are not yet in effect, as of October 2019).

… a short-term rental is a type of rental accommodation where a person (often referred to as a "host") rents out a premises or part of a premises for a short duration.

As we see some short-term rental regulations or bylaws emerging in other Canadian jurisdictions, we now have some proposed bylaws on short-term rentals in Alberta – well, at least in Calgary and Edmonton. One development to keep an eye out for in Alberta is a tourism levy on short-term rentals. With the recent release of the Government of Alberta's 2019 fiscal plan on October 24, 2019, the provincial government indicated that it plans to implement a tourism levy on short-term rental operators by spring 2020. With the continued growth of short-term rentals, we

can expect further changes in the regulatory environment to go along with it.

Tips:

- If you have concerns about a short-term rental unit in Edmonton (such as licencing, noise, parking, garbage collection/disposal, maintenance), you can call 311 or file a complaint on the City of Edmonton's website.
- To sign up for news about short-term rental regulation in Calgary, go to the City of Calgary's website.
- If you are in Alberta and have questions or concerns about short-term rentals outside of Edmonton or Calgary, you should contact your local municipality.
- Tenants should get permission from their landlords before operating a short-term rental. Be aware that landlords may restrict business operations in their property or short-term rentals through the lease. For more information on residential tenancies law in Alberta, go to CPLEA's website: landlordandtenant.org
- Some condominiums do not allow short-term rentals. For example, some condominiums may have bylaws or rules restricting business operations in units or short-term rentals. For more information on condominium law in Alberta, go to CPLEA's website: condolawalberta.ca

Judy Feng

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

Human Rights

Linda McKay-Panos

Equality Issues and Assisted Death Legislation

In *Carter v Canada (Attorney General)*, the Supreme Court of Canada (SCC) ruled that *Criminal Code* sections 241 and 14 deprived adults of their right to life, liberty and security of the person under s. 7 of the *Charter*. Sections 241 and 14 prohibited physician-assisted dying for competent adults who sought such assistance as a result of a grievous and irremediable medical condition that caused enduring and intolerable suffering. The SCC did not need to rule on whether the *Criminal Code* provisions violated *Charter* s. 15(1).

In response, the federal government passed an amendment to the *Criminal Code* through Bill C-14. There were some concerns about the legislation—particularly the requirement that the person must be suffering from an end-of-life condition. Several scholars argued this would result in a constitutional challenge. However, the federal government passed Bill C-14 without addressing these concerns.

Recent litigation in Québec involves a constitutional challenge. In *Truchon c. Procureur general du Canada*, 2019 QCCS 3792 (*Truchon*), both the federal *Criminal Code* (s. 241.2(2)(d)) and Québec's *Act respecting end-of-life-care* (s. 26(3)) were challenged for violating sections 7 and 15(1) of the Canadian *Charter of Rights and Freedoms* (*Charter*). (While the Canadian government has jurisdiction over the criminal aspects of assisted dying legislation, the provinces have jurisdiction over health-related aspects.)

At issue in *Truchon* was the meaning of death which has become "reasonably foreseeable".

Photo from Pixabay

Section 241.2(2)(d) of the *Criminal Code* reads:

> ***Grievous and irremediable medical condition***
>
> ***(2)*** *A person has a grievous and irremediable medical condition only if they meet all of the following criteria:*
>
> ***...(d)*** *their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.*

Doctors had declared Jean Truchon and Nicole Gladu ineligible for medical assistance in dying. Truchon and Gladu challenged the constitutionality of the *Criminal Code* provisions and Québec's legislation requiring that their natural death be reasonably foreseeable or that they be at the end of their lives.

Jean Truchon, age 51, was born with "cerebral spastic paralysis and tripartism". This meant that he was completely paralyzed except for his left arm. He led a relatively full life until 2012, when he permanently lost the use of his left arm. He also developed severe pain in

his arms and neck, including painful spasms and intense burning. Because there is no treatment or cure and because he is now totally dependent on others, Truchon feels "he died in 2012" (at para 25). Truchon continues to have full mental function and is considered capable of consenting to medical assistance in dying. However, he is not considered to be in a situation where his natural death is reasonably foreseeable, nor is he at the end of his life (at para 45).

The Court ruled that Criminal Code *s. 241.2(2)(d) was unconstitutional and delayed the implementation of the ruling for six months.*

Nicole Gladu, age 73, suffered from polio contracted at age 4. This left her with residual paralysis on her left side and severe scoliosis. When she was 47, she was diagnosed with post-polio degenerative muscular syndrome, which is characterized by generalized fatigue, progressive or sudden muscle weakness and pain that reduces mobility. The condition is degenerative and incurable (at paras 51-55). She only has remaining function in her upper right arm. In addition, she has severe osteoporosis, and her body no longer supports her. The spinal condition has caused severe restrictive pulmonary disease and a lung capacity equivalent to half a lung. This rib compression also causes a hiatal hernia and difficulty with feeding (at para 57). She is capable of consenting to assistance in dying (at para 67). Like Mr. Truchon, Ms. Gladu is not considered to be in a situation where her natural death is reasonably foreseeable, nor is she at the end of her life (at para 68).

The Québec Superior Court made several conclusions on the evidence. (Note: The Court has not yet translated the decision into English. The following is a Google translation of paragraph 466 of the French text.)

1. Medical assistance in dying as practiced in Canada is a strict and rigorous process that, in and of itself, has no obvious weakness;

2. The physicians involved are able to assess the patient's ability to consent and to detect ambivalence, mental disorders affecting or likely to affect the decision-making process or cases of coercion or abuse;

3. The vulnerability of a person seeking medical assistance in dying must be assessed individually, according to their particular characteristics and not according to a reference group of "vulnerable persons". Beyond various vulnerability factors that physicians are able to objectify or detect, it is the patient's own ability to understand and consent that is ultimately critical in addition to other criteria set out in the law;

4. The physicians involved can distinguish a suicidal patient from a patient seeking medical assistance in dying. In addition, there are important differences between suicide and physician-assisted dying, both in the characteristics of the individuals involved and in the reasons that motivate them;

5. Neither the national data in Canada and Québec, nor the foreign data, show any drift, slippage or even increased risk for vulnerable people when the imminent end of life is not a criterion for eligibility to medical aid in dying.

The Québec Superior Court found that both pieces of legislation violated Truchon's and Gladu's life, liberty and security of the person

under *Charter* s. 7. However, the Court ruled this violation was not saved under *Charter* s. 1 (see paras 125 to 142). The Court also addressed equality under s. 15(1) of the *Charter*. I will focus on the *Charter* s. 15(1) issue in relation to s. 241.2 of the *Criminal Code*.

The Court noted that *Charter* s. 15(1) addresses substantive equality and is not simply a question of similarity (at paras 641-3). The Court then applied the following two-step approach (as is also found in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143):

1. Does the law establish, prima facie or by its effect, a distinction based on an enumerated or analogous ground?

2. If so, does the law impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage?

At issue in* Truchon *was the meaning of death which has become "reasonably foreseeable".

Distinction Based on Enumerated or Analogous Ground

The Court held that the "reasonably foreseeable death" requirement creates a distinction based on physical disability. Because of their physical conditions, Gladu and Truchon could not obtain medical assistance in dying even though they met the other requirements of the law. The Court also noted that the reasonably foreseeable death requirement did not take into account the effect of this requirement on the applicants (at para 654). Further, this requirement by its effect established a distinction according to the nature and type of disability (para 661). The restricted category is persons with disabilities who suffer intolerably of serious and incurable conditions but are not close to death (a para 663).

Imposition of a Burden or Denial of a Benefit

The Court applied a contextual analysis and concluded that the requirement of "reasonably foreseeable death" did not take into account the actual circumstances, characteristics and needs of the claimants, in a manner that respects their value as human beings compared to others the law allows to obtain a medically assisted death (at para 673). Thus, the lack of equality in the recognition of autonomy and dignity is discriminatory in this case (at para 678).

The Court also held that the discrimination was not saved by *Charter* s. 1. The Court ruled that *Criminal Code* s. 241.2(2)(d) was unconstitutional and delayed the implementation of the ruling for six months. The Court also granted both parties an exemption so that they could proceed to apply for assisted death.

Peter Hogg notes there are other places where the new legislation departs from the direction given by the SCC in *Carter*. It remains to be seen whether these will also result in constitutional challenges.

Linda McKay-Panos

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

Law & Literature

Re-opening the Case of *L'Etranger*

Rob Normey

Albert Camus' early masterpiece *The Stranger*, published in 1942, is an enigmatic fable that has entranced generations of readers. One such reader, the Algerian journalist Kamel Daoud, has expressed his admiration for Camus' writings. Despite his appreciation, he also poses serious questions about a glaring omission in *The Stranger*.

The central act in the novel is the shooting of a man on a beach outside the city of Oran. The protagonist and narrator, Meursault, describes his rather confusing and hard-to fathom actions leading to the firing of five shots in the middle of the afternoon. These shots kill a man. But almost all we learn about the victim springs from the clipped confession of Meursault: "I killed an Arab." Throughout the novel, the victim remains nameless. Instead, the focus is on Meursault, including his having earlier reacted with seeming indifference to news of his mother's recent death.

... Daoud reveals the ways in which Camus' work can be woven into a depiction of today's Algeria

The famous trial imagined by Camus is a striking example of the absurdity inherent in the society of his time – French Algerian society twenty years or so before its demise through a revolutionary insurrection by the indigenous Algerian population. Symbolic of the hypocrisy of the legal system is the manner in which the trial unfolds. Meursault is found to be guilty far more on the basis of his lack of proper manners and his unwillingness to cry at his mother's recent funeral.

In his first (and beautifully written) novel, *The Meursault Investigation*, Daoud gives us another take entirely on the trial. The nameless narrator of the novel offers up a detailed depiction of the victim's life and restores his dignity by giving him a proper identity. Indeed, we might speak of the novel as a remarkable victim impact statement.

The first part of *The Meursault Investigation* irrefutably challenges the notion that Meursault provided a thorough and definitive version of the key events. The very fact that Meursault has so little to say about the man who has been shot – and appears to lack much in the way of curiosity or concern – means that he did not provide a fair and balanced account of the crime. The man with the capital "A" for Arab was shot presumably after he menaced a visiting French shipping clerk. In Camus' novel, he remains a type – with a murky and unknowable life that leaves him deprived of the qualities that would render him a proper citizen and fully embodied individual. Daoud becomes an effective advocate, challenging assumptions readers of the earlier novel were likely to have made.

Daoud's Algerian narrator reveals that he has obsessively returned to the famous trial and shreds Meursault's "official" account. He takes us back to that long-ago summer day on a deserted beach. He states:

> *The Arab is killed because the murderer thinks he wants to avenge the prostitute, or maybe because he has the insolence to take a siesta. You find my summary ... unsettling, eh? But it's the naked truth. All the rest is*

nothing but embellishments.... Afterward, nobody bothers about the Arab, his family, or his people.

This novel is essential reading, but any reader must not be misled by the tenor of the opening chapters. One review, quoted on the dustjacket, suggests that Daoud's novel stands as a rebuke to Camus. Later chapters broaden the scope of the work, so it is far more than an extended commentary on the earlier novel. Rather, it reveals that the death of Musa commences an unfortunate sequence of events for the narrator and his mother. Vital comparisons can be made between the role of the mothers in the two novels and the theme of separation and alienation, in families and in the wider society.

Further, the narrator in Daoud's novel recounts the way in which he is drawn to commit his own crime and is later judged by Algerian authorities for something other than the act itself. We come to perceive that, in significant ways, Meursault gradually is understood to be a dark double of Daoud's narrator.

One of the ways in which this happens is through a revelation in the new, independent but constricted society of Algeria post liberation. Religious authorities operating under a fundamentalist worldview do what they can to force our narrator to conform to the prevailing, conservative worldview. He rebels but pays a steep price for doing so. This naturally harkens back to the dialogue between Meursault and the priest, who urges him to confess his sins and somehow make peace with the Christian God that he does not believe in. He too refuses to act in an insincere manner and is further viewed as an unredeemable outcast.

The Meursault Investigation shines as a profound contemplation of some of the paradoxes and uncertainties associated with the pursuit of justice. It is much more than a straightforward postcolonial condemnation of the shortcomings of the "colonial writer" Camus and the parochial approach that he might possibly be accused of in his treatment of colonial non-citizens in his work. Instead, Daoud reveals the ways in which Camus' work can be woven into a depiction of today's Algeria. The various ways in which Camus fought with his pen for the importance of liberty in all its manifestations – freedom of thought and of association, freedom to rebel against injustice, economic liberties for all citizens – continue to be relevant in the 21st century, just as they were at the dawn of the Cold War and the anti-colonial struggles.

The first part of* The Meursault Investigation *irrefutably challenges the notion that Meursault provided a thorough and definitive version of the key events.

Daoud is a journalist and now novelist of rare courage. He continues to report on Algerian affairs even in the face of a fatwa declared against him for daring to speak truth to power. I recommend that any reader search out interviews with the author to learn more about his diagnosis of the ills of the current era but also for his ongoing bond with the land of his birth.

Rob Normey

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

Not-for-Profit

Peter Broder

Registered Charity Policy Advocacy: Rules beyond the *Income Tax Act*

Although welcome and overdue, the new federal tax legislation and guidance on policy advocacy by registered charities doesn't mean that compliance worries faced by sector organizations in this area are a thing of the past. For those unfamiliar with the changes, more information on them can be found online. Essentially, these changes free up groups to do more non-partisan policy advocacy in furtherance of their charitable purposes.

What hasn't changed are the obligations of organizations under other statutes. Charities should be aware of any regulatory requirements they face, whether under federal or provincial law, before embarking on their advocacy work.

This was highlighted last month when, as was widely reported in the mainstream media, Elections Canada warned charities that they remained subject to third party registration requirements under election legislation if they meet spending thresholds for "regulated activities". Activities in this category include several types of conduct, but for charities the most important is "election advertising".

Under charity tax rules, no coordination with a party or candidate is allowed.

Election advertising is "transmission to the public by any means during the election period of an advertising message that promotes or opposes a registered party or candidate, including by taking a position on an issue with which the party or person is associated." The last part of this definition means that charities can be required to register as third parties if they pay to promote a policy stance that happens to overlap with a position of a party or candidate. The $500 financial threshold is quite low, so easily triggered if any costs are incurred in the promotion.

The charity's position overlapping with the party or candidate's is enough to prompt the requirement. An organization having an existing stance on an issue, which is later taken up or opposed by a political actor, does not eliminate the need to register. Nor does the spending having been undertaken independently of the party or candidate relieve the charity of its registration obligation.

Provincial election legislation may take a similar approach.

Under charity tax rules, no coordination with a party or candidate is allowed. The Canada Revenue Agency (CRA) does, however, state in its guidance that autonomously promoting charity positions that at some point become part of a party or candidate's platform do not indicate partisanship for its purposes. More broadly, based on the two regulators' different areas of focus and definitions, registration with Elections Canada as a third party will not generally result in increased scrutiny from CRA.

That said, moves by a charity to sharply increase its advertising on a contentious issue or otherwise take a higher profile on a controversial position during an election campaign could spur CRA interest.

Election law is only one worry. In policy dealings with government, charities may also have registration and/or filing obligations under lobbying legislation. Some lobbying

statutes, such as Alberta's, recognize that charities' policy interaction with government is different from that of individuals, corporations or others because charities are established and operated for the public benefit, rather than private interests. So, exemptions or less onerous requirements may apply to charities under some of this legislation.

Both federal and provincial lobbying statutes need to be reviewed to determine what obligations, if any, a charity faces. Charities, their staff or their representatives may be required to register or report activity in some circumstances. Again, this is not in-and-of-itself apt to trigger compliance concerns from CRA.

One recent case, however, has thrown a wrinkle into federal lobbying regulations as they apply to charities. As a general rule, members of the governing body of a charity cannot be remunerated for their work on the board. This is a big reason for charities avoiding filing requirements in many cases. That could change.

Charities should be aware of any regulatory requirements they face, whether under federal or provincial law, before embarking on their advocacy work.

In the wake of a trip taken by Prime Minister Trudeau and his family to visit the Aga Khan over the 2017 New Year's holiday, a complaint was filed with the federal Lobbying Commissioner. The response to that complaint lead to a judicial review. The case, called *Democracy Watch v. Canada (Attorney General)*, included a challenge to the Commissioner's initial finding that the Aga Khan, in his capacity as a board member of the Aga Khan Foundation – since it was unpaid – was not covered by the *Lobbying Act* or the *Lobbyists' Code of Conduct*. The Federal Court held that the Commissioner's decision was not reasonable, given this and other factors, and ordered reconsideration of the matter by her office.

In commenting on the issues, the Court found that even if a salary wasn't paid to the Aga Khan this did not mean he wasn't compensated in other ways for his foundation role. It ordered the Commissioner to take into account "a broad view of the circumstances" in its reconsideration. The government has since taken the matter to the Federal Court of Appeal, where at the time of writing it had not yet been heard.

If, when this matter is eventually resolved, charity board members are found to be potentially compensated in circumstances where they are not remunerated directly, this will have huge implications for them in reporting requirements under the federal lobbying legislation. It could also affect many non-profit organizations that do not pay their directors.

For charities, both because they are public benefit groups and because many of them face capacity issues or are difficult to reach with compliance information, increasing what is required of them under this legislation would be a bad idea. While it would increase transparency, doing so would be at the price of unnecessary red tape for groups that are operating for public benefit.

For the moment, registered charities can celebrate their increased scope for policy advocacy under *Income Tax Act* rules, but they need to be diligent and careful in meeting any obligations they have under other statutes as well.

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.

Plain Language

Dave Pettitt

What is Plain Language?

> *"A communication is in plain language if its wording, structure, and design are so clear that the intended readers can easily find what they need, understand what they find, and use that information."*
>
> *– International Plain Language Working Group (IPLWG)*

Photo from Pexels

A communication in plain language can be a no-parking sign, insurance form, letter or even complex legislation. **Plain language is everywhere.** It is not limited to the legal world. Healthcare professionals need plain language to make sure their patients understand and are following their treatment plans. Insurance companies need plain language to make sure their insured persons provide the correct information during usually difficult times. Drivers in a city need to know the rules of the road. Everyone needs to understand the laws or other rules that affect them.

The above definition focuses on three elements of plain language: wording, structure and design. We will discuss each of these elements below.

Wording

Wording is key to plain language writing. Word choice is more than choosing the shortest and simplest words. When choosing words, we need to take into account the context of the word, as words affect the words around them. Words can be sneaky sometimes and mean different things in different regions. Just to be difficult, they can sound the same (homonyms) but mean something else. Then there are all the words that seem to mean the same thing (synonyms). Once you have chosen your word, you need to decide if it is necessary. Unnecessary and repetitive words should be removed from the communication. Too many words will complicate the communication, and using too few words leads to only partial understanding.

Structure

The structure of the communication is how you control the context of the words. The structure defines the purpose of the communication. A contract and a street sign have much different purposes and structures. Clear and meaningful headings and subheadings help the reader understand the context of the words. Bullet points can make complex sentences easy to understand. Many forms of communication have defined structures. A contract will have a signature block, a speeding ticket will identify the driver and an essay will have a thesis. How a communication is structured defines how a communication is organized.

Design

Design brings structure and wording together with visual cues, such as icons and the use of white space. Long documents have a table of

contents. Fonts must be easy to read. Charts and graphics complement the meaning of the words. White space around headings leads the reader through the communication. Headings are bold and parenthetical information is italicized. Design elements work with structure to tell the reader what to expect from the communication by creating context.

Conclusion

A plain language communication balances word choice, structure and design. The above definition also includes a way of measuring plain language success. The reader finds what they need, understands what they find, and uses that information. These measurements are not easy to come by. They require expensive user testing and focus groups. When working on a budget, we rely on other measurements and tools, which will be the focus of the next plain language column. Stay tuned!

Dave Pettitt

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

Youth & the Law

Jessica Steingard

Sexting: What's the big deal?

*Sometimes the laws are the same for youth, sometimes they are different. Our new **Youth & the Law column** aims to help readers better understand legal topics affecting youth today.*

In this issue, we're diving straight into a controversial topic among youth today: sexting.

What is sexting?

Sexting is sending or receiving sexual pictures, messages or videos through technology, such as cell phones, apps, email, the internet or webcams.

Sexting is serious business. What may start out as a seemingly innocent photo to your boyfriend or girlfriend can turn into much more. What if the recipient shows the image to their friends? What if the recipient forwards the image to others via text or Snapchat? What if the image gets posted online or to a group message? Suddenly the image has gone viral, and you cannot take it back.

The Alberta Government reports that about 25% of students in grades 7 to 11 in Canada have received or sent a sext. A University of Calgary study reports that 12.5% of teenagers are forwarding intimate photos without the sender's consent.

Is sexting illegal?

Sexting is illegal if you are under 18 and can be illegal if you are 18 or older.

If you are under the age of 18 years, as the sender or recipient, matters are complicated. It is illegal to take or send sexual photos or videos of anyone who is, or is shown to be, under 18 years of age. **This is child pornography.**

Photo from Pexels

It is also illegal to:

- possess child pornography. This means having or saving images or videos on any device or cloud storage.
- distribute child pornography. This includes sharing or selling to others, such as forwarding through text, email or an app, or posting on the Internet.
- access child pornography. This includes visiting websites with child pornography or causing someone to send you child pornography.

For example, if you are 16 and you send a naked photo of yourself to your boyfriend, you have created and distributed child pornography. If your boyfriend saves the photo to his phone, he possesses child pornography. If he also shares the photo with his friends, he has distributed child pornography.

Prison sentences for making or distributing child pornography are up to 14 years while those for possessing or accessing are up to 10 years. Youth under the age of 18 years old who are charged with a criminal offence are sentenced under the *Youth Criminal Justice Act*.

Sexting is sending or receiving sexual pictures, messages or videos through technology, such as cell phones, apps, email, the internet or webcams.

There is a "private use exception" defence available to individuals charged with child pornography. The accused must prove that the sexual activity recorded was lawful (there was lawful consent to the sexual activity and the person was not being exploited), the person being recorded consented to being recorded, and the recording was intended for private use only by the creator or the person depicted in the recording. Note though that this exception does not appear to apply to images of one person sent to another, since the recipient is neither the creator nor the person depicted.

If you are 18 years or older, it is not illegal for you to **willingly** send a photo, message or video **of yourself** to someone else. Matters get complicated (and illegal) where:

- you are not willingly sending the photo, message or video of yourself;
- you do not consent to a photo, message or video of yourself being made or shared; or
- you are sharing or publishing a photo, message or video that involves someone else without that person's consent.

Effective 2015, the federal government added an offence to the *Criminal Code of Canada*. Under s. 162.1, it is illegal for *anyone* to publish, distribute, transmit, sell, make available or advertise an intimate image of a person knowing that person did not give their consent (or being reckless as to whether that person gave their consent). This is sometimes called **revenge porn**. The penalty? A prison term of up to 5 years.

An "intimate image" is defined as a visual recording (photo, film or video recording) where the person is exposing their genitals or breasts or is engaged in explicit sexual activity. The recording must also be made in circumstances where the person had a reasonable expectation of privacy (such as a private moment between consenting adults).

What is consent?

Consenting to having photos or videos of yourself taken is different from consenting to sexual activity.

Consent in the context of sexting has to do with privacy. Kids Help Phone discusses consent as "agreeing to something using your own free will." Just because you consent to intimate images being taken of you does not mean that you consent to those intimate images being shared with anyone other than the intended recipient.

Sexting is illegal if you are under 18 and can be illegal if you are 18 or older.

When it comes to sexual activity, Canadian law says that the age of consent is 16 years old. There are exceptions:

- a person aged 12 or 13 can consent to sexual activity with someone less than 2 years older;

- a person aged 14 or 15 can consent to sexual activity with someone less than 5 years older.

People under 12 years of age cannot give consent at all, even with someone who is close in age.

However, if you are under 18 years of age, you cannot consent to sexual activity with anyone:

- who is in a position of trust or authority over you (such as a teacher, coach or employer); or
- who you are in a relationship of dependency with; or
- who you are in a relationship with and who is exploiting you.

Where to get help?

If you have more questions or concerns about sexting, you can call the **Kids Help Phone** at 1.800.668.6868 or visit their website. If you believe a photo or video of you has been shared without your consent, you can contact your local police.

Jessica Steingard

Jessica Steingard, BCom, JD, is a staff lawyer at the Centre for Public Legal Education Alberta.

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