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relating law to life in Canada

Volunteers & the Law

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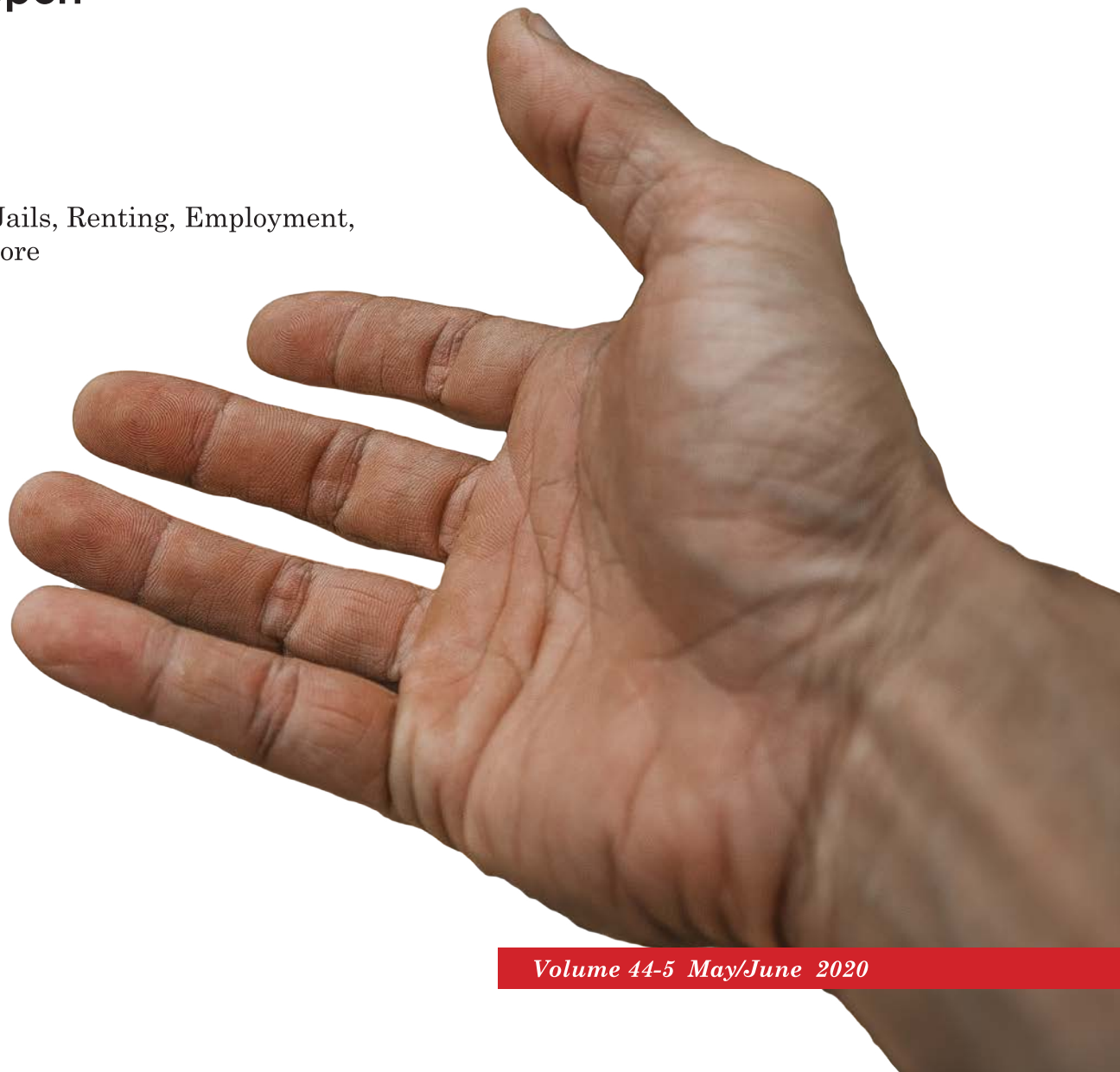

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Alberta LAW FOUNDATION

The Legal Resource Centre of Alberta Ltd., operating as the Centre for Public Legal Education Alberta, is a non-profit organization whose mission is to help people understand the law as it affects their everyday lives. We develop plain language booklets, presentations, and other learning materials to help people recognize and respond to their legal rights and responsibilities. We have a variety of programs, and provide legal information and referrals on many legal topics. For more information, please visit **www.cplea.ca**

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In This Issue

In the midst of this COVID-19 global pandemic, volunteers are stepping up more than ever to provide countless hours of manpower to various organizations. This issue of LawNow looks at the interaction of volunteers and the law. In this issue, our columnists also provide an update on how COVID-19 is impacting many aspects of our lives – from courts and renting to human rights and employment.

Feature

Volunteers & the Law

Volunteer Lawyers & Pro Bono Organizations in Alberta

Thomas Kannanayakal and Jimmy Lam

Lawyers across Alberta spend countless hours each year volunteering with legal clinics and court programs to assist vulnerable individuals with their legal problems. Without help, these individuals would otherwise represent themselves – called self-represented litigants or SRLs. Volunteer lawyers play a critical role in ensuring fair access to our justice system.

Many vulnerable individuals faced with a legal issue either abandon the fight for their rights or self-represent as they are unable to afford professional services. The Canadian Bar Association's November 2013 report states that judges are concerned about SRLs as they are usually "unable to articulate their case" or "fail to address the issues that are probative." The judges also noted that unrepresented litigants "are often overwhelmed by their emotions" and tend not to explore all possible scenarios. About 67% of SRLs reported that it was challenging to navigate the court system, and 49% of SRLs felt that self-representation made the process slower. In contrast, 72% of litigants represented by lawyers reported much better experiences and outcomes.

There is no simple solution to bridging the access to justice gap. It is a big puzzle requiring a re-evaluation of our current legal system. In the interim, volunteer lawyers play a critical role in minimizing the impact of the gap on marginalized individuals. Lawyers can volunteer their time providing pro bono legal services through community and student legal clinics, at courthouse-based programs, or within their practices. The Law Society of Alberta, which regulates lawyers in the province, encourages its members to engage in pro bono opportunities. Moreover, many lawyers feel an obligation to use their skills to serve those that cannot afford their services.

Clinics and courthouse-based programs rely significantly on the generosity of volunteer lawyers to provide free legal services in the community. We interviewed staff and volunteer lawyers from these organizations to get the inside scoop on the role of volunteer lawyers and pro bono organizations in the community.

Volunteer lawyers play an essential role in closing the gap in accessing justice for lower-income individuals.

The Clinics

Calgary Legal Guidance (CLG)

CLG's staff and volunteers are always ready to assist Calgary residents who do not qualify for Legal Aid with their family, employment, small claims, immigration, and other matters. CLG facilitates evening and outreach clinics

where volunteer lawyers provide 30-minute appointments of free legal advice. CLG also operates Dial-a-Law, a collection of recorded information on various legal topics. (This service was written and is updated by volunteer lawyers.) CLG believes that the law exists to empower individuals in finding a just outcome to their problems and not to create inequality in our communities.

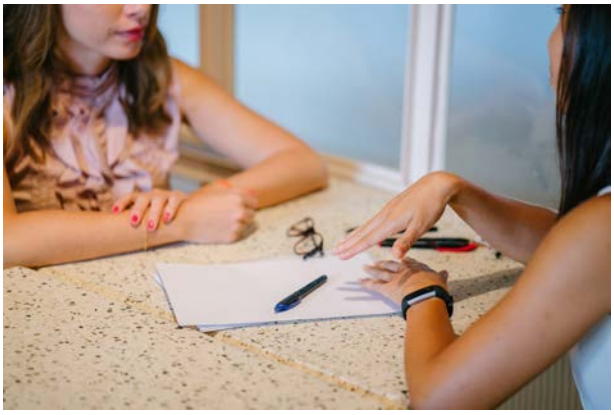

Photo from Pexels

Central Alberta Community Legal Clinic

Central Alberta Community Legal Clinic is headquartered in Red Deer and partners with other agencies in Ponoka, Medicine Hat, Fort McMurray, and Lloydminster to provide widespread legal support to smaller communities in Alberta. Volunteer lawyers give legal advice at evening clinics on matters related to family law, civil law, criminal law, wills, and other legal issues. Clients can chat with a lawyer for 30 minutes, following which they may receive further support from a paid staff lawyer.

Edmonton Community Legal Centre (ECLC)

ECLC addresses access to justice challenges in Edmonton by providing free legal information and advice to low and moderate-income people. ECLC assists with legal issues related to family, landlord and tenant, employment, human rights, debt, small claims, income support, and immigration matters. Volunteer lawyers provide free legal advice at evening clinics and provide legal information at presentations across the city. Pro bono services are supplemented by the work of paid staff lawyers who will further assist clients in some situations. ECLC also manages a legal clinic in Grande Prairie.

ECLC partners with the Association des juristes d'expression française de l'Alberta (AJEFA) to offer francophone services. Bilingual lawyers who are members of AJEFA meet with francophone clients at ECLC's clinics. Volunteer bilingual lawyers also present ECLC's legal information workshops to francophone communities.

Lethbridge Legal Guidance (LLG)

LLG assists individuals experiencing financial difficulty who need legal support but do not qualify for Legal Aid. Volunteer lawyers at evening clinics provide free legal assistance, information, and advocacy in matters relating to family law, civil law, employment law, immigration law, personal injury law, and criminal law.

Pro Bono Law Alberta (PBLA)

PBLA promotes access to justice by fostering a pro bono culture in the legal profession. PBLA creates volunteer opportunities for lawyers and works with law firms to develop pro bono policies and projects. In Calgary and Edmonton, PBLA administers the Civil Claims Duty Counsel project and the Queen's Bench Court Assistance Program. Volunteer lawyers staff these programs and support litigants dealing with civil matters at the courthouses in each city.

Volunteer lawyers, through the clinics, also present legal education workshops to the public to inform individuals of their rights, hopefully before a legal issue arises.

Why Volunteer?

The benefits of volunteering are numerous. Volunteer lawyers play an essential role in closing the gap in accessing justice for lower-income individuals. The justice system can be challenging to navigate for individuals in financial crisis and even more so if they do not qualify for Legal Aid. As a result, individuals may feel the only option they have is to self-represent. The Canadian Bar Association's November 2013 report estimates that in 1993 only about 5% of litigants were self-represented. Whereas in 2013, that number increased to a range between 10 to 80% of litigants – depending on the nature of the claim and level of court. This increase likely exists due to the unaffordability of legal services for many people. And so, this is where volunteer lawyers providing free legal services can help.

For example, ECLC's operations would not be possible without 300 volunteer lawyers contributing over 4000 hours each year in providing free legal advice and public legal education. Moreover, 120 community and student volunteers donate over 5000 hours each year to help clients with their legal issues. This is in addition to time that paid staff support workers and lawyers provide to clients.

Lawyers report that volunteering at a legal clinic provides positive, life-changing experiences. We spoke with Gabriel Chen, Senior Counsel of Litigation Programs at CLG, who started in the organization as a volunteer lawyer. Volunteering at CLG provided him with some important lessons in helping marginalized individuals:

> *I started to see that a lot of people just get really difficult life circumstances [through] no fault or choice of their own, and how that really puts them at a disadvantage in just living life – much less trying to make it through the legal system or deal with the legal issue…I had to be open to learning about different cultures, about how trauma affects people, about how addictions and mental health can really affect a person's judgment in order to be able to provide an effective representation for [clients].*

Holly Juska, Partner at Ackroyd LLP, has been volunteering with the Civil Claims Duty Counsel (CCDC) project in Edmonton for seven years now and finds the experience very enriching:

> *The people who come to the program are often stressed and uncertain about the legal system, and they greatly appreciate having someone be able to explain how the system works, give advice, or even just provide an ear to listen. I believe that the practice of law goes beyond my work in the office and being able to provide this service is deeply rewarding on a personal and professional level. I feel that I am a better lawyer for having participated in CCDC.*

Volunteering is also beneficial to a lawyer in terms of developing skills needed to succeed in their profession. Anthony Purgas, Partner at Reynolds Mirth Richards & Farmer LLP, encourages other lawyers to contribute some of their time to bettering our community. He shared with us his positive experience in volunteering with ECLC:

> *In my opinion, there is a social obligation to give back to our community, particularly given the access to justice issues throughout the country. ECLC provides a great opportunity to provide practical help to people who would otherwise likely not receive it. From a lawyering skills standpoint, I always recommend new lawyers volunteer with ECLC to hone their client interview management skills, as well*

as being able to think on your feet when completely unexpected legal issues arise. It helped me immeasurably early on in my career and I still find it valuable today. There are many different ways for lawyers to contribute their skills to the community but, in my opinion, ECLC is one of the best for its direct impact on people.

Marina Giacomin, Executive Director of CLG, recognizes how dedicated volunteer lawyers are in supporting their community. CLG has over 300 volunteer lawyers that donate a substantial amount of time helping individuals in need of legal assistance.

The Challenges

Providing pro bono legal services presents many challenges. While some lawyers may be used to clients with the means to pay, volunteer opportunities often reveal much different realities. Each client is different and so are their legal issues. In addition to financial barriers, individuals may face discrimination based on their race, ethnicity, gender identity, Aboriginal status, or being a newcomer to Canada. Additionally, individuals may suffer from substance abuse along with physical and mental health issues that further complicate their situation. Legal clinics and their volunteer lawyers understand that these barriers create many difficulties in obtaining proper access to justice, and they strive to help individuals overcome them. Merely addressing the legal problem is usually not enough.

Currently, ECLC is in the process of testing a model that has family law lawyers from Edmonton providing legal advice remotely via landline to northern Alberta residents.

To help clients overcome social barriers, ECLC's volunteer interpreters, domestic violence assessors, and paralegals often work in partnership with lawyers in aiding clients. Staff advocates also help to mitigate obstacles that can adversely impact the successful resolution of a client's legal matter. In some cases, a client may require a legal practitioner to represent them on their legal matter. ECLC has six paid staff lawyers ready to provide continued representation. In addition, ECLC retains two annual articling students and a certified immigration consultant for additional support.

Another challenge for legal clinics is ensuring individuals have access to good legal information. Kathy Parsons, Executive Director of Central Alberta Community Legal Clinic, believes in the importance of building greater community awareness in locating legitimate legal resources online. To address this challenge, clinics share links to good legal information online, including the Centre for Public Legal Education's resources. Volunteer lawyers, through the clinics, also present legal education workshops to the public to inform individuals of their rights, hopefully before a legal issue arises.

The Opportunities

Legal clinics and programs are constantly evolving in how they provide pro bono services to the community.

One opportunity is maximizing the time the client can discuss their legal issue with the volunteer lawyer. ECLC staff members conduct interviews with clients before their 45-minute meeting with a lawyer to understand their legal issues and to obtain background information. Before the meeting, this information is shared with the volunteer lawyer so they can get right to providing legal advice. During the scheduling of a follow-up appointment, ECLC staff reviews the legal recommendations from the previous meeting and determines if the client has followed

through on them. ECLC conducted outcome evaluations for the past few years in order to determine how effective their system was in helping clients. They learned that their clients greatly improved their understanding of their legal rights and responsibilities, and the pros and cons of different legal options. Moreover, two months after their clinic appointment, over 85% of clients have followed some or all the advice received, and over 90% would return if they encountered another legal problem.

Another opportunity is providing pro bono services to rural and remote communities. Currently, ECLC is in the process of testing a model that has family law lawyers from Edmonton providing legal advice remotely via landline to northern Alberta residents. Clients who cannot conveniently travel to a legal clinic because they are unable to leave their homes or because of geographical distance could benefit tremendously from this project. Through this project, ECLC and its volunteer lawyers can assist more Albertans in need of legal assistance.

In aiming to serve all of central Alberta, Central Alberta Community Legal Clinic works with smaller community partners, so out-of-town residents can speak with a lawyer without having to travel to Red Deer. A way that the clinic achieves this is by connecting small-town clients with legal practitioners on Skype through one of their partner locations. Down the line, partner locations will continue providing further assistance to clients as needed.

Legal clinics also make it easy for lawyers to volunteer. At CLG, no matter a lawyer's experience or availability, the clinic will find something suitable for those looking to donate their time and talent. CLG has a variety of opportunities for volunteer lawyers like writing public legal information materials, giving legal advice, or even acting as duty counsel in court for their clients. In addition, lawyers can also sit on CLG's board committee to help support their operations. For CLG, it is important that lawyers are properly accommodated so that they can have a truly rewarding volunteer experience.

… there still exists a shortage of lawyers to ensure that marginalized individuals are provided with proper access to justice.

Finally, lawyers volunteering their time to provide legal advice and information reflect positively on the legal profession. During our conversation, Marina Giacomin stated that she hopes that the work happening at CLG can help change unfavourable stereotypes about lawyers in our society.

Conclusion

It is the dedication shown by so many volunteer lawyers in Alberta that protects vulnerable individuals from slipping through the cracks of our justice system. Pro bono legal services provided by volunteer lawyers, in conjunction with the hard work of staff, at legal clinics are hugely beneficial to society.

This work also has a profound effect on the volunteers and staff themselves. Marina Giacomin found that after being involved with the amazing work going on at CLG, her perspective on the law changed dramatically:

> *I used to be maybe one of those people who would see a story in the news or on social media about somebody who has allegedly committed a crime, and I might have joined the mob mentality…I really started to think about those things differently, so now when I see a story like that and I read the comments, I'm thinking more to myself: I wonder if the lawyer is doing this and gosh I sure hope that they*

apply the Gladue principles and things that I would never ever have known before. I feel like I have a much more objective view on what people do and why they do it and all of our constitutional rights – to be fairly represented.

For Kathy Parsons, helping less fortunate members of our society remains one of the most rewarding aspects of working for Central Alberta Community Legal Clinic:

I think it's actually knowing at the end of the day that you either did something yourself, or help facilitate other staff members or community volunteers to have an impact on somebody's life that would be positive and could have a long-term improvement in their outcomes.

Volunteer lawyers remain essential to the successful operation of Alberta's pro bono organizations, but there still exists a shortage of lawyers to ensure that marginalized individuals are provided with proper access to justice. Debbie Klein, Executive Director of ECLC, acknowledges the need for more volunteer lawyers to help bridge the access to justice gap: "We can easily use a hundred more volunteer lawyers."

If you are a lawyer looking for volunteer opportunities in your community, we encourage you to contact your local community clinic or public legal education organization.

Thomas Kannanayakal

Thomas Kannanayakal is a law student at the Faculty of Law, University of Alberta and a volunteer with Pro Bono Students Canada.

Jimmy Lam

Jimmy Lam is a law student at the Faculty of Law, University of Alberta and a volunteer with Pro Bono Students Canada.

The Law of Unpaid Internships in Canada

Peter Bowal, Carter Czaikowski and Josh Zablocki

Photo from Pexels

For well over 100 years, students in industrial-era trade apprenticeships and professions have learned by 'watching and doing' under the supervision of the master craftsman. Historically, there was little or no pay or benefits associated with these tutelages. They were viewed as voluntary educational experiences which benefited the apprentice and burdened the senior craftsman.

Most trades and professions in Canada still operate today under this model of "shadowing" and learning skills by practising them under the guidance of a master. For Alberta trades, by way of example, see the *Apprenticeship and Industry Training Act*.

Apprenticeships and training programs that must be completed to earn full qualification have given rise to the modern *internship*. Not all internships are the same, but they usually involve learning about skills or business under the direction of proficient mentors.

The Modern Unregulated Internship

In recent decades, enterprising students, graduates and others – in the belief that industry contacts and practical experience enhance their employability – volunteer to work as unpaid (or under-paid) interns in private and public sector organizations. These are usually short (less than one year) term positions. The experience varies considerably in each internship. But since it is not a regulated academic requirement for any formal program, some of the 'work experience' will be routine work that regular employers at the organization can perform.

Organizations are willing to accept interns for several reasons:

- They want to assist them by giving them an inside view of their industry and business.
- They incur some overhead cost in hosting the intern, but they receive some service in return.
- Each side is able to assess the other at low cost if a regular job opens up.

Since such an internship is a voluntary relationship between two consensual parties, why must the law intervene?

Each province and territory has employment standards legislation that applies to internships without actually using the word "internship".

Some Canadian legislators assume these unpaid internships are exploitative of young, inexperienced workers. Legislators stipulate minimum wages, holidays, hours between shifts and many other minimum employment standards. In the same way, they have set rules across the country to govern when internships must be converted into regular paid jobs. This article outlines the regulation of internships in Canada under employment standards legislation.

Each province and territory has employment standards legislation that applies to internships without actually using the word "internship".

Professional Exemption

British Columbia, Alberta, Ontario, New Brunswick, Newfoundland and Labrador, and Nova Scotia exempt professional interns from employment standards legislation. Those training in the professions of law, accounting, medicine, engineering, dentistry and architecture are usually covered by *some* employment standards (such as minimum wage) but exempt from other standards like hours of work, statutory holidays and overtime. These trainees are not treated in law as regular employees. Professional statutes also regulate these individuals. For example, a student-at-law in Alberta is regulated by the *Legal Profession Act*, and an engineer–in-training is regulated by the *Engineering and Geoscience Professions Act*.

School Program Exemption

Interns who must work for an organization to satisfy a requirement in their formal education program come under school program exemptions. These exemptions operate everywhere in Canada except Newfoundland and Labrador, New Brunswick, Prince Edward Island and the Yukon. If work experience is a program requirement of the educational program, one may be legally unpaid for work performed.

In 2013, a co-op student complained to the Ontario Labour Relations Board saying he should have been paid under section 1(2) of Ontario's *Employment Standards Act*. The Board identified six conditions for this exemption (*Sandu v. Brar*):

1. the training must be similar to that in a vocational school;
2. the training must be for the benefit of the intern;
3. training organizations must derive little, if any, benefit from the intern's activities in the organization;
4. the intern does not displace employees;
5. the intern is not entitled to become an employee of the organization; and
6. the intern must be agree there is no remuneration for the training.

Although this Ontario administrative decision – which seems to *add* to the legislation more than *interpret* it – is not binding on any tribunal beyond itself, its principles may influence other jurisdictions.

Interns who must work for an organization to satisfy a requirement in their formal education program come under school program exemptions.

General Un-Categorized Internships

Many roles and positions that are called "internships" are actually regular, short, fixed-term, entry-level jobs. Most Canadian business and engineering schools *permit* (not *require*) their students to take six to eighteen months off to work in a company to learn practical aspects of their studies. The designation of 'internship' only relates to the temporary

nature of a job that is not required for the completion of the program or certification. These gigs usually refer to a learning feature in the work but all short-term entry jobs engage learning.

In other instances, a company may have a small general internship program where the roles look like regular work but there is no compensation. It is impossible to judge all or any of these as worker exploitation as both sides seem to find value in the voluntary internship. Union officials tend to oppose these arrangements because any free labour destabilizes salaries and job levels. In response, Canadian legislators have invoked employment standards to apply to any scenario where one 'could be paid' for the work performed.

The table below (click to view larger) sets out this pertinent legislation in detail. Today, unpaid internships – depending on the specific facts – may violate employment standards legislation. Courts and provincial regulators will interpret these employment standards provisions broadly. The common law test for employment will include many interns. In 1998, the Supreme Court of Canada called for broad and generous interpretation of minimum benefits and standards legislation that protects workers (*Rizzo Shoes Ltd*).

Hockey Player Exemption

British Columbia, Quebec, Prince Edward Island and Manitoba exempt ice hockey players from employment standards legislation. In return, players receive an annual scholarship covering the cost of post-secondary education (including books and fees) through a contractual agreement between the player and the league.

Many roles and positions that are called "internships" are actually regular, short, fixed-term, entry-level jobs.

Conclusion

An internship can mean many different things. For example, law students often take elective internships during law school (eg. working with a lawyer or judge) and must complete one year of articling after graduating. Articling is a mandatory, regulated professional internship. Almost nothing in law flows inexorably from the vague category of work known as "internship".

The law is clear for unpaid and underpaid apprenticeships and internships in trades, professions and academic programs where a short period of practical work experience is prescribed. These arrangements are governed by vocation-specific legislation. The non-prescribed internships – those that are voluntary and ad hoc – must be evaluated on their own facts according to the employment standards legislation applicable in each jurisdiction. For example, is the learning experience such that it can be properly deemed to be 'employment' at all? Is it work (even in non-profit organizations) that is otherwise and generally could be remunerated (ie. does the intern take the place of a paid employee)? If so, the relationship, even with learning and training elements, must be treated as a regular paid employment. If the intern performs (and therefore, replaces) regular paid work, the intern must be paid. Non-compliant organizations may be fined and ordered to pay full salary and benefits for the entire internship period.

Finally, what is sometimes called an 'internship' may in law and fact be a regular, full-time, short-term job that is already employment standards compliant. It is called an internship out of mutual recognition that it is a short, fixed-term, temporary job that offers both worker and organization some value. And, in many cases, these stints provide the employee and employer an opportunity to assess each other for suitability in a longer-term employment relationship.

SUMMARY OF INTERNSHIP REGULATION ACROSS CANADA				
Jurisdiction	*Definition of Internship*	*Legislation*	*Relevant Provisions in Regulation*	*Type of Internship Regulated*
British Columbia	On-the-job training that continues to form an employment relationship, requiring minimum wage to be paid unless it meets an exemption under the *Regulations* for a school program or professional training.	Employment Standards Act Regulation	Sections 31 and 32(1)	- Professional - School program - Major junior hockey players
Alberta	Individuals working to fulfill a requirement of their school program are exempt from being paid minimum wage. The Part II exemptions of the Regulation also preclude members or those in training in professional fields like law, accounting, optometry and medicine from specific employment standards like minimum wage, hours of work and overtime pay.	Employment Standards Code Regulation	Sections 1 (exemptions) and 8 (minimum wage)	- Professional - School program
Saskatchewan	A person whom an employer permits, directly or indirectly, to perform work or services normally performed by an employee, or a person being trained by an employee for the employer's business.	Saskatchewan Employment Act Regulation	Section 2(2)	- School program - General
Manitoba	The *Code* does not apply to employees who: (1) work as volunteers for charitable or political organizations, (2) work as beneficiaries under rehabilitation or therapeutic plans or projects, (3) are given training or work experience for a limited time through a program implemented or approved by a provincial or federal government authority, or school board under the *Public Schools Act*.	Employment Standards Code Regulation	Sections 2 and 2.1	- School program - Volunteers - Major junior hockey players
Ontario	Under the Act, an intern is appropriately classified as an employee if the individual receives training from a person who is an employer when the purpose of the training is for the individual to perform work completed by employees at the organization.	Employment Standards Act Exemptions, Special Rules and Establishment of Minimum Wage	Section 1(2)	- Professional - School program
Quebec	The Regulation expresses that minimum wage established in Division II does not apply to students employed in a non-profit organization having social or community purposes, such as a vacation camp, recreational organizations, or a trainee under a programme of vocational training recognized by law.	Act Respecting Labour Standards Regulation	Sections 3(5) and 3(5.1)	- School program - Athlete
Newfoundland and Labrador	Employee is defined as a person working under a contract of service for an employer. The definition of contract of service excludes a contact entered into by an employee qualified in or training for qualification in and working for an employer in the practice of (i) accountancy, architecture, law, medicine, pharmacy, professional engineering, surveying, teaching, veterinary science, and (ii) other professions and occupations that may be prescribed.	Labour Standards Act	Section 2(b)	- Professional
New Brunswick	Athletes are exempted from employment standards under the Act. Professionals are exempt from the Public Holiday's section of the Act.	Employment Standards Act Regulation	Sections 2.1 and 3(1)	- Professional - Athlete
Prince Edward Island	It is unclear whether an intern is properly classified as an employee. Athletes, while engaged in activities related to their athletic endeavors, are exempt from pay and notice for termination provisions of the Act.	Employment Standards Act Regulation	Section 2	- Athlete
Nova Scotia	Interns that are properly categorized under the professional or apprenticeship exemptions can legally be unpaid.	Labour Standards Code Regulation	Section 2(2)	- Professional - School program
Yukon	If the internship entails the individual being trained by the employer for the company's business, the individual is appropriately classified as an employee.	Employment Standards Act Regulation	Section 2	- General
Northwest Territories	Unpaid internships are illegal unless the individual is a student who, as part of their curriculum, is employed in a work program.	Employment Standards Act Regulation	Sections 3 and 3.1	- School program
Nunavut	Students who are undertaking a work experience program as part of their school curriculum are exempt from minimum wage standards under the Act.	Labour Standards Act Regulation	Section 2	- School program
Federal	Part II of the *Code* does not apply to internships undertaken to meet formal education requirements. Section 167(1) precludes employers from treating employees as if they were not their employees, intending to avoid obligations concerning the labour standards outlined in Part III of the *Code*.	Canadian Labour Code	Sections 167(1) and (2); Part III (Employment Standards)	- School program - General

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Can I Be Liable for the Actions of My Volunteer?: Vicarious liability and volunteers

Lauren Chalaturnyk and Jenna Chamberlain

In many volunteer-driven organizations, volunteer coordinators or boards may hold the view that the organization is not liable for negligent or intentionally injurious actions of its volunteers. This can sometimes be the benefit of using volunteers. They are not employees and, therefore, the same rights and obligations that arise in the employment context do not always arise in the volunteer context. However, volunteer organizations should exercise caution. In some cases, even though a volunteer is not properly an employee of the organization, the organization can still be held liable if a volunteer does something negligent or intentionally hurts another person. This situation is referred to as vicarious liability.

Vicarious liability is liability imposed on one party because of the misconduct of another party. The most common relationship in which vicarious liability arises is the employer/employee relationship. Vicarious liability can also arise as a result of legislation. There are several rationales for the imposition of vicarious liability. One of the rationales is that the person who creates the risk should be the one to pay for any injuries resulting from that risk. The other rationale is that employers have "deeper pockets" to pay for any damages arising out of the liability of the employee.

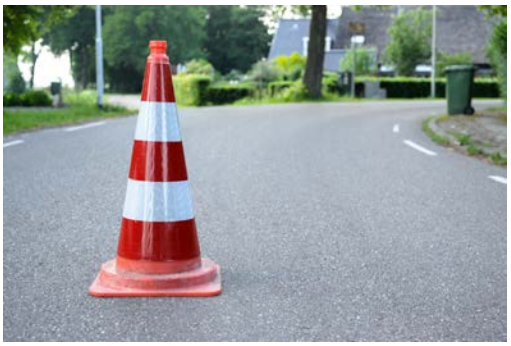

Photo from Pexels

To explain the basic parameters of vicarious liability, we will consider the employer/employee relationship. For vicarious liability to arise, an employee must have committed a tort (negligence or an intentional act that causes injury). That tort must have been committed during the course of that employee's employment. The logic being that employers should not be held liable for the bad behaviour of their employees outside working hours. Generally, vicarious liability will be found where an employer has authorized an employee to do something and the employee does that task negligently or carelessly.

The easiest way to avoid this type of outcome is for employers to ensure that when they authorize an employee to complete a certain task, they also train the employee to complete that task properly. This is why having employment policies, procedures and training processes in place is so important.

If a volunteer still acts negligently in the performance of their duties, or does something malicious and deliberate, the volunteer will be liable entirely on their own.

Employers may also be held liable for the deliberate or malicious actions of their employees if the employer has enhanced the risk of that action occurring. The most common case study of this type of situation is where employers are found vicariously liable for physical or sexual abuse committed by employees on individuals in their care. The most concrete way to avoid this type of situation is for employers to ensure they are not creating an environment that facilitates an employee doing something deliberate or malicious. This can be done through screening processes, training and reasonable supervision, for example. These types of precautions are particularly important in organizations that provide services to vulnerable populations.

Volunteer Organizations

The courts have decided that, in the volunteer context, organizations can be held vicariously liable for the actions of their volunteers.

The volunteer must be acting within the course of their duties to the organization for the organization to be found vicariously liable. Further, there must be a substantial connection between the creation of the risk by the organization and the tort committed by the volunteer.

The two examples below illustrate situations in which volunteer organizations have been held vicariously liable.

In one case, an organization, Farmers for Peace, was liable for the negligence of a volunteer, Barry King. Mr. King acted as a director and Vice-President for Farmers for Peace. Mr. King was assisting Farmers for Peace prepare a shipment of goods. The goods were being stored near his property. The plan was to place the goods in a truck and ship them to their final destination. Two trucks were purchased for this purpose. Mr. King borrowed a front-end loader to place the goods into the trucks. While driving the front-end loader to his property, Mr. King was involved in a motor vehicle accident. The accident caused injury to another person. During the accident, Mr. King was acting within the scope of his authority as a volunteer for Farmers for Peace. The court held an organization can be liable for the actions of its volunteers. Therefore, the court found Farmers for Peace liable for the injuries caused by Mr. King to the other person.

In another case, Boy Scouts of Canada was liable for the actions of its volunteer, Khris Chung. A boy was sexually assaulted while attending a Boy Scout camp. Ms. Chung saw the assault and failed to take any action in response. Ms. Chung's failure to act was negligent. The court held volunteers are the same as employees for the purpose of vicarious liability. The main issue was whether Ms. Chung was acting within her role as Camp Chief. Ms. Chung's duties were to ensure the safety of the children at the camp. Boy Scouts Canada had procedures to report sexual abuse, but Ms. Chung did not follow the procedure after witnessing the assault. Boy Scouts of Canada was found to be vicariously liable for the negligence of Ms. Chung.

Volunteers

For volunteers, there may be some temptation to avoid caution when volunteering, because if you do something wrong, you will not be held liable for your actions – your organization will be. This is wrong.

Organizations will not always be held liable for the actions of their volunteers. For example, an organization might not be liable if it has done everything it should to train a volunteer and avoid unnecessary risk. If a volunteer still acts negligently in the performance of their duties, or does something malicious and deliberate, the volunteer will be liable entirely on their own.

Further, if someone is injured, they will likely sue the organization and the volunteer together, jointly and severally. This means that if the organization is found liable, they can pursue a portion of the damages from the volunteer. Organizations may also have indemnification policies in place which state that if they are liable for the actions of a volunteer, the volunteer has to pay for the legal fees and damages incurred by the organization.

In some cases, even though a volunteer is not properly an employee of the organization, the organization can still be held liable if a volunteer does something negligent or intentionally hurts another person.

Volunteers must continue to exercise diligence and caution in the performance of their volunteer duties, despite the fact there are some situations in which the organization could be held vicariously liable.

Conclusion

Vicarious liability is highly fact-specific and must be assessed on a case-by-case basis. This makes it challenging to provide recommendations on the best actions an organization can take. However, at a minimum, organizations should be aware that they can be vicariously liable for the negligence of their volunteers if the volunteers are acting within the authority given to them. The best practice for organizations is to properly train and supervise volunteers, and to keep records of the organization's efforts to prevent negligence. With these procedures in place, an organization is less likely to be on the hook for damages caused by one of its volunteers. For volunteers, it is important to remember that your organization will not always shield you. It is important to exercise your duties with caution and care.

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Volunteering and Income Tax

Caitlin Butler

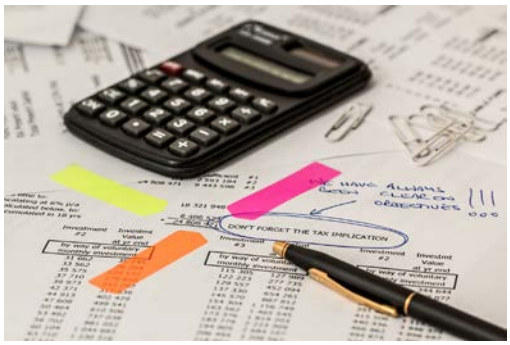

Photo from Pixabay

Whether we volunteer to coach our child's soccer team, deliver groceries to those who cannot do it themselves or provide pro bono services in our professional capacity, many Canadians (12.7 million in 2013 according to Statistics Canada) gratuitously give their time to others. With over 1.96 billion hours (the equivalent of 1 million full-time jobs) volunteered, the contributions are incredible! However, as it seems with most aspects of life, it all comes back to tax. In this article we will discuss tax issues from the prospective of the volunteer as well as the recipient, such as a non-profit organization or charity.

Tax Issues for Volunteers

For most of us, what constitutes a volunteer appears pretty obvious – a person who **does something for free** (or with very little pay) and **without obligation**. But what if the volunteer receives some type of compensation? What if the volunteer driver, using his own vehicle, receives an allowance or reimbursement to cover some costs of operating the vehicle? These payments or benefits may complicate matters.

Reimbursements

If a volunteer is reimbursed for expenses they incur carrying out their volunteer duties, the reimbursement is not taxable. In some cases, a volunteer of a registered charity may waive their right to be reimbursed for expenses and instead receive a donation receipt for tax purposes. That said, CRA encourages the exchange of cheques: the charity reimbursing the volunteer for expenses and the volunteer making a cash donation.

Allowances

Reasonable allowances for costs incurred by an individual in carrying out their volunteer duties are not taxable (provided the associated costs are not also reimbursed). However, if the allowance is large enough to influence the voluntary position, the amount would generally be taxable as employment or business income. In contrast to waiving the right to be reimbursed, CRA's administrative policy does not allow a donation receipt to be issued for waiving the right to an allowance.

So, what is a reasonable allowance? CRA has stated that allowances paid to Federal Government employees for travel, as dictated by the National Joint Council, are reasonable. For example, for the period commencing January 1, 2020, for those in Alberta an allowance of $0.475/km for use of a personal vehicle would be reasonable (the rates vary across the country). Of course, other amounts could also be reasonable. It is prudent to maintain a record of how these amounts were determined to approximate expected costs.

Benefits and Other Payments

Benefits received in a volunteer capacity are generally non-taxable. However, as above, if

the benefit is large enough to influence the individual's volunteerism, it would be taxable. For example, CRA previously opined that a volunteer golf marshal who is offered free rounds of golf in exchange for their volunteer services would not generally be taxed on this benefit. However, if the value of the particular golf rounds is unusually high or if rounds are awarded for a disproportionately minimal amount of work performed, it may result in a taxable benefit.

Provided the expense reimbursement, allowances and benefits are all reasonable and not taxable to the volunteer, the organization is not required to file a tax slip.

In some cases, a volunteer may receive another payment, such as an honorarium or a director fee. Where the organization provides nominal compensation, the amounts are non-taxable for the individual. If the payment is not nominal, the amounts are taxable. To be nominal, the amount must generally be significantly less in comparison to what would be paid to a regular employee or independent contractor. Nominal compensation would not be enough to influence the individual's decision to volunteer.

Donation Receipts for Volunteering with Charities

Volunteering time or providing a service to a registered charity does not qualify as a "gift" for the purpose of issuing a donation receipt. That is, no donation tax credit can be claimed. Of course, the value of the volunteer's services is also not taxable as they did not get paid for those services.

Director's Liability

Some individuals may volunteer as a director of an incorporated organization. If the organization does not properly collect and remit amounts held in trust for the government (for example, employee and employer's EI or CPP, withholding tax on salary, and GST/HST on sales/services), the director may be personally liable for these amounts. To protect oneself, the director must be duly diligent in preventing the failure of remitting the amounts. Also, directors should properly resign (including ceasing all "director-like" activities) to limit their future liability. CRA cannot take action to recover amounts from a director more than two years after the individual last ceased to be a director.

A director may also be liable for other risks of the organization. A director should ensure that the organization has proper director's insurance and pays the ongoing premiums.

Volunteer or Business in a Loss?

If an individual provides "volunteer" services and incurs expenses out of pocket, can they deduct these amounts against other sources of income? A recent Tax Court decision found that a lawyer who charged clients based on their circumstance was providing legal services in a capacity very close to volunteerism. As a volunteer, she was carrying on a personal venture without a view to profit and the associated expenses were not deductible against her employment income from another source.

Volunteering time or providing a service to a registered charity does not qualify as a "gift" for the purpose of issuing a donation receipt.

The fees charged in this case were extremely low, determined by the Court to fall well below minimum wage. This was not a case of a for-profit business providing a discount to some low-income clients, nor an occasional pro bono file.

Volunteer Firefighter and Search and Rescuers

Volunteer firefighters and search and rescuers that provide at least 200 hours of volunteer services in the year can claim a tax credit of $450 ($3,000 * 15%) to reduce their federal tax liability. Eligible services can include:

- responding to and being on call for firefighter duties;
- search and rescue or related emergency calls;
- attending meetings of the organization; and
- participating in required training.

However, if a volunteer is paid by the same organization for providing similar services, both the paid and volunteer hours for that organization are not counted towards the 200-hour test.

As an alternative to the tax credit, volunteer firefighters and search and rescue volunteers may claim a $1,000 exemption to reduce otherwise taxable amounts received from the organization. An individual can claim either the credit or the exemption, not both.

A number of provinces and territories (British Columbia, Manitoba, Quebec, Newfoundland, Nova Scotia, Prince Edward Island, Nunavut and, beginning in 2020, Saskatchewan) have credits for certain volunteer emergency responders.

Tax Issues for Organizations

Organizations that benefit from volunteers may also have a number of tax-related concerns, such as the impact of providing payments to volunteers.

… CRA's administrative policy does not allow a donation receipt to be issued for waiving the right to an allowance.

Provided the expense reimbursement, allowances and benefits are all reasonable and not taxable to the volunteer, the organization is not required to file a tax slip. It is also beneficial for the organization to maintain records of the reasoning which led to the conclusion that specific payments were not income to the recipients. This demonstrates the organization undertook due diligence.

If an organization is reimbursing volunteers for expenses or providing allowances, it should have a clear policy in place specifying both the type of expenditures they are willing to reimburse (for example, for reasonable accommodation if travelling as part of the organization's operations), and procedures to document the expenses and payments. This can be even more important for a registered charity, as such a policy demonstrates the charity uses its funds for charitable purposes.

If the organization is providing more than a nominal payment (such as an honorarium), then a tax slip (typically a T4 or T4A) may be required. Director's fees are employment income. The organisation should report these amounts on a T4 issued to the director. For employment income, the payer is also required to withhold EI and CPP, where applicable to the specific employment, and remit these

amounts plus an employer portion. If the payment relates to an amount other than employment earnings, the organization should issue a T4A to the individual. Note that CRA administratively does not require a T4A to be issued where the total of all payments (subject to this filing) in the calendar year are less than $500 and no taxes were withheld.

Caitlin Butler

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Special Report

Copyright

Know Your Rights: Copyright in Canada in the era of COVID-19 and beyond

Julia Ryckman

The effects of the COVID-19 pandemic and social distancing measures hit Canada's arts communities early, hard and fast. Even when present measures ease up, the return of performing artists to the stage looks to be a slow one.

Some creators may use this time in isolation to craft new works, while others may find it impossible to do so while trying to make ends meet and take care of their health and loved ones. Others are finding different approaches to making a living with their talents, such as creating original online content and live streaming performances on social media. With all norms interrupted and innovations sure to emerge, now is as good a time as ever to hone up on the protection copyright laws provide to creators.

What is Copyright?

Copyright is entirely a statutory right, granted by the *Copyright Act* of Canada (the "**Act**"). This means that copyright protection is limited to what is specifically provided for by the Act.

... copyright is not just one thing — it is bundles of rights, not necessarily held by one person.

At its essence, copyright provides economic rights which prevent the unauthorized use or reproduction of original literary (including computer programs), artistic, dramatic or musical works. Copyright also provides a separate form of protection, colloquially known as neighbouring rights, to:

- the maker of any sound recording (i.e. record label);
- any performer whose performance of an artistic, dramatic or musical work is captured in that sound recording; and
- the broadcaster in its signal (i.e. radio waves).

Here's the thing: copyright is not just one thing — it is bundles of rights, not necessarily held by one person. There are different sets of rights for different things, which may be owned by different parties. For example, A might write a song that B performs on a sound recording made by C, which D then broadcasts. All of A, B, C and D have different rights, which may be retained by them, or sold or granted to others.

Photo from Pexels

Economic Rights

The basic economic right provided by the Act is the exclusive right to:

- produce or reproduce a work, or a substantial part of it, in any material form;
- perform the work, or a substantial part of it, in public; and,
- publish the work, or any substantial part of it.

This economic right includes, for example, the exclusive right to:

- convert a dramatic work to another form, such as a novel, or vice versa;
- make a sound recording or film of a literary, dramatic or musical work;
- communicate the work to the public;
- exhibit the work;
- translate the work;
- sell a tangible work; and
- authorize someone to do any of the above.

Neighbouring Rights

Neighbouring rights provide performers certain exclusive rights, including the right to "fix" a live performance (i.e. record it) or have the performance broadcast, streamed, etc., or authorize others to do so. If the performance is already recorded, the performer has the exclusive right to reproduce that recording, make it available to the public, sell the recordings or authorize others to do such things.

The maker of the sound recording (i.e. record label) also has certain exclusive rights, including the right to publish the recording for the first time, reproduce it in any material form, rent it out, make it available to the public (i.e. streaming, etc.) and sell it in any material form.

At the end of the day, authorizing others to do things with a performer's performance or a sound recording typically means that the performer and/or sound recording maker (or the owner of those rights if they have been transferred), receives royalties or payment.

Moral Rights

The Act also recognizes that authors and performers have moral rights. These rights focus on the artist/performer's right to preserve the integrity of their work. Artists/performers can refuse any change that would be prejudicial to their honour or reputation and have the right to claim authorship or to remain anonymous.

Use of an insubstantial amount of a work does not require permission from the copyright owner.

For example, Canadian artist Michael Snow's moral rights were famously infringed when the Toronto Eaton Centre placed red ribbons around the necks of the geese in his work *Flight Stop* during the Christmas season. Snow successfully brought an action to compel the Centre to remove the ribbons from his work.

Moral rights exist for the duration of the copyright and are non-transferable, so they only belong to the author/performer or, on death, to the person the rights are bequeathed to. When an author/performer assigns their copyright (in whole or in part), the author/performer retains their moral rights but may be asked to formally waive these rights in favour of the new owner(s).

Conditions for Protection

Copyright only exists in original works which are fixed in some material form (i.e. put in writing or recorded). In order to be original, the work must:

- be more than a mere copy of another work;
- be the product of the author's exercise of skill and judgment; and
- be more than a purely mechanical exercise.

Moreover, copyright does not protect ideas or facts — it only protects the original expression of those ideas or facts.

Copyright also only applies to original works where the author was, at the date the work was created, a citizen or subject of, or ordinarily resident in, Canada or a treaty country. There are other instances where protection applies, as well as specific provisions addressing citizenship and residency requirements for neighbouring rights.

Ownership & Registration

Copyright protection arises as soon as you create a work and fix it in a material form. You do not need to do anything to receive copyright protection. Your copyright is still protected in Canada even if you do not use the copyright symbol (©) in association with your work. However, using the copyright symbol reminds others that you are claiming copyright in the work, and you could rely upon your use as evidence in certain infringement cases. You may wish to register your copyright with the Copyright Office, as registration creates a presumption of evidence of ownership.

Generally speaking, the author of a work, the performer of a performance or the maker of a sound recording are the first owners of the copyright, though certain exceptions may apply. For example, if works are made in the course of employment, there is a presumption that the employer is the first owner of that copyright.

Copyright is entirely a statutory right, granted by the Copyright Act of Canada ...

A copyright owner may assign (transfer) their rights, in whole or in part, to another party (or parties). The assignment may be for the whole term of the copyright or for a portion of it. An assignment is a change to copyright ownership. Assignments of registered works may be registered with the Copyright Office upon payment of the prescribed fee.

As well, copyright owners may issue licences to authorize another party or parties to use a work for certain purposes and under certain conditions. Licences may be exclusive or non-exclusive and the copyright owner still retains ownership. Collective Rights Societies – such as SOCAN, Re:Sound and Access Copyright – help administer members' copyrights by issuing licences and collecting and distributing royalties.

Term of Protection

Generally speaking, copyright protection lasts for the life of the author, the remainder of the calendar year in which they die and for 50 years following that calendar year. There are

certain exceptions to this general rule that address situations where works are created by joint authorship, where the author is unknown and where works are posthumous. Additionally, there are specific provisions dealing with the duration of copyright in performer's performances, sound recordings and signals.

The term of copyright protection will soon be extended to comply with the United States-Mexico-Canada Agreement (USMCA).

Once copyright expires, the work, performance or sound recording falls into the public domain. Anyone is then free to make use of it without obtaining permission.

Users

Generally speaking, users of copyrighted works, performances, sound recordings and signals must get permission to do anything that is the exclusive right of the copyright owner. Otherwise, the user may be infringing copyright and could be required to pay damages to the owner and comply with other court orders, such as delivering up infringing copies. So, before you perform someone else's song in a live stream or record it, or use someone else's photograph or art on your website, you need to get permission (i.e. a licence) from the copyright owner.

Copyright only exists in original works which are fixed in some material form (i.e. put in writing or recorded).

Use of an insubstantial amount of a work does not require permission from the copyright owner. However, since the Act does not define what constitutes substantial use or insubstantial use, even sampling a few seconds of a sound recording may constitute infringement.

Essentially, the Act grants a temporary monopoly to copyright owners. To balance this, the Act provides certain exceptions to copyright infringement, a few of which are discussed below. Before relying on any of the following exceptions to infringement, consult with a lawyer for legal advice specific to your situation.

Non-Commercial User Generated Content

This exception is colloquially referred to as the "YouTube exception". An individual may use an existing work, performance, sound recording or signal (protected by copyright) to create new content without consent of the owner when:

- the new content is created solely for non-commercial purposes;
- the source and (if known) the name of the author, performer, maker or broadcaster is mentioned (if reasonable to do so);
- there are reasonable grounds to believe the existing work, performance, sound recording or signal, is not itself infringing copyright; and
- use of the new content does not have a substantial adverse effect (financial or otherwise) on the existing work, performance, sound recording or signal, or on an existing or potential market for it.

Private Copying

It is generally not infringement to create copies of protected works provided that:

- you legally own the copy of the work you are reproducing;
- the copy of the work you are reproducing is not, in itself, an infringing copy;
- to make the reproduction, you did not circumvent a technological protection measure;

- you do not give the copy away; and
- the copies are only for your individual private purposes.

If you sell or give away the existing copy of the work you reproduced, you must destroy any copies you made.

Copyright protection arises as soon as you create a work and fix it in a material form.

Fair Dealing

Fair dealing allows anyone to use copyrighted works without authorization when the use is for the following specific purposes: research, private study, education, parody, satire, criticism or review, and news reporting.

However, the use must be fair in order for it not to constitute infringement. A determination of whether the dealing is fair is no simple matter. To decide, courts look at factors such as the purpose, character and amount of the dealing, as well as alternatives to the dealing, the nature of the work and the effect of the dealing on the work. If, on the whole, the factors tend towards fairness, then the use will likely be fair.

Conclusion

Understanding copyright is an important part of understanding how to make money and protect the integrity of your creative works. Additionally, if you are a user of copyrighted works, it is important to understand what unauthorized use may violate copyright owners' rights and what unauthorized use may be permitted as an exception to infringement.

Julia Ryckman

Julia Ryckman is an intellectual property lawyer and litigator at Pitblado LLP and previously taught Copyright Law at the University of Manitoba Law School in 2018. Her interest in intellectual property matters stems from her days performing in bands and collaborating with video and performance artists. Passionate about the arts, she is on the board of directors of the Winnipeg Symphony Orchestra and is Chair of Video Pool Media Arts Centre's board.

Fixing Canadian Crown Copyright

Amanda Wakaruk

The federal *Copyright Act* establishes the legal framework for use of copyright-protected works in Canada. Under the Act, rights-holders have the exclusive right to reproduce and re-use substantial amounts of a work unless such uses fall under one of the statutory exceptions to copyright infringement. This framework attempts to provide a balance between the needs of rights-holders and users. *This balance is supposed to serve the public interest.*

Legislators have been aware of the need to fix Canada's Crown copyright regime for at least 30 years.

It's easy to understand how this legal protection incentivizes the creation of new content for those with a commercial interest. However, it is unclear why economic controls are needed for government works: government information is produced using tax dollars and its creation furthers the aims of democratic governance, which includes sharing information with Canadian residents and citizens. Furthermore, other types of access and distribution controls are already available to governments under broadly-worded exemptions and exclusions in the *Access to Information Act*.

Our parliaments, government agencies and the judiciary simply do not need economic incentives to create government works. A government body produces press releases, reports and legislative publications to report on the work of government or further the aims of its policies and programs, not to make money off the people it governs.

What is Crown copyright?

Section 12 of the *Copyright Act* states that copyright belongs to Her Majesty (the Crown) when a work has been "prepared or published by or under the direction or control of Her Majesty or any government department…" The copyright term lasts "for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year." This language has remained virtually unchanged since 1921 when it was copied from the 1911 UK *Copyright Act*.

Section 12 gives governments the right to control the reproduction and re-use of government works in the same way that movie producers control the distribution of feature films and publishers control the copying of novels. That is, anyone sharing or re-using a substantial part of a government work without permission would be subject to a claim of copyright infringement. While a legal defense might include an exception to infringement, low levels of copyright literacy and institutional risk aversion make reliance on statutory exceptions unlikely, especially when a quick turnaround is needed (e.g., including a table in a government report in a web-based article or other publication). This puts Canadians in the absurd position of having to ask for permission to use works that they have already paid for through taxation and should already own.

Why does the legislation need to be fixed?

Confusion created by this copyright provision hampers the visibility and impact

Photo from Pexels

of government programs and services. It also prevents librarians and archivists from providing Canadians with perpetual access to government information. Unfortunately, such hampering, paired with the removal or destruction of government information, increases the democratic deficit and could be described as censorship.

The confusing nature of section 12 cannot be overstated. Even our Supreme Court justices disagreed about the criteria that should be used to determine if a work is subject to Crown copyright in the first place. As stated in a 2019 SCC decision, "Parliament is of course free to consider updating the provision in its current review as it sees fit" (para 90). Law professor Jeremy de Beer says it best: "That language, combined with the Court's quote about this legislative monstrosity, is about as blunt as judges can be about the need for statutory reform."

Librarians and archivists are sometimes denied permission to reproduce and redistribute government works — *works that have already been made available to the public*. In addition to born digital web content being missed by Library and Archives Canada and the Internet Archive's web harvesting work (and thus lost to posterity), digitization projects have been delayed — sometimes for years — or abandoned due to confusion about Crown copyright status and the associated legal rights to reproduce and share these works.

These denials and delays add to the fear of copyright infringement associated with the re-use of government works, a phenomenon known as copyright anxiety, leading to copyright chill. That is, user fear manifests as a decision *not* to exercise rights that might be available to them under statutory exceptions.

During the 2019 parliamentary review of the *Copyright Act*, many stakeholders explained how the current Crown copyright regime hurts Canadians. Importantly, no organization or individual who raised the issue of Crown copyright during the review supported its continuation in its current form.

The review served to corroborate and validate well-known concerns about the provision. It also shed light on lesser-known issues. These include the antiquated nature of the royal prerogative that opens section 12 and the ridiculous *perpetual* copyright term assumed for unpublished government works. Missing from the review were statements about how the work of government employees is hampered.

In all the scenarios described, it is clear that the current Crown copyright regime decreases the visibility and impact of the work of government employees, legislators and the judiciary.

What's being done to fix Crown copyright in Canada?

Legislators have been aware of the need to fix Canada's Crown copyright regime for at least 30 years. Former federal Justice Minister Robert Kaplan even tabled a Private Member's Bill asking for its abolishment in 1993. Another Private Member's Bill with the same goal was tabled by MP Brian Masse in 2019 and again in February 2020. It's unlikely that the Bill will pass.

Legislative change is rarely fast or easy, especially when it addresses powers held

by Canadian governments. The final report of the 2019 *Copyright Act* review accurately summarized stakeholders input but, curiously, failed to provide a recommendation consistent with the same submissions. Instead, parliament recommended that an existing (and problematic) system of open licensing be continued and expanded … but only for content "in the public interest and for the purpose of public use, education, research, or information." Much like the exemptions and exceptions in the *Access to Information Act*, this language is open to interpretation by the party in power and their appointees within the current government.

***Librarians and archivists are sometimes denied permission to reproduce and redistribute government works* — works that have already been made available to the public.**

New governments often have an interest in creating a "clean slate" when they take office or want to remove content that casts doubt on their efficacy. Obviously then, policy that serves the public interest can only come from legislative reform, which is much more difficult to change by the governing party. Open licensing will only work if it's legislated by default and uses an established, recognized open licence (e.g., Creative Commons public domain, CCO or attribution, CC BY).

Even more curious, the only legislative change in the parliamentary recommendation related to Crown copyright seeks to grant governments *more* control over their use of works subject to general copyright provisions. That is, the suggested legislative amendment does not consider works subject to Crown copyright at all:

> *That the Government of Canada introduce legislation amending the Copyright Act to provide that no Canadian government or person authorized by a Canadian government infringe copyright when committing an act, either:*
>
> - *Under statutory authority; or*
> - *For the purpose of national security, public safety, or public health.*

Both the Conservative Party of Canada and the New Democratic Party used a post-appendix section of the same parliamentary report to state their support of abolishing Crown copyright outright.

At the time of writing, the Liberal minority federal government had not yet tabled legislative amendments pertaining to the *Copyright Act* review of 2019. It had, however, noted such changes in the ministerial letters to both the departments of Canadian Heritage and Innovation, Science, and Economic Development Canada.

In November 2019, representatives from both the library and archival communities began meeting regularly with government employees in these and other federal agencies. We are hopeful that these conversations will include more stakeholders and help inform legislative change that better serves the public interest. While copyright legislation is a mandated mediating factor between creators and users, it is not doing its job when it prevents citizens in a democratic country from sharing the output of its government.

Amanda Wakaruk

Amanda Wakaruk, MLIS, MES, worked as an academic government information librarian for almost twenty years before becoming the University of Alberta's Copyright Librarian in 2015. To learn more about her work, go to amandawakaruk.ca. The views expressed do not necessarily reflect those of the University.

Copyright No Plaything: Celebrity Tattoos In Video Games

Tara Parker

Tattooed celebrities are abundant; from Shawn Mendes's fan-designed butterfly, to Drake's "6 God" praying hands, to the elaborate artwork displayed on the bodies of professional athletes like basketball star LeBron James (by one account more than half of all active NBA players have tattoos) — the list goes on. Whether it's angels or demons, expressions of faith, or names of family and friends who've been loved or lost, there's no doubt a celebrity's body art is an integral part of their personal brand, appearance and public identity.

It may be surprising to some that tattoo art, like other forms of art, is capable of attracting copyright protection. In Canada and the U.S., if a tattoo is an original work of art (not copied), is fixed in any tangible medium (e.g., inked on skin), and is not in the public domain, then it qualifies for copyright protection. Although there has been some legal debate as to whether the human body is considered a "fixed medium" for copyright law purposes, generally speaking, and as noted by the U.S. federal court in *Whitmill v. Warner Bros. Entertainment Inc.* (the case that dealt with Mike Tyson's tattoo in The Hangover movie), "[o]f course tattoos can be copyrighted … I don't think there is any reasonable dispute about that."

Photo from Pexels

Since copyright laws generally grant the owners of artistic works the sole right to control the use and reproduction of their works in all media (subject to some limited exceptions, including those noted below), any unauthorized use or reproduction of a celebrity's tattoo in an e-sports game (e.g., NBA 2K20), movie (e.g., The Hangover), or other media may result in a copyright infringement claim — not to mention a trademark, publicity or personality rights claim, depending on the circumstances.

… any unauthorized use or reproduction of a celebrity's tattoo … may result in a copyright infringement claim …

When it comes to video games specifically, tattoo artists have sued celebrity athletes and game publishers for reproducing the tattoos of, for example, former NFL player Ricky Williams in the Electronic Arts's sports title, NFL Street, and welterweight fighter Carlos Condit in the THQ game UFC Undisputed 3.

In the *Solid Oak Sketches, LLC v. Visual Concepts, LLC et al*. case (originally filed in 2016 but still making its way through the U.S. courts), at issue is Take-Two Interactive's unauthorized reproduction of the tattoos of NBA stars, LeBron James, Stephen Curry, Kenyon Martin, DeAndre Jordan, Eric Bledsoe and late basketball legend Kobe Bryant in its NBA 2K video games. Solid Oak claims it purchased the exclusive reproduction rights from the original tattoo artists and never gave permission to Take-Two to digitally reproduce, distribute, or display the NBA stars' tattoos in the games.

Take-Two argues its use of the tattoos was *de minimis* since the tattoos were not prominently featured in the game, which also includes 400 other NBA players. And, in any event, Take-Two says its use of the images should qualify as "fair use" since it would be impossible to realistically portray the individual NBA players unless their video game avatars capture their distinct tattoos and uniquely personal body art.

Interestingly, Take-Two relies in part on a declaration of support filed by James stating he personally contributed to the creative design of his tattoos, his tattoos are part of his "persona and identity," and any reproduction of his image without his tattoos is not really a depiction of him. James reasoned that any use of his image, without his tattoos, undermines his publicity rights and deprives him of the right to license (and control) his own body and what he looks like as both a private person and a public basketball player.

… there has been some legal debate as to whether the human body is considered a "fixed medium" for copyright law purposes …

James's declaration raises some fascinating legal issues. Is he a "joint author" of his tattoos? Were his tattoos created as "works-made-for-hire" so that under U.S. copyright law James would be deemed the author and owner of the tattoos? Alternatively, does he have an "implied licence" to use his tattoos any way he wants? What about his right to protect his personal liberty and freedom of expression?

As fascinating or frustrating as these issues may be (depending on your standpoint), avoiding this legal complexity with a reliable degree of certainty is simpler than it may seem.

Obtaining the necessary rights and releases from those who own, create, collaborate on or display tattoos can be as simple as selecting a few carefully crafted sentences and ensuring the parties "get it in writing." For example, instead of relying on *de minimis* and fair use defences, a game publisher could license the necessary rights to reproduce the tattoos from the tattoo rights holder to help alleviate this uncertainty.

… tattoo art, like other forms of art, is capable of attracting copyright protection.

Similarly, a licence or release from a tattoo artist in favour of a celebrity athlete could simply state: (i) the tattoo is original (not copied), (ii) the artist owns or controls all rights (including copyrights) in the tattoo, (iii) the celebrity is allowed to use and reproduce the tattoo in any manner or media without restriction, and (iv) the artist waives all so-called "moral rights" in the tattoo. The waiver of moral rights is important as it will give the celebrity the flexibility to modify, enhance or remove the tattoo altogether, with or without crediting the original tattoo artist.

In the wake of the recent ink cases and as body art continues to become more mainstream, celebrities — and anyone who licenses or

makes commercial use of their images — should take legal precautions to protect their interests in the celebrity's personal brand and likeness, especially when pre-emptive and preventative action can be as simple as noted above.

Editor's Note: After this article was originally published, a decision was released in *Solid Oak Sketches, LLC v 2K Games, Inc and Take-Two Interactive Software, Inc* (case number 16-CV-724-LTS-SDA). In the decision handed down on March 26, 2020, the court held that the Defendants did not violate Solid Oak's copyright rights because:

1. the Defendants' use of the tattoos was *de minimis*;
2. the Defendants had an implied license to display the tattoos; and
3. the Defendants' use of the tattoos constituted fair use.

This article first appeared in *The Lawyer's Daily* on February 25, 2020 and is reprinted with permission.

Tara Parker

Tara Parker is a partner in the Entertainment Law Group at Goodmans. Her practice focuses on advising major U.S., international and Canadian studios, broadcasters, producers, literary, musical, theatrical and business clients on a wide range of media-related matters, including film financing, international co-productions and joint-ventures, rights acquisitions, format licence and distribution deals, errors and omissions insurance, clearance and copyright law matters.

BenchPress

Rock-Paper-Scissors Debts, Napkin Wills & Injured Skiers

Jessica Steingard

Rock-Paper-Scissors Debt Cancelled

***Primeau c. Hooper*, 2020 QCCA 576**

Mr. Hooper lost a set of three games of rock-paper-scissors to Mr. Primeau in January 2011. The wager? $517,000 – $258,500 carried over from a previous debt on a quits or doubles bet.

Mr. Hooper signed a mortgage from Mr. Primeau to represent the debt. The mortgage was registered as a second mortgage on Mr. Hooper's home. Mr. Hooper paid Mr. Primeau ten monthly payments of $1,000 but then stopped. The mortgage was amended to acknowledge the default and the amount owing increased to $553,249.

On February 10, 2015, Mr. Hooper filed a court application asking the court to cancel the mortgage and amending agreement. The trial judge had to decide whether the debt was valid at law, according to Article 2629 of the *Civil Code of Quebec*. Only two types of gaming and betting contracts are valid:

1. Contracts expressly authorized by law.
2. Contracts which relate to lawful exercises and games related solely to the skill of the parties or to the exercise of their bodies AND where the sum involved is not excessive.

The trial judge found paragraph 2 applied to the contract but that both conditions had not been met. The game was one of chance and the amount was excessive – in part because it was the highest ever bet between the parties. The judge decided the contract between the parties was not valid. Mr. Primeau appealed to the Court of Appeal. The Court of Appeal also sided with Mr. Hooper.

McDonald's Napkin Will is Valid

Gust v Langan, 2020 SKQB 42

After Philip Langan passed away on December 30, 2015, his daughter produced a McDonald's napkin with his writing on it. She claimed this was his will. The napkin listed seven of Mr. Langan's children and then said "Split my property evenly". It was signed by Mr. Langan.

Mr. Langan had eight children – one son died in 2006 and another died in 2015. His surviving children believe Mr. Langan wrote the will sometime between the deaths of his two sons. One daughter challenged the napkin, saying it wasn't a valid will. *The Wills Act* of Saskatchewan states that holograph (handwritten) wills are valid wills. However, the Court noted that "holograph wills are [often] drawn so informally that the court is uncertain whether the author of the document intended to create a will."

The Court based its decision on affidavit evidence given by four of Mr. Langan's children. The daughter who had the napkin will said her father gave it to her one day and said, "This is my will. I want you to keep this in case something happens." He signed the napkin in front of her. Another brother was there when this happened. The oldest brother received the napkin will from his sister and gave it to his lawyer. He had dropped his father off at McDonald's on the day his father allegedly wrote the will. He said his father wrote it because he thought he was having a heart attack. The daughter challenging the will claimed her dad had told her he wasn't leaving a will because he wanted his kids to fight for it like he had.

The Court found the napkin was a valid will – Mr. Langan had the intention to create a will and the document showed Mr. Langan's final wishes.

Injured Skier Can Sue Ski Resort

Apps v Grouse Mountain Resorts Ltd, 2020 BCCA 78

Mr. Apps travelled to Canada from Australia just before he turned 20 years old. He wanted to live, work and snowboard at Whistler Mountain. He bought a season's pass for Whistler, and the next month he got a job in the rental shop there. He considered himself an intermediate snowboarder.

On March 18, 2016, Mr. Apps and three friends decided to go boarding at Grouse Mountain. He bought a lift ticket. The lift ticket and back of the receipt had the usual waivers of liability. But it also said that Grouse Mountain would not be liable for its own negligence, breach of contract or breach of statutory duty of care. Mr. Apps didn't sign anything.

Mr. Apps entered the Terrain Park. There were two additional signs alerting users to the dangers of the activity. Mr. Apps attempted a jump and was seriously injured. He sued Grouse Mountain for negligence and breach of contract and under the *Occupiers Liability Act* in the design, construction, maintenance and inspection of the jump.

The trial judge found that Mr. Apps should have known of the exclusion of liability for the mountain's own negligence, given his experience working at Whistler.

Mr. Apps appealed to the Court of Appeal. The Court had to consider whether:

- the judge erred in taking into account post-contract notice in determining whether Grouse Mountain had given reasonable notice of the exclusion of liability; and
- the judge applied the wrong test in dealing with Mr. Apps' past experience.

The Court found reasonable notice of the exclusion of liability could only be given before or at time of purchase. The exclusion of liability was in tiny print on the receipt and lift ticket and the mountain had not done anything to bring this onerous term to Mr. Apps' attention. Because of this, there was no basis for the judge relying on Mr. Apps' experience with snowboarding.

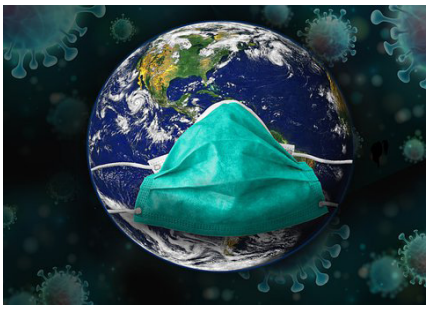
The Court allowed Mr. Apps to continue with his claim against Grouse Mountain.

Jessica Steingard

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

New at CPLEA

In this issue of LawNow, we are highlighting new and updated resources focused on legal issues amid the COVID-19 pandemic.



COVID-19 – Answers to your questions

This page provides information, links and answers to important questions on **COVID-19** for Albertans. It summarizes provincial and federal information about changes in the law and legal services as a result of the pandemic. Topics covered include:

- Court Hearings and Legal Proceedings
- Employment & Benefits
- Family Issues
- Government Service Updates
- Housing & Real Estate (Rentals, Utilities, Etc.)
- Legal Services
- Money Issues (Taxes, Mortgages, Loans & Student Loans)
- Public Health Orders
- Small Businesses, Entrepreneurs and Non-Profits
- States of Emergency
- Travel

This page will be **updated regularly**. But information is changing hourly! For the most up-to-date information, visit government websites.

Termination and Temporary Lay-offs FAQs

CPLEA's FAQs provide information for employees working in Alberta and covered under Alberta's *Employment Standards Code*. See all of our FAQs on Employment Standards.

More CPLEA publications on employment that may be of interest:

- You've Lost Your Job … Now What? (Post-employment Guide) (PDF)
- Employment Insurance (EI) and Job Loss (PDF)
- Things to Know When You've Lost Your Job (PDF)

LAWS FOR
LANDLORDS
AND TENANTS
IN ALBERTA

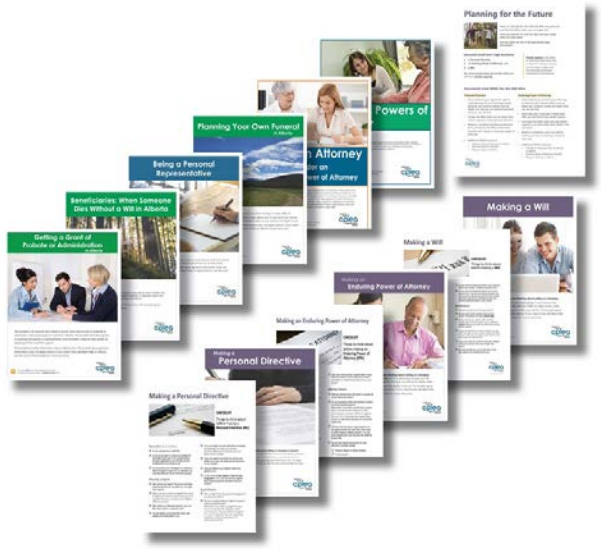
COVID-19 information for landlords, tenants, and condo owners and board members

Check out CPLEA's two new resource pages offering important information for **landlords and tenants** and **condominium buyers**, **owners and board members** in Alberta during the COVID-19 pandemic.

Planning for the Future – Wills, Personal Directives and Powers of Attorney

It is a good idea for every adult to have these three documents. You never know when illness or an accident could render you incapable of managing your own affairs. In the absence of these documents, family will have to apply to the court for permission to manage your affairs. Check out CPLEA's series of resources on Planning for the Future.

For a complete list of resources for Albertans related to estate planning, visit LawCentral Alberta.



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

Lesley Conley

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

Columns

Criminal

Melody Izadi

Will the COVID-19 Crisis Keep Us Modern?

How this global pandemic has changed things for the better in our criminal justice system

The world is experiencing a pandemic that has been unprecedented in most of our lifetimes. While all of us have been affected individually, the criminal justice system has not been exempt from the effects of COVID-19. It too, serving as a primary and essential service in our country and in our provinces, has been forced to adapt to the rapid shift in limiting public gatherings and human interactions.

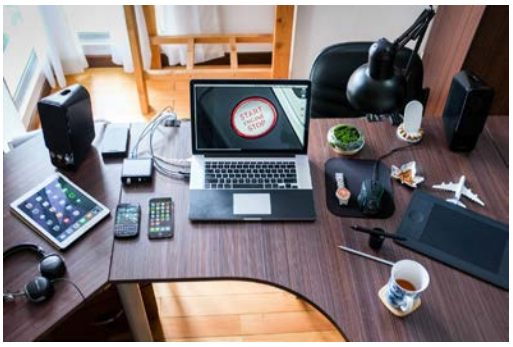


Photo from Pexels

Like a busy market bazaar, on any given day pre-COVID-19, criminal courthouses were buzzing. A plethora of people would be running to and fro, emotions high, or waiting endlessly for a matter to commence. People were everywhere. Now, courthouses are closed to members of the public. While it was a confusing and abrupt change for all of its regular participants, our criminal courts have been forced to adapt to a sleeker and more efficient version of itself. Hearings and pre-trials are now done via telephone or video conference. Materials and motions are being filed with the court electronically.

The COVID-19 pandemic has forced us to be more efficient in our approach, more flexible. We are no longer averse to keeping criminal matters moving through the system via telephone or other electronic mediums. We are no longer required to print hundreds of pages to serve materials on the court. Justice has been updated. But, it took the criminal justice system a terrifying global pandemic to become more streamlined and modern in its practice. As one of the most ancient processes in our civilization, it's not hard to see why.

This newer and sleeker justice machine is of course categorized as a temporary response to the global pandemic. But whispers around tele-court hallways seem to suggest that there is a push coming from inside the belly of the beast to advocate for this streamlined and efficient new approach to criminal law to become permanent. There was once a time when a lawyer could only be in one place at one time. Now, we can call into multiple courthouses in one day bringing closure to many criminal matters at a much faster pace (while saving trees in the process).

What we ultimately do lose though, is what we are all missing right now as a collective: that human-to-human interaction that cannot be replaced with even the best video conference applications. We cannot deny as a species that eye contact, body language and social cues speak volumes louder than even a great Zoom background selection.

One can only hope that at least some of the processes implemented will remain as shiny artifacts from the COVID-19 pandemic. Combining these new practices with the invaluable showcase of intelligence,

showmanship and candour that any given day in court can bring will surely be a magnificent and harmonious blend of our justice system's greatest strengths pre and post pandemic.

Now, we can call into multiple courthouses in one day bringing closure to many criminal matters at a much faster pace (while saving trees in the process).

And to think: a little bat somewhere in China is responsible for potentially changing the Canadian criminal justice system for the better.

Melody Izadi

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

Employment

Jessica Steingard

COVID-19: Temporary changes to Alberta's *Employment Standards Code*

COVID-19 has impacted every aspect of people's lives in Alberta, across Canada and around the world. Governments have scrambled to approve stimulus packages, update public health orders, and change laws to respond to this new disease.

Alberta declared a public health emergency under the *Public Health Act* on March 17, 2020. Doing so gives the government powers to temporarily suspend or change any part of a law through a Ministerial Order. The government posts all of Alberta's public health orders and Ministerial Orders online.

Ministerial Order 18/2020 dated April 6, 2020 makes temporary changes to Alberta's *Employment Standards Code*. The *Employment Standards Code* and the Ministerial Order apply to most workers in Alberta. For more information about who is not covered, see CPLEA's Employment FAQs.

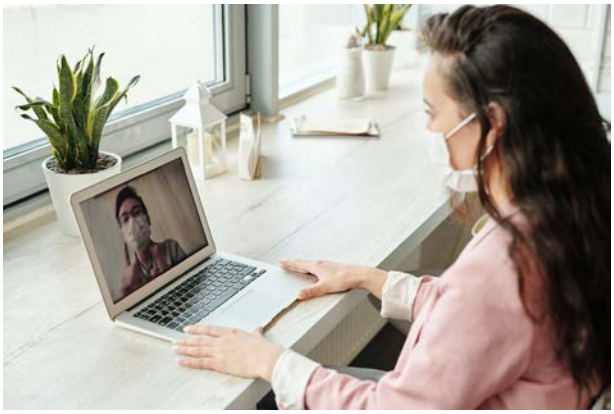


Photo from Pexels

What are the temporary changes to the Code?

Ministerial Order 18/2020 introduced several temporary changes:

1. **Notice of Schedule Changes**

Employers are usually supposed to give employees at least 24 hours' written notice of a shift change. Right now, employers only have to give written notice as soon as possible in the circumstances. The requirement for 8 hours of rest between shifts has not changed.

Under an Averaging Agreement, an employee can make a temporary change to the employer's schedule by giving them at least 2 weeks' notice before the change comes into effect. Right now, employers only have to give employees notice as soon as possible in the circumstances.

These changes will allow employers and employees to respond quickly to staffing needs.

2. **Job-Protected Unpaid Leaves**

Normally, an employee is entitled to up to 5 days of unpaid leave to deal with their own health or to meet their responsibilities in relation to a family member. Employees usually must be employed for 90 days to qualify for this leave.

... the government has temporarily changed the lay-off period to 120 consecutive days.

Right now, an employee is entitled to unpaid leave for the period of time directed by Dr. Hinshaw to allow the employee to meet their responsibilities in relation to a family member who is under quarantine as well as any of their children affected by school or daycare closures. An employee does not need to have worked for the same company for 90 days to qualify for this leave. As well, an employee must give their employer documentation to prove the leave at a time when it is reasonable to do so. Employees are not required to provide a medical certificate.

3. **Group Terminations**

Normally, an employer must notify the Minister of Labour and Immigration if the employer intends to terminate 50 or more employees at a single location within a 4-week period. The amount of notice (in weeks) depends on how many employees the employer is terminating.

Right now, employers are required to give the Minister notice of group terminations as soon as possible in the circumstances. The notice must include the number of employees the employer is terminating and the effective date of the terminations. However, employers are still required to provide employees with appropriate notice or pay in lieu of notice of the termination.

For more information on notice or pay in lieu of notice of termination, see CPLEA's FAQs on termination.

4. **Temporary Lay-offs**

Before COVID-19, employers could lay off an employee for a total of 60 days within a 120-day period. This means your employer could give you a lay-off notice and you could not work for up to 60 days in a 120-day period but still have a job.

Because of COVID-19, it is likely that many employees will not work at all in a 120-day period. Accordingly, the government has temporarily changed the lay-off period to 120 consecutive days. This means, your employer can lay you off for 120 consecutive days and recall you back to work at the end of that period. If your employer recalls you, you must return to the same job – it's not a termination and re-hire. If your employer does not recall you, then your employment has ended and you are entitled to the appropriate notice or pay in lieu of notice.

For more information on temporary lay-offs, see CPLEA's FAQs on lay-off.

5. **Applications for Variances or Exceptions to the Code**

The Code sets out a process for employers, a group of employers or employer associations to apply to the government (Director or Minister) to issue a variance or exemptions from certain provisions of the Code. Under s. 74 of the Code, an employer could apply to the Director for variances or exemption from certain provisions. (Those provisions are set out in s. 43.86 of the Regulations.) Under s. 74.1, groups of employers or employer associations could apply to the Minister for variances or exemptions from any provisions under the Code or Regulations.

Ministerial Order 18/2020 dated April 6, 2020 makes temporary changes to Alberta's Employment Standards Code.

Now, employers, groups of employers and employer associations can all apply under ss. 74 and 74.1. As well, s. 43.86 of the Regulation has been changed. And the factors the Director or Minister must consider do not

apply to employers, groups of employers or employer associations impacted by COVID-19.

How long will these changes last?

Ministerial Order 18/2020 remains in effect until August 14, 2020 unless one of the following happens first:

- 60 days after the Order is cancelled by the Lieutenant Governor (if she cancels it before June 15, 2020);
- the Minister terminates the Order because it is no longer in the public interest; or
- the Lieutenant Governor cancels the Order.

Once the Ministerial Order ends, the changes described above will be reversed, and the original provisions of the Code and Regulations will apply.

For more information about changes to the law due to COVID-19, see CPLEA's COVID-19 page.

Jessica Steingard

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

Famous Cases

Peter Bowal and
Dustin Bodnar

The Constitutional Right to Marijuana in Canada: *R v Parker*

> *If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person …*
>
> *R v Parker, [2000] OJ No 2787 (ONCA) at para 106*

Canada first criminalized the possession, use and trade of marijuana in the *Narcotics Drug Act* of 1923. It was added, almost incidentally, to the list of prohibited drugs. In the late-night session at the House of Commons on April 23, 1923, with the *Narcotics Drug Act* under discussion, legislators asked about additions to the list. One Member of Parliament – referring to marijuana – casually replied: "there is a new drug in the schedule."

Photo from Pexels

And thus was launched what would be for close to the next century the Canadian 'War on Drugs'. Marijuana use increased in the 1960s, along with its criminalization and enforcement. The maximum penalties were seven years' imprisonment for simple possession and life imprisonment for trafficking. From 1965 to 1975, some 300,000 marijuana possession charges were laid against predominantly young Canadians. Enforcement costs soared to $400 million annually.

The popular *Reefer Madness* movie added to the rhetoric around the drug's evils and stigmatization. Meanwhile, the counter-culture espoused marijuana (known by several different terms in street slang) as a drug of choice. Opium dens and back-alley heroin gave way to the hippy happy, laid-back, open lifestyle and occasional peaceful protest.

This change of social attitude eventually supported the argument that marijuana was even a *necessity of life*. A decade after this shift in 2000, it was no longer career ending to admit that one had inhaled. The next shoe to drop would be complete liberalization of marijuana in 2018. Canada emerged as the first federal G7 and G20 nation – the second country ever – to legalize the cultivation and consumption of cannabis and its by-products. Canadian social policy and attitudes to the plant had come full circle after nearly a century.

This article is about *R v Parker*, the leading medical marijuana case that represented the first legal crack to bring down the prohibition-era wall.

Facts

Terrance Parker was epileptic. Two lobectomies in his teens failed to control his seizures. He claimed to have suffered side effects from prescription drugs, psychological trauma and depression.

In the late 1960s, Parker tried marijuana recreationally. By 1974, he was a regular user

who found that it reduced the frequency and intensity of his seizures. His physician eventually prescribed marijuana in conjunction with his other prescription drugs, although it was not legally available in Canada.

Parker turned to street dealers but their pot was not effective. So he grew his own illegal plants. On July 18, 1996, Ontario police entered Parker's home and seized his 71 marijuana plants. At age 44, he was charged with possessing and cultivating marijuana under the then-*Narcotic Control Act*. Parker had been supplying marijuana to other epileptics. He refused to stop cultivating even after these charges. Police raided his residence again 14 months later and seized more plants. He received fresh charges under the new *Controlled Drugs and Substances Act*.

Canada emerged as the first federal G7 and G20 nation – the second country ever – to legalize the cultivation and consumption of cannabis and its by-products.

Trial

At trial, Parker asserted the defence of *necessity*. The judge agreed with him, saying (at para 28):

> *The seizures associated with Parker's epilepsy constitute a serious threat to his health and safety. He has been hospitalized over 100 times due to injuries sustained from seizures. He has been robbed while unconscious and arrested as being drunk, although he does not drink alcohol.*

Parker experienced fewer seizures when he consumed marijuana. The trial judge found Parker had a legal excuse for growing and using marijuana, exempted him from the law and stayed the charges. The judge even ordered the plants returned to him (silly because, if they could be located, these plants were useless by then).

Appeal

The Crown appealed to the Ontario Court of Appeal. Section 7 of the *Charter* states "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." You may remember the *Morgentaler* decision from 1988. In that case, male physicians successfully argued that charges they were facing interfered with women's "security of the person" when their access to abortions was restricted in any way. Likewise, here the Ontario Court of Appeal said (at para 80):

> *[I]t is open to Parker to challenge the validity of the marijuana prohibition not only on the basis that it infringes his s. 7 rights because of his particular illness, but that it also infringes the rights of others suffering other illnesses.*

The Court of Appeal struck down the marijuana laws because they "force[d] Parker to choose between commission of a crime to obtain effective medical treatment and inadequate treatment" (para 107). The criminalization of marijuana infringed the security of his person. The Court declared the marijuana crimes invalid in respect of him and other medical users.

Canada first criminalized the possession, use and trade of marijuana in the* Narcotics Drug Act *of 1923.

Instead of appealing this decision, the federal government introduced a medical marijuana regulatory scheme as regulations to the

Controlled Drugs and Substances Act. The *Marihuana Medical Access Regulations* (MMAR) has, since 2001, permitted many people who met stipulated medical criteria to lawfully use and possess marijuana. These users were exempted from the law.

The federal government failed several times in 2003 and 2006 to decriminalize marijuana. It would not happen until 2018.

Conclusion

The Ontario Court of Appeal significantly over-reached in this decision. It stated at the beginning (at para 2): "it has been known for centuries that, in addition to its intoxicating or psychoactive effect, marijuana has medicinal value." However, even up to today, marijuana's medical benefits and dosages have never been scientifically established.

All four judges in *Parker* presumed to know more about medicine than Health Canada. Even if one user claims a benefit, much more rigorous scientific proof is needed to approve marijuana as a drug therapy. This has never happened.

Ultimately, this case is a triumph of human rights and ideology over science and medicine.

Peter Bowal

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

Dustin Bodnar

Dustin Bodnar graduated with a BComm from the Haskayne School of Business at the University of Calgary in 2019.

Housing

Judy Feng

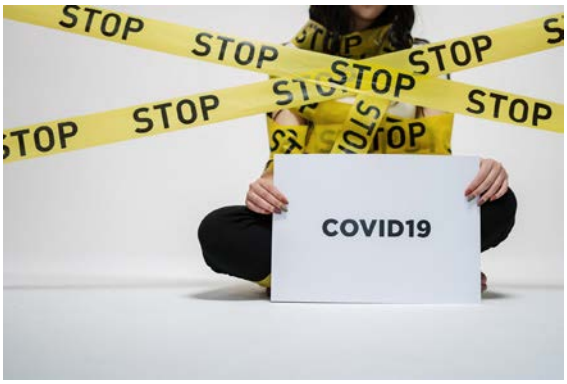


Photo from Pexels

COVID-19 in Alberta: A legislative overview of tenancy-related changes

Since declaring a public health emergency in Alberta on March 17, 2020, the government has made a flurry of announcements and legislative amendments in response to the COVID-19 pandemic. The government has implemented these changes through legislation and Ministerial Orders that majorly impact both landlords and tenants during this pandemic.

Unlike legislation that goes through a legislative process (including debate), Ministerial Orders do not require approval of the Cabinet. Orders can modify legislation. And like legislation, Orders have the force of law. A number of Ministerial Orders are currently in effect and introduce new protections for renters under the *Residential Tenancies Act* and *Mobile Home Sites Tenancies Act* during the state of public health emergency. Most of these orders are in effect as of April 1, 2020.

Ministerial Orders

No fees or penalties for late payment of rent or non-payment of rent

Ministerial Order no. SA: 003/2020 (Service Alberta) makes the *Late Payment Fees and Penalties Regulation*. Under the Regulation, landlords cannot charge a fee or penalty for late payments of rent or nonpayment of rent between April 1, 2020 and June 30, 2020. This applies even if a provision in a residential tenancy agreement says otherwise. The Regulation applies to every tenancy agreement in effect on April 1, 2020 (the coming in force of the Regulation) and those entered into between April 1, 2020 and June 30, 2020 under the *Residential Tenancies Act*.

Similarly, **Ministerial order no. SA: 004/2020 (Service Alberta)** modifies the *Mobile Home Sites Tenancies Act* to waive late fees from April 1, 2020 to June 30, 2020. This applies even if a provision in a mobile home site tenancy agreement says otherwise. The late fee waiver applies to every mobile home site tenancy agreement in effect on April 1, 2020 and those entered into between April 1, 2020 and June 30, 2020.

Requirement for payment plans

Ministerial order no. SA: 005/2020 (Service Alberta) changes both the *Residential Tenancies Act* and the *Mobile Home Sites Tenancies Act* to establish payment plans. If a tenant breaches a tenancy agreement by not paying rent, arrears of rent or utilities, a landlord cannot end the tenancy without:

- making reasonable efforts to enter into a meaningful payment plan OR

- entering into a payment plan and then the tenant not following such plan.

Similarly, before making an application for certain remedies (for example, recovery of rent arrears for unpaid rent or termination of a tenancy), landlords must demonstrate the tenant agreed to a payment plan but failed to follow it. Alternatively, landlords must demonstrate that they made reasonable efforts to enter into a meaningful payment plan before making an application.

No rent increases

Ministerial order no. SA: 006/2020 (Service Alberta) modifies the *Residential Tenancies Act* and *Mobile Home Sites Tenancies Act* to address rent increases. Effective March 27, 2020 (the date of the Order), any new rental rate increases or pre-existing scheduled rental rate increases are suspended for the term of the Order. This Order also applies to fixed term tenancies that have ended and where the landlord and tenant have or will enter into a new tenancy agreement (for the same premises but for an increased amount of rent). This means that the rental payment stated in the expired or terminated tenancy continues for the duration of the Order and replaces the amount of rent payable under the new agreement. Any rent increases will come into effect when the Order ends.

The* Consumer Protection Act *now allows customers to extend utility payments.

No evictions for failing to pay rent, utilities or both in April 2020

Ministerial order no. 20/2020 (Justice and Solicitor General) suspends the authority of civil enforcement agencies and bailiffs under the *Civil Enforcement Act* and the *Alberta Rules of Court* to evict a person for failing to pay rent, utilities or both. This suspension applies to orders issued by the Residential Tenancy Dispute Resolution Service (RTDRS), the Provincial Court and the Court of Queen's Bench. **This Order is only good until April 30, 2020.**

Utility payment deferrals, landlord restrictions on entry of premises and more

Under **Ministerial order no. SA: 009/2020 (Service Alberta)**, Service Alberta made a number of changes to legislation it administers, including the *Consumer Protection Act*, *Residential Tenancies Act* and *Condominium Property Act*. Some of the highlights are:

- The *Consumer Protection Act* now allows customers to extend utility payments. Between March 17 and June 18, 2020, it is an unfair practice for any person (including suppliers, landlords or condominium corporations) to:
  - refuse to defer a sub metering customer's utility payments when the customer requests it AND
  - disconnect that customer from energy supply for non-payment, including any non-payment of arrears that accrued before March 17.
- The *Residential Tenancies Act* is modified so that landlords cannot enter a rental unit if the tenant, potential purchaser or landlord is self-isolating or in quarantine because they are showing COVID-19 symptoms or have tested positive for COVID-19. However, a landlord in self-isolation or in quarantine can name an agent to enter the premises on their behalf, as long as the agent gives proper notice under the *Residential Tenancies Act*.
- A tenant dispute resolution officer with RTDRS must make their order no later than

60 days after the proceedings conclude. This is a change from 30 days in the *Residential Tenancies Dispute Resolution Service Regulation*.

- Most of the changes to the *Condominium Property Act* have to do with a condominium corporation's governance and gives condominium corporations flexibility in complying with the legislation during the pandemic. For example, the changes suspend certain meeting requirements but do not prevent virtual meetings (e.g., meeting to elect first board, AGMs, etc.). For more information on changes to condominium legislation during the pandemic, go to our COVID-19: Tips for Condominiums in Alberta webpage.

Legislation Changes

Bill 11 and new provisions under the *Residential Tenancies Act* and *Mobile Home Sites Tenancies Act*

The first reading of *Bill 11: Tenancies Statutes (Emergency Provisions) Amendment Act, 2020* was on March 31, 2020, and it swiftly received Royal Assent on April 2, 2020. Bill 11 amends both the *Residential Tenancies Act* and the *Mobile Home Sites Tenancies Act*, while validating the *Late Payment Fees and Penalties Regulation*, to prohibit rent increases and late fees during a state of public emergency.

... Bill 11 only addresses late fees and rent increase protections. It does not deal with other aspects of the tenancy protection plans announced by the province.

One of the changes confirms that landlords cannot increase the amount of rent owed under an existing tenancy agreement until after the emergency ends (June 30, 2020 or another date decided by government) where the:

- landlord has given a tenant written notice of the rent increase AND
- the notice period or the Regulation is to elapse between March 27, 2020 and the emergency end date.

Another change affirms that landlords cannot charge fees or penalties for late payment of rent or non-payment of rent between April 1, 2020 and the emergency end date. This change applies to every tenancy agreement in effect in Alberta on April 1, 2020 and every tenancy agreement entered into in Alberta between April 1, 2020 and the end date.

Any provisions in the tenancy agreement are void if they are contrary to the prohibition of rent increases, fees and penalties during the public health emergency.

Interestingly, Bill 11 only addresses late fees and rent increase protections. It does not deal with other aspects of the tenancy protection plans announced by the province. For example, the Bill does not address payment plans and protection from eviction for the month of April for non-payment of rent. Minister (of Service Alberta) Nate Glubish's rationale is noted in the Hansard pages upon the Bill's 3rd reading: "[T]hat is dealt with through the Ministerial Orders and only needs to happen for the duration of the public health crisis. It doesn't need that protection at the expiry of the crisis, so that's why that is not included in this bill."

Nevertheless, the wording and legislative intent of the Bill affirms that particular protections – such as prohibition of rent

increases, fees and penalties during the state of public health emergency – will still be in effect retroactively beyond the expiry of the public health emergency.

Conclusion

We have heard from both tenants and landlords in Alberta in the past several weeks of the impact of COVID-19. Many are facing challenges, some of which are not addressed by the above Ministerial Orders or legislation. For one, tenants that don't fall under the *Residential Tenancies Act* or *Mobile Home Sites Tenancies Act* miss out on the tenancy protections put in place during the pandemic.

... Ministerial Orders have the force of law—even if they are only in place for a short period.

Another concern among tenants is uncertainty of what happens after the end of April— more specifically, when the Ministerial Order for no evictions for failing to pay rent, utilities or both in April 2020 expires. While (in theory under Ministerial Order) landlords must work together with tenants to make payment plans (or at least make reasonable efforts to do so) before a landlord can end a tenancy during the pandemic, there's questions about whether this is indeed happening in practice. Here at CPLEA, we have been receiving complaints from tenants that some landlords are not cooperating with them in making payment plans. We don't know if this is a widespread issue.

We have also heard from landlords about their concerns in making their own mortgage payments. The possibility of a prolonged pandemic raises issues about long-term loss of income on their properties. Despite any short-term relief offered by their banks through mortgage deferrals (remember, deferrals just mean paying later), their mortgages remain. Landlords are still on the hook for principal and, in most cases, accrued interest during the deferral period. Some landlords have inquired about whether there is any provincial or federal loan forgiveness for residential property owners similar to the Canada Emergency Commercial Rent Assistance (CECRA) program, which provides forgivable loans to qualifying commercial property owners. Hint: the answer is no as of the writing of this article.

What we can conclude from the flurry of Ministerial Orders and legislative changes over the past several weeks is that there has been swift action in addressing tenancy challenges during the pandemic. Bill 11 makes permanent some rental protections first introduced under Ministerial Orders (such as prohibition of rent increases and fees/penalties during a public health emergency), but not others. However, one important thing to emphasize during this time is that Ministerial Orders have the force of law—even if they are only in place for a short period. Only time will tell if further legislation or Ministerial Orders will address emerging tenancy issues during this pandemic.

For more information on tenancy and condominium-related legislative changes during the COVID-19 pandemic, see the following CPLEA COVID-19 resources:

- Canadian Legal FAQs: COVID-19
- COVID-19: Information for Alberta Landlords and Tenants
- COVID-19: Tips for Condominiums in Alberta

Judy Feng

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Human Rights

Linda McKay-Panos

COVID-19: Human rights implications for Canadians held in remand, prisons and jails

Photo from Pixabay

We find ourselves in unprecedented times. As we scramble to "socially distance" and address the economic consequences of the global pandemic, inmates in Canadian institutions are particularly vulnerable to adverse effects by virtue of the conditions where they are held. On March 30, 2020, the Canadian Government announced that two inmates in the Port-Cartier Institution of Quebec tested positive for COVID-19. Nine employees of the institution also tested positive.

There are significant numbers of people held in remand or custody. The majority of people held in remand have not been convicted of a crime and are awaiting trial. In 2017-2018 in Canada, there were 38,786 adults in provincial/territorial or federal custody per day, 792 youth in custody on average per day, and about 50% more adults (14,812) in remand that were in provincial/territorial sentenced custody (9,543).

Inmates held in close contact with each other who cannot "socially distance" or who do not have adequate access to hand sanitizer, masks or even soap are likely to become infected and could affect the staff as well. There are currently 700 federal inmates who are over 65 years old; these individuals are at very high risk.

While some people may not be particularly sympathetic, prisoners do have rights to adequate health care, reflected in both international law and in Canada's *Corrections and Conditional Release Act*, (CCRA). The *United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)* provide:

> *Rule 24*
>
> 1. *The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.*
> 2. *Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.*

While these rules are not legally enforceable, they set the standard for treatment of prisoners that is accepted by countries across the world. The CCRA *is* legally enforceable in Canada. It provides:

> ***86*** *(1) The Service shall provide every inmate with*
> *(a) essential health care; and*
> *(b) reasonable access to non-essential health care.*

(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.

Inmates held in close contact with each other who cannot "socially distance" or who do not have adequate access to hand sanitizer, masks or even soap are likely to become infected and could affect the staff as well.

CRC *Commissioner's Directive 800* defines essential health care as:

> ***Health services:*** *physical and mental health services, which include health promotion, disease prevention, health maintenance, patient education, diagnosis and treatment of illnesses, in accordance with the National Essential Health Services Framework.*

It would seem that access to effective measures to address COVID-19 would be part of "essential health care".

There have been calls by various justice-related groups for prisons and jails to release non-violent inmates, those who are medically vulnerable or those who have less than 90 days left in their sentences to stop the spread of the coronavirus. Some inmates are considering legal action. In Prince Albert, the inmate wellness committee hired Ottawa lawyer Michael Spratt to explore a possible legal challenge on how the government and prisons are handling COVID-19.

Some provinces have taken measures such as releasing some inmates (e.g., those who were serving on weekends) or creating separate spaces for those who become sick. However, those who are still in institutions face more isolation, dealing with no visitors, no recreation or gym time—all of which can result in mental health effects, such as depression or even suicide.

Hopefully, all possible measures will be taken to address the inmate population before some of these dire predictions come to fruition.

Linda McKay-Panos

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Law & Literature

Rob Normey

1919 by John Dos Passos: A requiem for the defeated and outcasts

I have always intended to work my way through all three volumes of Dos Passos' U.S.A. trilogy, published between 1930 and 1936 and clocking in at 1,300 pages. During today's strange pandemic times, I have taken advantage of the opportunity to do so. And I can tell you that, while at times it was a steep climb and rocky road, I have reached the final ascent. It is truly a unique trio of novels. U.S.A. is a demanding modernist masterpiece which dispenses with any notion of a conventional plot. Instead, it operates by way of a pattern that illustrates the deepest impulses of the American experience over the first three decades of the twentieth century. It ends with the series of hammer blows that announce the onset of the Great Depression.

1919 is also the year that the worldwide pandemic known as the Spanish flu hit its peak.

Dos Passos employs a truly revolutionary prose style and juxtaposes four distinct types of writing in the narrative. These styles serve to operate in a conveyor belt manner to capture the onrush of the new technologically-advanced society that comes into being in these pivotal years. First, the reader must attempt to grasp and make sense of Newsreel sections. These exemplify the rapidly changing circumstances that his generally hapless characters must attempt to adapt to despite the disadvantages of their circumstances – they are not part of the class of wealth and power that will dominate. This is followed by the brilliant short Biographies of key individuals who stand for either the best, or the worst, of the era. We are then funnelled toward the fictional narrative of the novel. We follow the lives and the temptations and challenges that threaten to sweep away 12 different characters living in various parts of the nation (from one end of the 42nd parallel to the other, as it were). The fourth, very different prose style is the "Camera Eye", which employs impressionistic – and at times poetic accounts – of the world that the diverse characters experience. The subjective viewpoint is Dos Passos' – one of frequently acute observations of the situations in a much richer prose style than the flat, purposeful and naturalistic style used to describe the fictional characters.

The three novels making up the trilogy are: *The 42nd Parallel*, *1919*, and *The Big Money*. I will focus primarily on the middle volume, 1919. In The Guardian's survey of the 100 best novels, critic Robert McCrum lists 1919 as the outstanding volume of U.S.A. and number 58 on his (necessarily subjective) list.

1919 introduces us to several characters who in one way or another are deeply affected by President Wilson's decision in 1917 to enter the war. This declaration contradicted his election pledge to keep the country out of the murderous conflict. We encounter supporters of the democratic socialist leader, Eugene Debs, who leads a party dedicated to keeping working men free of the sacrifices incumbent on participation in warfare. Dos Passos gives Debs pride of place in the trilogy by making him the very first biographical subject – "Lover of Mankind". The sketch ends with Deb's stirring words at his trial for defending the

right of fellow socialists to protest against the war: "While there is a lower class I am of it, while there is a criminal class I am of it, while there is a soul in prison I am not free."

Dos Passos employs a truly revolutionary prose style and juxtaposes four distinct types of writing in the narrative.

In *1919*, we witness one character's initiation into the dangerous world of labour activism. Ben Compton is an idealistic Jewish student who overcomes his timidity. When confronted with the desperate conditions of workers, he finds his calling as a brilliant speaker, condemning the injustices of predatory capitalism. Like Debs, though, Ben cannot escape the punitive spirit of the Wilson administration. He claims to be a conscientious objector but is rejected with disdain. All that stands between Ben and a lengthy prison term is his friend, the radical lawyer and defender of civil liberties of the most vulnerable, Morris Stein. Ben will become yet another lonely rebel in the course of the narrative, his dream of studying for the law under Stein shattered by the effects of wartime fervour.

1919 is also the year that the worldwide pandemic known as the Spanish flu hit its peak. One of the humanitarian doctors who toil in relative anonymity and for little reward is Doc French. His exhausting schedule will cost him dearly. In the final volume of the trilogy, Doc French's daughter Mary will take the torch from her father and become another of the tale's fighters for social justice. Mary will emerge as the novel's most sympathetic character. She will find her way to Chicago to work at the legendary Hull House, caring for vulnerable down and outers.

U.S.A. possesses wide scope and is a unique combination of tragedy (best captured in some of the most brilliant of the Biographies) and satire (the fictional stories juxtaposed with the other elements). Dos Passos ties it together with his commitment to his personal conception of the history of his country through the first three decades of the twentieth century. The second Biography perhaps best captures the sense of tragic loss and missed chances for the country. It is of Randolph Bourne, the radical thinker, musician and educational theorist. He was the leading spokesman for the youthful members of the Progressive movement that had such high hopes for the building of a humane society in the years immediately prior to the war.

1919 introduces us to several characters who in one way or another are deeply affected by President Wilson's decision in 1917 to enter the war.

Bourne overcame gigantic handicaps in his short life – he was deformed at birth by misused forceps and later developed tuberculosis of the spine. His articles were incendiary in their day. "The Handicapped – by One of Them" is now considered a foundational work in disability studies. The article that surely inspired Dos Passos while composing *1919* is "War is the Health of the State." Bourne was prophetic in fearing the build-up of a large military, and indeed the military industrial complex has developed into a monster that has dominated decision-making in Washington over many decades. Dos Passos, in a prose poem, refers to Bourne as a "little sparrow like man" who nonetheless overcomes his constant pain to put a pebble in his sling and achieve a direct hit on Goliath through his brilliant writing.

Bourne was another socialist who was harried and followed by the secret service in his last year before succumbing to the Spanish Flu. At his end, he was saddened by the repressive practices of the Wilson administration. We are

told in the novel though that this prophet-without-honour retained his capacity for joy to the end. Although suffering with pneumonia, a friend brought him an eggnog and he kept exclaiming: "Look at the yellow, it's beautiful."

The author imagines Bourne in *1919* to be hopping along the old brick and brownstone streets of New York, a ghost in his famous black cape. For me, Randolph Bourne's ghost echoes through the pages of the trilogy. It constitutes a prophetic warning and vision of an organic community based on humane values that are distinctly lacking in the fragmented and mechanical world of this haunted novel.

While *1919* is a novel that certainly conveys the pessimistic worldview of the author, nonetheless there is a certain nobility in defeat that merits our attention. The diligent reader who reaches the end of the novel will encounter the brilliant prose poem "the Body of an American". That final section doesn't evince faith in the ability of Dos Passos' characters to avert disaster, but it is a fighting faith in the power of art to strike a meaningful chord.

Rob Normey

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Not-for-Profit

Peter Broder

The Pandemic, Charities and Volunteers

As I write this, the coronavirus pandemic is shining an unexpected spotlight on charities and non-profit organizations. Canada is reputed to have – in economic terms – one of the largest and most dynamic voluntary sectors in the world. It is estimated to account for more than two million jobs and to contribute tens of billions of dollars to Canada's Gross National Product. Volunteers are estimated to provide almost two billion hours of time annually – the equivalent of about two million full-time jobs.

But the frontline efforts needed to deal with the fallout from COVID-19 remind us that the sector's contribution to the country's quality of life far exceeds the raw economic numbers.

The pandemic and the accompanying economic disruption have thrown into sharp relief those sector groups that serve and support vulnerable or disadvantaged Canadians. Both federal and provincial initiatives have been put in place to bolster the resources these organizations have to meet the needs of the individuals and communities with which they work. That's the good news.

Another positive note has been the inclusion of voluntary sector groups in most government relief initiatives. Eligibility for these programs was opened to charities and non-profit organizations having had to temporarily shutter operations or suffering economic hardship as a result of "social distancing".

These and other responses to the crisis were again a reminder, however, of the blind spots

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and challenges governments have in dealing with voluntary sector organizations.

Ironically, as was noted by the Prime Minister, some low-wage employees in crucial jobs – both in the voluntary sector and in other parts of the economy – faced a dilemma of potentially being better off leaving their positions and accessing government relief payments. Adjustments to programs were made to try to correct this anomaly. More broadly, this incongruity is a reminder of the reliance by governments on using sector groups to economize on the cost of delivering services.

Among other shortcomings – sometimes more evident at the provincial level, as that is the point of delivery for many services – were governments proposing programs providing "80-cent dollars". This practice, which is not limited to pandemic emergency measures, entails funding client services or other program activities but not providing resources for infrastructure and other overhead needed to support frontline work. Given the fraught state of fundraising in the wake of the pandemic, weak demand for the products and services often sold by charities to generate revenue, and the collapse of investments, it is not clear where the difference is supposed to be made up.

… civic leaders at all levels encouraged and recognized the role that volunteers needed to play in providing services and fostering social cohesion given the disruption brought on by the pandemic.

Some governments actually saw windfalls because organizations had to shut down or scale back their operations and so lost access to subsidies or direct funding, since they were no longer able to meet targets for service provision or deliverables. Properly, such saving should have been put back into supports for sector groups and their work, but it is not clear this always happened.

Another aspect of voluntary groups, which governments have difficulty grappling with, is their reliance on volunteers. To be sure, in their public statements civic leaders at all levels encouraged and recognized the role that volunteers needed to play in providing services and fostering social cohesion given the disruption brought on by the pandemic. At the same time, it was widely acknowledged that social distancing curtailed the use of volunteers in many organizations or required new procedures to ensure that people were kept safe when they did offer up their time and skills.

The more efficient use of resources stemming from the availability of volunteers to charities and non-profit organizations is often taken for granted. And, though government were in many cases prepared to prop up voluntary sector groups with financial support, there wasn't a quick or simple policy solution to organizations losing or having to limit their access to this valuable resource.

That said, the recent Report of the Senate Special Committee on the Charitable Sector recommended a series of measures to reinvigorate volunteerism in Canada. These included:

- development of a national volunteer strategy;
- use of government funding mechanism to promote volunteer recruitment and retention;
- seeking ways to defray the cost of police checks on volunteers; and
- recognition programs for volunteers assisting in the delivery of government services.

One often-cited notion, a tax credit for volunteers, was not taken up. The Committee found that the idea was likely to be difficult to administer, particularly for small groups, and that there were doubts as to how effective it would be in increasing volunteering.

The pandemic and the accompanying economic disruption have thrown into sharp relief those sector groups that serve and support vulnerable or disadvantaged Canadians.

With the exception of a national volunteer strategy, it is not clear that any of the proposals would have made a significant difference to the problems that arose in the recent crisis.

Since volunteering is often undertaken – at least in part – for social reasons, it may even be that the pandemic, and the anticipated "new normal" that will come after it, will reduce people's appetite for volunteering.

On the flip side, there is some suggestion that the compelled isolation and collective purpose stemming from Canadians together

having faced a common threat could increase our sense of social cohesion. In that context, finding ways to encourage contributions that are outward looking might find a receptive audience. And with much travel and mass entertainment likely curtailed for the foreseeable future, there could be opportunity to alter how people spend their time away from work in the post-pandemic world.

So, a national volunteer strategy is a concept that may be timely.

Working out a national strategy could also help in coming to terms with some modern trends in volunteering. These include greater interest in "informal" volunteering among younger people. That is, a desire among individuals for more casual and time-limited roles with organizations, rather than on-going, regular positions. This trend to informality is no doubt egged on by technology, and that is another area that could be fruitfully explored in promoting contemporary volunteering.

As well, the strategy could grapple with concepts like mandatory volunteering – something that is now a component of the high school curricula of many provinces. It could examine the popularity of people "volunteering" as part of fundraising events and explore whether this type of activity could be better leveraged to benefit organizations.

Development and adoption of a national strategy could also be useful in slowing, or perhaps even reversing, recent stagnation in volunteering. As importantly, it could also help in expanding the current demographics of volunteering, which see religious affiliation and post-secondary education as key drivers of volunteerism.

None of that will solve the challenges faced by charities and non-profit organizations as a result of the coronavirus pandemic, but in fiscally straightened circumstances that government will undoubtedly face once the crisis has passed, it would be a worthwhile investment.

And, looking beyond economics, it could add immeasurably to the ability of charities and non-profit groups to enhance Canadians' quality of life.

Peter Broder

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Youth & the Law

Jessica Steingard

But Do I Have To Go To School?: Education laws in Alberta

COVID-19 has changed everything! One of the biggest changes for youth? School buildings are closed. But school has not been cancelled! It has simply moved online. So just in case you've forgotten how to 'do school', this column focuses on the laws about school in Alberta.

The *Education Act* sets out the law for all things school-related in Alberta. The following list covers some of the important provisions of the Act from a student's perspective:

Right to an Education

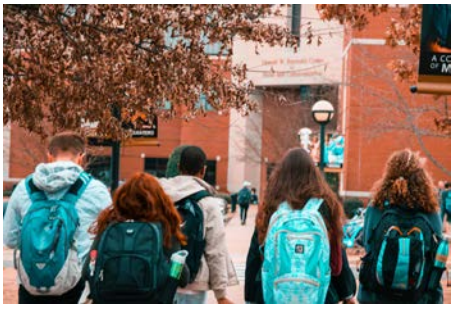
If you are aged 6 to 18 years and live in Alberta, you have a right to access education.

Attendance at School

If you are under the age of 16, you must attend school. If you do not, the school can take steps to make sure you attend. A judge can also make an order allowing someone from the school to enter into a place where you are and take you home or to school. There is an exception if you finish high school before you turn 16.

If you are continuously absent from school, the school can refer your case to the Attendance Board. The Attendance Board consists of members from across the province appointed by the Minister of Education. If your school refers you to the Attendance Board, one or three members will form a panel. They will host a meeting (called a case conference) with you, your parents and school staff. If your attendance issue cannot be resolved at the case conference, then the Attendance Board can schedule a formal hearing. At the hearing, the Attendance Board can:

- direct that you attend school
- direct that your parent send you to school
- direct that you take a certain education program
- report the matter to a child intervention worker
- impose a fine on your parent of $100 or less per day for each day you do not attend school. The total maximum amount your parent will have to pay is $1000.
- give any other direction it thinks is appropriate in the circumstances.



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French Education

Section 23 of the *Canadian Charter of Rights and Freedoms* says that French speakers in a province where French is the minority language spoken have a right to education in French. The same is true for English speakers in a province where English is the minority language spoken. This means that French speakers in Alberta have a right to a French education. Franco-Albertans have the right to manage and control French-language schools. Today, there are four French-language school boards in Alberta. French is also widely taught as a second language in schools across the province.

The Alberta government sets the curriculum for most Alberta students.

The Curriculum

The Alberta government sets the curriculum for most Alberta students. It contains certain learning objectives. However, depending on specific learning contexts, teachers get to decide how they teach the material, including which appropriate resources to use. So your friend in another class or school is learning the same things but maybe in different ways.

The Education Act *sets out the law for all things school-related in Alberta.*

Types of Schools

There are different types of schools in Alberta:

- Public schools are funded by the Alberta government.
- Private schools can be operated by anyone the Minister approves. Private schools are either accredited (students write provincial exams and are taught by Alberta certified teachers) or registered (instructors are not required to have Alberta teaching certificates). Private schools can charge tuition. Some accredited private schools receive funding from the Alberta government.
- Charter schools are operated by societies or charitable organizations and approved by the Minister of Education. They usually offer an alternative program.

The *Education Act* also provides for diverse and flexible learning opportunities, including alternative programs, early childhood services programs, off-campus education programs and continuing education programs. The Act also provides for home education (or homeschool) programs, which must follow certain guidelines.

Responsibilities of Students and Parents

Under the Act, you as a student have the following responsibilities:

- Attend school regularly and on-time
- Be ready to learn and engage in your education
- Conduct yourself in a way that contributes to a welcoming, caring, respectful and safe learning environment for everyone
- Respect the rights of others at school
- Not tolerate, not participate in and not be afraid to report bullying
- Follow the rules of the school and the school board
- Be accountable for your conduct to your teacher and other school staff
- Positively contribute to your school and community.

Under the Act, your parent has the following responsibilities:

- Act as the primary guide and decision-maker about your education
- Take an active role in your success, including helping you meet your responsibilities
- Make sure you attend school regularly
- Conduct themselves in a way that contributes to a welcoming, caring, respectful and safe learning environment
- Co-operate and work with school staff to help you learn

- Encourage and maintain collaborative, positive and respectful relationships with teachers, principals and other school staff
- Engage in your school community.

Student Discipline

If you misbehave at school, you can be suspended or expelled. Misbehaviour includes not complying with your responsibilities (see above) or distributing an intimate image of another person without their consent.

If you are under the age of 16, you must attend school.

Your teacher can suspend you from one class period. Your principal can suspend you from school, one or more class periods, from taking school transportation, or from any other school-related activity. If your principal suspends you, they will call your parents and provide an opportunity for your parents to meet with them to discuss the suspension. If you are 16 or older, you can be in the meeting too. A suspension cannot be longer than 5 school days.

You can be expelled from school for more serious misbehavior. First, the principal will suspend you. Then the principal will recommend to the school board that you be expelled. You and your parent may talk to the board about the proposed expulsion. Within 10 days of the start of your suspension, the board must make a decision to return you to school or to expel you.

Conclusion

A lot of rules are in place to regulate education in Alberta. Within the boundaries of these rules, schools can still adapt to the needs of their students. Ultimately, the school experience is a combination of everyone's efforts to create a positive learning environment. The more you get involved in different aspects of school, the more you may feel in control of your learning.

Jessica Steingard

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