LawNow
relating law to life in Canada

The "Super Powers"

Included in this Issue

Special Report

Home Work

Columns

Discrimination and Hate Crimes

Condominium Insurance Rules

and more

Volume 44-6 July/August 2020

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

Department of Justice Canada

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**

Centre for Public cplea Legal Education Alberta

About LawNow

The contents of this publication are intended as general legal information only. **It is not legal advice.**

Opinions and views expressed are those of the writers and do not necessarily reflect the opinion of the Legal Resource Centre of Alberta Ltd. and/or the Centre for Public Legal Education Alberta.

LawNow is published six times per year.

More information is available on our website at:
www.lawnow.org

Publisher Jeff Surtees

Editor/Legal Writer Jessica Steingard

Designer Jessica Nobert

Contents

In This Issue

During this global pandemic, governments in Canada have worked together to help keep us healthy and safe. This issue looks at "super powers" available to governments – that is, legislative authority governments can use in situations like the COVID-19 crisis. We also report on current legal issues around housing and homes.

Feature

The “Super Powers”

The *Emergencies Act*

Charles Davison

When I agreed to write about the *Emergencies Act*, I had no idea that I would end up doing so at a time when the federal government was actually considering resorting to this never-before-used legislation. But with the arrival and spread of COVID-19 in Canada, this Act is an option the government has considered. While its use seems unlikely at time of writing, by the time you read these words the Act may well be in effect in some or all of Canada. Coming events will determine this.

The *War Measures Act*

The *Emergencies Act* was enacted in 1988 as a replacement for the *War Measures Act* (*WMA*). The latter was passed in 1914 shortly after the beginning of the First World War. The *WMA* gave the federal government the ability to quickly respond to international developments as it saw fit. The Act was short – only three pages – but dramatic in its scope and impact. Upon the government declaring there was a "war, invasion or insurrection, real or apprehended", the Act gave it sweeping powers without the need to consult with or submit to the supervision of Parliament. Invocation of the *WMA* gave the federal government the power to:

- impose censorship on all publications and writings;
- arrest, detain, exclude and deport persons without the need for charges or trials;
- take over control of harbours and ports and all means of transportation;
- intervene in all trading of any sort.

Breaching a government order could result in imprisonment for up to 5 years.

The federal government has not yet used the* Emergencies Act *since it became law in 1988.

Probably the most controversial aspect of the use of the *WMA* during each world war was the government's internment of large groups of persons based solely upon their ethnicity and racial backgrounds. Thousands of persons were imprisoned in camps hundreds of miles from home, suffering not only the loss of their liberty but also properties, income and other aspects of their usual, peacetime lives. Fear of spies and saboteurs among these ethnic communities usually lay behind the government's actions. But the vast majority of those imprisoned bore no allegiance to any foreign power. Almost all were loyal Canadian citizens who had committed no crime though none were permitted to appear in court to contest the government's orders before being interned.

The "final straw" which ultimately led to the repeal and replacement of the *War Measures Act* was the only time it was invoked during peacetime: in October 1970 during the so-called "FLQ Crisis". After years of bombings in Quebec, the violent Front de Liberation du Quebec (FLQ) kidnapped the British Commissioner for Trade and the Quebec Minister of Labour. The FLQ then threatened more violent actions if its demands were not met. (James Cross, the Commissioner, was ultimately released while Pierre Laporte, the Quebec Minister, was murdered.) After appeals for assistance from the mayor of Montreal and the premier of Quebec, Prime Minster Pierre Trudeau and his cabinet invoked the *War Measures Act*, effective at 4 a.m. on October 16, 1970. Within Quebec, the

police quickly arrested hundreds of persons, including known nationalist and independence supporters (whether or not they supported the FLQ and its violent methods) as well as politicians and others whose views were considered to be "too far" towards the left of the political spectrum. Even outside of Quebec, police arrested persons who distributed the manifesto of the FLQ or literature explaining its aims and goals. Newspapers (usually student publications on university campuses across the country) which sought to cover the crisis or publish the manifesto were threatened with being shut down, and published editions were confiscated.

At the time, most Canadians supported the government's response to the FLQ's actions – including its use of the *WMA*. Over the years that followed and as more and more information came out, views changed. Ultimately, a consensus formed which tended to agree that use of this legislation was a significant overreaction to the criminal actions of a very few, isolated radicals and not the "apprehended insurrection" the government believed to be the case. Around the same time – also thanks to Pierre Trudeau – in 1982 Canadians adopted the *Charter of Rights and Freedoms*. The *Charter* placed more value on concepts such as democratic oversight and involvement of all forms of government action.

The *Emergencies Act*

NDP leader Tommy Douglas (one of the few who opposed use of the legislation) said the *War Measures Act* was "a sledgehammer [used to] crack a peanut". By contrast, the *Emergencies Act* is a far more cautious attempt to clothe the government with exceptional powers in certain carefully described situations. These powers are more consistent with the democratic values and practices Canadians value in the 21st century.

The Act describes four different emergency situations and carefully outlines the powers the federal government may exercise in each case. It is intended as a "last resort". The federal government may only invoke it when there is an urgent, critical "national emergency" which threatens the lives, health or safety of Canadians which is beyond the ability of a province to address, or which seriously threatens the ability of the Government of Canada to preserve our sovereignty, security and territory. There must be no other legal option to effectively deal with the crisis.

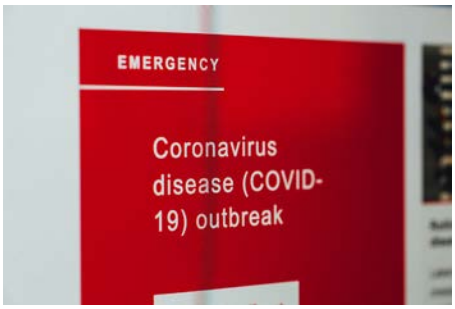


Photo from Pexels

Public Welfare Emergency

A Public Welfare Emergency could apply in response to the COVID-19 pandemic. It is defined as:

- the result of real or imminent fire, flood, drought or other natural occurrence;
- disease in humans, animals or plants; or
- an accident or pollution.

Declaration of a Public Welfare Emergency expires after 90 days, unless it is revoked earlier or continued as needed. Under the declaration, the government has significant powers, including:

- regulating or prohibiting travel to, from or within a particular area;
- evacuating persons and property;
- controlling distribution and use of property and essential services; and
- establishing emergency shelters and hospitals.

A Public Welfare Emergency could apply in response to the COVID-19 pandemic.

The powers of the government are limited to the area affected by the emergency and can only be exercised to supplement (not to impair) the ability of the province(s) involved to deal with the emergency. Public Welfare Emergencies are one of the two situations in which, prior to invoking the Act, the federal government is required to consult the affected province(s). If the situation only impacts one province, the Act may not be invoked unless that province confirms it is not able to deal with the situation alone.

Public Order Emergency

During a Public Order Emergency, similar provincial input is required. The Act describes this situation as one arising from:

- a threat to Canada's security, including acts of espionage and sabotage;
- "foreign influenced" activities which are detrimental to Canadian interests;
- terrorist activities; and
- efforts to covertly or by violence overthrow the constitutional structure of the country (though lawful advocacy, protests, demonstrations and similar activities are not included).

The declaration expires in 30 days but can also be revoked earlier or extended for longer. The federal government has powers to, among other things:

- regulate or prohibit public assemblies (where they are reasonably expected to lead to a breach of the peace);
- regulate travel to, from or within specified areas;
- secure and protect designated areas and places; and
- assume control of, and restore and maintain, public utilities and services.

Where the emergency is limited to a specified area, the powers of the government are only in effect in that zone. The federal government must seek provincial input before the emergency is declared. If more than one province is involved, the government may proceed without consultation if to do so would jeopardize the effectiveness of the actions it intends to take in response to the situation.

The Act describes four different emergency situations and carefully outlines the powers the federal government may exercise in each case.

International Emergency

An International Emergency involves Canada and one or more other countries and "acts of intimidation or coercion and the real or imminent use of serious force or violence." This declaration lasts 60 days, subject to earlier termination or its continuation as necessary. The powers of the government are similar to those in the other situations but also include specific powers relating to:

- defence contracts and supplies;
- regulating or prohibiting of travel outside of Canada by citizens or permanent residents;
- removing from Canada persons who are not citizens, permanent residents or certain other "protected persons";
- controlling international aspects of some financial activities within Canada; and

- authorizing the use of public funds for dealing with the situation even where Parliament has not given its approval.

However, the Act requires that none of the government's exceptional powers be used to censor, suppress or control "the publication or communication of any information regardless of its form or characteristics." In an International Emergency, provincial consultation is to take place as far as "it is appropriate and practical" to do so, but provincial agreement is not required. This is because in our federal system, the national government has sole responsibility for international and foreign affairs.

War Emergency

This is the most serious type of emergency addressed by the Act. A War Emergency involves "war or other armed conflict, real or imminent, which involves Canada or any of its allies…" This form of declaration expires after 120 days but can be revoked before that time or extended and renewed. The special powers of the government under such a declaration are almost without limit: it may "make such orders or regulations as … [it] believes, on reasonable grounds, are necessary or advisable for dealing with the emergency." The only exception in the Act is that conscription may not be enacted by way of a regulation made under the authority of the declaration. As with the situation of an International Emergency, provincial consultation would only be required to the extent it is "appropriate and practicable in the circumstances."

Limitations & Oversight

During all four situations, the *Canadian Charter of Rights and Freedoms* continues to apply as a limit on sweeping emergency powers of the federal government. Canadians' rights and freedoms continue in force unless limited by other legislation or by court orders.

The other major change from the *War Measures Act* is that the *Emergencies Act* ensures a role for Parliament in overseeing and controlling the actions of the government. Regardless of the type of emergency being declared, the government must bring a motion before both the House of Commons and Senate for confirmation of the declaration within seven days. Both houses of Parliament must confirm the declaration of emergency. Failure by either to do so means the declaration is revoked immediately. Similar procedures and requirements apply when the government seeks to renew a declaration.

The* Emergencies Act *was enacted in 1988 as a replacement for the* War Measures Act *(*WMA*).

When it comes to revoking a declaration, ten senators or twenty Members of Parliament may sign a motion for revocation, in whole or in part. A vote for revocation ends the declaration on the day specified in the motion (which cannot be earlier than the day of the vote itself).

Any orders or regulations made by the government pursuant to its powers under the Act must go before each house of Parliament within two sitting days of its enactment. Such orders and regulations are subject to amendment or revocation by Parliament. The *Emergencies Act* provides for two final forms of Parliamentary oversight:

1. All powers exercised pursuant to a declaration under the legislation are subject to review by a committee composed of members of both houses (including at least one member from each party which holds at least twelve seats in the House of Commons).

2. Within 60 days of the end of the emergency, the government must initiate an inquiry into the circumstances leading to the declaration and the measures taken to deal with the emergency.

Both the parliamentary committee and inquiry must file reports with the House of Commons and the Senate as to their findings and conclusions.

Conclusion

The federal government has not yet used the *Emergencies Act* since it became law in 1988. In late March 2020, Prime Minister Trudeau and the premiers discussed its use in responding to the COVID-19 pandemic. As reviewed above, the pandemic likely qualifies as a Public Welfare Emergency. The outcome of the discussion apparently was that the provincial and territorial leaders felt they did not need the federal government to intervene. Given the significance of declaring an emergency, it is undoubtedly a good thing that we may get through the present crisis without the need to invoke this particular federal "superpower".

Author's Note: Sources consulted in preparing this article include the entries for the *War Measures Act* in both the online version of the *Canadian Encyclopaedia* and *Wikipedia*, as well as Clement, "The October Crisis of 1970: Human Rights Abuses under the *War Measures Act*" in *Journal of Canadian Studies*, Spring 2008, Vol. 42, No 2. (online version).

Charles Davison

Charles Davison is the Senior Criminal Defence Counsel with the Somba K'e office of the Legal Services Board in Yellowknife, N.W.T.

The Use of the Peace, Order and Good Government Clause in Canada's Constitution

Linda McKay-Panos

Recent events in Canada have caused a resurgence of reliance on the Peace, Order and Good Government (POGG) clause in section 91 of *The Constitution Act, 1867*. When federal and provincial governments seek to pass legislation, they must have authority under section 91 (federal government) or 92 (provincial governments). These sections list subject matters that each government has authority over. Section 91 provides:

> *91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, …*
>
> *[this is followed by a list of subject matters; underline added]*

Photo from Pexels

There are different theories as to the purpose of the POGG clause. It is often described as a residuary clause. This means it covers subject matters that have developed since Confederation in 1867 (such as pollution, climate change and inflation) or those matters that are distinct from the list that follows the opening clause.

The courts have recognized two main branches to the POGG power:

1. The Emergency Branch
2. The National Concern Branch

Emergency Branch

The Emergency Branch of POGG was recognized in 1923 by the Privy Council in *Fort Francis Pulp & Power Co v Manitoba Free Press Co.*, [1923] AC 965. This power contemplates

"highly exceptional" or "abnormal" circumstances that require the federal government to assert jurisdiction as needed to address an emergency. The important criteria that the federal government needs to prove in order to rely on the Emergency Branch to pass legislation were set out in the *Reference re Anti Inflation Act,* [1976] 2 SCR 373:

1. Legislation must be of a temporary nature (p 427).
2. There must be evidence that it was rational to conclude there was a crisis (p 423).
3. There must be an emergency (p 415).

The federal government can use the emergency power to address matters that are usually under provincial jurisdiction.

The federal government can use the emergency power to address matters that are usually under provincial jurisdiction. The above three key requirements must still be met.

The recent COVID-19 pandemic has sparked some commentary about whether the federal government should use the POGG Emergency Power. Block and Goldenberg look at all of the bases upon which the federal government could rely on POGG to justify emergency legislation during the COVID-19 pandemic. Thus far, the federal government has been working with the provinces and has declined to exercise its emergency power.

National Concern Branch

As for the National Concern Branch, the leading case in this area is a 1988 decision of the Supreme Court of Canada: *R v Crown Zellerbach Canada Ltd*. Justice Le Dain, writing for the majority of the Court, summarized the law as follows (at para 33):

> 1. *The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;*
> 2. *The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;*
> 3. *For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;*
> 4. *In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.*

Most recently, there has been a series of three Court of Appeal decisions over whether the federal government can rely on the POGG National Concern Branch to pass carbon

tax legislation. The federal government relied on the National Concern Branch of POGG to argue that climate change has become a matter of national concern, so the federal government has jurisdiction to pass carbon tax legislation. In 2019, this argument prevailed in two Court of Appeal cases (Saskatchewan and Ontario). However, in the Alberta Court of Appeal (ABCA), the provincial government prevailed by relying in part on an interesting argument involving *The Constitution Act*: ss 92A and 92(16). Section 92(16) provides that the provinces have jurisdiction over "Generally all Matters of a merely local or private Nature in the Province" (residuary matters not listed in *The Constitution Act*). The ABCA agreed that the National Concern Power only applies to matters under s 92(16). However, s 92A explicitly provides that the provinces have jurisdiction over natural resources, and thus the National Concern Branch could not be used. The majority judgment of the ABCA has been critiqued on several grounds, including that it lacks clear reasons on why greenhouse gas emission regulations are laws that relate to the "exploration for, development, conservation or management of natural resources" (s 92A).

It appears as though the Supreme Court of Canada will have to resolve this matter. For more information on these three decisions, please see the LawNow article by Jessica Steingard.

The federal government relied on the National Concern Branch of POGG to argue that climate change has become a matter of national concern…

Conclusion

Although the federal government has not relied on the POGG power to pass federal legislation in too many situations, it remains a significant feature of our constitutional law and is highly relevant to current events. This seems logical. The drafters of the Constitution would have desired that this power would guide us into the future, even as non-contemplated subject matters arise.

Linda McKay-Panos

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

Charter Notwithstanding: Section 33

Peter Bowal, Carter Czaikowski and Josh Zablocki

> *33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.*

Section 33 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") is known as the "notwithstanding clause" and the "override clause." It allows governments to suspend the rights in section 2 and sections 7 to 15 of the *Charter* for consecutive five-year periods.

As a "superpower", it happens to be the most controversial *Charter* provision. This article explains the notwithstanding clause in detail.

Purpose

Section 33 is intended to leave some law and policy-making power in the hands of elected officials. The enactment of the *Charter* significantly expanded the power of judges to strike down and re-write legislation. In return for their consent to the *Charter* in 1982, some provinces insisted on having a democratic override of the courts over some rights. This compromise, the 'notwithstanding clause', allows governments to suspend some rights by declaring their legislation shall *operate notwithstanding* the *Charter*.

What Rights Can be Overridden?

Section 33 can override rights in sections 2 and 7 to 15, including fundamental freedoms, legal rights and equality. Accordingly, governments can override our:

- freedom of conscience and religion;
- freedom of thought, belief, opinion and expression, including freedom of the press;
- freedom of peaceful assembly;
- freedom of association; and
- right to life, liberty and personal security.

Governments could also override rights to conduct unreasonable searches and seizures and subject us to cruel and unusual punishment. And equality rights can be paused.

Photo from Pexels

Rights associated with criminal justice administration can also be suspended. The government may demand an accused give evidence, be arbitrarily detained or

imprisoned, remain unaware of the reasons for arrest or the specific offence charged, and denied access to a lawyer. Rights such as trial within a reasonable time, bail, presumption of innocence, jury trials, language interpreters and double jeopardy can all be overridden.

What are the super-rights that cannot be overridden and suspended?

- Democratic rights to vote and run in elections
- Mobility rights to move, live and work anywhere in the country
- Language rights

However, all three of these categories of rights have some of their own built-in flexibility.

Use by Governments

Although section 33 confers substantial power on governments, they have been exceedingly reluctant to use it. Section 33 has been used very sparingly in the almost forty years of the *Charter's* existence. A government's mere hint at overriding a *Charter* right for five years brings a harvest of scorn and contempt from the media and liberal interest groups that few are willing to unleash.

Governments cannot override retroactively. To invoke the override, government must make its express declaration to do so and this is not subject to judicial review. Government does not need to justify its action at all. Presumably, the justifying will come in the next election campaign.

Section 33 can override rights in sections 2 and 7 to 15, including fundamental freedoms, legal rights and equality.

Quebec did not originally sign on to the *Charter* in 1982 and, in protest, immediately issued a blanket declaration that all of its legislation would operate notwithstanding the *Charter*. This made a mockery of the clause until the gesture ended.

In *Ford v. Quebec*, the Supreme Court of Canada ruled in 1988 that Quebec's sign language law violated freedom of expression. Quebec invoked section 33 to reinstate the prohibition of languages other than French on signs. We discussed this case in a recent *LawNow* article. After five years, Quebec did not renew the override and simply required French as the predominant language on signs in the province.

Quebec most recently has pre-emptively invoked the override to support its state laicity legislation: *An Act Respecting the Laicity of the State (Bill 21)*, section 30. On the basis that a society should be served by religious-neutral institutions and public services, individuals who exercise higher public authority are prohibited from wearing religious symbols while on duty. Opponents claim this law breaches equality and freedoms of conscience and religion. The Bill became law in June 2019. While Quebec's activation of the notwithstanding clause has shielded it from most *Charter* contests, numerous court challenges continue to assail against it nevertheless.

Override Threatened or Invoked Without Effect

Yukon inserted the override in legislation that passed in late 1982 but not ultimately proclaimed into force.

Often governments have promised to trigger the notwithstanding clause and have backed down or found it ultimately unnecessary. Alberta proposed using the override in 1998 to limit compensation that sexual sterilization victims would receive. It scrapped this plan

in the face of strong opposition. Two years later, in its *Marriage Act*, Alberta used the override to define marriage as the union between a male and a female. However, in 2004, the Supreme Court of Canada decision in *Reference re Same-Sex Marriage* determined that marriage fell under federal legislative jurisdiction and Alberta's legislation (including the override) enjoyed no legal effect.

In late 1999, the federal government publicly mused an override of the British Court of Appeal decision *R v Sharpe*, which struck down crimes relating to possession, distribution and sale of child pornography. The Supreme Court of Canada went on to overturn the lower ruling in 2001 and the government exhaled.

Saskatchewan applied the override to undergird its back-to-work legislation in 1985 after a Queen's Bench decision in *Retail, Wholesale and Department Store Union, Local 544 v. Saskatchewan* found a violation of freedom of association. In the follow up 1987 appeal, the Supreme Court of Canada in *RWDSU v. Saskatchewan* concluded that the *subject legislation* did not infringe the *Charter* so the override was unnecessary. The Supreme Court curiously changed its mind again in 2015 in another Saskatchewan case, which has received criticism in a recent *LawNow* article. While a provincial override was not required in 1985, today it would be required.

More recently, Saskatchewan reached for the notwithstanding clause to ensure its education funding policy in the *School Choice Protection Act* passed in 2018. This was in response to a 2017 Saskatchewan Court of Queen's Bench decision in *Good Spirit School Division*, which found that funding non-Catholic students to attend Catholic schools violated the *Charter*. The Saskatchewan government sought to preserve its schooling-funding model, which had been in place for more than 100 years. In March 2020, the Saskatchewan Court of Appeal, in *Saskatchewan v Good Spirit School Division*, found no *Charter* infringement. Again, the override was rendered superfluous.

Section 33 is intended to leave some law and policy-making power in the hands of elected officials.

In 2018, the *Better Local Government Act* (Bill 5) sought to shrink Toronto City Council to about half of its existing wards. The first court struck down Bill 5, concluding the legislation disregarded municipal voters' freedom of expression. In response, Ontario introduced Bill 31, the *Efficient Local Government Act*, a reworked version of Bill 5 which declared the override. It also proved redundant when the Ontario Court of Appeal granted a stay of the lower decision. The 2018 Toronto municipal election proceeded with 25 wards and Bill 31 – with its override – was abandoned. The Supreme Court of Canada granted leave to appeal the original decision in March 2020.

Vaccinations for school students is the current override subject in New Brunswick's Bill 11. This law, which is still making its way through the legislative process, eliminates non-medical exemptions to vaccinations. Section 4 declares the Act shall operate notwithstanding *Charter* sections 2 and 7 to 15.

Conclusion

The override clause is a uniquely Canadian invention in world constitutions. Still, today it is constitutionally easy, but politically very complicated, for a Canadian government to use section 33 in the way it was envisioned. Opponents of the provision claim that suspending rights is anti-*Charter*. But what could be more pro-*Charter* than embracing one of its provisions? The requirement of re-

declaration every five years – coinciding with election cycles – adds to the political checks and balances.

Often governments have promised to trigger the notwithstanding clause and have backed down or found it ultimately unnecessary.

Quebec is the only jurisdiction to effectively utilize section 33. It has done so twice: first to *re-enact* legislation that had been struck down by the courts and in the second to pre-emptively avert any *Charter* scrutiny.

By far, most of the provision's play in Canada outside of Quebec to date has been fruitless and ineffectual for various reasons. The section has misfired or been applied tactically. Provinces have uttered – and later retreated from – threats or promises to invoke the clause. Where they have used it, they have not followed through to operationalize the legislation.

More commonly, governments signaled their intention to apply the clause after facing unfavourable lower court decisions but found the override unnecessary when appellate courts later reversed those decisions. One wonders whether appellate courts feel more constrained in their judicial review to conclude there was no *Charter* breach where the override is clearly already in play in some way. If so, the notwithstanding clause's value might be found more in the *spectre* of its use than in its actual use.

The lingering overall negative connotation around the notwithstanding clause means the judiciary's law and policy-making powers are rarely challenged. Until it has gained more acceptance through regular principled use without disgrace, Canada will not know the significance of this unique superpower in shaping public policy and law.

Peter Bowal

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

Carter Czaikowski

Carter Czaikowski is a student at the Haskayne School of Business at the University of Calgary.

Josh Zablocki

Josh Zablocki is a student at the Haskayne School of Business at the University of Calgary.

The Rise of the Digital Robber Barons: Is government up to the task at hand?

Rob Normey

Given Canada's history, we can anticipate that any plans for the federal government to use its "super powers" could erode our civil liberties. We must vigilantly protect fundamental rights and look to the courts to affirm, and in some instances extend, the reach of our *Charter* protections should government threaten our rights. However, in this article I wish to offer for consideration something of a different perspective – that one of the grave dangers of this decade is that Western governments will *fail* to exercise their powers to protect citizens.

With good management, Canadians can hope to surmount the immediate challenges posed by COVID-19. There was brief debate about whether or not the federal government should invoke the powers of the *Emergencies Act* and declare a public health emergency to address the pandemic. Ultimately, cooperative efforts by the federal, provincial and territorial governments sufficed.

Photo from Pexels

A Look Back

If we cast a glance back at Canadian history, we can surely conclude that, in real or imagined emergencies, the federal government is capable of overreacting and temporarily interfering with basic liberties. The predecessor legislation for addressing emergencies of various kinds was the *War Measures Act*. The federal government employed this Act, in a draconian fashion, during and immediately after the World Wars. A key chapter of Thomas Berger's outstanding account of human rights and dissent in Canada, *Fragile Freedoms*, recounts the mistreatment of Japanese Canadians during and even after the conclusion of World War II. Berger emphasizes that the evacuation and internment of Japanese Canadians represented a horrible instance of mass racial hysteria, made worse by the egregious conduct of the federal government under Liberal Prime Minister Mackenzie King. During the Hearings of the Special Joint Committee on the Constitution in 1980 and 1981, which considered necessary improvements to the proposed *Charter of Rights and Freedoms*, the committee agreed that such events must not be repeated. Not only did the government employ racist orders-in-council to deport to Japan residents and Japanese Canadian

citizens, but the courts of the day were of absolutely no assistance. Lacking, for the most part, a "rights consciousness", they rejected most of the valiant arguments of Andrew Brewin, the deportees' counsel and a leading democratic socialist of the day. (See *Reference Re Persons of the Japanese Race* (1946) SCR 248, affirmed by the Privy Council.) Brewin later successfully persuaded the federal government to establish a Royal Commission to examine the question of compensating Japanese Canadians whose property had been confiscated without any payment.

Given the "super powers" exercised by the omnipresent Big Daddies of the digital age, it is past time to examine just what the Canadian government has been doing in response.

Canadian politicians, with broad support from citizens, ultimately agreed to enact a *Charter of Rights and Freedoms* as part of the patriation process that concluded with the *Canada Act, 1982*. A decade later, the government introduced a new emergency powers statute. Thankfully, the *Emergencies Act* emphasizes that the government cannot override the fundamental rights enshrined in our Constitution if they invoke emergency powers. This should do much to address the dangers that previously existed in allocating broad discretionary powers under the *War Measures Act*.

While the dangers of national governments using their powers in ways that undermine the freedoms of their citizens were apparent in a study of emergency measures undertaken in the first half of the twentieth century, this should not lead us to ignore other dangers to the cause of freedom in our time. We might recall the drama that unfolded upon the release of George Orwell's classic dystopian novel, *1984*. Several of the first critics, particularly in the U.S.A., took the satire as a thinly veiled account of left-wing governments of the day, whether democratic as in Britain or dictatorial as in the Soviet Union. Orwell was sufficiently perturbed to issue a statement through his publisher. He was a clear supporter of the Labour Party (then in power) and had long been a democratic socialist. He hardly wanted to imply that the major social reforms and regulation of business taking place represented "Big Brother" in action. Indeed, Orwell made clear his disdain for unregulated and therefore predatory forms of capitalism in his review of the writer who would become a guru of the politicians and economists of the neoliberal revolution of the 1980s, Frederik Hayek. Vigorously responding to the arguments in *The Road to Serfdom*, Orwell asserts:

> *[Hayek] will not admit that a return to "free" competition means for the great mass of people a tyranny probably worse, because more irresponsible, than that of the State. … Hayek denies that free capitalism necessarily leads to monopoly, but in practice that is where it has led…*

The Digital Era

Some decades into the current neoliberal era, we observe precisely the developments that Orwell criticized. In today's digitalized economy, monopoly capitalism has taken on a life undreamt of in the worst nightmares of this activist of the left who spoke of the need for "new blood, new ideas and in the true sense of the word, a revolution." Many books have been written on the massive powers exercised by the major digital powers – especially the Big Four (Facebook, Google, Amazon, Apple) and we could add Microsoft, as well as Saudi Aramco to the list of threatening tech giants.

It does not seem that long ago that the internet and the world of "big data" were claimed to represent a new era of enlightened connectivity and democracy. All the while, however, the gurus of Silicone Valley were working feverishly to monetize all of the data that had been collected. Now a time of rapid disillusionment has set up. I can gaze at the titles of a number of recent studies:

- "Antisocial Media: How Facebook Disconnects Us and Undermines Democracy";
- "Move Fast and Break Things: How Facebook, Google and Amazon Cornered Culture and Undermined Democracy"; and
- "Race After Technology".

The last in particular is a penetrating study by Ruha Benjamin of the myriad ways technology is perpetuating racism and entrenching racial hierarchies.

The most expansive recent account of the new shift in our economic and political systems appears to me to be Shoshana Zuboff's. In her book, *The Age of Surveillance Capitalism*, she details the quest by powerful corporations to predict and control our behaviour, exerting unprecedented power over our lives in the process. Unimaginable wealth and unchecked influence are rapidly accumulated in the ominous new "behavioural futures markets." As she explains, the major threat today is less a Big Brother state than an omnipresent digital honeycomb or trap. What is particularly dismaying is the lack of regulation of the big tech companies, as surveillance capitalism grows by leaps and bounds. Democracy and the values of dignity and autonomy are disfigured in the process.

Given the "super powers" exercised by the omnipresent Big Daddies of the digital age, it is past time to examine just what the Canadian government has been doing in response. It is fair to state that Canada does have some laws that ostensibly protect the privacy of Canadians and might just possibly hold Facebook and the other tech giants to account. A review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) would, on a superficial reading, lead one to believe that privacy interests are protected. Yet surely far more must be done.

In sharp contrast to the rather lackluster use of federal powers to address the manifold issues that have arisen with the massive, disruptive presence of Big Tech in Canada, one can look to the European Union at present for leadership.

Readers can review for themselves the federal government's "Canada's Digital Charter in Action: A Plan by Canadians, for Canadians" report, issued October 2019. To my reading, the report is long on generalities. It fails to register the need for urgent action and making proper use of the extensive powers the federal government has to meaningfully regulate these foreign corporations. Instead, these corporations earn massive sums and operate at will in the Canadian marketplace and social sphere, acquiring greater and greater dominance in the process. No one can argue with the goal of harnessing technological advancements for economic growth and prosperity. However, it is vital to meet the monopolistic practices of the tech giants with new laws. These new laws should safeguard citizen's interests not only in a genuine protection of their privacy rights, but also their autonomy and independent decision-making, free from the predatory practices that have been clearly documented. Speaking in generic terms of a "digital Charter" for Canadians is less helpful than strengthening and

modernizing competition law and bringing in a fair tax regime that would place Canadian and foreign tech monopolies on something approaching an even playing field.

The federal Privacy Commissioner Daniel Therrien issued a shout of warning in 2019 and again more recently. CBC News reports Mr. Therrien (OPC) as stating that "Canadians are at risk because the protections offered by Facebook are essentially empty" (April 25, 2019). This in relation to his Commission's Report on Facebook's operations, described as "blistering." After a shocking series of actions in which the roles of Facebook and the Canadian company Aggregate IQ and the British firm Cambridge Analytica faced severe criticism, a Canadian investigation occurred. This was in response to media reports – it took investigative journalism to uncover the wrongdoing. And an investigation has only occurred long after the alleged illegal harvesting of personal data of more than 600,000 Canadian users of Facebook (and an alleged 50 million users worldwide). The report found that the company broke a number of federal and British Columbia laws, including;

- failing to obtain valid and meaningful consent of installing users;
- failing to obtain meaningful consent of friends of the users;
- having inadequate safeguards to protect user information; and
- failing to be accountable for the user information.

Mr. Therrien revealed exasperation in his public comments, commenting on the stark contradiction between Facebook's public promises to mend its ways on privacy and its refusal to address the serious problem his Commission had identified. Both Mr. Therrien and the B.C. Privacy Commissioner simultaneously called for stronger sanctioning powers for Canadian regulators. To date, the federal government has not provided those stronger powers. A small step forward would be the ability to provide meaningful fines.

The OPC found it necessary as a follow-up to bring the matter to federal court, given Facebook's adamant questioning of the correctness of the report. Facebook seeks a ruling that the findings and practices of the Commission were not impartial and lacked procedural fairness. This lengthy process – far from resolved as of this date – and the meagre consequences for the tech giant is strongly suggestive of the inadequacy of the status quo.

... one of the grave dangers of this decade is that Western governments will* fail *to exercise their powers to protect citizens.

In sharp contrast to the rather lackluster use of federal powers to address the manifold issues that have arisen with the massive, disruptive presence of Big Tech in Canada, one can look to the European Union at present for leadership. A good place to start for Canadian reformers would be a review of the EU General Data Protection Regulation and the stiff sanctions meted out to tech companies under it. Specifically, we can address made-in-Canada problems, like the tax loophole found in s. 19 of the *Income Tax Act*, to ensure that Canada stands ready and able to implement progressive and protective measures for the 21st century.

I might briefly mention that the federal government also possesses ample powers to promote and ensure the survival of what could be a thriving cultural sector here in Canada. The United Nations enshrines the right to one's culture in its Declaration of

Human Rights for an excellent reason. France and other European countries recognize the unprecedented challenges to local culture in the digital era and have enacted fair and supportive laws which at least partially respond in proportion.

Conclusion

There is no question that Facebook, Google and the other tech giants possess wide, monopoly powers that the robber barons of the 19th century would have coveted. This represents an ominous challenge to Canadian society on a number of fronts. One can only hope that the federal government will very soon dig deep into the velvet bag of powers it possesses under s. 91 of *The Constitution Act, 1982* and enact a wide-ranging set of laws to regulate and, where appropriate, sanction these companies. Surely we must balance short-term economic growth through technological advances against the diverse needs of today's and tomorrow's citizens. For inspiration, we might turn once more to Orwell, who declared in *The Lion and the Unicorn: Socialism and the English Genius* that we must add to our heritage or lose it, we must grow greater or grow less, we must go forward or go backward.

Rob Normey

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

Special Report

Home Work

Working from Home: Income tax issues

Joseph Devaney and Hugh Neilson

During the COVID-19 pandemic, many employees transitioned to working from home. During the crisis, few were considering the income tax implications. As life returns to whatever the "new normal" is, we can be confident taxes will still exist. So what are the tax implications of a workspace in the home?

Photo from Pexels

Deducting home office expenses

In general, the expenses employees can deduct are very limited. The COVID-19 pandemic has opened up new questions in respect of working from home. The tax community has been pushing for guidance in time for the next tax filing season. However there has been little commentary from the Canada Revenue Agency (CRA) to date, which is understandable given the other priorities during the crisis.

When are expenses deductible?

In order for home office expenses to be deductible against employment income, the employee's contract must require them to incur such expenses. While the COVID-19 pandemic has required many to work from home, was this required under their contract of employment? The CRA has not commented on this issue to date. They will hopefully acknowledge that, when the only option for working at all was working from home, such a requirement was implicit and does not require revising existing employment contracts. Note that if the employee had the choice of working from home or at the regular workplace, they would not meet this requirement.

Any claim for workspace in home costs must meet one of the following tests:

1. The home is where the employee principally (more than 50% of the time) does their work; or
2. The employee uses the space exclusively to earn employment income, and on a regular and ongoing basis for meeting clients, customers or other people in the course of performing employment duties.

While working from home during the COVID-19 pandemic, it seems likely that many more workers will meet the requirement under (i) than in previous years. However, it is uncertain whether the workspace must be the main place of work in context of the entire year, or whether meeting this test for a period during the year (such as the weeks or months dictated by preventative COVID-19 measures) is sufficient. While the CRA has not yet commented, hopefully they will provide a reasonable interpretation for this unusual situation before we need to file tax returns.

If working from home for only part of the year means qualifying under provision (ii), the requirement for regular and ongoing meetings becomes more problematic than usual due to social distancing measures and government-required shutdowns. The CRA has historically stated that those meetings must be in person. Tax Court decisions have held differently, accepting telephone calls as well. The advent of videoconferencing adds a third possibility. Perhaps this will be the impetus for CRA to review their position, which many have suggested is outdated.

In addition to meeting these criteria, any such deduction requires the employee to obtain a completed T2200 (Declaration of Conditions of Employment) from their employer. Some large employers whose workforce shifted substantially to remote work during the pandemic have raised concerns regarding the administrative costs of completing this form for hundreds, or even thousands, of employees. While again we hope for CRA guidance, the form is a legislative requirement, which may make CRA uncomfortable waiving it.

What expenses are deductible?

A portion of household costs – such as electricity, heating, water, rent, security and maintenance – would typically be deductible. If the employee is a commissioned salesperson, as opposed to a regular employee, they can also deduct a portion of property tax and insurance costs. No employee (neither commissioned salespersons nor regular employees) can deduct mortgage interest or capital cost allowance on the residence itself.

When calculating the deductible percentage, a reasonable basis should be used, such as the area of the workspace divided by the total finished area (including hallways, bathrooms, kitchens, etc.). Expenditures that relate solely to the workspace and employment duties do not have to be prorated. For example, an employee who installed a separate phone line exclusively for employment use or incurred long-distance charges for employment-related calls would deduct those costs in their entirety. On the other hand, costs incurred entirely for personal use would be excluded from any deduction claim. For example, few employees would need to pay for cable television or deck repairs in connection with their employment duties. Where the employee used the workspace for only part of the year, a further prorating of relevant costs for time used for employment also becomes relevant. Finally, the claim cannot exceed income earned from the employment, prior to this deduction.

… CRA recently noted that acquiring computer equipment may be primarily for the employer's benefit, in the context of the COVID-19 pandemic …

Note that on a review of any claim for these deductions, the CRA will expect supporting documentation. The employee must retain:

- receipts for the various expenses claimed;
- the completed T2200 (Declaration of Conditions of Employment) from the employer; and
- details of the manner in which the personal usage was prorated, based on:
  - space (portion of house) used for work;
  - daily time (portion of the day used for work); and
  - overall time, prorating expenses that do not relate to the portion of the year when working from home.

For more information and copies of the relevant forms, see CRA Guide T4044.

Telecommuting allowances and reimbursements

What if the employer pays the costs incurred for working from home?

In general, all allowances paid to an employee are taxable.

Generally, a reimbursement for a personal purchase of equipment used for working remotely would be a taxable benefit for the employee. However, CRA recently noted that acquiring computer equipment may be primarily for the employer's benefit, in the context of the COVID-19 pandemic and the resulting requirement that many employees work remotely. Accordingly, CRA indicated that they are prepared to accept that such reimbursement would be a *non-taxable* benefit to the employee. Actual invoices or receipts must support the reimbursement and total no more than $500 towards equipment for an employee. Unfortunately, to date, CRA has not published this French interpretation in a form accessible to the general public. Read the French version online at Video Tax News, a non-government website. Non-accountable allowances would always be taxable, as no provision would provide for an exclusion of such amounts, so once again, receipts are essential.

A portion of household costs – such as electricity, heating, water, rent, security and maintenance – would typically be deductible.

CRA did not comment on situations where the equipment was used exclusively for employment and was owned by the employer, not the employee. CRA has indicated in the past that there is no taxable benefit to the employee where equipment is the employer's property and any personal use is incidental. Of course, this would suggest that the employee return the equipment to the normal workplace after the crisis has passed.

In general, all allowances paid to an employee are taxable. This means that where an employer pays, say, a monthly allowance for the period the employee was required to work from home, this allowance would be treated like the rest of the employee's compensation – subject to source deductions, T4 reporting and inclusion in income. The provision of such an allowance would at least seem to indicate that the employee was required to work from home, possibly supporting the claim that this is a contractual requirement and opening the door to deductions as described above.

Overall

As the immediate crisis passes, the economy returns to some semblance of normalcy and we all struggle to assess what "normal" will mean in the post-pandemic world, assessing the tax implications of that temporary work-from-home arrangement well in advance of tax time next year will allow appropriate documents to be gathered and hopefully result in some tax savings next April.

Joseph Devaney

Joseph Devaney, CPA, CA, is a member of the editorial board of Video Tax News in Edmonton, Alberta.

Hugh Neilson

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

A Tale of Two Cities: Residential property assessments and appeals in Calgary and Vancouver

Peter Bowal and Michael Osachoff

Commercial and residential property taxes are by far the largest source of revenue for Canadian municipalities – about one third of the budgets in large cities. Other revenue streams include provincial grants and licenses, permits and user fees.

Residential accommodation is taxed on market-based values. Municipal assessors annually determine and issue an assessment for each property. The mill rate (based on "mills") is the amount of tax payable per $1,000 of the assessed value of a property. The higher the assessment, the higher one's annual tax bill will be. Therefore, municipalities have an appeal procedure for the property tax assessment.

This article studies the residential property assessment and appeal processes in Calgary and Vancouver.

Assessment Processes

Assessment Process in Calgary

The City of Calgary Assessment Unit handles residential property assessments. Alberta's *Municipal Government Act* governs assessment protocols. Assessments are based upon the property's estimated market value on July 1st of the previous year. Most residential properties are assessed with the sales comparison model. In other words, people on the same street whose houses are about the same size, age and value will be assessed at about the same value for tax purposes. If a representative house in the neighbourhood has sold in the previous year, that selling price will become the new baseline value for that neighbourhood with similar properties.

Photo from Pexels

By contrast, commercial properties are assessed on the income they generate or a cost approach that recognizes the land value plus depreciated replacement cost for improvements.

Calgary conducts a mass appraisal that evaluates location, structure type, size of the

structure and lot, as well as any influencing factors such as a view, proximity to green spaces and traffic. Once total property tax is billed and collected, Calgary remits about 40% to the provincial government.

Assessment Process in Vancouver

The provincial BC Assessment organization assesses all properties in Vancouver (and all of B.C.) pursuant to B.C.'s *Assessment Act* which outlines the rules and procedures. Appraisers collect information typically following construction but at other times too, such as after a renovation. The organization analyses property sales for provincial and local housing markets to obtain an up-to-date understanding of property markets for a reference date (also July 1st of each year). BC Assessment then creates and distributes assessment notices to property owners by December 31st each year. This information is passed on to municipalities which impose and collect residential property tax according to their annual budgets.

Appeals

Homeowners can appeal their assessment, but not the tax rate they pay or the level of services their municipality provides. If homeowners choose to appeal, they must pay a modest appeal fee of about $30 in both cities, which is refundable if the assessment is lowered. Both agencies recommend paying the assessed property tax by the deadline to avoid late penalties. All adjustment credits will be reimbursed after the appeal process.

Appeals in Calgary

After assessment notices are mailed to homeowners, a 60-day Customer Review Period (CRP) begins during which homeowners should review their assessments and determine whether there is an error with the assessment. Homeowners should contact Calgary Assessment to discuss and negotiate an adjustment if one can be justified.

... municipalities have an appeal procedure for the property tax assessment.

Homeowners dissatisfied with their assessment must file formal complaints by the end of the 60-day CRP. Once the CRP ends, the appeal period is closed and the city will calculate the taxes owed by each homeowner and mail out the tax bills.

To appeal, the first step is to file a complaint with the Calgary Assessment Review Board (ARB) within the 60-day CRP. City Council appoints qualified residents to serve on the roster of the ARB. The ARB sits in panels of three members, one of whom is the chair. A Local Assessment Review Board (LARB) hears appeals of residential property tax assessments. More complex commercial appeals come before Composite Assessment Review Boards (CARB). The CARB process was the subject of a recent *LawNow* article.

Complaints must clearly outline why they claim the assessment is incorrect. The ARB will only hear matters listed in the complaint and nothing else. The ARB will decide based on the written evidence submitted, though complainants should attend hearings to substantiate their claim and add to their evidence. The onus of proof rests with the complainant.

The ARB must provide a written, reasoned decision within 30 days of the hearing. The ARB can reduce or confirm the assessment. Either party may appeal to the Court of Queen's Bench for judicial review within 60 days of receiving the ARB decision. These appeals must be on a question of law, whether an error was committed in the preceding level of appeal, or on a matter of jurisdiction.

Appeals in Vancouver

The Property Assessment Review Panel (PARP) hears appeals in Vancouver. Homeowners must file appeals by January 31st of the assessment year, allowing them about one month to decide whether to appeal. Panels are independent from BC Assessment. The Minister of Municipal Affairs and Housing appoints members to the Panels. Again, the burden of proof rests with the homeowner making the appeal, who must provide evidence of why the assessment is incorrect. The Panel is not required to provide written reasons for its decision but will provide an oral explanation.

The second level of appeal is to the Property Assessment Appeal Board (PAAB), which only hears cases that the PARP already reviewed. The *Assessment Act* also governs this board, which is independent from BC Assessment, the PARP, and the provincial government. PARP does not forward evidence it reviewed to the PAAB. The complainant must resubmit the evidence they are relying on.

Canadian homeowners should understand assessment and appeal processes to ensure they are paying a fair level of property tax.

Even after a PARP hearing, settlement resolution is still possible. Before the appeal is heard, the appellant and BC Assessment must attempt to resolve the appeal and the assessment. If they cannot do so, the PAAB will schedule a telephone conference for an appeal management conference between the homeowner, BC Assessment and the Board's appeal manager. In this conference, the PAAB determines whether the complaint can be resolved through settlement and offers a non-binding opinion to assist in the settlement process. If settlement is not possible, the manager provides a date for the parties to deliver written submissions for appeal to the PAAB.

Written submissions, including the BC Assessment appraisal report, are exchanged. Homeowners can submit a written rebuttal, although they cannot introduce new evidence or repeat information from their written submission. The Board then considers the submissions and issues a written decision. The PAAB can order BC Assessment to adjust the assessment.

Homeowners can appeal the PAAB decision to the province's Supreme Court only on a question of law within 21 days of receiving the PAAB decision. The Board will forward evidence to the Court; the complainant cannot submit new evidence. The Supreme Court can order the unsuccessful party to pay the other party's appeal costs.

Conclusion

The 60-day Customer Review Period in Calgary allows ample time for homeowners to address concerns directly with the assessment of their property and informally negotiate an adjustment. As a result, only about 0.2% of homeowners appeal their assessment. In 2018 there were 7,386 residential property appeals of which:

- 2,002 were resolved without a hearing;
- 2,622 had no change;
- 2,473 had their assessment reduced;
- 65 were revised by mutual consent;
- 215 were dismissed;
- 5 were adjusted through Board decision; and
- 4 had their assessment increased.

Only 7 cases were elevated to the Court of Queen's Bench.

Residential accommodation is taxed on market-based values.

Despite this efficient review process, the number of residential appeals has risen since 2017. LARB hearings rose from 821 in 2017 to 977 in 2019. During this same period, the number of applications for judicial review to the Court of Queen's Bench dropped from 199 in 2017 to 5 in 2019. This may reflect the economic downturn in Calgary, where homeowners are weary of higher taxes but also wary of the formalities of a Queen's Bench review.

In 2018, 1.3% of approximately 2.044 million B.C. property owners across the province submitted formal complaints. The Vancouver property market volatility in recent years and imposition of the provincial school tax levy on properties valued above $3 million resulted in a spike in the number of appeals. Then a market slump in 2019 saw appeals dropping by 66%.

Forcing parties to address settlement prior to PAAB arbitration is a positive note for Vancouver. This resolved 92% of pending appeals which did away with the need for a hearing in the years 2016 through 2018.

These two jurisdictions reflect municipal and provincial responsibility for property assessment. Both approaches conduct fair, transparent reviews to ensure equitable taxation. The mandate in both cities for resolution before hearings (albeit a more structured one in British Columbia) may become a more common feature of the appeal processes because of its proven success for resolution as well as cost and time saving benefits.

Canadian homeowners should understand assessment and appeal processes to ensure they are paying a fair level of property tax. Vancouver and Calgary provide useful examples of different approaches to the challenge of municipal property tax assessment.

Peter Bowal

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

Michael Osachoff

Michael Osachoff is a graduate of the Master of Management program at the University of Calgary.

The Right to Housing as a Human Right

Myrna El Fakhry Tuttle

International human rights law acknowledges everyone's right to an adequate standard of living, which includes the right to adequate housing.

Many international legal instruments protect the right to adequate housing, including:

- the *Universal Declaration of Human Rights* (Article 25);
- the *International Covenant on Economic, Social and Cultural Rights* (Article 11);
- the *Convention on the Rights of the Child* (Article 27);
- the *Convention on the Elimination of All Forms of Racial Discrimination* (Article 5); and
- the *Convention on the Elimination of All Forms of Discrimination Against Women* (Article 14).

The international community affirmed the right of every individual to adequate housing at the World Conference on Human Rights in Vienna in 1993.

Photo from Pixabay

The Committee on Economic, Social and Cultural Rights defined adequate housing as:

- housing which is habitable (for example, wind and watertight);
- housing which is accessible (for example, that meets the needs of its occupants);
- housing in which the occupant has legal protection to remain, that is affordable, and that is close enough to a school, healthcare facilities and employment.

Human rights are interdependent, indivisible and interrelated. That means the right to adequate housing cannot be separated from other rights, such as the rights to health, work, vote, privacy, education, sanitation, etc. When people relocate due to a forced eviction, they might not be able to find a job and make a living. Homeless people, who cannot show or prove their residency, may not be able to vote, benefit from social services or get health care. In addition, inadequate housing may lead to health issues if there is limited or no safe drinking water and sanitation.

Moreover, the absence of decent and secure accommodation can affect children, who are vulnerable and need care and protection. Without adequate housing, children may be mistreated and neglected and may grow

up in an environment that lacks moral and material security. Also, children who do not have appropriate housing may not be able to register in schools.

"A lot of people don't look at housing as a human right, but it is," said former US President Jimmy Carter. He added:

> *To have a decent place to live is a basic human right. Also, to have a chance to live in peace and to have adequate health care and adequate education, so you can take advantage of your talents… I don't see how a family can enjoy other human rights like freedom of expression, freedom of speech, freedom of religion, the right to vote, if they live in a disreputable place of which they are ashamed and makes their family lower their standard of ethical and moral values.*

International Human Rights Obligations

International human rights conventions usually impose obligations only on governments that have ratified the conventions. These governments have to respect and implement the rights and freedoms covered in these conventions. Therefore, they become accountable to their citizens, other parties to the same convention and to the international community as a whole. In addition, some of these conventions require parties to show the steps they have taken to accomplish these rights and to report on the progress they have made in this regard.

However, and according to a United Nations report, despite governments committing to protect the right to adequate housing, that does not mean that these governments must "construct a nation's entire housing stock". The report continues:

> *Rather, the right to adequate housing covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure to all, and guarantee that everyone's housing is adequate.*

The UN Special Rapporteur, appointed by the United Nations in 1992, further confirmed:

> *[T]he human right to adequate housing did not require the State to build housing for the entire population or to provide housing free of charge. It certainly did demand that the State undertake a series of measures indicating policy and legislative recognition of each of the constituent aspects of that right. Countries must not misinterpret and abrogate their responsibility, particularly in relation to highly disadvantaged groups such as the homeless.*

Canada's Obligations

"Housing rights are human rights and everyone deserves a safe and affordable place to call home… and one person on the streets in Canada is too many," stated Prime Minister Justin Trudeau.

In Canada, the right to housing is not included in either *The Constitution Act, 1867* or the *Canadian Charter of Rights and Freedoms* (the *Charter*). Also, Canadian provinces and territories do not protect housing in their laws. Provincial human rights codes protect only against housing discrimination and denial of housing, and sometimes against forced evictions. They also allow for special programs that prevent inequality, which may include housing programs.

Nevertheless, Canada has signed and ratified the *International Covenant on Economic, Social, and Cultural Rights* which, as mentioned earlier, recognizes adequate housing as a fundamental human right. Since Canadian legislation does not mention the right to adequate housing, courts have to rely on international legal instruments when interpreting and applying section 7 of the *Charter* (which guarantees the right to life, liberty and security of the person) and section 15 (which protects equality rights).

The right to housing is a human right that is critical to a person's health, dignity, safety, inclusion and contribution to their community.

According to the UN Special Rapporteur, courts must protect both negative and positive housing rights guaranteed by these international instruments. Negative housing rights protect individuals from certain violations of their housing rights while positive housing rights can force the government to take some action.

But Canadian courts did not acknowledge both rights. The Supreme Court of British Columbia recognized some negative housing rights, when the province had no adequate shelter available, in the following cases: *Victoria (City) v Adams*, 2009 BCCA 563, *Abbotsford (City) v Shantz*, 2015 BCSC 1909, *British Columbia v Adamson*, 2016 BCSC 584 and *British Columbia v Adamson*, 2016 BCSC 1245. However, in *obiter* (a ruling not required for the outcome) the Ontario Court of Appeal in *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 ruled that section 7 does not create positive rights to guarantee adequate living standards.

In April 2018, the government released the country's first National Housing Strategy in order to implement Canada's obligation under international human rights law. However, as it was originally introduced, the *National Housing Strategy Act* did not have necessary elements of a practical human rights structure, especially in terms of accountability. Thus, amendments were needed to ensure that the government could achieve its aim of recognizing housing as a human right, and to guarantee that it could set up methods to protect this right.

In April 2019, and after making some amendments, the government introduced the *National Housing Strategy Act* in the *Budget Implementation Act* (which the Governor General approved in June 2019). This Act requires the government to "further the progressive realization of the right to adequate housing" as recognized by international human rights laws.

Section 4 of this Act reads:

> *It is declared to be the housing policy of the Government of Canada to*
>
> *(a) recognize that the right to adequate housing is a fundamental human right affirmed in international law;*
>
> *(b) recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities;*
>
> *(c) support improved housing outcomes for the people of Canada; and*
>
> *(d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.*

The UN Rapporteur on the right to housing, Leilani Farha, has commented:

> *With just over a decade before the Sustainable Development Goals are to be achieved, the Government of Canada has shifted its approach to the right to housing to one that recognizes housing as a fundamental human right essential to the inherent dignity and well-being of the person.*

She added:

> *Canada's new model contains the hallmarks of a human rights approach. Not only does it include a legislated right to housing, it also establishes in law creative mechanisms to monitor and hold the Government accountable and ensure access to remedies to address systemic barriers to the enjoyment of adequate housing. This model can serve as an example for countries all over the world.*

However, Farha stated that despite Canada's global standing as a top ten performing economy, there are at least 235,000 homeless people and 1.34 million households in core housing need, with acute affordability problems in several cities.

Human rights are interdependent, indivisible and interrelated.

It is important to note that we do not know what legal consequences this Act will have. We just have to wait and see how the courts will interpret and implement it. This will take some time. Also, this Act is not included in the Constitution. This means any future government could revoke it, as there are no limits preventing a government from doing so.

Conclusion

The right to housing is a human right that is critical to a person's health, dignity, safety, inclusion and contribution to their community. Without appropriate housing, it is hard to get or keep a job, have access to health care, have proper sanitation, recover from mental illnesses and get children into schools.

Myrna El Fakhry Tuttle

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

BenchPress

Sentencing, Supervising and Schooling

Jessica Steingard

Systemic Racism in Sentencing

***R v Kandhai*, 2020 ONSC 3580**

Mr. Kandhai was charged with and pled guilty to one count of possession of a prohibited firearm with accessible ammunition and one count of a breach of a firearms prohibition order. At the sentencing hearing, the defence asked for 3 years while the Crown requested 4 to 5 years.

Justice Harris relied on a social history report that considered systemic racism. Social history reports, or enhanced pre-sentence reports, are relatively new and not widely used. They differ from conventional pre-sentence reports in that they "provide necessary and accurate information about the complex backgrounds of individuals and provide a clearer path to rehabilitation."

In particular, the Court reviewed the report and considered the impact of:

1. Kandhai having grown up in poverty in Flemingdon Park (a community in Toronto); and
2. Kandhai's exposure to anti-black racism from a young age.

The author of the report interviewed Mr. Kandhai four times as well as his parents and brother. The report highlighted Mr. Kandhai started hanging out with "negative peer influences" and was charged for the first time in 2010 after starting secondary school. He is now 25 years old and has a lengthy criminal record.

Justice Harris considered the link between Mr. Kandhai's background and his moral blameworthiness. He summarized as follows: "Mr. Kandhai was not compelled to make the choices he did but his alternatives were circumscribed by his environment and the dearth of opportunities that were open to him" (at para 64).

Justice Harris noted the over incarceration of African Canadians and drew careful analogies with the over incarceration of Indigenous individuals. He concluded:

> *Applying Mr. Kandhai antecedents to the contextual approach established in Ipeelee, one's head would have to be in the sand not to acknowledge that Mr. Kandhai's responsibility is affected in some measure by the racism and poverty in the community in which he grew up.*

The decision? The Court found 4 years was appropriate.

Liability of Social Hosts

***McCormick v. Plambeck*, 2020 BCSC 881**

In September 2012, seventeen-year-old Calder McCormick attended a party on Salt Spring Island in B.C. Twin sisters hosted the party at their home while their parents stayed in their room upstairs. The Facebook event page for the party asked guests not to drink and drive. The sisters' parents had strict rules: car keys of anyone who drove would go into a bowl, the party would end at 1am, no alcohol would be provided though guests could drink if they brought their own, and guests would be picked up or be driven home by the parents. The parents circulated through the party approximately every hour.

At the end of the party, Ryan Plambeck drove up to the party in a car. The car belonged to the Couplands, who lived a short distance away from the party residence. Mr. Coupland had left the car unlocked with the keys inside so that a potential buyer could test drive it. Both Ryan and Calder had been at the party. The judge did not rely on Calder's evidence about how he came to be in the car. There was also conflicting evidence about whether Ryan was intoxicated or impaired by marijuana. The judge concluded Ryan was not intoxicated when he left the party residence. In any case, the car crashed. Ryan was killed and Calder was seriously injured. Calder is now 25 years old and lives with the side effects of a serious brain injury.

The Court had to decide whether the sisters' parents, the Pearsons, were liable (along with Ryan) for Calder's injuries. The law is clear that commercial hosts owe a duty of care to patrons and sometimes the public. In the cases of social hosts, the court must decide whether the hosts owed a duty of care to the guests – was the accident reasonably foreseeable such that the hosts should have protected guests from it?

The decision? The Court found that, if the Pearsons owed a duty of care to Calder, they had met the required standard of care through their rules for and actions at the party. It was not reasonably foreseeable that a guest would steal a car and get into a car crash after the party. Therefore, the Pearsons had not beached their duty of care and 'caused' Calder's injuries. They were not liable for the money damages he was claiming.

French Schools in B.C.

***Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13**

Section 23 of the *Charter* sets out minority language educational rights. French speakers in any province where French is the minority language are entitled to French language primary and secondary education. The same is true where English is the minority language. This right applies where there are sufficient number of children to warrant the education be funded by the government, including separate minority language schools (again, where numbers warrant).

In 1990, the Supreme Court of Canada addressed s. 23 rights in *Mahé v Alberta*. On June 12th, the Court released a follow-up decision that clarified the test for situating students on a 'sliding scale'. This sliding scale determines the level of services that an official language minority is entitled to, be it homogeneous schools, sharing facilities with the majority or another appropriate solution.

In *Mahé*, the Court outlined two factors but didn't define them. In this recent decision, the Court clarified the test and broke it into three steps:

1. Determine how many students will eventually use the service, based on long-term projections not just short-term demand.
2. Compare whether the school contemplated by the minority is appropriate based on pedagogy and cost. To do so, compare the number of students from the official language minority to the number of students in the majority language schools. If the numbers are comparable, then the number of minority language students is at the high end of the sliding scale and the minority is entitled to a homogeneous school. Local, regional or province-wide comparisons may be reasonable. The province can rebut a presumption of homogeneous schools by showing the comparators used are not appropriate or that the proposed school is not appropriate based on pedagogy or cost.
3. Determine the level of services to provide to the official language minority. If the second step shows the number of students is comparable and the province does not rebut the presumption, then a homogeneous school is appropriate. If the number of minority language students falls in the middle or at the low end of the sliding scale, then the level of services might be a few hours of language instruction in a school shared with the majority.

Because this is a *Charter* challenge, s. 1 also comes into play to see if the breach is justified. Damages can be awarded against governments where government policies infringe fundamental rights.

The decision? The Court ordered damages of $7 million and made a series of declarations for more French-language schools in B.C.

Jessica Steingard

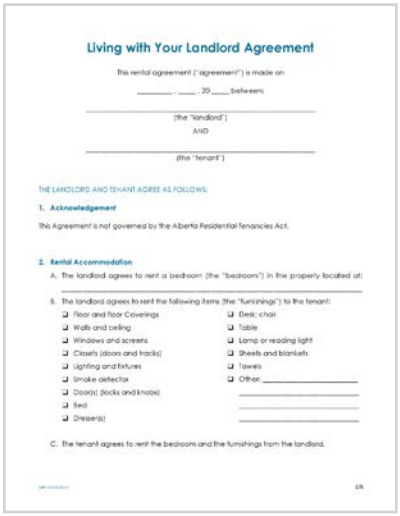
Jessica Steingard, BCom, JD, is a staff lawyer at the Centre for Public Legal Education Alberta.

New at CPLEA

In this issue of LawNow, we are highlighting **new and updated resources for landlords and tenants**.

New Resources

We have prepared the following sample agreements in a **fillable PDF format**:


Living with Your Landlord Agreement

This rental agreement ("agreement") is made on

_____ - _____ - 20____ between:

_____

[the "landlord"]

AND

_____

[the "tenant"]

THE LANDLORD AND TENANT AGREE AS FOLLOWS:

1. Acknowledgement

This Agreement is not governed by the Alberta Residential Tenancies Act.

2. Rental Accommodation

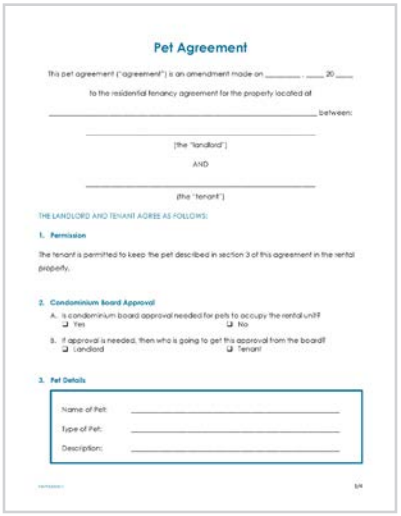
A. The landlord agrees to rent a bedroom (the "bedroom") in the property located at:

_____

B. The landlord agrees to rent the following items (the "furnishings") to the tenant:

- ❑ Floor and floor Coverings
- ❑ Walls and ceiling
- ❑ Windows and screens
- ❑ Closets (doors and tracks)
- ❑ Lighting and fixtures
- ❑ Smoke detector
- ❑ Door(s) (locks and knobs)
- ❑ Bed
- ❑ Dresser(s)
- ❑ Desk; chair
- ❑ Table
- ❑ Lamp or reading light
- ❑ Sheets and blankets
- ❑ Towels
- ❑ Other: _____

C. The tenant agrees to rent the bedroom and the furnishings from the landlord.


Pet Agreement

This pet agreement ("agreement") is an amendment made on _____ - _____ - 20____

to the residential tenancy agreement for the property located at

_____ between:

_____

[the "landlord"]

AND

_____

[the "tenant"]

THE LANDLORD AND TENANT AGREE AS FOLLOWS:

1. Permission

The tenant is permitted to keep the pet described in section 3 of this agreement in the rental property.

2. Condominium Board Approval

A. Is condominium board approval needed for pets to occupy the rental unit?

❑ Yes ❑ No

B. If approval is needed, then who is going to get this approval from the board?

❑ Landlord ❑ Tenant

3. Pet Details

Name of Pet: _____

Type of Pet: _____

Description: _____


Roommate Agreement

This Roommate Agreement ("agreement") is made on _____ - _____ - 20____ between the following persons:

_____

AND

_____

(the "roommates")

THE ROOMMATES AGREE AS FOLLOWS:

1. Rental Unit / Lease Agreement

A. The roommates have entered into this agreement to live together in the following place: _____ (the "rental unit").

B. This is a binding agreement between the roommates living together in the rental unit. Each roommate will carry out their responsibilities contained in this agreement in a timely manner.

C. This agreement does not replace the rights and responsibilities that the roommates have as tenants under the Residential Tenancies Act and their residential lease agreement with _____, the landlord of the rental unit.

2. Terms of Agreement

The terms of this agreement are in effect from

_____ - _____ - 20____ until _____ - _____ - 20____.

Living with Your Landlord

If you are living with your landlord (as in sharing space with them), this fillable agreement includes terms you can use to create an agreement specific to your situation.

Download or order a printed copy.

Pet Agreement

This sample agreement includes examples of what can be covered in a pet agreement.

Download or order a printed copy.

Roommate Agreement

Planning to live with a roommate? This sample agreement includes things you should talk about before living together.

Download or order a printed copy.

Updated Resources

The following resources have been updated:

- Eviction Notices
- Renting Basics Guide (English)
- Renting Basics Guide (French)
- Reverse Mortgages
- Sample Living with Your Landlord Agreement for Alberta Renters
- Sample Pet Agreement for Alberta Renters
- Sample Pet Resume
- Sample Roommate Agreement for Alberta Renters

Download these updated resources from our website or order free printed copies from our store. Or visit our **Laws for Landlords and Tenants in Alberta website** for these resources and much more information.

Got questions about COVID-19 in Alberta? Visit our webpage dedicated to legal updates related to COVID-19: **www.law-faqs.org/covid-19**

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

There is no Monopoly Man and COVID-19 is Not a Get out of Jail Free Card

Why the public needs to relax their fear of violent criminals being needlessly freed

Amidst the COVID-19 pandemic, there has been public query and fear (and at times outrage) over whether or not the COVID-19 pandemic allows violent criminals to roam free on our streets. Salacious and tantalizing commentary has sparked public debate over whether or not our justice system remains operable, and whether it can still function as a mechanism for law and justice during this unprecedented time.

Recent media publications have touched at the very heart of this inquiry: are courts automatically and unjustly releasing on bail violent criminals because of the COVID-19 pandemic?

Short answer: no.

Photo from Pexels

Firstly, our bail system is premised on the vital right to a presumption of innocence. That is not watered-down Kool-Aid speak from a defence lawyer. That is a constitutionally entrenched and fundamental concept of our justice system. The reason why criminal trials exist in our country is because there is a presumption of innocence. From that legal starting point, our bail system has developed a series of legal tests and requirements that set out the parameters of consideration for release into the community after arrest. This intrinsic and essential part of our justice system did not get thrown out the window because there is a virus that is effecting the day-to-day operation of our court system. Imperative legal precedents, requirements, statutes, tests and standards have not been suddenly flushed down the proverbial toilet. Instead, the justice system has adapted (as any modern and liberal justice system should) to the changes that this pandemic demands. The risk of contracting the virus in custody is one of many factors thrown into the pot of consideration for the Crown and presiding justice when considering release. However, the case law developing from the courts has been crystal clear: the fact that an inmate is at a heightened risk in custody for contracting the virus is not itself a ticket out of jail. The traditional legal tests and requirements for release still must be met. It is pure fiction and propaganda to suggest that our justice system is suddenly releasing violent offenders back into our communities with little regard for anything but the risk of that alleged offender's risk of contracting COVID-19.

Don't drink that Kool-Aid.

What the COVID-19 pandemic has affected, more than anything, are the procedural demands and practices of our justice system.

Secondly, the idea that "violent criminals" are being released back into our communities on bail erroneously assumes their guilt. Any individual released on bail is presumed innocent. An individual released on bail has

not been convicted of that crime. Individuals on bail have passed the legal tests and standards required for lawful release, including the threshold that the Crown's case against that individual is so strong that the public would not favour incarceration, despite the presumption of innocence. Our bail courts have used this legal test daily for years. The legal test did not suddenly vanish when a strange virus infiltrated our country. Presiding justices did not simply forget to apply that test because they are under the spell of COVID-19.

Thirdly, should the Crown believe the court made the wrong decision in releasing the individual – as the highly respected criminal defence attorney Frank Addario reminds us all in a recent Zoomer Radio podcast – the Crown has the right to appeal the decision for release to a higher court. It is in these higher courts where some of the most experienced, accomplished and reasoned judges preside.

Lastly, to suggest that our justice system whimsically releases individuals during this pandemic is nothing short of an insult to every member of our justice system who works tirelessly to ensure the lawful application of justice to every matter. No clever defence attorney tricks during this pandemic assist an alleged offender when they are facing serious charges. The judicial weighing of factors for and against release is not affected simply because a defence lawyer thinks they are good at running bail hearings and pulls the COVID-19 card from their pocket. Our criminal justice system isn't a flashy legal drama airing at 8 p.m. ET tonight.

What the COVID-19 pandemic *has* affected, more than anything, are the procedural demands and practices of our justice system. Courts are accommodating bail hearings via telephone and guilty pleas via video conferencing mediums like Zoom. The courts are closed to the public, and hearings are no longer conducted in person. We must wait to see how the courts will effectively deal with the backlog of cases that has inevitably occurred. It is a day-to-day process of adaptation and development.

… the idea that "violent criminals" are being released back into our communities on bail erroneously assumes their guilt.

However our justice system approaches the COVID-19 pandemic, protecting the public has always been one of the pillar functions of our justice system (contrary to some commentary and fear mongering critics). A little virus, no matter how mighty, will not erase this concept and purpose of our independent and adapting justice system. If anything, it has enhanced the public safety concern from the courts' perspective.

To buy into sensational comments to the contrary is an ill-fated attempt perhaps to Velcro our fears and concerns about the virus itself into all aspects of our community. This should not be the case. Not a vicious little virus, nor soapbox propaganda, will shake the rule of law in our justice system. So, rest assured, our courts are here to protect all members of the public. Even defence lawyers.

Melody Izadi

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

Employment

Peter Bowal and
James Ragan

Bad Behaviour 5.0: Employees getting away with …

> *Whitford was not given sufficiently clear and detailed warnings about his misconduct, was mislead [sic] by approvals granting him leave, and was not told that failure to prepare a return-to-work plan could result in his dismissal. Further, he was not caught drinking on the job, other than the one occasion when he made no attempt to hide his condition, and he did not jeopardize the safety of others.*
>
> *– Whitford v Agrium Inc, 2006 ABQB 726 (at para 50)*

We scoured judicial and arbitral decisions across the country and found another instance of egregious employee behaviour that a Canadian court has excused. The employer fired the employee, but the judge disagreed and ordered the employer to pay damages for wrongful dismissal and court costs.

This is the latest installment of another head-scratching outcome in a dismissal-for-cause case. In reading this, one is left asking, "What was that judge thinking?"

The Absentee Alcoholic

Agrium hired Mr. Whitford out of high school, and he worked his way up to shift supervisor. In 2000, he began treatment for depression, likely induced by family issues including the death of his mother and separation from his wife. In 2002, he accepted a salaried position at Agrium, after which his supervisors began noticing an absentee problem. Later that year, Mr. Whitford accepted that he had a problem with alcohol and entered a rehabilitation program.

Photo from Pexels

His supervisor supported his rehabilitation efforts. Agrium continued to pay his full salary while he attended the program and modified his responsibilities at work to reduce his stress upon return. Agrium expected Mr. Whitford to return to work in December, but instead he took another leave of absence to attend counselling. His employer expected his return to work the following February.

After completing the second program, Mr. Whitford began drinking again and exhibited "dismal attendance" at work. He would regularly check-in with his supervisor to inform him that he was not going to attend work because his doctor advised him to take more time off, he was dealing with divorce matters or he needed to fix his car. Throughout this process, a medical consultant from Agrium's occupational health department tried to help him develop a back-to-work plan.

Employers must give express and clear warnings to employees about their behaviours and give opportunities to improve.

On March 19, Agrium gave Mr. Whitford a letter stating it wanted to help him get back to work. However, if he was not able to improve this attendance, he would be dismissed. His absences continued.

On April 30, after Mr. Whitford had been absent without leave for up to six days, his supervisor called him to ask if he had a back-to-work plan. Mr. Whitford replied "no". In the first four months of the year, he had attended work for only 21 days. Agrium terminated his employment on May 1 on the basis of absenteeism without leave and his failure to develop a back-to-work plan.

Mr. Whitford sued Agrium for wrongful dismissal.

Conclusion

The Alberta Court of Queen's Bench took more than six months to decide this case. It ruled the dismissal of Mr. Whitford from his employment was unjustified. Even though Mr. Whitford had not reasonably mitigated his losses, the judge awarded him 12 months of pay in lieu of notice. The judge said Agrium did not prove Mr. Whitford's alcoholism impaired his ability to fulfill his workplace duties when considered against his otherwise good 22½-year employment record. As well, the employer had only caught Mr. Whitford drinking on the job once.

The judge said Agrium should also have issued more specific warnings to Mr. Whitford. Employers must give express and clear warnings to employees about their behaviours and give opportunities to improve. The judge in Mr. Whitford's case said that "a single warning is generally not sufficient to give an employee an opportunity to improve, or to inform an employee that he or she is failing to meet the standards expected."

On the other hand, it is unreasonable for any worker to assume they can be paid for full time employment without coming to work. Why must employers repeatedly issue "express and clear warnings" about the essence of a job?

Early in the litigation, Mr. Whitford made a formal offer to settle the case for $94,000, payable by Agrium. At trial years later, the court awarded Mr. Whitford $81,834.78 plus interest and costs. The judge, finding Agrium should have accepted Mr. Whitford's settlement offer, ordered Agrium to pay double the amount of costs to him.

The costs issue only – not the merits of the dismissal itself – was successfully appealed to the Alberta Court of Appeal. In the end, this case cost Agrium well over $100,000 in direct costs and major disruption.

The judge said Agrium did not prove Mr. Whitford's alcoholism impaired his ability to fulfill his workplace duties when considered against his otherwise good 22½-year employment record.

This case illustrates the legal and practical complexities facing employers who seek to manage workers with addictions and persistent absenteeism from the workplace. Canadian judges will point to other appalling behaviours in which employees *could* possibly have (but did not indulge) as a straw man device to excuse the intolerable, discomfiting behaviours for which employees are actually responsible.

Peter Bowal

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

James Ragan

James Ragan earned an MBA at the Haskayne School of Business.

Family

Sarah Dargatz

What COVID-19 Caselaw Tells Us about Parenting

This column is coming out during the COVID-19 pandemic. Health authorities across Canada, and the world, have issued protocols for limiting the spread of the virus. Many family courts are only hearing "urgent" matters.

The court has heard cases during this time that speak to a specific set of circumstances in our history. However, the court's decisions also speak to principles that parents, and legal professionals, can apply at any time.

The Cases

One of the first parenting cases to come out was ***Ribeiro v Wright***, 2020 ONSC 1829. Justice Pazaratz of the Superior Court of Justice in Hamilton, Ontario, heard an application shortly after the government implemented pandemic protocols. The mother wanted to suspend all of the father's court-ordered parenting time due to the pandemic.

Justice Pazaratz spoke of the balancing act that parents and courts must achieve. On the one hand, we must follow and respect current parenting orders based on the presumption that those orders reflect the child's best interests. And on the other hand, we must respect the health directives during an extraordinary time. In other words, parents and courts have to balance competing "best interests": having a relationship with both parents vs. preventing the spread of a deadly disease. This balancing act will not be the same for every family. The court will deal with each family on a case-by-case basis. The court noted that the existence of the pandemic and the resulting change to our day-to-day routines does not, in and of itself, necessarily justify changing the parenting schedule. However, there may be some cases where parents have to forego time with their children. For example, where a parent must quarantine, where family members have a heightened risk or where a parent is not complying with health protocols. Parents must make specific and realistic time-sharing proposals to address all COVID-19 considerations, with their primary focus being the children.

Parents must make good faith efforts to communicate.

In ***Le v Norris***, 2020 ONSC 1932, Justice Conlan of the Superior Court of Justice in Milton, Ontario heard an application from a father who was being denied his court-ordered parenting time by the mother. Justice Conlan noted that "responsible adherence" to the existing court order could address the mother's concerns related to COVID-19. This means "being practical and having some basic common sense". The parents could follow the order while still following the protocols set out by the health authorities.

In ***Skuce v Skuce***, 2020 ONSC 1881, Justice Doyle of the Superior Court of Justice in Ottawa, Ontario heard another application

by a father who was being denied his in-person parenting time set out in Minutes of Settlement signed only a couple weeks before. By unilaterally cutting off the father's visits, the mother had engaged in what courts often refer to as a "self-help remedy". Justice Doyle noted:

> *The Court cannot be seen to condone this type of behaviour. Without citizens obeying existing court orders, the whole justice system would be turned over on its head.*

The court went on to note: "children need and deserve stability, comfort, and predictability in their routine. Despite the current world events, this can be accomplished." Children already cannot see their friends, teachers and extended families. They should see still see their parents, unless for their safety they should not.

Parents should follow *the orders and agreements already in place, to the extent possible.*

In ***SR v MG***, 2020 BCPC 57, Judge Bond of the Provincial Court in Vancouver, British Columbia heard an application from a mother seeking the return of the children from their father. The father was withholding the children because the mother works as a Licensed Practical Nurse. The mother was taking every recommended precaution. Judge Bond noted that the following factors are relevant:

- whether or not the child, the parents or other members of their households are at an elevated risk;
- the parties risk of exposure and the steps they are taking to mitigate that risk;
- the usual factors we consider when determining what is in the child's best interests, such as their need for stability, their relationships with both parents, their history of care, etc.; and
- society's need to maintain access to services such as health care.

Judge Bond found that the mother was doing what she could to mitigate her risk and following the recommended precautions. Therefore, she should still have parenting time.

In ***TC v RE***, 2020 BCPC 65, Judge Bond heard another application where a father applied to reinstate and increase his parenting time. The father would not communicate with the mother about the steps he was taking to comply with the recommended health protocols until they were in court. Judge Bond noted that:

> *[I]t is incredibly important that separated parents communicate effectively in co-parenting their children. That commination should not focus on the rights of the parents to see their children, but rather on the rights of their children to have parents that can share important information about the children's safety and welfare respectfully and effectively.*

The court was "appalled" that the father had not made full disclosure about his intentions and behaviours to the mother until he had brought her to court.

Courts will not condone self-help remedies *except in exceptional circumstances.*

Hundreds of other cases have followed the principles set out in these cases, including in my home province of Alberta. In ***SAS v LMS***, 2020 ABQB 287, Justice Graesser of the Court of Queen's Bench in Edmonton followed the reasoning in *Ribeiro v Wright* when

considering a father's application to reinstate his parenting time. The mother had cut if off because she believed he was not following the recommended precautions. The court balanced the need for the children's safety versus the need for them to see both parents. The court also discouraged self-help remedies. Justice Graesser provided guidelines to the parents and gave them time to work out an agreement, which they were able to do.

Justice Graesser also warns parents not to look for "loopholes" in the guidelines issued by the public health authorities. In this case, the father tried to avoid physical distancing from others by invoking the concept of "cohorts". The court wrote:

> *Looking for "loopholes" or exceptions is too frequently an attempt to justify an unwillingness to comply, or an attitude of dismissiveness towards the risks acknowledged by medical professionals. Courts should be slow to permit anything that puts a person or the community in an unreasonable risk.*

The Take-aways

These cases, and the many other cases issued during the COVID-19 pandemic, give us principles that we can apply at any time:

- Parents must remain focused on their children and work to find *realistic* solutions. Parents need to be *practical* and exercise *common sense*.
- Staying *healthy* is important. The court will defer to public health authorities and expect strict compliance with health orders. It is also important for children to have a *relationship with both parents*. Parents should *mitigate risks*.
- Parents must make good faith efforts to *communicate*.
- Parents should do what they can *cooperate* and stay out of court.
- Parents should *follow* the orders and agreements already in place, to the extent possible. Courts will not condone *self-help remedies* except in exceptional circumstances.
- Every family is *unique* and must be assessed on the facts of their particular situation.

Sarah Dargatz

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

Famous Cases

Peter Bowal
and Patrick Ma

Canada Opens its Courts to Overseas Human Rights Abuses

On February 28, 2020, the Supreme Court of Canada refused to strike damages claims for international human rights abuses and Canadian torts by three former workers at a Canadian majority-owned mining company in Eritrea. In the five-to-four majority decision in *Nevsun Resources Ltd v Araya*, the court signalled that Canadian courts are open to hear claims under Canadian law for wrongs committed outside Canada.

Background

The ruling Eritrean regime has an abysmal track record of human rights abuses against its people. In 2018, *Forbes* magazine called Eritrea the "North Korea of Africa." For example, Eritrea's National Service Program conscripts civilians into mandatory, indefinite military service. This includes for work on public projects in the "national interest", with subsistence wages. Nevsun's gold, copper and zinc mining operation is one such national interest project. The Eritrean government owned a 40% stake in the mine.

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle were the named plaintiffs in a class action on behalf of more than 1,000 individuals compelled to work at the Nevsun-owned Bisha mine between 2008 and 2012. They claimed they had to work in dangerous conditions and suffered shocking abuses and punishments. Their employer did not allow them to leave the premises without authorization on their days off. If they did so without permission, they faced severe fines and possible retaliatory acts on their family members.

In 2014, they brought a civil suit against their Vancouver-based employer in a British Columbia court seeking damages for breaches of customary international law (the common law of the international legal system): crimes against humanity, slavery, forced imprisonment and torture. They also sued for conversion, battery, unlawful confinement, conspiracy and negligence in Canadian tort law. Nevsun is a publicly held company incorporated under British Columbia legislation. It moved to strike the claim under the *act of state doctrine* (which precludes domestic courts from judging acts of sovereign foreign governments) as well as on the basis that the customary international law claims had no reasonable prospect of success.

Supreme Court of Canada Decision

In its decision released more than thirteen months after oral argument, Canada's top court readily embraced (para 1):

> *... the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.*

A unified majority of five judges on the Supreme Court of Canada concluded that the act of state doctrine, as developed in Canadian jurisprudence, was not a bar to the claims. This doctrine has never been a part of Canadian

law. The doctrine, rooted in English common law, is "a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state" (para 29), granting a form of state immunity.

Photo from Pexels

Rather, Canadian law focuses on the principles underlying the doctrine: conflict of laws and judicial restraint. Each of these principles has developed separately apart from the act of state doctrine. The enforcement of foreign laws is considered under regular private international law principles which generally call for deference. However, Canadian judges enjoy discretion to refuse to enforce foreign laws which are contrary to public policy and public international law.

Customary international law norms form part of Canadian common law.

International law used to be about independent states but the Court declared that the proliferation of human rights law over the past seven decades has created a complex network of conventions to ensure compliance with those rights. This represents "a revolutionary shift in international law to a human-centric conception of global order." Accordingly, international law now also protects the lives, liberty, health and education of human beings. These norms are enforced directly against private actors such as corporations (para 108).

The Court said Canada automatically incorporates customary international law into domestic law, unless there is a conflict with existing Canadian legislation, through the doctrine of adoption without any need for legislative action (para 90). Customary international law must be treated with the same respect as any other law. Breaches by a Canadian company can be directly addressed and remedied. Since the plaintiffs' claims are based on norms that are part of Canada's common law, it was *not* "plain and obvious" that Canadian domestic common law would *not* recognize a direct remedy. One cannot conclude that customary international law claims have no reasonable likelihood of success. Accordingly, Nevsun did not meet the test to strike the pleadings at this preliminary stage.

Breaches of customary international law, or *jus cogens*, may apply to Nevsun. Customary international law norms form part of Canadian common law. Since Canadian law binds Nevsun, the claims of breaches of customary international law should proceed.

Strong Dissent

Four of the judges dissented for various reasons. Two were of the view that there was no reasonable cause of action based on breaches of international law because international law (and especially *this* law) did not formally bind corporations. International human rights law did not explicitly bind private corporations. Only states and natural persons were expressly implicated.

The other two judges fully disagreed with the majority. They stated that the act of state doctrine applied. They also found that customary international law did not automatically merge into Canadian law. Rather, Canadian legislatures, not the judiciary, must incorporate it. Therefore, the claims in international law not only had no reasonable

likelihood of success, but they were bound to fail in Canadian courts. Likewise, under *forum non-conveniens*, since the acts occurred in Eritrea, the courts of Eritrea – not Canada – would be the best forum to hear the matter. Overall, the dissenting judges were concerned that Canadian courts could find themselves overstepping their official judicial roles by adjudicating on such matters. This could interfere with the Canadian government's executive branch related to foreign relations, potentially undermining Canadian diplomacy with other nations.

We can view the* Nevsun *precedent as a significant change in Canadian law but also another step along the road to export Canadian human rights values and law around the world.

Conclusion

Addressing international human rights abuses requires identifying a variety of actors, including courts. The middle power of the Government of Canada, with its clamorous globalist proclivities – along with its top appellate courts – are now taking on the role of global social justice and human rights warrior. The venerable principles of judicial deference and restraint, the sovereignty of nations over activities within their territories, adoption of international law into domestic law, and the practical complications of subjecting private corporations to liability in Canada for the actions of foreign states under international and Canadian private law – these legal principles become secondary to virtue on the international stage.

We can view the *Nevsun* precedent as a significant change in Canadian law but also another step along the road to export Canadian human rights values and law around the world. The Supreme Court of Canada also recently let stand the British Columbia Court of Appeal decision in *Garcia v Tahoe Resources Inc.* In that case, seven Guatemalan plaintiffs commenced a damages action in British Columbia against a Canadian company operating a mine in Guatemala after private security personnel allegedly injured them during a protest outside the mine. The company had argued that *forum non conveniens* rendered Guatemala the better trial jurisdiction given the ongoing criminal proceeding and a potential civil suit in Guatemala. The appellate court disagreed largely on the basis of corruption and injustice in Guatemala. Today, anyone can bring a case for damages in Canada for wrongful conduct anywhere in the world by a Canadian company. The onus is on corporate defendants operating overseas to prove home countries are capable of providing justice.

International law has become more difficult to ignore. *Nevsun* will have far-reaching consequences, including impairing the competitiveness and hollowing out of Canadian companies doing business globally. One might also wonder whether *Nevsun* will lead to more justice for plaintiffs ultimately. Nevsun is now a Chinese company, so the plaintiffs will now have to win and collect damages under Chinese rules.

Peter Bowal

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

Patrick Ma

Patrick Ma is a 2020 Masters of Management graduate of the University of Calgary.

Housing

Judy Feng

CONDO LAW FOR ALBERTANS
www.condolawalberta.ca

Alberta's New Condominium Regulations: Insurance

On January 1, 2020, revised condominium governance regulations came into effect in Alberta. This article is part of a multi-part article series on Alberta's new condominium regulations. Stay tuned for our next article on repairs.

The previous incarnation of the regulations primarily addressed the type of insurance condominium corporations were responsible for. For example, condominium corporations must maintain insurance to protect common property and condo units against loss resulting from destruction or damage. The new regulations further clarify:

- the condominium's requirement to maintain insurance on condo units
- what the condominium corporation's insurance does not cover
- the types of additional insurance condominium corporations may impose on owners, and
- claim back on insurance deductible from owners.

Clarification on condo unit insurance

Under the new regulations, the amount of insurance that a condominium corporation must have on condominium units depends on the type of unit. For example, condominium corporations must, at a minimum, place and maintain the following amount of insurance:

Type of unit	Amount of insurance
Residential units on the parcel (other than those owned by the developer)	Replacement value of the units and of the fixtures and finishing in the units (as described in the standard insurable unit description OR SIUD)
Residential units on the parcel owned by the developer	Replacement value of units and of the fixtures and finishing as they existed at the time of the condominium plan's registration
Non-residential units on the parcel used in connection with a residential purpose (e.g., parking spaces and storage units for owners)	Replacement value of the units and of the fixtures and finishing, as were typically provided to purchasers by a developer
All other non-residential units on the parcel	The replacement value of the units, excluding the replacement value of any fixtures and finishing in the unit
Units on the parcel owned by the corporation	The replacement value of the units and of the fixtures and finishing in the unit

A corporation can increase the amount of insurance for residential units on the parcel (other than those owned by the developer) to reflect a higher replacement value. This may happen if there are variations from the standard insurable unit descriptions.

… the amount of insurance that a condominium corporation must have on condominium units depends on the type of unit.

Going hand in hand with the clarification on condo unit insurance, we now have a legislative definition for the **standard insurable unit description (SIUD)**. A SIUD is a description that developers give to purchasers. The condominium corporation can also adopt one if there isn't one in place. A SIUD consists of typical standard fixtures and finishing in a residential unit or class of residential units.

A SIUD must include a description of the typical features in the unit(s). For example:

- Floor coverings, wall coverings and ceiling coverings
- Electrical lines and fixtures (includes lighting fixtures)
- Plumbing lines and fixtures
- Natural gas lines and fixtures
- Air exchange and temperature control fixtures
- Walls that do not form the unit's boundaries, and any windows/doors located in those walls
- Cabinets and counter tops
- Non-chattel appliances.

***TIP:** If you are a condo purchaser or owner and looking for the SIUD, you can ask your condominium corporation. Upon receiving the request, the corporation has 10 days to provide it to you.*

Corporation's insurance does not extend to improvements

Unless required by the corporation's bylaws, a corporation's insurance does not extend to any improvements made to the units by the owners. For residential units, improvements do not include any property included in the standard insurable unit description. For non-residential units, improvements do not include any fixtures and finishing that must be insured by the corporation.

Additional insurance requirements on owners

The new regulations make it clear that condominium corporations can now impose additional insurance requirements on owners. For example, a corporation may, by bylaw:

- require owners to purchase insurance for deductibles that may be payable to a corporation
- specify the particulars of deductible insurance to be purchased, and
- specify the proof an owner must provide the corporation of purchased insurance.

Claim back on insurance deductible

An insurance deductible is money that an insured must pay before the insurer will pay out any expenses for a claim. Under the new regulations, if damage for a claim originates in or from an owner's unit (or owner's exclusive possession area), then the condominium

corporation can claim back an insurance deductible from the owner, up to a maximum of $50,000.

A SIUD is a description that developers give to purchasers.

In such a situation, the owner is "absolutely liable" to the corporation on demand by the corporation. This means that whether or not there was any proven negligence, the owner is liable for the corporation's deductible.

For example, there is water damage to a condominium building that came from an owner's unit. The condominium corporation can only make the owner liable for the deductible limit up to $50,000. If the deductible is $10,000, then the owner is liable for $10,000. But if the deductible is $60,000, then the owner is only liable for $50,000 (the maximum amount).

That said, there are situations where an owner is not liable for the deductible. For example, if the claim arose from:

- a defect in the construction of the owner's unit or exclusive possession area
- damage due to an act or omission of the corporation, board member, officer, employee or agent of the corporation (or any combination of them), or
- normal structural deterioration of the common property, managed property or real property, other than the property that the owner was responsible for maintaining or repairing.

Tips for owners

- Some insurance companies offer owners deductible coverage that will help pay for the corporation's deductible. Check with your insurance representative to discuss this type of coverage. It is prudent to request to add coverage.
- If you already have deductible coverage in your unit owner's policy, it is prudent to adjust your deductible coverage accordingly.
- You can ask your board, manager or corporation's insurance broker for a copy of the corporation's Certificate of Insurance, which outlines current deductible amounts.

To learn about the latest changes to Alberta's *Condominium Property Act* and *Regulation*, go to our website: www.condolawalberta.ca.

Judy Feng

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

Human Rights

Linda McKay-Panos

Overt Discrimination and Hate Crimes are Increasing During COVID-19

Generally, when talking about the situation in Canada, the emphasis is on the prevalence of systemic discrimination —policies or practices that are part of an organization, which perpetuate disadvantage. This is pervasive in Canada and difficult to address because it is reinforced by acceptance as the "normal" way of doing things. However, while complex systemic discrimination continues to exist, recently there are numerous overt examples of discrimination against racialized minorities in Canada. In some cases, the behaviour rises to the level of criminal assault or hate crimes. It seems as though fear and ignorance have caused some people to act out on their racist attitudes.

CTV News reported on April 27, 2020 that a poll carried out by Corbett Communications revealed that 14 per cent of respondents in Toronto, Montreal and Vancouver either "believed that all Chinese or Asian people carry the coronavirus (four per cent) or were uncertain about that (10 per cent)." In the same article, Susan Eng, director for the Chinese Canadian National Council of Social Justice, said that: "With results like this, it is not surprising that we are seeing a growing increase in anti-Asian racism, likely provoked by COVID-19 fears and ignorance, but no less threatening for that." The poll also found that one in eight respondents were aware of racist incidents in their neighbourhood since the beginning of the COVID-19 pandemic.

There have been several examples of crimes against people of Asian descent across Canada. Vancouver police are investigating an attack on March 13, 2020 against a 92-year-old man as a hate crime. The Edmonton Police Service reports that there have been several incidents of hate-related graffiti reported in Edmonton since March 17. On April 29, 2020, Marichu Antonio of Calgary's Action Dignity reported that online expressions of hatred towards newcomers who worked at Cargill Meat Packing Plant has resulted in newcomers being turned away from services such as banks and grocery stores. There are almost daily reports of racist incidents across Canada.

... recently there are numerous overt examples of discrimination against racialized minorities in Canada.

Several prominent Canadians and world figures have commented on this crisis. United Nations Secretary-General António Guterres pointed out that the world is facing "the biggest international crisis in generations", stressing that human rights "cannot be an afterthought". The report states that "the virus is the threat, not the people, and emphasized that any emergency and security measures be temporary, proportional and aimed at protecting individuals."

Mr. Guterres added that:

> *We see the disproportionate effects on certain communities, the rise of hate speech, the targeting of vulnerable groups, and the risks of heavy-handed security responses undermining the health response.*

On April 8, 2020, Marie-Claude Landry, Chief Commissioner of the Canadian Human Rights Commission, issued the following statement:

> *The Canadian Human Rights Commission is deeply concerned by the rise of racism across Canada since the start of the COVID-19 pandemic.*
>
> *Minority groups, in particular people of Asian origin, have been the victims of racist taunts, threats and intimidation in public and online, and physical violence. This is both an issue of public safety and fundamental human rights. No one should feel threatened or unwelcome because of the colour of their skin or where they are from.*
>
> *Racism and xenophobia are also contributing to misinformation during a global health crisis. Viruses do not have borders. Viruses do not discriminate. People do.*
>
> *Flattening the curve and slowing the spread of COVID-19 will take cooperation, solidarity and unity. As a country built on diversity, freedom and inclusion, we cannot let racism, intolerance and inequality undermine our peace and prosperity.*
>
> *We are not safe unless we are all safe.*

On May 5, 2020, Michael Gottheil, Chief of the Commission and Tribunals at the Alberta Human Rights Commission, released a statement:

> *The COVID-19 pandemic has impacted all our lives in many ways. Unfortunately, it has led to an increase in racism and discrimination towards certain groups of Canadians. Since the beginning of this crisis, minority groups in Alberta, especially people of Asian descent, have been the targets of racist comments, threats, and intimidation.*
>
> *Even though it may be human nature to want to assign blame or lash out in difficult times, we must be vigilant against xenophobia. To fight this pandemic, we need to look after one another by reaching out to our fellow Albertans and showing compassion, care, and consideration.*
>
> *… We know that racism and discrimination will not stop when this pandemic ends, and may even worsen for some within our communities. Now, more than ever, Albertans and Canadians need to come together as one to stand up to hate. As we begin to ease restrictions and gradually move toward recovery, it is crucial that all spaces are free from hate, racism, and xenophobia, and that all Albertans feel safe.*

Hopefully, the majority of us who are deeply troubled by this will take this opportunity to get involved in some way in the human rights movement.

There are many individuals and groups taking steps to address the situation. Chief Commissioner Michael Gottheil notes that ACT2endracism recently developed the Covid-19 Anti-Racism Incident Reporting Centre. Individuals can report hateful incidents in multiple languages, either on-line or by text messaging.

The Tyee also listed five steps on April 10 that allies can use to address the current crisis and the long-term implications of racism.

It is unfortunate that it often takes blatantly offensive events to draw attention to the unpleasant and illegal actions resulting from racial discrimination and racism. Hopefully, the majority of us who are deeply troubled by this will take this opportunity to get involved in some way in the human rights movement.

Linda McKay-Panos

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

Not-for-Profit

Peter Broder

COVID-19 Support: Getting the 'best bang for the buck'

The COVID-19 pandemic has devastated charity and non-profit organizations' revenue sources to an extent rarely, if ever, seen before. Though some high-profile groups saw governments and the public funnel generous support to them and there have been a few clever online initiatives to raise money, that is just a small part of the story. The reality is that fundraising activities for many sector organizations have either been substantially scaled back or halted altogether. Gaming proceeds from casino nights that are budgeted and relied on by numerous Alberta groups have disappeared.

One silver lining is that emergency relief programs from all levels of government are generally open to voluntary sector groups … as well as the private sector.

Those charities and non-profits, such as YMCAs, that offer products or services to part of their client base at market rates, and then use the proceeds to defray overhead, have seen sales dry up. This development, together with the fall in more traditional fundraising, is particularly troubling because funders — whether government or philanthropic — often remain only willing to fund direct service delivery or other frontline work. They expect agencies to find other ways to cover their infrastructure costs. Colloquially this is known as funding with 80-cent dollars.

Arts and cultural organizations that use ticket sales to fund their core operations are in deep peril. Even if they can find a way to recover from their revenue loss, and meet costs such as rent and utilities, with the gig economy workers on which they rely disproportionately hurt by the economic shutdown and with huge uncertainty about the willingness of audiences to return as we emerge from the crisis, prospects look glum.

Photo from Pixabay

Finally, most voluntary sector groups don't have investments, but those that do have seen the value of their holdings plummet. So, things are pretty lean there as well. There is an initiative — notwithstanding recent poor investment returns — to encourage foundations and other organizations with endowments to spend 5% of their portfolios this year, instead of the 3.5% mandated by the federal government. If that 5% goal was to become a standard widely followed, it would still cover only a miniscule fraction of the revenue gap currently being experienced by the sector.

One silver lining is that emergency relief programs from all levels of government are generally open to voluntary sector groups (or

individuals associated with them) as well as the private sector. That is a positive because in the past it was not always the case that charities and non-profits were eligible for government initiatives, particularly those with an economic focus. That said, some measures have been better thought through than others.

At the federal level, the emergency benefits available either through the employment insurance program or though the Canada Emergency Response Benefit (**CERB**) seem to have been well-received and by and large successful. One shortcoming of the CERB, noted by the Prime Minister, was the potential for a low-wage earner in a frontline organization (frequently a voluntary sector group) to opt for the benefit rather than continue in a job where they faced a health risk and would be financially worse off than on the relief program. Tweaks were made to the CERB and funds were announced to boost frontline wages in essential industries to counter this problem.

The cost of wage subsidy is being shared by the federal and provincial governments, with the provinces determining eligibility. The long-term care sector, which is the focus of much of the attention for this measure, is composed of different types of providers. The federal tax system allows for long-term care facilities to qualify as registered charities, as a special category of non-profit organization under *Income Tax Act* s. 149 (1)(i) or as for-profit entities.

In having providers that are charities, non-profits and for-profits, the long-term care sector mirrors the early learning and childcare sector, where the Alberta provincial government has long financed a wage top-up for certain workers. The model is to offer the same support regardless of the nature of the provider. It is anticipated a similar approach will be taken to the wage top-up for long-term care home workers.

In the circumstances of the pandemic it makes sense to have programs with broad scope and to support frontline workers directly rather than focusing too much on the nature of organizations or companies. Staff recruitment and retention are necessarily of primary concern for the moment.

The reality is that fundraising activities for many sector organizations have either been substantially scaled back or halted altogether.

But widespread reports of deplorable conditions in some long-term care facilities in Eastern Canada suggest a more strategic approach to funding and regulating these activities ought to be taken. Ideally, this would see facilities that offer higher quality care receive priority in getting funding. One approach, which is taken by Alberta in the childcare field, is to link the amount of the wage supplement to educational qualifications.

Though correlation between education and quality of work is not exact, research does indicate a discernible relationship. So, linking the wage top-up to academic training is reasonable as something of a proxy for better care.

On the flip side, experience in the early learning and care sector has been that wage top-ups paid to employees of for-profit entities are hidden cross-subsidies for acquiring private property (i.e., ownership of facilities, such as buildings) and in increasing profitability. As well, the better quality of care

they make possible allows for higher fees to be charged. So, in economic terms, without additional regulatory measures — such as caps on fees — subsidies paid in these situations are less efficient in improving quality.

The COVID-19 pandemic and its economic fallout are unprecedented. Government support in the face of this is understandably less nuanced than might be desired. But resources are not unlimited. As we move past the crisis, we should think harder and more deeply about how we can get the best 'bang for the buck' out of public dollars.

Peter Broder

Peter Broder is Policy Analyst and General Counsel at The Muttart Foundation in Edmonton, Alberta. The views expressed do not necessarily reflect those of the Foundation.

Youth & the Law

Jessica Steingard

Medical Treatment: When can I give my own consent?

We are in the middle of a global health crisis – the COVID-19 pandemic. With health on everyone's mind, now is a perfect time to talk about when you can give your consent to medical treatments, without your parents' approval. To be clear, by youth we mean anyone under the age of majority in the province where you live. In Alberta, the age of majority is 18 years.

In this column, we are going to look at two related concepts:

1. Giving consent for medical treatment
2. Confidentiality between patients and doctors

Giving Consent

If you are a minor (under the age of majority) in Canada, you can generally make your own medical decisions if:

- you are mature enough to make your own informed decisions; and
- you understand the consequences of your decision.

Alberta uses the mature minor doctrine for youth giving consent to medical treatments.

This is called the 'mature minor doctrine'. It is law according to the common law. (Common law means judge-made law, as opposed to laws made by the government.) Alberta uses the mature minor doctrine for youth giving consent to medical treatments.

A health professional will decide if you are capable of making your own decision. They might make you sign a consent form. There is no hard and fast rule about how old or mature you have to be. Generally, you must be more mature to make more important decisions. For example, if you are 16 years old and want to get birth control, your doctor may decide that you are capable of making the decision yourself without your parents. If you are 14 years old and need cancer treatment, your doctor may decide that you are not capable of making this decision by yourself.

Each province has its own laws about disclosing health information.

If you are capable of making your own health decisions, your parents cannot overrule your decision. There have been many court cases where youth have asked the court to let them make their own medical decisions or where parents want the court to order the youth to undergo treatment. The court will look at all the evidence and decide if you are a 'mature minor'.

There have been other court cases where the government gets involved because the youth and their parents are refusing medical treatment that could save the youth's life. For example, there was a case in Alberta where a 16-year-old refused blood transfusions that would save her life. She was a mature minor. Both her and her parents refused the treatment based on their religious beliefs. The

government applied to court to be able to make decisions for the girl. The court found the girl was in need of protective services under Alberta's *Child, Youth and Family Enhancement Act*. The government, through the Director of Children's Services, then had the authority to make decisions for the child. The courts have said that the mature minor rule does not apply in child welfare proceedings. Instead, the court looks at what is in the child's best interests.

Two provinces have legislation that give minors the right to make their own decisions at a specific age. In New Brunswick, the *Medical Consent of Minors Act* gives all youth who are 16 or older the right to consent the same way as if they were 19 (the age of majority in that province). Youth under 16 can make decisions if they are mature minors – according to the mature minor doctrine above. In Quebec, the age for consenting to medical treatment that is necessary for health is 14 years. A child under 14 years cannot make health decisions on their own.

Photo from Pixabay

Patient-Doctor Confidentiality

If the health professional believes you are capable of making medical decisions for yourself, your next question probably is whether the health professional will share health information with your parents.

Generally, if you are capable of making your own health decisions, then the health professional cannot disclosure your health information to anyone, including your parents, unless you give your consent.

Alberta's *Health Information Act* confirms this rule. The Act sets out to whom, how and when your health information gets disclosed. Section 104 says who can exercise the rights or powers conferred under the Act (such as the right to control disclosure of your health information). If you are under 18 then:

- You can exercise these rights or powers if you understand the nature of the right or power and consequences of exercising the right. (This would be the case for a mature minor.)
- Your guardian can exercise these rights or powers if you do not understand the nature of the right or power and consequences of exercising the right.

If you are capable of making your own health decisions, your parents cannot overrule your decision.

So if you are a mature minor in Alberta, you can control how your health information is disclosed. Each province has its own laws about disclosing health information.

However, health professionals have an obligation to disclose your health information in certain situations, even if you ask them not to. This includes where the health professional suspects abuse, for court proceedings, to prevent fraud or if it is related to an offence being investigated.

If you have concerns or questions about your health information being disclosed improperly, you can contact the Office of the Information and Privacy Commissioner of Alberta or the equivalent in the province where you live.

Resources

For more information, check out these resources:

- **Alberta** law: Youth FAQs – Health & Medical by CPLEA
- **British Columbia** law: Legal Rights for Youth in British Columbia – Medical Rights by Justice Education Society
- **Saskatchewan** law: Requirements for Consent to Medical Treatment by PLEA
- **Ontario** law: Youth Medical Rights by Justice for Children and Youth
- **Quebec** law: Consent to Medical Care and the Right to Refuse Care by Educaloi
- **New Brunswick** law: Patient Rights by Public Legal Education and Information Service of New Brunswick
- **Nova Scotia** law: Consent, Capacity, and Substitute Decision-Makers by the Government of Nova Scotia
- **Yukon** law: Informed Consent by Yukon Health and Social Services

Jessica Steingard

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

Thank You

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

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

Alberta LAW FOUNDATION

Canada
Department of Justice Canada | Ministère de la Justice Canada

The contents of this publication are intended as general legal information only. **It is not legal advice.**

Centre for Public cplea Legal Education Alberta

LawNow