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Columns

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Contents

In This Issue

COVID-19 is still with us. This issue provides a status update – freedom of movement, court processes, contractual relief and tracing apps. And for the filmmakers out there, we report on some of the legalities of producing a film.

Feature

COVID-19: Where are we now?

Freedom of Movement during COVID-19

Myrna El Fakhry Tuttle

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 – an infectious disease caused by a new coronavirus – a global pandemic. With no vaccines or treatments to control the disease, the WHO asked governments "to take urgent and aggressive action to stop the spread of the virus".

Freedom of movement is a human right protected by domestic laws and international treaties ...

In order to address the COVID-19 outbreak, governments around the world took strict measures and curtailed their citizen's freedom of movement. Borders of countries, states, provinces, counties and cities all over the world closed. Lock-downs and quarantines obstructed non-essential movement outside of the home. People were required to stay home, to abstain from going to work or school. Restaurants, stores, offices, museums, playgrounds, gyms, etc. also closed. In addition, public gatherings like religious services, concerts, social and sporting events were cancelled. Government and health officials also asked people to keep a safe distance from each other whenever they did go out.

When can freedom of movement be restricted?

In 1959, Hannah Arendt said:

> *Of all the specific liberties which may come into our minds when we hear the word 'freedom', freedom of movement is historically the oldest and also the most elementary. Being able to depart for where we will is the prototypal gesture of being free, as limitation of freedom of movement has from time immemorial been the precondition for enslavement.*

Freedom of movement is a human right protected by domestic laws and international treaties, including the *Universal Declaration of Human Rights* (article 13) and the *International Covenant on Civil and Political Rights* (ICCPR) (article 12). Both documents guarantee the right of everyone to leave any country including their own country and to return to it. They also protect the right of everyone lawfully in a country to move freely within the territory of that country.

Concurrently, article 25 of the *Universal Declaration of Human Rights* states that everyone has the right to a standard of living adequate for the health of himself and of his family. Also, article 12 of the *International Covenant on Economic, Social and Cultural rights* (ICESCR) recognizes the right of everyone to the enjoyment of the highest attainable standard of health, and asks governments to take steps to prevent threats to public health and to provide medical service to those who need it.

In order to address the COVID-19 outbreak, governments around the world took strict measures and curtailed their citizen's freedom of movement.

Human rights are interdependent. Therefore, the right to freedom of movement is not absolute and can be restricted when needed for the public's health. Article 12(3) of the *ICCPR* allows restrictions on the right to freedom of movement for reasons of public health and national emergency. However, these restrictions must be lawful, necessary and proportionate. "Restrictions such as mandatory quarantine or isolation of symptomatic people must, at a minimum, be carried out in accordance with the law".

In addition, according to the Siracusa Principles – principles that determine the conditions under which restrictions on civil liberties are justified – any steps taken to protect the public and limit people's rights and freedoms must be "legal, proportionate and necessary". These measures have to be limited in time and need to take into consideration their impact on vulnerable and marginalized groups.

Silva and Smith stated (citing CESCR General Comment No. 14):

> *A right to health also includes the right to control the spread of infectious diseases via a variety of control measures, some of which are restrictive. The use of restrictive measures during infectious disease outbreaks, including measures like quarantine, isolation, and travel prohibitions, restrict or limit basic human rights prescribed by the Universal Declaration of Human Rights, such as freedom of movement (Article 13) and the right to peaceful assembly (Article 20), for the sake of protecting and promoting the health of individuals and communities.*

Unfortunately, the extent and danger of the COVID-19 pandemic threatened public health all over the globe. This justified restrictions on certain fundamental rights and freedoms,

Photo by Michael Gaida from Pixabay

such as imposing travel bans, quarantine and isolation.

People in China were asked to stay home. About 760 million people were confined to their homes. In the United States, millions of people were ordered to stay home. The U.S. government also denied entry to non–U.S. citizens traveling from China, Iran and most of Europe, and was screening travellers returning from heavily hit countries.

In Australia, the government banned entry to anyone who had travelled to China, with exceptions for Australian citizens, permanent residents and others. However, once they arrived in Australia, they were required to "self-isolate for 14 days."

Italy, which was badly affected by the virus, imposed harsh restrictions on freedom of movement – the worst in Europe since World War II. Sixty million Italians were not allowed to leave home except (and only with written permission) for work, health and other justified urgencies.

Restrictions in Canada

Section 6 of the *Charter of Rights and Freedoms* (the *Charter*) gives Canadian citizens and permanent residents the right to travel freely within the country, and to leave and enter Canada whenever they want.

These democratic rights are not subject to the *Charter*'s notwithstanding clause (section 33). Therefore the government cannot enact legislation that restricts people's freedom of

movement – unless it can be justified by the government under *Charter* section 1.

But in order to control the COVID-19 pandemic, the Centre for Constitutional Studies argues that the federal, provincial and territorial governments had to take various measures that curtailed people's freedom of movement. These include restrictions on leaving and returning to Canada, as well as limiting travel within the country. The Canadian Civil Liberties Association notes that people were also required to stay home and asked not to interact with others, including not being able to see family and friends.

These restrictions on free movement were extraordinary in Canada and opened the door to a possible *Charter* violation of section 6. However, under section 1 of the *Charter* – which permits reasonable limits on protected rights and freedoms – the government can infringe on the right to free movement if it is deemed necessary to stop the spread of the virus and protect public health.

The Centre for Constitutional Studies stated:

> *In order to justify its actions, any government travel restriction must be reasonable and demonstrably justified in a free and democratic society. If a court decides that the government has made its case for justifying its actions, the breaches will be deemed constitutional. If they do not, then the government would need to stop its travel restrictions because they would be unconstitutional. For this reason, Section 1's limitation clause is of great importance in ensuring that the government does not overstep when it breaches the section 6 rights of Canadian citizens, but also, allows the government to provide a rationale for a breach in specific circumstances.*

It added:

> *The Canadian Constitution permits restrictions on some liberties where the health and safety of Canadians is at stake, there may be a greater public good that requires the breaching of some individual rights.*

… the right to freedom of movement is not absolute and can be restricted when needed for the public's health.

Section 7 of the *Charter* guarantees life, liberty and security of the person. These rights may be at risk when people cannot go to work and earn a living, and are told to isolate or avoid going out whenever they wish. Also, a travel ban on Canadians by not allowing them to enter or leave the country can also breach section 7 of the *Charter*. However, this violation would also be legal if justified in a free and democratic society under section 1.

In an Ontario case, *Basrur v Deakin*, [2002] OJ No 2777 (ONCJ), Mr. Deakin suffered from tuberculosis. He did not consent to treatment and requested the protection and support of the *Charter*. However, the Court upheld the extension of the period of detention and treatment of Mr. Deakin. According to health experts, "what was done to Mr. Deakin was carried out for the protection of public health and the prevention of the spread of tuberculosis, a disease … described as extremely contagious" (at para 26). Therefore, the Court decided "Mr. Deakin's rights under section 7 of the *Charter* have indeed been violated. But those breaches were justified" (at para 31).

Conclusion

German Chancellor Angela Merkel, who grew up in communist East Germany, stated:

> *For someone like me, for whom freedom of travel and movement were a hard-won right, such restrictions can only be justified in absolute necessity.*

In a democratic society, there should be a balance between fundamental freedoms and public health and safety. When a health issue – such as a pandemic – threatens a whole population and presents a serious danger to others, curtailing our individual freedoms is justified and necessary in order to protect others and ourselves.

Myrna El Fakhry Tuttle

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Aftershocks: COVID-19 and the "new normal" for family lawyers

Erika Hagen

When the world feels like it is off its axis and everything is changing at an unprecedented pace, sometimes it helps to remember what has NOT changed as we grapple with what has. Things that have **not** changed:

1. Families continue to require compassionate and thorough assistance to get their lives in order following a separation.
2. Technology continues to be both the bane of our existence and our saviour.
3. Access to justice continues to be a challenge.
4. The mundane remains mundane. We still calculate guideline incomes the same way. We continue to require the same financial disclosure we always have. We continue to draft thorough and detailed Agreements, Affidavits and other materials. We do our best to tackle our inboxes and voicemails in as timely a fashion as we can. The list goes on. None of this changes whether we are working in the office or remotely, whether we are meeting with clients in person or via video-conferencing, nor whether we are working with children underfoot or accessing childcare.

That being said, my practice has changed considerably. Initially my workload decreased – overnight my calendar all but emptied. The courts understandably took time to grapple with the practical and technological challenges that the pandemic posed for their operations.

Photo by Engin Akyurt from Pixabay

Some clients themselves required some time to find their "new normal." There were many short-term changes, new policies and new procedures. However, the practice now seems to be finding its "new normal" too, and so I wish to highlight some of the lasting (or hopefully lasting) changes to the practice and at the Alberta Court of Queen's Bench.

Due to the pandemic, for the first time the Court has publicly referred families to an online "mini arbitration" app called coParenter.

Family Docket

The Court of Queen's Bench took the "pause" necessitated by the pandemic to introduce Family Docket. This is a new procedure and a mandatory pre-requisite to nearly all other types of procedures. It allows families to get their foot in the door without first needing to start proceedings. The judge spends a few minutes on each case to understand what the major issues are, offer procedural direction, and attempt to shepherd the file

towards the lowest-conflict avenue available. It is conducted online via Webex. We can view it as yet another thing we have to do before we can get to the type of hearing we want. However, I am seeing the benefit for clients of being able to go to Court without having to file a Statement of Claim, Family Law Claim or Application in order to get the advice and direction of a learned justice. As well, at Docket, clients can access further and more substantial non-litigation avenues that the Court offers (such as Judicial Dispute Resolution and Early Intervention Case Conferencing).

Desk Consent Orders, Simple Written Applications and Written Disclosure Applications

While it has always been possible to get consent orders granted via desk process, the Court has streamlined and publicized this process to make it simpler and more readily accessible. Further, "short and sweet" matters – such as routine disclosure Applications and basic child support calculation matters – can now be submitted and "heard" entirely through written evidence and arguments. This can save considerable time for everyone involved when used effectively.

Electronic Filing

Although not a fancy online interface, the Court of Queen's Bench is now accepting materials for filing from lawyers via email. This is saving clients time and money, and is saving my back and feet from the lines at the courthouse.

The Court of Queen's Bench took the "pause" necessitated by the pandemic to introduce Family Docket.

Arbitration

Arbitration is not a new option, but it has certainly been more widely used and discussed (at least in Edmonton) since the pandemic began. I am aware that arbitration has been more widely used in Calgary for years now. The Court, for the first time, publicly referred litigants to the availability of this option. I have had many judges suggest and endorse family-law oriented technology, such as Our Family Wizard, to clients over the years. Due to the pandemic, for the first time the Court has publicly referred families to an online "mini arbitration" app called coParenter. I recently had a justice suggest it in open court.

Video-Conferenced Negotiation Meetings, Case Conferences and other Dispute Resolution Procedures

This, for me, has been the most significant shift. I have often noticed over the years that parties in family matters communicate in-person through non-verbal cues. This becomes problematic when entire negotiation meetings fall apart because one party grins or winks at the other at a knowing moment. In other words – separated spouses can and do push one another's buttons without needing to lift a finger or open their mouth. However, I have observed that this does not seem to occur in the same way via remote platforms. On these platforms it becomes difficult for more than one person to speak at a time – and so all participants are forced to speak in turn. Further, unlike a meeting in-person, the interactions feel somewhat artificial, or awkward. The result I have observed is that the meeting cannot function practically if someone is being belligerent. As a result, those who might have problematic tendencies tend to reign it in, at least somewhat.

During the early weeks and months of the pandemic lock-down, litigation options were significantly altered or curtailed. Some parties were therefore more willing to try these other dispute resolution options. In other words, where they were unable to simply "leave it up to the judge," they willingly participated in remote resolution procedures. My

observations arising from these procedures has been a nearly 100% success rate of settling the file on a complete or interim basis. This is substantially higher than what I observed from similar in-person procedures prior to the pandemic. As such, I see benefit to parties in keeping some of these meetings happening remotely, rather than in-person, on a permanent basis – at least in family matters where emotions and inter-personal history tend to play a key role in the success of such procedures.

… the Court of Queen's Bench is now accepting materials for filing from lawyers via email.

Client Comfort with Using Remote Technology

At the outset of the lockdown clients seemed reluctant to do everything remotely. However, even clients who were initially reluctant have gradually come on-board with providing their financial disclosure electronically, conducting meetings by phone or video-conferencing, and downloading apps in order to attend court remotely. There will always be technological difficulties and problems along the way, but I have observed a greater willingness to tackle them rather than avoid them.

Legislative Changes

There have been Ministerial Orders, procedural or Rules changes, notices from the Court, and other legislative changes that have (among other things):

1. Clarified the rules and procedures for the remote commissioning and signing of documents such as Affidavits
2. Clarified the rules and procedures for verifying identity using remote technology
3. Added Family Docket, reduced the availability of judicial case management, implemented the above procedural or administrative changes, etc.
4. Temporarily postponed limitation periods, filing deadlines and other timelines
5. Delayed the implementation of the new federal *Divorce Act*.

This last change has helped to reduce the number of changes that the Court, lawyers and litigants are trying to grapple with simultaneously. Although I will admit to breathing a sigh of relief when this occurred, the new provisions for the *Divorce Act* are exciting and long overdue. Canadians will have to wait a little longer to benefit from them. Undoubtedly this was the right decision, but it remains an unfortunate delay and side effect of this pandemic.

Uncertainty

Finally, I suspect that I could speak for many in the profession when I say that I have had to get used to being unable to give my clients as certain or concrete advice as I used to give – particularly about procedural issues (as opposed to substantive issues). My advice was once: "We can bring this application and we'll likely have a decision in regular family chambers on an interim or partial basis by [certain date]." My advice is now: "It is likely that I can get you this relief that you are seeking, but we will first go to Family Docket, and then be referred to an appropriate type of hearing to address this issue directly, and I cannot say exactly when that will occur." This is an improvement on my advice given during the first part of the lockdown, which for some matters was: "You are correct to want to seek that relief, but I am not sure when I will be able to initiate that type of proceeding."

At the outset of the lockdown clients seemed reluctant to do everything remotely.

In other words, lawyers are used to working in a field where changes are gradual, or where significant notice and consultation is given in advance. The pandemic has forced rapid changes and with limited notice and consultation. This is not to "blame" the Court, the Legislature, Parliament or any other entity. It has simply been foisted upon us all by the pandemic itself. We have had to learn to adapt, and a big part of that has been learning to accept an increased level of uncertainty in our practices and in our legal advice, at least until we all get used to the "new normal."

Erika Hagen

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Mechanisms for Relief from Contractual Obligations in the Realm of COVID-19

James McTague

The novel coronavirus ("COVID-19") has directly impacted society as a whole. But what really is COVID-19? It is a member of the coronavirus family of viruses. When virologists first studied this class of viruses, they used microscopy to view these viruses. The viruses appeared to have a faint halo, which advanced microscopy techniques later determined to be small spike-like protrusions from the virus' surface. Due to these characteristics, coronaviruses take their namesake from the halo – reminiscent of the sun's atmosphere, also known as the corona. The "19" represents the year this particular virus strain emerged.

After several months of this global pandemic, the number of infections and deaths continue to persist and the chance of a second wave in Canada remains probable. Add to that the global economy has been devastated. The expectation is that these adverse impacts will continue.

The economy is built on contracts. The continued disruptions in the supply chain, increasing unemployment rates, business solvency issues, and travel restrictions means many individuals and businesses are in difficult positions. They no longer require the services or goods they contracted for, they are financially unable to pay to fulfill some contractual obligations, or they can no longer perform the terms of the contract. How can an individual or business seek relief from their agreed upon contractual obligations in these circumstances?

Photo by Miguel Montejano from Pexels

Doctrine of Frustration

The doctrine of frustration is a longstanding common law legal principle. It allows a party to a contract to no longer be bound by their contractual obligations due to a notable change in circumstances – through no fault of their own – which makes performance of the contract impossible. Unlike *force majeure* clauses (discussed below), frustration could potentially be available to any contract.

... frustration could potentially be available to any contract.

Frustration is relied upon when the contract does not say how to deal with a supervening event – an event which causes the contract to become something radically different from what the parties contemplated when

they agreed on the exchange of promises. The Supreme Court of Canada has confirmed that the threshold for finding a contract to be frustrated is very high. The event must not merely cause hardship to a party. The event must be more in line with a party being completely unable to perform the contract.

In order to rely on frustration, the supervening event must be:

1. unforeseeable at the time the contract was entered into by the parties; and
2. no fault of the parties.

The supervening event must be truly unforeseeable. Courts will likely find that an economic downturn or financial hardship is not enough to reach the threshold of frustration, as these events are foreseeable. The COVID-19 global pandemic is likely an unforeseeable event, which is beyond the control of the parties to the contract. The last global pandemic, the Spanish Flu of 1918, occurred over 100 years ago. Parties likely did not think about a pandemic when they entered into the contract, and they cannot reasonably control it.

Provincial public health emergencies have restricted individuals and businesses. Some regular activities are now illegal, such as hosting a large gathering. Courts have said that if the law changes after the contract is created that makes performing the contract now illegal, the contract has been frustrated. This principle likely applies to many contracts in the realm of COVID-19, such as a contract for renting a venue for a previously planned large gathering.

As the threshold for frustration is high, affected parties to a contract must take all mitigation measures and try to perform the contract in light of the intervening event. In the context of COVID-19, it is possible that a court may find some contracts could still go ahead with some changes. For example, a wedding could potentially proceed by following the government's mandatory health guidelines and physical distancing requirements. A court may find that although the parties cannot perform the contract exactly as expected, the changes would make performing the contract still possible. This would not satisfy the high threshold of frustration.

For a party seeking to rely upon a* force majeure *clause due to COVID-19, the clause must have language sufficient to capture a global pandemic.

Whether or not the performance of the contract is truly impossible and whether frustration applies is a very fact specific determination. It requires a detailed review of the circumstances and contractual obligations of the parties. Even in light of the high threshold, it is likely that many non-performing parties will be able to successfully avoid liability for failing to perform their contractual obligations due to the pandemic. The non-performing party would have to refund money or return deposits.

Force Majeure Clauses

A *force majeure* clause is a contractual provision that relieves a party of their contractual obligations in the event that performing the contract becomes impossible due to an intervening circumstance beyond the control of the non-performing party. While frustration can apply to all contracts, a *force majeure* clause only applies if it is written in the contract.

A *force majeure* clause allows for the parties of a contract to expressly mitigate uncertainty. This clause allows a non-performing party to rely upon intervening circumstances that may not rise to the threshold required for frustration. A *force majeure* clause is a creature

of contract and does not exist independently at common law. Each clause must be specifically interpreted.

Force majeure clauses allow the non-performing party to escape liability or be entitled to relief for their failure to perform their obligations due to a "*force majeure*" event. The parties can say what circumstances fall within the scope of a *force majeure* event. Often the clause will list events that trigger the relief.

Some *force majeure* clauses do not explicitly say what events are a *force majeure* event. Other clauses may simply refer to "acts of God". The Supreme Court of Canada has indicated that an "act of God" means an event that is intervening and beyond the control of the party. In these situations, the contracting party must argue as to whether an event causing a party's failure to perform falls under the provision.

In addition, the parties agree what relief applies when the clause is triggered. Relief could include relief from liability, entitlement to claim any increased costs as a result of the delay, or extension of time to complete obligations.

As seen with frustration, the operation of a *force majeure* clause requires the intervening event to be unexpected and make performing the contract impossible or impractical. The clause may place additional obligations on the non-performer, such as requiring them to take steps to mitigate the event or prevent the event from occurring, and to comply with specific notice obligations.

… a* force majeure *clause only applies if it is written in the contract.

For a party seeking to rely upon a *force majeure* clause due to COVID-19, the clause must have language sufficient to capture a global pandemic. The party must also abide by all notice conditions in the clause. The non-performing party must show that COVID-19 has made performing their contractual obligations impossible or wholly impractical. They must also show that the event was not self-inflicted, but was in fact beyond their reasonable control and expectation.

A court will likely find that the COVID-19 global pandemic is an intervening event that neither party anticipated. However, whether a *force majeure* clause applies will likely depend on the factual circumstances. Does the language of the specific clause sufficiently capture the event? Is performing the contractual obligations truly impossible?

Conclusion

The unprecedented global COVID-19 pandemic has created many challenges. The situation is too new for us to already have clear direction from the court. As such, parties who find themselves in a situation in which performing their contractual obligations may no longer be possible due to COVID-19 must carefully review their contracts to assess their rights and obligations. When frustration of contract or a *force majeure* clause apply, a party will likely be entitled to relief (such as a refund) due to the non-performance of the contract.

James McTague

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COVID-19 Tracing Apps: Are they secure enough to protect the right of privacy?

Carolina Albuquerque

It is almost impossible to know somebody who does **not** have a smartphone they use for almost every purpose: to send e-mails, to search for a new apartment or to navigate using the map features. The technology seems limitless. If a new problem arrives, technology can present an answer or an effective resolution.

For this reason, the uncertainty created by the coronavirus has led governments to find new technological ways to try to control the spread of the disease. As a result, smartphone apps were created to help track people's movement and consequently help the government to manage this new catastrophic and unpredictable situation.

Photo by GiftPundits.com from Pexels

As an example of this, Alberta's government launched in May the ABTraceTogether app to improve contact tracing. As explained by the government, the app uses a phone's Bluetooth to log anytime it comes within two metres of another person with the app for more than 15 minutes. Also, more recently at the end of July, the federal government launched the COVID Alert app. First launched in Ontario, the app alerts Canadians when they have contact with someone who has tested positive for COVID-19.

Although it is undeniable that smartphones have revolutionized the way that people behave in this decade, it is also evident that all of this technology raises another relevant issue. The uncertainty about privacy and protection of personal information seems to be an immediate consequence of the increased use of technology. Concerns about the safety of the information stored can hinder people from downloading these new apps.

How do these new apps work?

Both apps mentioned above work in a similar way: the app uses Bluetooth technology to log and exchange codes with phones that are nearby. Your app will be able to detect everyone who you have been close to and who has downloaded the app. If a person eventually tests positive for COVID-19, the government will be able to trace and contact everyone who was recently in contact with the infected person.

But I must emphasize: As explained by the Alberta government, the infected person must allow the government to access all the data

collected by the ABTraceTogether app before the government contacts anyone. Without this consent, the encounter history data will not be shared with the government.

Is it mandatory for people to download these new apps?

The answer to this question is short and simple: no, it is not. No one in the country is obliged to download the apps launched by the provincial and federal governments. Downloading and using the apps are voluntary and depend on your personal preferences. However, people are encouraged to download the app because it has been shown to be an effective measure to help stop the spread of COVID-19.

Should people be worried about the government retaining personal information?

As reported by the provincial and federal governments, people should not be worried about the government retaining any type of personal information. First of all, the app does not use or access any location data or GPS. This means the app will not be able to track the user's location or contacts. As emphasized by Alberta's Chief Medical Officer of Health, phones with the app detect each other and exchange anonymous encrypted data. No personal information is uploaded or shared with the government.

No one in the country is obliged to download the apps launched by the provincial and federal governments.

According to the official website, the COVID Alert app launched by the federal government has no way of knowing:

- the user's location, as it does not use GPS or location services
- the user's name or address
- the place or time the user was near

Second, even if a person contracts COVID-19, they must give consent to the government to access the random codes from the past 14 days. Even once the person gives consent to the government to access their data, the government does not share the person's identity. The government will merely inform the other users, who have been nearby the person infected in the last 14 days, that they have come into close contact with someone who has tested positive for COVID-19.

What about privacy rights?

In *Peace Country Health v UNA*, 2007 CarswellAlta 2612, the court expressly stated that privacy is not only one of the values underlying the protections in the *Canadian Charter of Rights and Freedoms*, but it is also a fundamental Canadian value.

Although the *Canadian Charter of Rights and Freedoms* does not specifically mention privacy or the protection of personal information, sections 7 and 8 afford protection to these rights:

> *Life, liberty and security of person*
>
> *7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> *Search or seizure*
>
> *8. Everyone has the right to be secure against unreasonable search or seizure.*

Furthermore, Alberta's *Personal Information Protection Act* expressly recognizes "the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable". Therefore, protecting people's

information must be a concern for the government in order to preserve the right of privacy.

Even in times where collective consciousness should be a priority to prevent spread of the disease, the government must respect individuals' privacy rights. To ensure this protection, the government is taking all possible measures, including reassuring that the only information exchanged between phones is a random ID that is non-identifying.

... phones with the app detect each other and exchange anonymous encrypted data.

How many people have downloaded the apps?

Although the government has made a lot of effort to assure people that the apps are secure, most Canadians still have not downloaded them. Initially, in Alberta, health officials expected that at least twenty per cent of the population would join the app. That number would be enough for the app to be effective.

But after seven weeks, no more than five per cent of the Alberta population had joined the ABTraceTogether app. On the other hand, the app launched by the federal government appears to have been better accepted. In less than twenty days, almost two million Canadians have downloaded it.

This number represents almost four per cent of the Canadian population. Considering that the app is only operational in Ontario right now, this percentage should increase across Canada as soon as other provinces start using the COVID Alert app.

Conclusion

Overall, it is reasonable to say that tracing apps can benefit the country without contravening privacy rights, considering that:

1. the user's identity will not be shared
2. the user's previous consent is necessary before releasing any type of information
3. the app does not have access to any website nor GPS from the user
4. downloading the app is voluntary
5. there is more benefit if lots of people use the app.

Carolina Albuquerque

Carolina Albuquerque is a lawyer who graduated in Brazil. She moved to Calgary and is enrolled in the law program at the University of Calgary. She is also involved in volunteer programs that provide support for women.

Foreclosures in Alberta: The return of the ’80s?

Judith Hanebury

When the pandemic hit, mortgage companies quickly realized the potential for a large upswing in mortgage defaults due to job losses. As a result, many offered homeowners an opportunity to defer their mortgage payments for up to six months.

Photo by paulbr75 from Pixabay

The CBC recently reported that Albertans took lenders up on this offer and deferred more than 1 in 5 CMHC-insured mortgages. This was the highest uptake of the deferral offer of any province in the country.

Those six months are now mostly up, leaving the question of what will happen next? From my time practising foreclosure law in the early ‘80s, and my 14 years as a Master on the bench hearing foreclosure applications, here is what I think is likely.

1. A Wave of Foreclosures and Judgments against Mortgagors

Generally in Alberta, an individual is not liable for any deficiency resulting from a foreclosure on a mortgage on their home. A deficiency is the difference between the amount outstanding on the mortgage and the value of the property. If the property is worth less than the mortgage, the borrowers will lose their home but can walk away owing nothing more.

The same is not true of insured mortgages. Lenders grant insured mortgages when the homeowners do not have a sizeable down payment to buy their home. As a result, the lender requires the borrowers to pay for mortgage insurance. Traditionally only CMHC offered that insurance, but there are now two other insurers: Canada Guaranty and Genworth. With an insured mortgage there is personal liability for a mortgage deficiency. If the property is worth less than the mortgage, the borrowers will lose their home and still owe the deficiency.

In a strong economy, as long as the price of the home increases and the owner can make the payments, things carry on. In time, the owner will often sell the house and either pay off the mortgage or the new buyer will assume it.

The most common scam used in a downturn is an offer to buy the home of a borrower in financial distress.

In a downturn, as job losses mount, more and more homes go into foreclosure. The real estate market often ends up with depressed prices and there is a glut of homes offered for sale either by desperate owners or because of the foreclosure process. Trying to estimate

the value of a house in foreclosure in such a market can be a guessing game.

Alberta has been through this scenario a number of times, the worst in memory having occurred in the early '80s. The coming wave of foreclosures may well match or exceed that one.

2. Deficiency Judgment "Surprises" will Return

To many homeowner's surprise, selling their house does not necessarily relieve them of liability for the mortgage. If the new owner assumes an insured mortgage (takes it over from the prior owner) and fails to make the mortgage payments, both the prior owner and the new owner can be sued and found liable for any deficiency. The lender obtains a judgment and assigns it to the insurer, who then often looks for the party with the deeper pockets. Often that is not the person who has defaulted on the mortgage. The insurer may pursue payment from the previous owner of the house, who may have no viable option but bankruptcy.

... a number of organizations and individual volunteers are working together to create both a new website and a program at an existing clinic to help Albertans who find themselves in financial distress.

However, it is not only the prior owner who is at risk. There are situations where the purchaser does not realize that they have assumed an insured mortgage. The house was purchased for a price sufficiently greater than the amount of the mortgage that the nature of the mortgage assumed by the buyer was not obvious. In Alberta, there is a regulatory requirement that there be a warning on the face of the mortgage to the effect that it is insured, but the court held the regulation was unenforceable. As a result, should the new owners default, they could also find themselves personally liable for the lender's loss.

When the economy and house prices take a downturn, the courts frequently see both owners and former owners who are stunned to find out they are *both* personally liable for the lender's loss because the mortgage in default was insured.

3. The Return of the Scammers

In every economic downturn, as well as in overheated housing markets, the scam artists come out. In both cases, many naïve and usually innocent people are caught.

The most common scam used in a downturn is an offer to buy the home of a borrower in financial distress. To find victims, the scammer will search court records for homes in foreclosure, respond to Kijiji ads and place roadside signs offering to buy houses with cash. One case I remember well illustrates how the scam works.

I will call the woman who was before me that December day Kathleen. The matter was in court to determine when she had to move from the house. She explained to the court that it was all a mistake and she shouldn't be there. She had sold her house, and she did not know why the new owner had not appeared in court. She said that she was a single mom with two kids, both in school. When she lost her job, despite wanting to stay in her house for her kids, she realized she had to sell it.

She placed an ad on Kijiji and a man contacted her, interested in purchasing it. He offered to buy it, rent it back to her and make the mortgage payments. When she got back on her feet she could look at buying her home back. It was the answer to her problems. She sold it for a nominal down payment and started paying rent.

When she understood that her personal liability continued because the mortgage was insured, and realized that the new owner had not used her rent to pay the mortgage, she was devastated.

With each downturn there have been many similar situations. In 1984, the legislature amended the *Law of Property Act* to provide that if a property was transferred either while the mortgage was in default or within 4 months of it going into default, there was no requirement that the owner be granted any time to bring the mortgage back into good standing.

4. The Effect on the Courts, Lenders and Homeowners

When the wave of foreclosures hit in the early '80s, Masters' Chambers in Calgary would sit into the evening to get through the day's list of foreclosures. The courts have since imposed limits on the number of applications that can be set down for chambers. With the backlog due to the pandemic and many hearings now virtual, a large increase in foreclosure applications could result in increased stress on the court system. Lenders may find themselves facing timing delays.

To many homeowner's surprise, selling their house does not necessarily relieve them of liability for the mortgage.

From my time on the courts, I noticed a number of homeowners either did not understand the foreclosure process or wanted to make specific arrangements, or both. Some wanted to redeem their mortgages over time. Others wanted some control over the nature of the sale or to plan an "exit with dignity". Trying to make those arrangements in the middle of a court hearing was stressful for all. Sometimes the homeowner made their request too late in the process for it to be feasible.

Where to Get More Help

With those concerns and the likely increase in other personal debt in mind, a number of organizations and individual volunteers are working together to create both a new website and a program at an existing clinic to help Albertans who find themselves in financial distress. Both expect to launch in the latter part of October, 2020.

The website offers a "guided pathway" of questions to help individuals find what options make sense for their debt situation and what services are available. It includes a budget calculator for those uncertain of their exact financial situation. The Centre for Public Legal Education Alberta will host it.

In conjunction with the new website, the Public Interest Law Clinic at the University of Calgary Faculty of Law is opening a virtual Debt Negotiation Clinic. It plans to be in operation for a period of two years and will help Alberta debtors, particularly homeowners, deal with their debt. Individuals can receive legal advice to understand collection, foreclosure and other legal processes. They will also receive help if they want to negotiate with their creditor to arrange a payment plan or have some control over the legal process. The students at the Clinic will work with volunteer retired lawyers and judges with "active for pro bono" status with the Law Society to provide this assistance.

The hope is that these additional resources will help the anticipated wave of Alberta debtors. Many of these debtors are victims of the economic effects of the pandemic and never expected to find themselves in a situation where they could not pay their bills.

Judith Hanebury

Judith Hanebury, QC received an LLB and an LLM from the University of Calgary. She recently retired after 14 years as a Master in Chambers in the Court of Queen's Bench in Calgary.

Special Report

The Law of Film

Getting Your Film onto the Screen

Linda Callaghan

So, you have an idea for a great movie and think it has "legs". Where do you start?

Let's look at it like any product to be sold in the marketplace. To understand how to make and market your movie, there are three basic questions that you need to answer:

1. What are you selling?
2. Who is the seller?
3. Who is the buyer?

The Product

First, you need to translate your idea into a concrete form. It might be recorded on film or it might be recorded in a digital format. It will be your idea translated into a tangible product. Regardless of how you have recorded or plan to record your idea, for the sake of simplicity let's call it a film. What you will be selling is the copyright in your film. This is your product: the copyright in your film.

Copyright is a bundle of rights. Think of a package of licorice strings. You can divide up the package amongst your friends in any number of ways. Some friends get more strings than others. You can do the same with copyright. You can divide up your copyright in various ways and then sell it. You can divide the copyright into different territories of the world. You can divide the copyright into different platforms that exist today to exhibit films. You can exhibit your film in theatres or on television, or allow it to be streamed or downloaded. You can break your film down into smaller pieces or versions. You can create episodes from a longer version. You can expand your film to make sequels,

Photo by Knelstrom Ltd. from Pexels

prequels and series. You can translate your film into different languages. All of these are the "strings" that you can bundle for sale. So, for example, you can sell your film to theatres limited to North America for one year. Or you can sell your film to a streaming service in Europe for three years. If your film is a nature documentary, you can create stock footage (that shot of the caribou herd running across the tundra) which you can sell. If you have a musical score accompanying your film, you can create a soundtrack which you can sell.

You can divide up your copyright in various ways and then sell it.

Because you are not putting licorice strings in a box and shipping them off, you need to pay attention to what rights you are selling. Selling the rights to your film is complicated. You need to be clear on what exactly you are putting in the conceptual box that is being shipped off. You need to keep track of all the rights you have sold and make sure you don't do the equivalent of selling 200% of your licorice strings.

The term "sell" is not usually used when dealing with copyright because generally you will not give away your copyright. The term used when you deal in copyright is "license". You let a user have the copyright for a period of time, and then usually the user returns the copyright to you.

The Seller

It may seem obvious but if you are going to *license* the rights in the film, then you must *own* the rights in the film. The rights to a film are assembled much like a car is assembled in a factory. A car is made up of many parts that are assembled in a factory. A film is made up of many parts that are assembled in the production and post-production "factory". The parts consist of (to name but a few):

- the screenplay
- the computer graphics and animation
- the performances by actors or musicians
- the music
- the set design.

You need to buy these parts just like the car manufacturer has to buy the steel and the rubber. The parts you need to acquire for your film include the copyright owned by the contributors to your film. These include the copyright in any screenplay, computer graphics, animation, artistic works used on the set, and music. It includes the performing rights of the actors and musicians. You buy these parts by licensing the copyright from the owners. When you license these rights, you need to make sure you have the correct bundle of rights. That is, you need to make sure you have enough rights from the contributors to be able to sell your film in the intended markets. For example, if you hire a writer for your screenplay and only license from her all rights for a single theatrical production, you will not have the right to release your film to television or on streaming services. It is advisable to hire a lawyer to help you acquire all the rights for your film.

Continuing with our analogy, who owns the car? It is the manufacturer. As the "manufacturer" of the film, you should own all the rights. Who is "you"? In the film world often the acquisition of copyright for your film starts off with you personally acquiring rights to a screenplay. You hire a writer to help you with the first draft. The license with your writer gives you the rights to the first draft screenplay. As the budget and the financing for your film grows, it usually becomes necessary or advisable to create a corporation. Once you have created a corporation, you need to transfer the first draft screenplay rights to your corporation. If you have acquired any other rights during this development stage, you need to ensure all these rights are turned over to your corporation. And as you move into production, you need to ensure that all copyright acquired going forward is given to your corporation. On completion of the production, your corporation needs to have acquired all the "parts" in order to be the owner of the film.

It may seem obvious but if you are going to* license *the rights in the film, then you must* own *the rights in the film.

The Buyer

A buyer can appear at any time. There may be a buyer or buyers so interested in your film that they are willing to help finance the production process. The financing may be in the form of a license from a broadcaster who will pay you for the exclusive right to broadcast your film once the film is completed. The financing may be in the form of a distribution advance from a distributor who believes that your film will be very saleable and gives you

an advance on future sales. In fact, in Canada, to be eligible for certain tax breaks and grants, you often need to have a broadcast license or distribution advance in hand before you can even apply.

If you do not find a buyer during the production process, or if you have not fully exploited the sales of your film, then you will be looking for a buyer of your completed film. You can try to sell the film on your own to the various owners of media platforms around the world. Or you can try to find a distributor who will help you do all or some of this job for you.

Because of the complexity in licensing copyright, any licensing of film rights needs to be set out in writing. Furthermore, under Canadian copyright law, you cannot enforce a licensing agreement that is not in writing.

As with the sale of any product, you need to be concerned with *what* you are being paid and *when* you will be paid. If you are selling directly to an end user, such as a broadcaster or streaming service, you will usually be paid a set amount. Generally there are conditions you must meet before you are paid. Make sure you have read your agreement and understand what these conditions or requirements are. For example:

- What are the specific technical requirements that your film must meet?
- Do you need to provide the translation into another language?
- Do you need to register the copyright in the territory?
- Do you need to provide proof of errors and omissions insurance?

If that is the case, you need to know what it will cost you to meet these conditions.

If you are using a distributor to sell your film, then you usually authorize the distributor to sign license agreements with the end user on your behalf. The distributor must keep your apprised of the license agreements they have entered into.

... under Canadian copyright law, you cannot enforce a licensing agreement that is not in writing.

If you are allowing a distributor to sell your film, then what you are paid will usually depend on the sales they make from your film. Generally, the distributor collects all of the revenue from sales. Before the distributor pays you, it reimburses itself for its expenses in marketing your film. You and your distributor then split the remaining amount according to your agreement. If you entered into any agreements to share profits with financiers, writers, musicians, cast or crew, these amounts need to be taken into account too.

What expenses the distributor can claim is often a point of contention. So is how the split with your distributor is calculated. You should carefully examine your agreement to make sure you understand how all these are calculated. The agreement with your distributor also needs to be clear on who pays out the profit shares to the other parties and out of whose share (yours or the distributor's) these profits are paid.

Your distributor will usually pay you periodically. It could be monthly, quarterly, semi-annually or annually. The distributor should be required to provide, on a regular basis, a report to you on the sales of your film along with a clear calculation of how your share is determined. The distributor should also be required to provide you with copies of all licensing agreements for your film.

A sales agent is similar to a distributor in that you are giving them the right to sell the film on your behalf. The difference is that usually the sales agent negotiates the agreement with an end user. However, it is you, not the sales agent, who signs the agreement.

Conclusion

Technology is making it easier to pick up a camera and tell a story that you can share with the world. To be successful though, you need to understand the market you are in and what you are selling.

Linda Callaghan

Linda Callaghan is a lawyer with Ackroyd LLP in Edmonton, Alberta.

Lights! Camera! Music!

Gregory Pang

For over a century, music has been used in film to not only enhance the viewing experience, but it has become very much an integral part of the film. For example, it is hard to imagine watching *Star Wars* without the score by legendary composer John Williams. Songs, by especially popular artists, can also rise to become the proverbial flag-bearers of a film. Think "Eye of the Tiger" by Survivor in *Rocky III* or, even though it makes me gag mentioning it, "My Heart Will Go On" by Celine Dion in *Titanic*.

Aspiring filmmakers know of the power of using music in their projects. In these times of COVID-19, you might be more tempted to add music to your video content that you are making more and more for virtual classrooms, seminars and conferences. But how can you legally use music in your films and video projects? Unfortunately, the answer is not very straight-forward.

I attended a music licensing workshop a couple years ago by Elizabeth Klinck, who is a very competent researcher and music supervisor for hire. She described the system of licensing music for film as "Byzantine." And she's not wrong. Different types of rights need to be licensed depending on the music you are using, such as an existing recorded song, an existing song for which you want to record your own rendition, or a new song you want to have written and recorded. For sake of reference, "song" refers to a musical work whether or not it includes vocals.

1. Using an Existing Recording of a Song

Let us say you really like Taylor Swift and you think her latest hit "Cardigan" would work amazingly in your short film. You would need to obtain not one, but *two* licences.

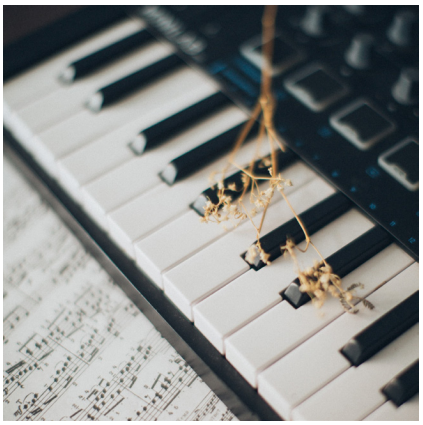

Photo by Elina Sazonova from Pexels

The first of those is a **synchronization licence** ('sync licence') to reproduce the music "in timed relation" with your audio-visual work. Here, the songwriters or composers are giving you permission to use the song in your film. You would track down, or hire a music supervisor to track down, which big label(s), e.g. Universal Music Group, administers the publication rights on each of those songwriters' behalf and their respective percentage ownership of those rights. You would then try to negotiate a fee for the sync licence that would fit into your budget and based on how you are planning to use the song. Then the publisher(s) would prepare their standard sync licence agreements for all parties to sign. But you are unlikely to even get that far for a Taylor Swift song, unless you have a massive music budget for your project. Even if you are able to negotiate a sync licence price for "Cardigan", you still only have one-half of the permissions you need!

... stock music sites try to be a one-stop shop where their licence can include all rights to the music you need to use in your film.

The next permission you need for using "Cardigan" in your film is a **master use**

licence, which is the right to use *that particular recording* of the song. The master use rights holders for that recording, likely one or more major record labels for that Taylor Swift song, is not necessarily the same as the publishers for the sync rights. Like with the sync licence, you (or your music supervisor) would track down all of the potentially multiple rights holders of the master and negotiate a fee, which must usually be no less than the fee for the sync rights.

Unlike for public performance rights (e.g. playing recorded songs in a restaurant), there is no central administrative organization like SOCAN or ASCAP that doles out sync and master use licences based on set rates. Sync and master use rights are all free market negotiable with their respective rights holders, unfortunately. Byzantine indeed!

You may want to steer clear of expensive songs by popular artists like Taylor Swift and instead license songs from small local bands. The same rules apply here, except you might be dealing with the artists themselves to figure out the percentage splits between the songwriters for the sync rights and whoever owns the master. You can find examples of sync and master use agreements on this page.

2. Recording a New Version of an Existing Song

There's a fantastic cold open for a *Brooklyn Nine-Nine* episode where Jake Peralta gets a lineup of perpetrators to sing a few lines of "I Want It That Way" by the Backstreet Boys. Unlike licensing an already recorded rendition of a song like in our above Taylor Swift example, there is no master here to license because the actors sing it. Thus, the context of the sync rights they would have negotiated with the publication rightsholders would be to perform parts of that copyrighted song. I have heard that this can sometimes push up the fees so much that it would be cheaper to just get a sync and master licence to use a version that was already recorded! However, if performing your own version or a new version of an existing song is important, you will need to explore this avenue of licensing.

3. Creating New Music

Another way of legally using music in your film is to hire a composer or songwriter to write it and record an original song. Budget permitting, this is the choice for film producers who want a custom score to convey the intended effect and emotions in the film. The ins and outs of a composer agreement deserve an article in itself, but this is one way to ensure you have all the rights you need in the music for your project.

Different types of rights need to be licensed depending on the music you are using ...

4. Stock Music and Public Domain Music

There are a couple of options to avoid the high costs and having to navigate the complexities of the above options. Stock music from sites like Pond5 and PremiumBeat can be relatively affordable sources for music to use in your film or video project. Rather than having to chase down many rights holders, stock music sites try to be a one-stop shop where their licence can include all rights to the music you need to use in your film. However, you should carefully review – better yet have your lawyer review – the terms of their standard licence agreement to make sure that licence gives you the rights you need because not all stock music sites are created equal and they usually have different levels of licences. On several occasions, I have reviewed the standard terms of stock music licences and told clients to absolutely not use music from that site.

Finally, there is music from public domain (often referred to as just "PD") sources. For PD music, this can of course be a cheap (i.e. free) way of obtaining music for your project. However, you need to make sure that the music you are considering is fully in the public

domain. Just because the copyright term of the composition for Mozart's "Symphony No. 40" has long expired, that does *not* mean at all that the London Philharmonic Orchestra's performance and recording of it 10 years ago is PD. You may still need to hire a music supervisor or a researcher to verify that a musical work (and its recording) is PD.

So, cue the final credit roll and happy hunting for music to use in your next film or video project!

If you want to learn more about music licensing in film, please check out our four-part series on that subject we posted in summer 2019 on our entertainment law podcast Legal Cut Pro, which you can find on your favourite podcast catcher.

Gregory Pang

Gregory has been practising law since 2009 in the areas of business, trademark and entertainment law. He is also a co-host of the Legal Cut Pro entertainment law podcast and has been a sessional instructor at MacEwan University. Before his law career, Gregory worked in film and television for five years in various roles from being a locations PA to being a business coordinator in marketing/distribution. While Gregory takes his clients' matters seriously, he believes in having fun with the law by running panels and mock trials at the Calgary and Edmonton Comic Expos and participating in Nerd Nite.

My Brain Needs a Rating System!

Nathalie Tremblay

In the past few months, lack of access to my regular activities has "forced" me to make significant behavioural changes to my daily routine. Some people may have taken the opportunity to get in better physical shape or learn a new language. I will be the honest voice and admit that I have mostly increased my consumption of movie and television products – besides baking bread, of course.

Regardless of what people might think, consuming media does not necessarily stop your brain from functioning! In fact, nagging questions kept popping up every time a new movie or a fresh episode would appear on my screen: Who rates this content? Why? How does it work for different platforms? Are there laws about the classification process? These highly existential questions launched a digging expedition to satisfy my own curiosity. My findings can perhaps answer queries you have secretly been harbouring in the back of your mind but were afraid to ask!

A movie rating – or classification – is a public notice that indicates what kind of content you can expect to see. It provides people with the information they need to make informed viewing choices for themselves and their children. This type of content evaluation is about protection rather than censorship.

Rating Systems

The United States does not have laws governing the classification of films. The American film industry voluntarily participates in a rating system created by the Motion Picture Association of America (MPAA). We (Canadian viewers) typically see these

Photo by Ian Panelo from Pexels

indicators as we consume a lot of American entertainment products.

In Canada, there is no federal rating system but there are associations and provincial laws that create them. Classification for home videos is usually based on the Canadian Home Video Rating System (CHVRS). Provincial laws and regulations apply to theatrical classification. Only four provinces have actual classification authorities: British Columbia, Alberta, Québec and Nova Scotia. The other provinces and territories have agreements with one of these four boards to use their classification services.

I have just thrown a lot of organizations and acronyms at you, haven't I? Essentially what you need to know is that there are different authorities and agencies for rating films. And each authority or agency has a slightly different way of labelling content.

There is no universal application of ratings for streaming services.

For example, most places have a 14A rating for films suitable for children over the age of

14 with adult supervision. But in Québec, this rating is called 13+. It is also interesting to point out that the same movie might receive a different classification depending on where you are. For example – and this will show my age – the movie "Saturday Night Fever" is rated **14A** in Alberta, **18A** in British Columbia, **G** in Québec, and **R** in Nova Scotia as well as in the MPAA system. Incidentally, each of these websites provides a search feature that you can use to check on any movie. Give it a try, it's fun!

This can be a bit confusing but the good news is that rating systems provide more comprehensive details than a mere age indicator. Their actual description of content is a lot more consistent so you get the best information by reading a little further instead of just relying on the code itself!

When it comes to legal implications, most provinces only impose classification on movies shown in theatres charging admission in that province. In Alberta, the *Film and Video Classification Act* says movie distributors must apply for a theatrical classification from the government for any given movie in order to get a license to show the movie. Failing to do that, or allowing admission without abiding by the classification (i.e. allowing a 10-year-old alone to see a 14A movie), could result in fines or even jail time. Of course, these instances would have to be uncovered either via an inspection or a specific complaint. So yes, a few people in Alberta have the job of watching entire movies and applying a rating to them! Public participation is also welcome! If you want to find out about the process in Alberta, you can venture to the Alberta Film Classification Office website.

Streaming Services

That all being said, do you remember the last time you were in a movie theatre? These days, movie viewing happens primarily through "streaming" services. These services are **not** governed by provincial legislation or classification requirements. There is no universal application of ratings for streaming services. Each company compiles ratings from sources of their own choosing. So how do you know what the classification means? The key is once again to do some research. Even though streaming companies do not have to abide by the same rules, they still care about providing important viewing information.

When it comes to legal implications, most provinces only impose classification on movies shown in theatres charging admission in that province.

Here is what I found out:

- Netflix has just recently (in 2018) made their ratings even more visible on screen. They have adopted a rating system loosely based on the MPAA.
- Disney + uses the MPAA rating system for their content. It is interesting although not surprising to note that there is no need for the R rating for Disney content!
- Amazon Prime endeavours to use a rating system for each country where their content is streamed, therefore adapting to local standards.
- Crave uses a rating system developed by the Action Group on Violence On Television (AGVOT). You can find this system on the Canadian Broadcast Standards Council website.
- YouTube presents a bit of a different system which relies heavily on uploaders to accurately rate their own content. Their tagging system provides very specific descriptions to facilitate the process. Instead of age-related classification, videos are rated by types of mature content

(language, nudity, etc.) with three levels per type of content (none, mild and restricted 18+).

The good news about most streaming services is that they also allow for parental control features!

It is important to note that, in Canada, content broadcast over the internet does not require licensing from the Canadian Radio-television and Telecommunications Commission (CRTC). When it comes to offensive content, there are laws and industry-developed guidelines to deal with content generated in Canada. Your internet service provider's "acceptable use policy" (you know, the small writing that we never read?) can provide more information about their standards. You can always report concerning content of an illegal nature to local police as well.

Another Rabbit Hole?

As I was emerging from the bottomless hole that is the internet, I noticed that different ratings are also used for video games through the Entertainment Software Rating Board (ESRB) … perhaps an article for another time? For now, I really need to replace my screen with some kind of natural environment (rated G) where I can find real rabbits prancing around in the daylight. Until next time!

Nathalie Tremblay

Nathalie Tremblay, MEd, is the Education Design and Evaluation Specialist at the Centre for Public Legal Education Alberta.

The Art of Canadian Taxation

Hugh Neilson

Jean-Baptiste Colbert said, "The art of taxation consists in so plucking the goose as to procure the largest quantity of feathers with the least possible amount of hissing." I suspect that this is the closest that most would equate tax and the arts.

But the arts provide the livelihood of artists, and income tax applies to that livelihood as it does to other forms of income. Unusual tax issues can arise within the arts, issues which the income tax system is forced to address. This article discusses a sampling of such issues.

The Kindness of Others

Many arts organizations are charitable organizations. Most Canadians are well aware that donations to registered Canadian charities generate a personal income tax credit.

Donations of "cultural property" to organizations such as museums can generate a further benefit – no portion of capital gains on such property is included in income for tax purposes. Prior to donation, the Canadian Cultural Property Export Review Board must certify and value the property. The receiving institution may be familiar with this process, or at least willing to learn in order to secure the donation.

What is "Art"?

The income tax system thrives on definitions. Art, by its nature, defies precise definition. As a result, different provisions may apply to different "arts". One special rule is provided for a business which is an "artistic endeavour". The legislation describes an artistic endeavour as "creating paintings, prints, prints, etchings,

Photo from Pixabay

drawings, sculptures or similar works of art" but excludes a business which reproduces such works. The individual carrying on such a business may elect to value inventory of that business at nil.

Normally, inventory must be valued at the lower of its cost or fair market value at each business year-end. Imagine trying to determine the cost of canvasses, paint or supplies used in sculpture which form any given piece of artwork. Then, assess the value of any artist's work when it has not yet been sold. This election provides a much-needed simplifying assumption.

Given the cliché regarding the value of art during and after the artist's lifetime, determining that value immediately prior to death – to report a deemed disposal at fair market value – would create further interesting arguments at the Tax Court and unwelcome costs for those administering, or benefitting from, the artist's estate.

Working for the Man

Of course, not all artists are self-employed. Employees who earn income from an "artistic activity" may deduct expenses incurred in

respect of such costs, to a maximum of the lesser of $1,000 and 20% of their earnings from such employment. They can carry forward any excess for possible deduction in future years. Certain amounts deducted under other provisions, related to interest or depreciation of a vehicle, or to musical instruments (discussed later in this article), reduce this annual limit. Other expenses deductible under the rules applicable to all employees could be deducted under those provisions. For example, employees may deduct costs of supplies they must provide which they consume in the course of their employment.

Two special tax credits are available to corporations involved in film or video production.

The definition of "artistic activity" is broader than the "artistic endeavor" described above. Artistic activity covers:

- creating (but not reproducing) paintings, prints, prints, etchings, drawings, sculptures or similar works of art;
- composing dramatic, musical or literary works;
- performing of a dramatic or musical work as an actor, dancer, singer or musician; or
- any activity in respect of which the taxpayer was a member of a professional artists' association certified by the Minister of Communications.

The Sound of Music

Employed musicians enjoy a special provision allowing them to deduct costs related to a musical instrument which they must provide in the course of their employment. These costs could include rental, maintenance or insurance of the instrument. As well, employed musicians can claim a "capital cost allowance" (the tax term for depreciation) on these musical instruments. Few other assets generate such claims for employees.

For incorporated musicians, the treatment of royalties they receive on their work as "active business income" (ABI) or "specified investment business income" (SIBI) significantly impacts the rate of corporate taxes applicable. SIBI is subject to higher corporate tax rates. This includes income earned from property, generally including royalties.

A 2018 tax case (*Rocco Gagliese Productions Inc. v Her Majesty the Queen*) examined the application of these provisions to a corporation which composed music. The Court concluded that royalties were the manner in which music composers collected active business revenues. Residual royalties from rebroadcasts were incidental to that active business. As such, this income was ABI for a composer, and not SIBI.

For a taxpayer like myself – whose ability to produce music of a quality anyone would wish to hear is limited to the radio, the stereo and streaming services – such income would be SIBI earned on property (purchased royalty rights). It would be taxed like term deposit interest or real estate rental income. The composer, however, carries on the active business of composing music.

Lights, Camera – Tax Credits

Two special tax credits are available to corporations involved in film or video production.

The definition of "artistic activity" is broader than the "artistic endeavor" ...

The Canadian Film or Video Production Tax Credit is available to certain Canadian corporations whose primary activity is film or video production carried on in Canada. A refundable income tax credit is available for 25% of "qualified labour expenditures"

incurred in respect of a production certified by the Minister of Canadian Heritage. Among other requirements, certification requires that Canadian entities retain an "acceptable" share of revenues from non-Canadian markets.

Eligible labour costs are subject to detailed definitions. They can include payments to both employees and non-employee service providers (with the latter restricted based on the service provider's labour costs), with restrictions for services rendered by non-residents of Canada.

The Film or Video Production Tax Credit provides similar assistance for "accredited productions", requiring similar Ministerial certification. The rules are similar, but the credit is 16% of "qualified Canadian labour expenditures". These must relate to services rendered in Canada in respect of the production. This is a less lucrative credit available for productions not meeting the requirements of the first credit.

Some provinces also have credits for film, video, digital media or animation projects. These would expand the scope of this article beyond any practical size. Interested readers can review PWC's summaries of these incentives at PWC's website.

Gimme Shelter

Tax credits often attract tax shelter promoters, which have intersected with the arts over the years. The Canadian Film or Video Production Tax Credit discussed above is not available for any production where the production, or a person with a significant interest therein, meets the definition of a tax shelter.

A series of high-profile tax shelters in the 1990's and early 2000's, referred to as "buy low – donate high" shelters, attempted to take advantage of uncertainties in the term "fair market value". These shelters purchased various commodities in bulk and then donated them to charities. They would claim the donation based on a much higher value, on the argument that this should be without the discount applicable to bulk purchases. In the years since, the courts have held that many of these tax shelters relied on unsupportable valuation numbers, even considering these uncertainties.

In the interim, however, the government implemented legislation to limit the value of certain donations of property to the cost of the property. These rules apply to property acquired under "gifting arrangements" which were tax shelters and other properties held for less than three years before being donated (ten years if the property was acquired for the purpose of being donated).

The Power of the Press

According to my own less than comprehensive research (a google search), journalism is an art, not a science. The government has recently implemented several tax incentives to assist Canadian journalism. These incentives are not addressed here for reasons of length of the article, the fact that few people would include journalism in a plain English definition of "the arts" and to save the topic in case there is a future edition of this publication addressing legal issues relevant to the news media. However, should the reader be interested, the Canada Revenue Agency discusses these measures.

Employed musicians enjoy a special provision allowing them to deduct costs related to a musical instrument ...

The Fine Print

As with virtually all articles on taxation, the above is a general overview. Often, specific criteria must be met to claim certain credits and deductions. Professional advice to ensure a complete understanding of these requirements is strongly advised.

Overall

As with many cultural areas, the Canadian income tax system seeks to offer incentives to Canadian taxpayers within, or contributing to, the arts in Canada. As indicated above, however, the rules can become quite complex – one might say there is an art to both drafting and interpreting such legislation. At least, if one is a self-confessed tax nerd lacking any true artistic skills, which certainly describes the writer.

Hugh Neilson

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Have You Heard? | Introducing CPLEA TV

Lesley Conley

Welcome to the first instance of **HAVE YOU HEARD?** Here, we will share updates on the law – cases, legislation and processes – as well as highlight access to justice issues and our public legal information resources.

Today, we are introducing **CPLEA TV** and passing on a recent Court of Queen's Bench announcement.

CPLEA-TV

This is a series of video-presentations on a variety of popular topics from **finding good legal information** to **landlord and tenants issues** to **planning for the future**. You can access these new videos our YouTube channel.

New titles include:

- Legal Information vs Legal Advice
- Finding Good Public Legal Information: Is it Reliable?
- Planning for the Future 1: Personal Directives, Enduring Powers of Attorneys and Wills
- Planning for the Future 2: Mental Capacity
- Planning for the Future 3: Decision-Making Tools
- Top 10 Housing Issues: Deposits, Landlord Entry, Repairs, Pests, Guests and Shared Accommodations
- Top 10 Housing Issues: Evictions, Human Rights and Housing, and Dispute Resolution
- Top 10 Housing Issues: *Residential Tenancies Act*, Rental Applications and Leases

And keep watching for new topics in the near future!

Families and the Law series

Due to the changes to the *Divorce Act*, effective March 1, 2021, our Families and the Law series is undergoing significant updates. Look for a refreshed series with expanded practical information to support those involved in family law disputes, all launching on March 1, 2021.

Court of Queen's Bench Announcement

The pandemic continues to impact court services. On August 20th, the Court of Queen's Bench released an **Instructions and Etiquette Guide for Online Hearings for Counsel, Parties, Witnesses, Media and the Public**. The document gives best practices for online hearings, including info on hearings, technology and conduct. If you or someone you know is involved in a family proceeding in the Court of Queen's Bench, check out this resource so you know what is expected of you. You can access the document from the Alberta Courts website.

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 more legal information on a variety of topics, visit: www.cplea.ca

Columns

Two Steps Forward, One Step Back?

Melody Izadi

One Ontario Court of Justice judge says accused cannot plead guilty by phone

In *R. v. Candelaria*, 2020 ONCJ 194, Justice Downes ruled, amidst the adjustments the courts have had to make due to the COVID-19 pandemic, that an accused cannot plead guilty via telephone. This means, according to Justice Downes, an accused can only enter a guilty plea in person or via video link during these unprecedented times.

At the time of the *Candelaria* judgment, the criminal courts nearly closed to all members of the public, including accused persons and their lawyers. Indeed, this was a frustrating but welcome adjustment the justice system was forced to make due to the real and probable threat of the COVID-19 virus. While the consequences of this virus on our planet and people are grave, its effect on the justice system has been a substantial push towards a more streamlined and modernized process.

In* R. v. Candelaria, *2020 ONCJ 194, Justice Downes ruled … that an accused cannot plead guilty via telephone.

As such, in an effort to keep justice moving forward and efficiently as much as possible, courts were allowing virtual court appearances to take place all over the province. Both by audio or video or both, accused in custody were given priority to resolve their matters—in the interest of justice and humanity. The justice system quickly adjusted to and accommodated this new world order. The court and counsel are flexible and open to new court practices and procedures. Surprisingly, however, Justice Downes seemingly thwarted the court's newest accommodation: guilty plea by telephone.

Photo from Pexels

The accused, Mr. Candelaria, was in custody at the time of his anticipated guilty plea. He was requesting a sentence of time served, while the Crown was asking for some additional custody. Justice Downes held that not only did the courthouse he presides in have an "extremely limited capacity" to accept the plea by video link, but that a self-represented accused such as Mr. Candelaria could not plead guilty via telephone. According to His Honour, this was in accordance with the *Criminal Code*. While His Honour very briefly addressed the injustice that befell Mr. Candelaria, the focus of his ruling was seemingly on applying pressure to the Court and the jail systems to facilitate more sustained video link appearances for the accused. This judgment meant that, while Justice Downes hoped the courts and jail would take his advice seriously and implement more accommodations quickly, Mr. Candelaria would have to wait in custody indefinitely

while this was done or until the court could accommodate his video plea.

Thankfully, Justice Monohan, presiding in a different jurisdiction and city, disagreed with this ruling. In *R. v. Daley*, 2020 ONCJ 201, Justice Monohan echoed the comments of Justice Downes about the limited capacity for the jail and courts to accommodate a video link plea. Mr. Daley, like Mr. Candelaria, was in custody. Justice Monohan specifically cites the *Candelaria* decision and respectfully disagrees with Justice Downes. He finds that the *Criminal Code* does permit the court to hear a guilty plea via audio conference only, if necessary. He further finds that there is no express prohibition in the *Criminal Code* of audio teleconference pleas, in direct contrast to the decision by Justice Downes. Justice Monohan expressed clearly the chaotic and intense ramifications that accused persons would be subject to if the *Candelaria* decision was followed:

> *If section 650 and 715.23 [of the Criminal Code] were to be interpreted so narrowly as to only permit pleas by video and prohibit a plea by audioconference, then accused persons would not just find themselves in jail. They would find themselves in jail in something akin to a Franz Kafka novel. Take a person in a time served situation (not necessarily Mr. Daley's situation). Prisoners are no longer being brought to court during the worldwide pandemic. All plea and bail hearings across the Province previously done in person are now being done only by audio and video. However, most courts and correctional institutions have little videoconference capacity. Audioconferencing is more readily available. For example, I conducted the plea and sentencing in this case from my office telephone. There was no need for a courtroom or a correctional facility with video capabilities, just a telephone and a conference call number. If a narrow interpretation of subsection 650(2)(b) and section 715.23 were to prevail excluding a plea by audioconference, an accused person in a time served situation who wishes to plead guilty by audioconference would be told that they have to serve more time. They would have to "get in line" and wait for a videoconferencing option or time slot to materialize. They would have to do this in a context where courts and jails across the Province are seeking to do what they have never done before namely have all prisoners appear remotely for substantive hearings. To give a pop culture analogy, if a person in a time served situation could only plead guilty by video, they would find themselves in something like the Hotel California, they can check in, but they can't leave. That is to say, if pleas had to be done by video only, cases would no doubt arise whereby people in a time served situation would be unable to plead and be sentenced and released in a timely way even when they have served all or more of the sentence they will ultimately receive.*

Bravo, and well said Your Honour.

… Justice Monohan, presiding in a different jurisdiction and city, disagreed with this ruling.

However, because the *Candelaria* and *Daley* decision both originate from the same level of court – the Ontario Court of Justice – they apply equally to other cases and jurisdictions. Unless a higher court, or a directive from the judiciary or government, mandates with certainty whether audio pleas are in fact allowed, the courts are free to choose what is and isn't lawful by following either decision.

That all being said, both cases focus on the interests of justice at hand, and on the rights of the accused persons, especially

those whom are most vulnerable because of incarceration. Both jurists note candidly the limited capacity of video conferencing availability in their courthouses and the difficulties each jurisdiction routinely faces with the correctional facilities. Thus, while the courts and counsel have been forced to adapt, so too must the correctional facilities who house the very individuals subject to the court proceedings. And these individuals are presumed innocent until found guilty. While these facilities have made a consorted effort to accommodate as rapidly as possible, both the *Candelaria* and *Daley* decisions make clear that these efforts are not completely adequate. But if an archaic, pen-and-paper justice system can quickly adapt during these unprecedented times (albeit with a few bumps along the way), then so can they— and they must. The accused person ought to be as present as possible during their court proceedings with respect to accepting responsibility for their actions in open court.

Melody Izadi

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Employment

Enhanced Job Security for Federal Workers

Peter Bowal and Curtis Birch-Lucas

> *It is an outcome that is anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice. To decide otherwise would fundamentally undermine Parliament's remedial purpose.*
>
> *– Wilson v Atomic Energy of Canada Ltd., 2016 SCC 29 at para 69*

Employment security is something every worker is concerned about, especially during a pandemic. It is generally accepted that unionized workers enjoy more security than their non-unionized counterparts do. And public sector workers are better protected than private sector workers are.

The federal government regulates only about 6% of all Canadian employees. They may be directly working for the federal government or in one of the federally regulated industries such as telecommunications, shipping, aeronautics, railroads, banking and atomic energy.

Most of these federally regulated employees are unionized. But some workers in banks, telecommunications companies, airlines, Crown corporations and other federally controlled employers are non-unionized. In 1978, Parliament amended Part III of the *Canada Labour Code* to add ss. 240 to 246 about "unjust dismissal." These amendments granted unionized federal workers the right to written reasons for dismissal and to complain to an adjudicator if they believe they have been dismissed without just cause. This is an expansion of their collective agreement rights.

Photo from Pixabay

An adjudicator finding the dismissal unjust can order the worker reinstated or compensated.

This article describes how the Supreme Court of Canada recently decided that these *Canada Labour Code* extended protections from 1978 apply to non-unionized workers as well. Federally regulated employees without unions and collective agreements share unionized employees' statutory rights.

Wilson v Atomic Energy of Canada Ltd

In 2005, Joseph Wilson began work as a Senior Buyer/Order Administrator for Atomic Energy Canada Limited (AECL), a federally regulated Crown corporation. He was dismissed after more than four years of employment despite having a clean disciplinary record. He claimed he was dismissed because he blew the whistle on improper procurement practices at the company. Mr. Wilson's employer dismissed him without cause and gave him a large severance package. The employer was of the view that it could terminate Wilson at any time without cause since he "was provided a generous severance package that well exceeded the statutory requirements" and was not protected by a collective agreement.

The unjust dismissal scheme in the* Canada Labour Code *ensures federal non-unionized employees cannot be dismissed without cause.

The adjudicator ruled that AECL could not dismiss Wilson with severance payments alone.

In the Supreme Court of Canada

Six of the Supreme Court judges concluded that the adjudicator was reasonable (indeed, correct) in his interpretation of the 1978 *Code* amendments. They said the unfair dismissal process intended to provide these workers with a method of challenging their dismissals, because battling their employers in courts was very costly and burdensome.

They referred to the Parliamentary intent expressed by the then Minister of Labour Munro when he originally introduced the amendments. Munro said the provisions would provide *unorganized workers* with some of the "minimum standards" in collective agreements given to organized workers. He added:

> *The intent of this provision is to provide employees not represented by a union, including managers and professionals, with the right to appeal against arbitrary dismissal – protection the government believes to be a fundamental right of workers and already a part of all collective agreements.*

The three dissenting judges noted: "a dismissal is not *per se* unjust, so long as adequate notice is provided." They viewed the majority interpretation as an "absurdity," ensuring "two identical classes" of employees [non-unionized public and private sector] will be handled differently "based on an arbitrary or irrational distinction." They said Parliament did not mean to change the relationship between these employees and employers "simply by adding the unjust dismissal procedure to the *Code*." There is no definition of an "unjust dismissal" in the *Code*.

The dissenting judges referred to provincial schemes that answer this question and "they have done so expressly . . . had Parliament intended to prohibit without cause dismissals, it would have done so by using such clear and unambiguous language."

In 1978, Parliament amended Part III of the Canada Labour Code to add ss. 240 to 246 about "unjust dismissal."

Conclusion

The unjust dismissal scheme in the *Canada Labour Code* ensures federal non-unionized employees cannot be dismissed without cause. Severance payments are not an option for federally regulated employers to justify terminating employees without cause. Non-unionized workers – unprotected by collective agreements – enjoy recourse and protections comparable to unionized employees.

Federally regulated employers must show good cause to dismiss employees. These employees may also have the right to progressive discipline before being dismissed.

Under section 240(1), this protection is available only to those who have worked at least 12 consecutive months and if they are dismissed for reasons other than lack of work or restructuring.

The case represents a big win for employee rights in Canada and a challenge for federal employers who seek to reduce their workforces. It continues a recent trend of the Supreme Court strengthening labour rights of workers to unionize and strike.

Peter Bowal

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When is Shared Parenting Appropriate?

Sarah Dargatz

When the parents of a child separate, they must make decisions about where the child should live on a day-to-day basis. Many parents prefer some form of "shared parenting" which usually means that each parent has day-to-day care of the child at least 40% of the time. However, shared parenting is not right for all families. In some cases, it's best for one parent to care for the child more of the time.

Under Canadian family law, decisions about a parenting schedule are based on what is in the **best interests of the child**. The new *Divorce Act*, likely coming into force in March 2021, will include a list of factors that judges must consider when determining what is in a child's best interests. Many provincial family laws, such as Alberta's *Family Law Act*, already include a list of factors.

Factors that a judge must consider when determining what is in a child's best interests include:

- a child's needs, including their need for stability
- a child's nature and strength of relationship with each parent and other significant people
- the history of care
- a parent's plans for the future
- the child's view, where they can be ascertained, and where appropriate to consider given the child's age and maturity
- the child's cultural and religious upbringing
- a parent's willingness and ability to support the child's relationship with the other parent
- a parent's willingness and ability to communicate and cooperate with the other parent about the child and
- any family violence.

What the legislation does not do, however, is dictate how a judge will weigh each of these factors. The law does not say what outcome is appropriate given a certain factor or constellation of factors.

Photo by Markus Winkler from Pexels

Under Canadian family law, decisions about a parenting schedule are based on what is in the best interests of the child.

Judges consider the factors of a particular case and what outcome the judge considers to be in the child's best interests, based on those factors. These decisions published by the court establish "caselaw" and "precedent" that other judges apply to subsequent cases.

Recently, Justice Lema of the Court of Queen's Bench of Alberta (in ***CAS v NPC*, 2020 ABQB**

421) reviewed the Alberta caselaw regarding factors that tended to support an order of shared parenting and those factors that tended to demonstrate when shared parenting would not be in a child's best interests. His survey of factors is helpful. The case is worth a read for those struggling with this question.

Some of the factors that judges have determined **support** shared parenting include:

- both parties being capable and engaged parents
- good communication between the parents
- each parent loving the child and "no evidence that [the child] will not be properly cared for with all their needs being met in the care of each parent"
- adequate proposed work and child-care arrangements from the parents, even if one parent's plan is less developed than the other's
- a history of shared parenting
- parents having different and important interests and capabilities to pass on to their children
- shared parenting would enhancing a child's contact with a parent's cultural or linguistic background
- children have spent significant time with, and have strong attachments to, both parents
- children prefer shared parenting
- increased contact with half-siblings and other family members
- practical considerations such as manageable driving time between parental residences and school and the availability of child care and
- where there is a parenting assessment from a qualified psychologist recommending shared parenting.

The law does not say what outcome is appropriate given a certain factor or constellation of factors.

Factors signaling **against** shared parenting include:

- parents' inabilities to put their children's interests ahead of their own to such a degree that regular cooperation and coordination in scheduling is impossible
- the parties being and having been in "substantial conflict" and lacking a "genuine willingness to work together to ensure the success of a shared-parenting arrangement"
- where separation of the child from their primary caregiver, particularly at a young age, may be emotionally and developmentally disruptive for the child
- one parent's possible serious alcohol dependency
- medical evidence suggesting no major changes to routines of seriously disabled child
- a parent's frequent violence and angry outbursts against child
- child at risk of serious psychological problems
- one parent's residential and new-relationships instability
- the absence of definite plans for where the parent would live with the child or where they would go to school
- the opposed-to-shared-parenting opinions of the child, ascertained by a parenting expert
- one parent's move making it "impossible to continue with the alternating week parenting schedule" and

- practical considerations such as the distance between parents' residences making shared parenting impractical.

Justice Lema notes that determining what is in a child's best interests is not a "box-checking exercise". He writes:

> *Determining a child's best interests is not simply a matter of scoring each parent on a generic list of factors. Each case must be decided on the evidence presented. The listed factors [in one case] merely serve as indicia of the best interests of the child. By their very nature, custody and access applications are fact-specific. The listed factors may, therefore, expand, contract, or vary, depending on the circumstances of the particular case as manifested by the totality of the evidence. Courts must approach each decision with great care and caution.*

Sarah Dargatz

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Famous Cases

Your Land is My Land: *Reeder v Woodward*

Peter Bowal and Roberto Torres Martinez

> *[T]he appellants … were, after all, the registered owners of the disputed parcel, which the respondents have now acquired through adverse possession. The litigation was necessary to resolve this dispute, even though it was undoubtedly expensive and unfortunate for both sides.*
>
> *– Reeder v Woodward, 2016 ABCA 91 at para 34*

Adverse possession, also known as "squatters' rights", is an old common law doctrine where one may acquire ownership to another's land by simply occupying it for a certain period of time. Since the supply of land is limited, the theory is that those who need it and can best use it should own land.

From the mid-1500s to the 1800s, recovering one's land from a "squatter" or occupier was subject to a 60-year limitation period. Occupiers who could show actual possession of the land for that time could keep the land. Lawmakers reduced this limitation period to 20 years in 1833 and then to the current 10 years in Alberta.

The Land Titles system tracks and assures title (ownership) to land through the *Land Titles Act*. Formal registration of documentation provides landowners certainty in ownership of their land. Registered owners have priority over all others claiming ownership. The system tracks and digitally stores all interests and changes to land ownership. It operates on the mirror principle (the register always reflects actual ownership) and the curtain principle (the register is complete on its face so no one needs to verify historical records).

Photo Credit: Jessica Steingard

Adverse possession claims are not documented or registered in the land titles system. They represent a common law exception to the legislative framework and the mirror and curtain principles. Adverse possessors may have their claims validated by judges and then entered on the title to the land.

"Adverse" means that occupation of the property must be without consent of the registered owner. This occupation is basically trespass. The elements of adverse possession are:

- the registered owner must not be possessing the disputed property and must be aware that the occupier is possessing it
- the occupier must be intentionally occupying and using the land to exclude the owner and
- the occupier's occupation and use must be exclusive, continuous, open, visible and notorious for the required statutory time period.

Five provinces still allow adverse possession in some form:

Province	Act	Limitation Period
Alberta	*Limitations Act* (s 3) *Land Titles Act* (ss 73 and 74)	10 years
Manitoba	*Registry Act*	10 years
Nova Scotia	*Real Property Limitations Act* (ss 11 and 32) *Land Registration Act* (ss 74 and 75)	20 years
Ontario	*Registry Act* (s 113) *Real Property Limitations Act* (ss 4, 13 and 15)	10 years
New Brunswick	*Registry Act* *Real Property Limitations Act* (s 29)	20 years

Rare and newsworthy adverse possession disputes often lead to calls to abolish the law. The Lutz family built a fence which – unknown to both parties – rested on the land of Kawa, who had lived on the land for nearly 40 years. Upon discovering the error over the small parcel, Lutz filed an adverse possession claim to acquire the disputed land.

The trial judge ruled the possession was not "adverse" as Lutz had built the fence inadvertently encroaching. In 1980, the Alberta Court of Appeal said a lack of "adverse" intention or ignorance of the possession was unnecessary to gain title by adverse possession. Nevertheless, the appellate court still refused to transfer the land to Lutz because Kawa's counterclaim to the adverse possession was within the 10-year limitation period: *Lutz v Kawa*. This case formed an important precedent for the recent dispute described below.

Many criticize adverse possession as unfair and a violation of registered landowner rights.

Reeder v Woodward

The Reeder family has owned land at Cardston, Alberta for several generations. In 1972, the county upgraded Highway 501 running just south of the property boundary line between William Reeder's farmland and neighbour Dennis Vadnais' land. The construction created a remnant that separated 9.5 acres of Vadnais' land next to the Reeder property. The Vadnais-owned strip was now divided by the newly built highway and surrounded by a fence. Although the land did not belong to them, the Reeders improved the parcel of land and regularly grew hay and pastured cattle on it. Vadnais knew of this. The neighbours never discussed the issue. The disputed strip of land is worth about $30,000 today.

In 1999, Robert and Lorraine Woodward purchased the Vadnais land, knowing of the Reeders' occupation of the 9.5 acres. Eleven years later, in 2010, the Woodwards claimed the disputed strip belonged to them and built a new fence to separate the Reeder land, creating three distinct fenced slices of land. They guarded the area and blocked Reeder access to the land. The Reeders filed a caveat for adverse possession, and the Woodwards counterclaimed for repossession.

Adverse possession claims are not documented or registered in the land titles system.

The Woodwards argued a lawful entitlement of the land based on a three-way agreement reached in 1972 between the county and the landowners. However, there was scant evidence of such contract for which the judge could make clear affirmative findings of fact. The judge found the Reeders' adverse possession was exclusive, continuous, open, visible and notorious when the Woodwards purchased the property on May 5, 1999. While there were "neighbourly attempts" to reclaim the land, no actions were brought until 2011, two years after expiration of the statutory 10-year limitation period. The judge awarded the Reeders title by adverse possession of the 9.5 acres. The trial judge also awarded damages of $20,280 for lost hay production and solicitor and client costs. The Woodwards appealed.

The Court of Appeal agreed that Alberta's *Limitations Act* extinguished the Woodwards' ownership in the disputed land. Section 3(6) of the Act reads:

> *The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection 1(b).*

The appellate court observed that the Woodwards lived in the area and knew of the Reeder's occupation of the land even before purchase. Furthermore, the Reeders consistently asserted their occupation of the disputed land for more than 10 years. The $20,280 damages award was set aside because proof of that loss was inadequately established. The legal, financial and personal costs substantially exceeded the value of the disputed land.

Conclusion

Many criticize adverse possession as unfair and a violation of registered landowner rights. The *Reeder v Woodward* case was controversial. Some called for the doctrine to be abolished as it serves no purpose in modern society where settling and conquering is a thing of the past.

In 2019, the Alberta Law Reform Institute released a report titled *Adverse Possession and Lasting Improvements to Wrong Land*. The report recommended abolishing adverse possession. The amendment would eliminate the limitation period and allow property owners to recover their titled land at any time. It was based on a 2003 report which observed that most adverse possession cases fall into three categories:

1. the occupier's presence on the land is due to an honest but mistaken belief in the boundary
2. equitable circumstances support the occupier's presence on the land
3. a third-party's error is prejudicial to the occupier.

Adverse possession, also known as "squatters' rights", is an old common law doctrine …

There is frequent overlap between adverse possession and claims for permanent improvements to others' land. Occupiers prefer adverse possession as a primary claim to obtain title to property instead of compensation for the lasting improvement. If adverse possession were abolished, occupiers' only claim would be for compensation. Alternatively, as the Law Reform Institute observed, "adverse possession might be more equitable if the occupier was required to

compensate the registered owner for the loss of the land."

The Alberta government did public consultation in October 2019 as to what should be done with adverse possession. As of date of publishing, the government has not yet made a decision.

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Human Rights

The Importance of Distinguishing Racism from Racial Discrimination

Linda McKay-Panos

Photo from Pixabay

Recently, anti-racism has received extensive media coverage. Instead of addressing what can be done about it, there has been much discussion about whether racism—particularly systemic racism—exists in Canada, and apparent confusion about the meaning of important terms. For example, on June 9, 2020, CBC reported that Alberta Deputy RCMP Commissioner Curtis Zablocki denied there was systemic racism in policing in Canada. RCMP Commissioner Brenda Lucki said that Deputy RCMP Commissioner Zablocki had indicated he misunderstood the meaning of "systemic racism". In order to proceed to actually address racism, it is very important that everyone is very clear about terminology.

Racism, racial discrimination and even systemic racism are often used interchangeably, leading to confusion and misinformation. Provincial, territorial and federal legislation prohibit **racial discrimination**. The *Canadian Charter of Rights and Freedoms* (*Charter*) prohibits racial discrimination by the government. There are limited circumstances under this legislation where racial discrimination may be justified by the government or the respondent.

"Race" is one of several grounds covered under both human rights legislation and s. 15(1) of the *Charter*. Walter Tarnopolsky defined race for the purposes of human rights law (as quoted in *Blake v Loconte* (1980), 1 CHRRD/74 at D/78 (Ont. Bd. of Inquiry)) as:

> *... only one [Board of Inquiry] has attempted to provide a definition of the word 'race' and this was the 1976 Board of Inquiry under the Alberta Individual's Rights Protection Act [S.A. 1972, c. 2, in] the case of Ali v. Such... The Board quoted from Webster's New World Dictionary (2d. ed.) and Black's Law Dictionary (rev. 4th. ed) and thereupon concluded that 'race indicates broad or great divisions between mankind, and each of the definitions indicates that the races have physical peculiarities that distinguish one race from the other'.*

Racism is a combination of racial prejudice (or discrimination)* plus *power.

Legislation often does not define "discrimination", but leading cases from the Supreme Court of Canada (SCC) provide guidance. Under human rights law, the leading case is *Moore v British Columbia* (*Education*), 2012 SCC 61 (*Moore*). *Moore* provides:

> *[33] ... [T]o demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.*

Under s. 15(1) of the *Charter*, the SCC summarizes the law on discrimination in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17:

> *[25] … The test for a prima facie violation of s. 15 proceeds in two stages: Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose 'burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating … disadvantage' (citation omitted).*

Intention is not relevant in discrimination; we do not consider whether a person intended to discriminate. It is the impact of the discrimination that we take into account.

In the case of Canada and United States, white people currently possess socially-imbued power and this is reflected in our institutions.

The legal tests for "discrimination" and "race" indicate that a person faces racial discrimination any time a person experiences an adverse impact (e.g. caused by the operation of law under the *Charter*; or in areas such as employment, tenancy or public services under human rights law) because of their race. This applies to white people, persons of colour, black persons and Indigenous people. For example, if a prospective employer did not hire an otherwise qualified person based on their race, that would be racial discrimination. This discrimination is illegal unless the employer can reasonably justify it. In short, it is possible for a white person, an Indigenous person or a person of colour to experience **racial discrimination**.

The law addresses behaviour and not attitudes. While racial discrimination is an action, it is often caused by **racial prejudice**, which is an attitude. According to the Calgary Anti-Racism Education (CARED) website:

> *Assumptions and stereotypes about white people are examples of racial prejudice, not racism. Racial prejudice refers to a set of discriminatory or derogatory attitudes based on assumptions deriving from perceptions about race and/or skin colour. Thus, racial prejudice can indeed be directed at white people (e.g., white people can't dance) but is not considered racism because of the systemic relationship of power.*

Thus, **racism** is not the same as racial discrimination. Although people sometimes refer to racial discrimination as "racism", this creates confusion and is not correct. Racism is a combination of racial prejudice (or discrimination) *plus* power. By "power", we are talking about who is recognized and accepted as having power in society as a whole. In this context, the power is socially-imbued but not necessarily earned. For example, in Canada and the United States, it is generally accepted that heterosexual white middle-aged males are natural leaders. We can see this by looking at various institutions – such as governments, legislatures, large corporations, justice and other institutions – to see who is at the head (or who has the power).

CARED further explains "power" as follows:

> *By power we mean: the authority granted through social structures and conventions—possibly supported by force or the threat of force—and access to means of communications and resources, to reinforce racial prejudice, regardless of the falsity of the underlying prejudiced assumption. Basically, all power is relational, and the*

different relationships either reinforce or disrupt one another.

Systemic racism and **institutional racism** are subsets of **racism**. Frances Henry and Carol Tator define racism in *The Colour of Democracy 4th ed* (Toronto: Nelson Education, 2010) at p 383 as:

> *A system in which one group of people exercises power over another on the basis of skin colour; an implicit or explicit set of beliefs, erroneous assumptions, and actions based on an ideology of the inherent superiority of one racial group over another, and evident in organizational or institutional structures and programs as well as in individual thought or behaviour patterns.*

In order to proceed to actually address racism, it is very important that everyone is very clear about terminology.

In the case of Canada and United States, white people currently possess socially-imbued power and this is reflected in our institutions. The Centre for Race and Culture talks about systemic racism in Canadian society as follows:

> *A system of power and violence that structures opportunity and assigns value based on the social construct of race where privilege is afforded to whiteness. A system that unfairly disadvantages Black, People of Colour and Indigenous Communities while subsequently unfairly advantaging communities and individuals embraced by whiteness.*

Another confusing term is being incorrectly used interchangeably with **systemic racism**—**systematic racism**. These two terms are not the same. Josh Burnoff provides the following explanation:

> *Systematic racism is a set of practices that discriminate on the basis of race. Systemic racism is a system that has racism inherent in how it operates.*
>
> *Systematic racism is relatively easy to fix, if you care to try. Systemic racism requires a deeper level of thinking. I also think it demands including a racially diverse set of decision makers, because a diverse set of people can more easily identify racism in the systems that include racism within it, whether that racism is intentional or not.*

Why is it very important to be clear? When a white person says that they have experienced **racism**, this is not possible in Canada because white people currently possess socially-imbued power. However, they may well have experienced **racial discrimination** and can obtain a legal remedy in some circumstances. For more in-depth information on racism and racial discrimination, please visit CARED.

Linda McKay-Panos

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Law & Literature

Richard Wright's *Native Son*: Dread in Chicago's desolate South Side

Rob Normey

As I write, impassioned protests in Kenosha and elsewhere attest to the anguish experienced by many Americans at the racialized violence meted out to African Americans. The incomprehensible shooting in the back of Jacob Blake, father of three, by a white police officer is the latest in a string of recent shootings and assaults. Shocking levels of violence by whites against black Americans is in fact a recurring theme in U.S. history.

One of the first significant protest works to explore racism, oppression and violence against black Americans is Richard Wright's 1940 novel, *Native Son*. Wright was a black American who fled the Jim Crow south (Mississippi) to inhabit what must have seemed a new form of prison on the South Side of Chicago in the 1930s. He interrogates the racist practices of his society from the standpoint of its victims. Never before had such a threatening, dangerous character as Bigger Thomas been selected as the central consciousness who will lead the reader through a lengthy novel. The three parts – Fear, Flight and Fate – reveal in economic terms the stark nature of the predicament and the powerful response of the main character.

Major critic Irving Howe summed up the novel's significance by claiming it changed American culture forever. Howe stated that Wright's work had made impossible a repetition of the old lies, and brought into the open the hatred, fear and violence that have crippled the culture. The Modern Library's list of the best 100 novels ranked *Native Son* as No. 20. As a formidable, path-breaking

Photo by Kelly Lacy from Pexels

protest novel, though, it is easier to value it as an important social event and provocative exploration of the vexing problems of race relations in America than it is perhaps to endorse its brilliance and greatness as a work of art.

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In this Black Lives Matter era, this novel provides readers an unrelenting look at the violence that the forces of law unleash on the black characters who emerge from their one-room apartments and do life in conditions little better than those faced by actual prisoners. The opening chapter is a perfectly executed description of the stunted lives of Bigger, his mother and his two siblings, under the pressure of hunger and despair. It is twenty year-old-Bigger, badgered by his mother to find employment or lose welfare benefits, whose toughness and tenacity is needed to once again battle a huge black rat menacing the Thomas family. The author gives a vivid and authentic account of the desperate struggles in which his protagonist and others in the black community of Chicago's South Side must engage.

Bigger is encouraged to take employment with a wealthy, privileged white family: the Daltons. His crossing the color line creates in him a palpable sense of dread at the prospect of saying or doing the wrong thing. While escorting home the daughter, Mary, after she had a night of heavy drinking, tragic circumstances result in her accidental death at his hands. A sequence of cascading actions leads Bigger to commit crimes and attempt various deceptions to escape capture.

The most remarkable scenes in the novel depict the harsh circumstances of the black community and the links with the dominant class – whites like Mr. Dalton. We learn Mr. Dalton is more than an impeccable liberal who donates to worthy charitable causes. He is also a slum landlord who enforces segregated hosing through restrictive covenants and who owns the apartment complex Bigger's family lives in. Further, Dalton charges the vulnerable tenants seemingly unconscionable rent.

Dalton is one of several characters we meet in the third part of the novel – the trial of Bigger for two murders as well as the presumed rape of Mary. Bigger's counsel, Max, effectively draws out the predatory nature of Dalton's commitment to market fundamentalism in cross-examination. Dalton purports to be compelled by some iron law of capitalism to charge his stiff rents. The testimony of other witnesses contributes to the portrait of economic injustice and staggering levels of racial discrimination.

***One of the first significant protest works to explore racism, oppression and violence against black Americans is Richard Wright's 1940 novel,* Native Son.**

Max is an elderly Jewish counsel with the Communist-backed Independent Labor Office who takes on Bigger's apparently hopeless defence pro bono. He appears to me to have employed a rather risky strategy. Many of the submissions in closing argument at trial appear to underpin a radical political critique of the type of society that would create the accused. The submissions do not seem particularly well judged as an attempt to engage the judge's sympathies (noting he is most unlikely to share the radical views of counsel). However, the efforts of Bigger's lawyer do link to central themes emerging from the events that have led to the crimes in question. Max's description of Bigger's unfortunate life assists in the realization that this young man's life was, in one sense, a crime waiting to happen. The accused is less someone whose fate is to be determined based on an individualized assessment than he is a symbol. Precisely what is he a symbol of? Perhaps of the depths with which American society can force a black youth – denied a proper education and any opportunity for hope – to descend to.

The novel also offers some engaging arguments for and against the use of the death penalty and incorporates references to other leading trials of the era. Wright makes good use of the shocking trials know as the Scottsboro trials (1931-37). In those cases, the state of Alabama was determined to prosecute nine young black men for the rape of two white girls aboard the top of a freight train, no matter how many miscarriages of justice the state had to keep committing to succeed. In the case of Bigger Thomas, Wright has attempted to depict a very different scenario. His protagonist becomes a figure who can stand as the logical counter to the immoral violence of 1930s law as it applied to black Americans.

I conclude that *Native Son* is indeed a must-read. I do remain ambivalent about a few of the artistic choices Wright made, the most controversial being telling the tale through the consciousness of such a thoroughly

unpleasant and violent character as Bigger. (One should remember as well that this was his first novel.) Some readers will not buy into Bigger being the symbol who brings together the various strands of the author's radical critique. However, no reader will fault Wright's courageous attempt at an autopsy of an unhealthy and divided society.

Rob Normey

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

Not-for-Profit

Charity and Non-Profit Law Case Update

Peter Broder

The COVID-19 pandemic lead to numerous court proceedings being postponed. So, some important charity and non-profit cases may well remain in limbo as I write this. But, both internationally and domestically, the last few months have also seen some major decisions on a range of sector issues.

Aga v Ethiopian Orthodox Tewahedo Church of Canada (*Aga*)

Earlier this year, I wrote about this Ontario Court of Appeal (OCA) decision, which dealt with crucial member rights issues for voluntary sector groups. The litigants in that case have now been granted leave to appeal the decision to the Supreme Court of Canada.

Aga will provide the Supreme Court with the opportunity to further clarify when a court can delve into the internal decisions — here having to do with disciplinary measures taken against congregants — of faith-based or other voluntary sector organizations. It will also provide a chance to look at the applicability of the *Charter of Rights and Freedoms* in private litigation. Specifically, whether the *Charter* has any role where the courts have been asked for a remedy that may compel a religious group to take certain actions.

Friends of Toronto Public Cemeteries Inc v Public Guardian and Trustee (*FTPC*)

In another OCA decision, the Court looked at governance issues. The case concerned the Mount Pleasant Group of Cemeteries (MPGC) in Toronto. The organization was originally established in 1826 as a statutory trust but has had its structure modified by legislation at various times during the ensuing two centuries. MPGC is now run as a corporation. The OCA looked at whether the succession procedure of the governing body was legitimate and at whether certain decisions about the permitted scope of its activities were valid.

Photo by succo on Pixabay

As well as the governance questions, the proceeding dealt with whether the organization was a charity, and whether it should be subject to an investigation by the province's Public Guardian and Trustee under Ontario's *Charities Accounting Act*.

The decision could be a setback for development of Canadian charity law.

The OCA finding that the group is not a charity does not accord with the practice in other common law jurisdictions of recognizing organizations operating cemeteries as charities. As well, the analysis used in the case to determine if MPGC is a charity features consideration of some factors that are not traditionally used in determining common law charity status. The decision could be a setback for development of Canadian charity law.

Greenpeace of New Zealand Inc v Charities Registration Board (*Greenpeace*)

A recent decision of the New Zealand High Court, on the other hand, adds to the common law of charity in a more positive way. Decided in August, *Greenpeace* was the latest case that considered the eligibility of Greenpeace NZ for registration as a charity.

An early proceeding had set out the proper criteria for assessing Greenpeace NZ's eligibility, but had referred the matter back to the regulator to determine. The 2020 case arose when the regulator refused to register the group.

The High Court decision contributes to the law in four distinct ways. It examined if the advocacy component of Greenpeace NZ's work made it ineligible for registration, and determined that, under New Zealand, law, it did not. This aspect of the decision will likely have little impact in Canada, since a December 2019 change to the federal *Income Tax Act* allowed all Canadian registered charities to undertake the type of advocacy done by Greenpeace NZ.

Second, the decision appears to expand what is considered within the purpose of advancement of education in New Zealand — opening up that term to include work mobilizing the public. In Canada, however, the Supreme Court of Canada commented extensively on what qualifies as advancement of education in the 1999 case, *Vancouver Society of Immigrant and Visible Minority Women* (*Vancouver Society*).

While the SCC expanded the term to include instruction or training outside the classroom, so long as it was sufficiently structured, it cautioned against material primarily aimed at indoctrination or persuasion. It stated dissemination of such material was not charitable advancement of education. As the High Court seems to go further than *Vancouver Society*, it is unlikely that this aspect of the decision will hold sway here unless there is legislative change or additional jurisprudence on the topic.

...Greenpeace was the latest case that considered the eligibility of Greenpeace NZ for registration as a charity.

Third, the High Court analysis of protection of the environment as a common law charitable purpose featured a similarly expansive view on what could qualify as charity. That part of the decision does not face the same uphill battle against settled Canadian law.

Greenpeace rejects a narrow interpretation limiting charity in this area to uncontroversial, remedial work to mitigate or eliminate harm. It instead endorses public engagement as an important element of the purpose of environmental protection, and rejects deeming this work not charity merely because it vies with other economic or social interests. *Greenpeace* acknowledges the charitable purpose of protection of the environment ought to include the ability to raise environmental concerns as part of public policy discourse, even if this entails conflict with competing interests. If adopted by Canadian courts or regulators, this would be a positive development. The reasoning in *Greenpeace* could be helpful in bringing that about.

Finally, it has long been established that an illegal purpose precludes eligibility to be a charity. Less clear is the relationship of incidental illicit activity (rather than purpose) to qualifying as charity. The "fact and degree" analysis used in *Greenpeace* helpfully contributes to the common law on this topic. It finds minor and isolated illegal activity may

not prevent an organisation from being a charity. This is so even where small amounts of the charity's resources are used to support illegal activity.

There may well be other significant charity and non-profit cases wending their way through the courts in the pandemic backlog, but in the meantime *Aga*, *FTPC* and *Greenpeace* provide amply food for thought for the moment.

Peter Broder

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Youth & the Law

Hit the Gas!

Jessica Steingard

You passed the test. You practiced driving in your parents' car. You were set to take the road test to get your license. And then COVID-19 hit. And your road test was cancelled.

The good news: As of June 30th, you can now book a road test in Alberta! The bad news: Road tests are booking four to eight weeks in advance right now because of the backlog. To prevent further delay, are you ready?

Learner's Licence (Class 7 License)

In Alberta, you must be at least 14 years old to get a Learner's License or Class 7 License.

The Tests:

You must take a driver's knowledge test and a vision test. You can take the tests at most registry offices in Alberta. Call ahead to see if there are extra rules you should know due to COVID. Your parent or guardian must go with you and consent to you writing the test, if you are under 18.

The test is 30 multiple-choice questions and you must get at least 25 correct to pass. If you fail, you can go back the next day to try again. There are no limits to how many times you can take the test but you can only try once per day. To help you study up, study guides and practice tests are available online.

Your parent or guardian must go with you and consent, if you are under 18.

The test is available (writing only) in 25 languages. For $30, you can use an audio-assistant device that reads the questions and answers to you. The device only speaks English. In some circumstances, you can request a translator. See the Government of Alberta's website for instructions on requesting a translator.

The test costs $17. Once you have passed the test and the registry agent validates the test permit, it is valid for one year from the date of the test. This means you must apply for your Class 7 License within this time. If you wait longer than one year, you will have to rewrite the test. You must pay a fee to get your license. A new license costs $93* and is valid for five years. You can choose to get a license for fewer years for a lower cost.

You will also need to take identification with you to prove who you are, where you live and you are allowed to be in Canada. Identification includes an ID card, valid passport, permanent resident card, driver's license issued by any official government or nexus card. See the Government of Alberta website for ID requirements.

You do not have to take a road test to get your Learner's License. But you will need to practice up with a licensed driver before you can get your next class of license.

The Rules:

- You can drive a moped by yourself.
- A Class 5 License holder who is 18 years or older must accompany you when driving. They must be in the seat next to you in the car.
- You cannot drive between midnight and 5 AM.
- You cannot have more passengers than the number of functioning seat belts in the vehicle.
- You will have your license suspended at 8 demerit points. You get demerit points

for traffic infractions. For example, if the police pull you over for speeding, they will give you one or more demerit points depending on how fast you were going.

- You cannot have any alcohol, cannabis or illegal drugs in your blood when driving.

Photo by Taras Makarenko from Pexels

Probationary License (Class 5 Graduated Driver's Licence (GDL))

You have had your Learner's License for at least one year. You are at least 16 years old. You are ready to take the next step to becoming a fully licensed driver!

The Tests:

You must pass the basic Alberta road test. Book your road test online or in-person at a registry office. Your parent or guardian must go with you and consent, if you are under 18.

You start the road test with zero points. You get points if you do not practice safe driving (shoulder checking, etc.), fail to follow the rules of the road or complete a maneuver poorly (being too aggressive or hesitant, etc.). You fail if you get 75 points. You automatically fail if you endanger a pedestrian or another driver, drive unsafely, or break traffic laws.

Book your road test online or in-person at a registry office.

The test costs $83. If you pass, you will also have to pay the fees to change your license. If your Learner's License is still valid, you can pay $28* to reclass your license. If your license is almost expiring, you must renew your license.

You must also pass a vision screening. A registry agent conducts this test at the registry office.

The Rules:

- You cannot have more passengers than the number of functioning seat belts in the vehicle.
- You will have your license suspended at 8 demerit points.
- You cannot have any alcohol, cannabis or illegal drugs in your blood when driving.
- You cannot upgrade to a commercial driver's license (Class 1, 2, 3 or 4).
- You cannot be the accompanying driver to a learner.

You do not have to take a road test to get your Learner's License.

Fully Licensed Driver (Class 5 License)

You have had your GDL for at least two years. Your license has not been suspended in the last 12 months. You are ready to become a fully licensed driver!

The Tests:

You must pass an advanced road test. Book your test online or in-person at a registry office. Just like the basic road test, you start with zero points and fail if you get 75 points. The test costs $138. If you pass, you will also have to pay the fees to reclass or renew your license.

The Rules:

- You must follow all of Alberta's traffic laws.
- You will now lose your license if you get 15 demerit points.

Ready to Hit the Gas?

Now you know what to expect. Study up and drive safe! And if you have any more questions, see the following resources:

- Government of Alberta website on getting a driver's license
- Youth and the Law in Alberta FAQs

**License fees may change slightly. The amount listed here is the maximum amount a registry agent can charge in Alberta.*

Jessica Steingard

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

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