LawNow

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2021 in Review

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Cover photo by Anete Lusina from Pexels.

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About LawNow

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

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www.lawnow.org

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2021 Employment Law Alberta Year in Review

December 2, 2021 by Joel Fairbrother

The courts released several important employment law decisions in Alberta in 2021, including about bonuses, just cause, defamation and constructive dismissal.

This article summarizes several important employment law decisions in Alberta in 2021. This article does not focus on cases from other jurisdictions, although many of those can have persuasive weight here. It also does not address developments in human rights and labour (union) law, because to do so would make the article much longer than it already is!

Photo by Ekaterina Bolovtsova

Bonuses, Duty of Good Faith

Matthews v Ocean Nutrition, 2020 SCC 26 is a Supreme Court of Canada decision that came out at the end of 2020. I have included it here because it is probably one of the most important employment law decisions in a decade. It also majorly influenced cases in 2021. There are many important parts to this decision. Some highlights are:

1. If an employer does not want to pay a bonus that the employee would have been entitled to during their reasonable notice period, the employment contract must unambiguously (very clearly) take away that right. Simply requiring "active employment" at the time of payment is not enough to remove that right.
2. The duty of good faith and honest performance applies to employment contracts. It applies at the time of termination of employment and can apply prior to termination of employment in some other situations, such as where an earlier period is part of a claim for constructive dismissal.

In *Hy Pham v Petro-Tech Heat Technology Inc*, 2021 ABPC 78, the court required an employer to pay out the full bonus it had announced prior to termination of employment. It did not matter that the employer's financial position had declined since then. The court also rejected the employer's argument that it should be able to pay out less than the full bonus as discipline for the employee's misconduct.

In *Schafer v Calgary Co-Operative Association Limited*, 2021 ABQB 579, the court awarded a stunning 24-month reasonable notice period (severance). It also awarded bonuses that would have been paid in the notice period if the employees had remained employed. The case is important for several reasons:

1. a 24-month severance award is rare so should be noted, and
2. this is one of the first Alberta decisions to consider the significance of *Matthews v Ocean Nutrition* on things like bonus awards and payments during the reasonable notice period. The court found the incentive plans did not unambiguously (clearly) remove entitlement to the bonuses, so the employer had to pay them.

Just Cause for Dismissal

Haack v Secure Energy (Drilling Services) Inc, 2021 ABQB 82 dealt with just cause for summary dismissal. The case provides an excellent summary of the law of just cause in Alberta, affirming the high bar an employer must meet to establish it. The case also found:

1. An employer is not required to investigate misconduct prior to terminating employment for just cause related to poor performance. However, failing to investigate will make it harder for the employer to prove that it correctly believed the employee's performance was deficient.
2. Emailing confidential employer documents to oneself can be cause for discipline. But the employer must consider the context for doing so to decide if the conduct is blameworthy enough to warrant dismissal for cause.

In *Jegou v Canadian Natural Resources Limited*, 2021 ABQB 401, the court weighed in favor of employers for establishing just cause for dismissal.

In this case, the court found that CNRL had just cause to dismiss an on-site paramedic who had worked there for 8 years. The facts were that an on-site employee had displayed symptoms of a stroke. The paramedic's guidelines clearly instructed paramedics to stabilize the patient and then take for "rapid transport to stroke centre". The paramedic instead took the patient to the patient's clinic, and it took 32 minutes. The patient did not suffer any harm as a result of the paramedic's failure to follow protocol.

The court found this was not an error of judgment but breach of a clear, black-and-white protocol. That the patient was not harmed did not help the paramedic in these circumstances because what matters is the possibility of harm.

In *GiVogue v International Union of Elevator Constructors Local 130*, 2021 ABPC 188, the court found the employer did not have just cause for terminating employment. The case involved an office manager/bookkeeper who had entered time for herself for a day she did not work. The court found it had not been intentional so was not just cause for termination. The court went on to find that even if it had been intentional, in all the circumstances of this case it would not have been just cause. This case affirms the principle that context must always be considered when assessing cause for termination, even where the employer is alleging dishonesty.

Constructive Dismissal, Fixed-Term Contracts & Defamation

Kosteckyj v Paramount Resources Ltd, 2021 ABQB 225 dealt with an unusual constructive dismissal case in Alberta.

The employer reduced the employee's income between "16.6% and 20%". The court found this was a significant breach of the employee's contract. The employer fired the employee 25 days later. The employee argued the wage cut was a constructive dismissal, and the pre-cut wages should be used to calculate severance. The employer argued that it could not be constructive dismissal because the employee did not actually end the relationship but was fired later on.

Usually constructive dismissal does require an employee to end the relationship. In this case, the court agreed with the employee that the timing of the constructive dismissal was at the time of the wage cut, even though the employee did not end the relationship and was terminated 25 days later.

Koutsikaloudis v Maple Leaf Academy Ltd, 2021 ABPC 136 dealt with the law of fixed-term contracts in Alberta. The plaintiff was employed for 18 consecutive years, ending in May 2018. The employer provided the plaintiff with a new contract each year, which she signed. Each contract provided for one year of paid instruction. The 2017 contract and the employee handbook had clauses which

tried to place limits on severance. The plaintiff refused to sign the 2019 contract which had more of such clauses.

The court found the plaintiff was an indefinite-term, not a fixed term, employee, considering the circumstances. She had been constructively dismissed. The court strictly interpreted the clauses which the employer said limited severance. The court found these clauses did not limit severance in the circumstances.

Alberta Computers.com Inc. v Thibert, 2021 ABCA 213 is an Alberta Court of Appeal decision upholding the trial judge's decision. The case involved an employee whom the employer had poached away from another job. After six and half months of working in a toxic work environment, the employee finally quit. The employer then sent a letter "warning" third parties about the employee's dishonesty. The court found that it was constructive dismissal and awarded the employee nine months' reasonable notice, $10,000 for aggravated damages, and $60,000 for defamation. One of the most important parts of the case is the defamation award, which is very uncommon in employment law dismissal cases.

Gender as a Factor In Reasonable Notice (Severance)

Cordeau-Chatelain v Total E&P Canada Ltd, 2021 ABQB 794 dealt with the termination a female employee in the oil and gas sector. She was 53 years old and had worked for 8 years and 7 months in a middle-management position. The court awarded her a stunning severance of 18 months. Part of the court's reasoning in this very high severance was that it would be more difficult for this employee to get a new job, due to the "compounding negative effects" of gender and age.

Joel Fairbrother

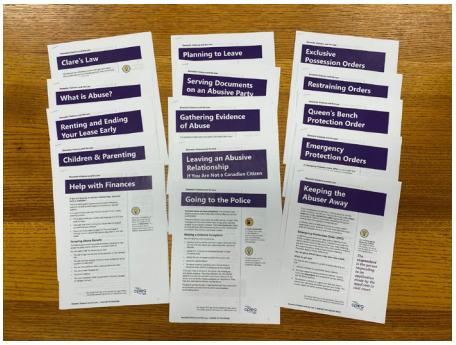
Joel Fairbrother is an employment lawyer and partner at Bow River Law LLP. His key practice areas are employment law, labour law and human rights, but he does some general civil litigation as well. Joel has experience litigating at all levels of court and many different tribunals in Alberta.

Domestic Violence Resources from CPLEA

December 3, 2021 by Centre for Public Legal Education Alberta

Family Violence Prevention Month has come to an end but sadly information on this topic is needed year round. Here's a summary of information available from CPLEA.

Watch the **Family Violence Prevention Month 2021 video** on YouTube.



INFO SHEETS | Domestic Violence and the Law

We have updated our Domestic Violence and the Law series of info sheets. Topics include:

- What Is Abuse?
- Emergency Protection Orders
- Queen's Bench Protection Orders
- Exclusive Possession Orders
- Restraining Orders
- Keeping the Abuser Away
- Going to the Police
- Gathering Evidence of Abuse
- Serving Documents on an Abusive Party
- Renting and Ending Your Lease Early
- Planning to Leave
- Help with Finances
- Children & Parenting
- Leaving an Abusive Relationship If You Are Not a Canadian Citizen
- Clare's Law

Each info sheet includes legal information on the topic as well as where to go for more help.

Download, print or save from www.willownet.ca. Or order print copies from cplea.ca/store.

WEBINAR | Domestic Violence and the Law: Panel of Resources

On November 18, 2021, CPLEA hosted a panel discussion on resources for those experiencing, or supporting those experiencing, domestic violence. We were pleased to welcome several panelists to share their expertise:

- **Gwen May & Julia McGraw**, lawyers with Legal Aid Alberta's Emergency Protection Order Program
- **Sheila Pahl**, senior lawyer with Calgary Legal Guidance's Domestic Violence Family Law program
- **Kathy Collins**, Executive Director at WINGS and representing Alberta Council of Women's Shelters
- **Amy Munroe**, Intervention Lead at Sagesse
- **Lois Gander**, QC, Emeritus Professor with the Faculty of Extension, University of Alberta and Vice President of CPLEA

Watch the webinar on-demand at CPLEA TV.

ARTICLES | LawNow

In November 2021, we were fortunate to share several articles on LawNow about family violence from esteemed contributors.

The articles discussed the laws around family violence – both the good and where there is need for improvement.

Read them now:

- Family Violence and Family Law in Alberta: The need for legislative reform and expansive statutory interpretation by Jennifer Koshan
- The *Divorce Act* and Invisible Abuse: Coercive control in family law by Glenda Lux
- Toward a holistic approach to reform of the Canadian legal system by Lois Gander, QC
- WINning Through Courage, Vision & Conviction by Lois Gander, QC

WEBSITE | WillowNet

WillowNet is a CPLEA website about violence and abuse laws in Alberta. Find the Domestic Violence and the Law info sheets, more legal information and helpful resources at **www.willownet.ca**.

Centre for Public Legal Education Alberta

The Centre for Public Legal Education Alberta (CPLEA) makes the law understandable for Albertans. Information is available through its many websites, info sheets, videos, webinars, FAQs and more. Visit www.cplea.ca to learn more.

Roger Casement: Hedgehog ahead of his time

December 9, 2021 by Rob Normey

Roger Casement, the subject of Jordan Goodman's *The Devil and Mr. Casement*, was a leader in the modern human rights movements.

Roger Casement was a giant in the modern human rights movement that emerged in the twentieth century. Indeed, Casement courageously, and with great determination and skill, became a major leader in two of the first genuine human rights campaigns in this time.

The first was an investigation of King Leopold of Belgium's misrule in the Belgian Congo, then called nonsensically the "Congo Free State". Casement's 1904 Report was the vital first step in an impressive international campaign to end human rights abuses against African slave labour in the lucrative exploitation of rubber and other natural resources. This brilliant campaign moved beyond the writing of indignant letters to the *Times* (or one's local newspaper). It started with Casement visiting the Congo, engaging in field research, and interviewing victims, participants and other witnesses. Then came his detailed report.

Casement moved on to investigate a second example of a major, systematic operation founded first and foremost on human rights violations. This second campaign is the focus of a wonderful account by Jordan Goodman in *The Devil and Mr. Casement: One Man's Struggle for Human Rights in South America's Heart of Darkness*. In 1906, Casement's employer, the Foreign Office of the British

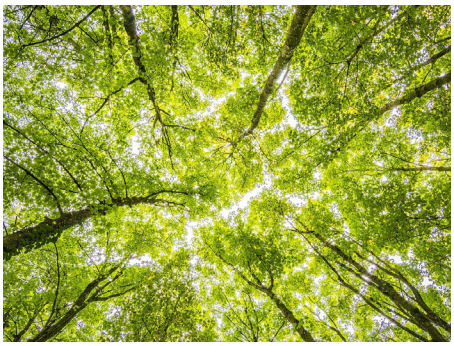


Photo by Felix Mittermeier from Pexels

Government, sent Casement to Brazil. He was soon asked to become a consular representative to a commission involving rubber slavery by the Peruvian Amazon Company (PAC). The PAC was exploiting primarily the Indigenous peoples of the Amazon region, the Putumayo.

Before delving into Goodman's book, it is worth noting a few pertinent facts about Roger Casement. Although he had a long and distinguished career in the British Foreign Service, he was Irish – the son of a Protestant father and a devout Catholic mother. His father suffered ill health and moved the family often after being invalided out of the army at half-pay. Their impoverished circumstances and his parents' persistent health problems caused considerable anxiety. Tragedy struck when Casement's mother died in childbirth in 1873, when Roger was nine. His father was most devastated, and his health rapidly declined until his death four years later. Despite these unpromising circumstances, Casement maintained a burning desire to make his mark in the world.

Casement's first break came when he landed a job as a shipping clerk with a Liverpool

company. His employment took him to several African locations. In 1892, the British Foreign Office offered him a position in its consular post in what is now Nigeria. Recognizing his gifts, the Foreign Office soon made him British Consul in Portuguese East Africa. In 1900, the Office requested he take up a key consular post in Leopoldville (now Kinshasa, Democratic Republic of the Congo).

The Devil and Mr. Casement

While *The Devil and Mr. Casement* describes Casement's remarkable work on behalf of the local inhabitants of the Congo, the major focus of the book is Casement's second major human rights campaign. Goodman takes us, along with the intrepid British diplomat/investigator, to South America and the wilds of the Amazon. From here emanated disturbing but unconfirmed reports of torture and abuse.

Goodman extensively researched the Foreign Office records and various files on the PAC's evil empire, providing a thrilling narrative. While Casement was given authority to delve into any wrongdoing done to British subjects, his real objective was much more ambitious. He initiated his own investigation into the reports of murder, rape and virtual enslavement of the Putumayo Indians. They lived in the area exploited by PAC and were pawns in PAC's game to maximize profits from the rubber trade. Indeed, his exemplary work illustrates the value of going beyond bureaucratic limitations to call out human rights violations. Especially when one considers the need to act and speak out to be a moral imperative.

Casement displays zeal and fortitude many times in his journey to the Amazonian "heart of darkness." The area was controlled by Julio Cesar Arana – the evil owner and managing director of the PAC, and the so-called devil in the title of Goodman's book. Arana was the typical rubber baron, employing the Indigenous peoples under informal enslavement. These 'employees' faced murder, rape and brutal acts of violence to ensure production quotas were met. Casement's valiant efforts to obtain firsthand testimony helped uncover the reality of these crimes against humanity, including severe whippings in patterns called the "mark of Arana." He then prepared a damning indictment of the company.

Casement's report on the PAC should have led to more thorough trials with convictions or other actions against Arana and his key associates. However, Arana escaped any criminal or other liability. A rather halfhearted attempt to arrest a few of the human rights abusers in the field did not bring the company to account. Nonetheless the brutal form of colonialism practiced by the Company was exposed for others to read about and ponder.

One reason the Foreign Office did not take stronger diplomatic measures to hold the abusers to account was the role of the United States. At that time and for many years, the world was expected to follow the U.S.'s Monroe Doctrine. This doctrine held that the U.S. and its policy should guide foreign actors throughout the Americas. Brutal treatment of Indigenous peoples within the U.S., under its unique understanding of "Manifest Destiny", meant the U.S. was not overly concerned with human rights violations of the Putumayo. The U.S. particularly did not want to see any principle established that would hinder the workings of "free enterprise."

Casement's report indicted both the PAC and, to a high degree, the Peruvian and British governments. Why the British government? To the extent it was responsible for a corporation that had established itself in London and on the London Stock Exchange. Further, the report called into question the role of the U.S., as the effective overseer of this part of South America under the Monroe Doctrine. Casement now saw the world as carved up into various spheres of influence, whether in the Americas where Indigenous peoples suffered

from a failure to recognize their right to self-determination, amongst other rights, or in the many colonies established by Europeans.

The Hedgehog

In its conclusion, *The Devil and Mr. Casement* describes the remarkable remainder of Roger Casement's career. He was one of the main players in the Easter Rebellion of 1916, an anticolonial strike against Britain that reverberates to this day. Casement's complex actions and motivations are beyond the space available here.

The ancient Greek philosopher Archilochus of Paros wrote: "The fox knows many things but the hedgehog knows one big thing." Casement, as a thinker and activist, was a hedgehog. In his case, the "one big thing" he added to twentieth century thought is the close connection between human rights violations and colonial/imperial rule. He stressed repeatedly in his last years that major systematic human rights violations will occur without proper redress as long as a group of people are subjected to colonial rule. Neither the Putumayo nor the Irish deserved to suffer the degradation that went with colonial rule by their respective masters. The only course of action that was morally justified in Casement's view was a serious effort to end that rule in the immediate future.

Casement's extra-consular campaigning work, such as organizing interventions by the Anti-Slavery and Aborigines' Protection Society based in London, brilliantly illustrates ways to engage in what we would now call critical decolonization. He likened the excesses of colonial rule to imposing a form of slavery and of course opposed the latter wherever he found and reported on it. Early in his campaigning career, he wrote: "We all on earth have a commission and a right to defend the weak against the strong, and to protest against brutality in any shape or form."

Several well-known Irish writers wrote letters of support and organized a petition against Casement's impending execution for treason against Britain (for his part in the Easter Rising). These were to no avail. W.B. Yeats wrote a powerful poem, "The Ghost of Roger Casement".

In the years since the (partially) successful revolt against British colonial rule, which led to the Free State of Ireland in 1922, a long line of Irish writers and human rights campaigners have spoken out on the injustice of colonial rule. In recent years, the singer-songwriter Sinead O'Connor and the novelist Sally Rooney have spoken up in solidarity with Palestinians, subjected to settler colonial rule and regularly denied their most basic human rights. Like Casement, they have faced severe and unwarranted criticism for their efforts but have steadfastly maintained their belief in the universal application of human rights.

The Devil and Mr. Casement is a superb account of one of the earliest twentieth century heroes in the field of human rights. Roger Casement was surely a man ahead of his time in many ways. His remarkable journey resisting the wrongdoing committed by imperialists – who employed whatever rhetoric they thought justified their domination over others – has lit a flame that hopefully can never be extinguished.

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.

#WFH: Considerations from an employment lawyer

December 14, 2021 by Victoria Merritt

Remote work or hybrid work arrangements have become the norm for many office workers due to COVID-19, but what are the legal considerations?

Photo by Los Muertos Crew from Pexels

I started this article perched on a kitchen chair watching snow fall outside of my in-laws' house in Calgary. And I am finishing it relaxing on a couch in Sherwood Park. Usually, I work from my home office in Squamish, B.C., which I can do because the employment law firm I work at is fully remote.

Remote work, or hybrid work arrangements (a combination of office and remote work), have become the norm for many office workers because of the COVID-19 pandemic. While there are pros and cons to remote work from personal and business perspectives, this article will focus on several key legal considerations for remote workers.

1. Is there a Remote Work Policy or Agreement in place? What does it say?

Many employers have policies or individual agreements in place that apply to remote work arrangements. It is important to review any written confirmation of the remote work arrangement carefully to make sure you understand your rights and obligations (just like with the original employment contract).

Having clarity on what is expected is key. For example, does your employer care when you work or just how much you get done? How will your employer track your productivity? Do you need to be available at certain times for meetings? If a hybrid arrangement, how often do you have to come into the office? If you want to travel and work, is that allowed?

Remote work policies and agreements will also often speak to the other items mentioned in this article, such as who pays for and owns your home office equipment, and the health and safety expectations for a home office.

2. Who owns and pays for home office equipment?

At the beginning of the pandemic, many employees worked perched on kitchen chairs or hunched over their laptop in a kid's playroom. As the pandemic dragged on, many employees needed to upgrade their remote workspace to ensure their health, safety, and effectiveness at work.

Just like in the office, your employer should make sure you have the tools needed to complete your work, including an ergonomic office set up. However, employees should remember that any equipment provided by the employer, or at the employer's cost, belongs to the employer, not the employee. This may mean not being able to use a computer or

phone for personal use, or that the employer is able to monitor those devices.

There are also differences where the work arrangement is voluntary, as opposed to being government mandated. For example, if you are allowed to work from your office, but have requested to continue working from home. If voluntary, it may be reasonable for your employer to require you to pay for more of the home office expenses because you could be working from the physical office and using the equipment provided there.

Employees may also want to get tax advice about home office expenditures and should make sure they know in advance what is or is not covered by their employer.

3. Is your remote workspace safe and private?

A home office is considered a "workplace" under most provincial health and safety legislation. Just like your usual workplace, you and your employer will have certain responsibilities to ensure the workplace is healthy and safe. This may include having an ergonomic assessment completed.

If you experience an injury while working from home (for example, developing wrist pain from typing), this may be a compensable claim. However, you must be prepared to prove it was caused because of work, not your non-work activities (for example, cutting yourself making a sandwich for lunch or videogaming with friends).

Your employer may be required to have regular check-ins with you and ask you to inspect your workplace for hazards. Employers will also often have specific health and safety policies in place for remote workers, which you should review.

In terms of privacy, if your work is confidential, you should consider whether you need to take certain steps to ensure your home office is secure. This might include using a locked filing cabinet for confidential documents and password-protecting devices.

4. Can my employer make me return to the office?

Generally speaking, yes. However, the answer to this question will depend on your specific circumstances. A few of the things impacting that assessment include:

- What does your employment contract say?
- What does your remote work agreement or policy say?
- Were you working remotely only because of the COVID-19 pandemic?
- Why is your employer requiring you to return to the office?
- Why are you unwilling to return to the office?

Your employer can always issue an ultimatum: return to the office or lose your job. The question then becomes whether you may be entitled to severance pay because of that decision, which will depend on the facts of your situation. Generally speaking, employees are entitled to notice or pay in lieu of notice of their termination. Employers may risk a constructive dismissal claim if they change a condition of your employment unilaterally.

Remember, employers can change conditions of your employment by providing notice. If an employer sends a letter to all remote workers on January 1, 2022 advising they are expected to return to full-time office work on June 1, 2022, it will be challenging for most employees to contest that.

However, employees can advocate for remote or hybrid work arrangements to stay permanent. And employers now more than ever before are open to those arrangements, particularly if you are an employee they want to keep.

Victoria Merritt

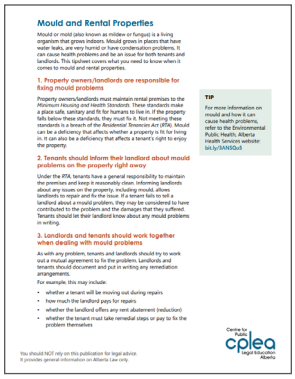
Victoria Merritt is a lawyer at Ascent Employment Law in Vancouver, B.C. The views expressed do not necessarily reflect those of the firm.

Have You Heard? CPLEA's new publications & upcoming webinars

December 17, 2021 by Centre For Public Legal Education Alberta

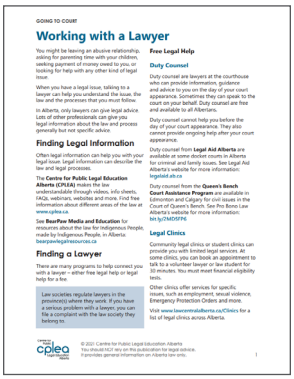
New & Updated Publications

The CPLEA team is working hard on making sure the information you find on www.cplea.ca is up to date! Here are some recently new and updated resources:



Landlord & Tenant

- **Mould and Rental Properties** ***NEW***
- **Shared Accommodation**
- **Death of Tenant**



Condos

- **Buying a New Condo**
- **Condominium Meetings**
- **Reserve Fund Guide**
- **What to consider if you are self-managing a condominium**
- **The Developer Turnover Process**
- **Tips for working with and hiring a condo manager**

Going to Court

- **Working with a Lawyer** ***NEW***

January Webinars

In 2022, we are hitting the ground running with our webinar series. Here's what you have to look forward to in January:

January 12, 2022 @ 10AM | Zoom

Watch on-demand.

Do you or someone you know have debt issues? Overwhelmed with bills and don't know what to do next? Do you know where to get help for yourself or someone you know? Debt can be scary but learning about how to get out of it doesn't have to be!

Moderated by the Centre for Public Legal Education Alberta (CPLEA) and featuring a Q&A discussion with Money Mentors and the Alberta Debtor Support Project, learn about:

- Different types of debt
- Common debt issues
- What to expect when reaching out for help
- Resolution options for solving a debt problem
- Tips and resources for personal debt situations

January 19, 2022 @ 10:00AM | Zoom

Watch on-demand.

Mental Capacity is the first of the 4-part Planning for the Future series.

This session will provide participants with information on:

- The spectrum of mental capacity
- The assessment of mental capacity
- Planning for incapacity and decision-making options

We are planning new additions to our video offerings in 2022!

Make sure to visit our Youtube channel regularly for on-demand videos on various legal topics!

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What if parents do not agree on vaccinating their children?

December 17, 2021 by Jessica Steingard

With children five years and older now eligible for the COVID vaccine, some separated parents who cannot agree on vaccinating their children are ending up in court.

On November 19, 2021, Health Canada approved the use of a lower dose Pfizer-BioNTech COVID-19 vaccine for use in children aged five to eleven years of age. It had already approved the Pfizer vaccine for use in children aged twelve to seventeen years.

To say vaccination status has been a polarizing topic is an understatement. Some family members are not speaking to each other. Some employers are terminating employees who refuse to follow the workplace vaccination policy. And communities are divided.

And what about separated parents who have joint decision-making authority but cannot agree on whether their children should be vaccinated?

In a few cases across Canada, the courts have grappled with this question, including one case in Alberta. Before we dive in though, let's take a step back. First, the principal guiding any decision about children is Canada is what is in the best interests of the child, not what the parents or anyone else wants. Second, the courts have dealt with childhood vaccine issues long before COVID became a thing. In most cases, the courts decided in favour of the parent requesting authorization to vaccinate the children. And these COVID cases are no different.

Photo ID 23256 | Center for Disease Control's Public Health Image Library

Saskatchewan's *OMS v EJS*

In September 2021 in the case of *OMS vs EJS*, the father applied for an order authorizing him to have a 12-year-old daughter vaccinated against COVID.

First, the court had to contend with heaps of documents, including affidavits from both parents and medical professionals. It did not seem too impressed to do so!

As part of the best interests of the child analysis, the court considered the daughter's views and preferences. The mature minor doctrine requires that the court consider whether a child is mature enough to make their own decisions. In this case, the court found the daughter to be mature but held that she was deciding not to be vaccinated because of the influence of her mother and paternal grandparents. Thus, the court decided the child was not speaking independently.

The court also took judicial notice of several facts related to COVID. Judicial notice allows a court to accept the truth of a fact or situation without requiring proof. The mother's counsel was not on board with the court doing so,

and instead asked the court to keep an open mind and consider evidence provided about COVID. The court decided it *could* take judicial notice of a few things without any evidence to support its conclusion, including:

- Canada has been in a pandemic which has led to health and other restrictions to control the spread of the virus.
- The possibility of getting the virus poses a serious and significant health risk to people.
- The Pfizer vaccine is safe and effective for use in people given the vaccine approval process in Canada and approval by health authority. The court noted that to argue the vaccine "is experimental as is put forth by the mother and her supporting affidavits is not in accordance with the general knowledge available regarding this approval process and implementation" (para 113).

Finally, the court concluded "in light of the determinations concerning Covid-19, its effects, and the need to be vaccinated to avoid these effects" (para 119), it was in the daughter's best interest to be vaccinated. The father could arrange for vaccination without the mother's consent. However, the court did note the vaccination could only be completed following further advice from the child's family physician and endocrinologist (given her diabetes diagnosis).

The parents also have a younger son. I wonder what will happen now that he may be of age to be vaccinated as well?

Ontario's *Saint-Phard v Saint-Phard*

In the October case of *Saint-Phard v Saint-Phard*, a 14-year-old boy's father was for and mother against vaccination.

In this case, the court also took judicial notice of several facts related to COVID, including:

> ***The applicable government authorities have concluded that the COVID-19 vaccination is safe and effective for children ages 12-17 to prevent severe illness from COVID-19 and have encouraged eligible children to be vaccinated. (para 7)***

The mother provided a letter from a doctor saying the child should not have the vaccine because he had asthma and the vaccine is experimental. The court rejected this opinion given that it countered judicial notice taken about the vaccine.

The court also looked at the child's preferences. The mother said the boy did not want the vaccine while the father said he did. Again, the court found both parents were influencing the child with misinformation.

Thus, the court concluded the child should be vaccinated and gave the father sole parental decision-making authority to do so. Interestingly, the court also ordered the mother not to make comments to the child (or to someone else to make to the child) about the vaccine being untested or unsafe or that he is at risk. This included showing him any websites or other materials about the vaccines.

See also the Ontario court's decision in *AC v LL*, also entitling the children to the vaccine. In the end, both parents agreed their 14-year-old triplets were capable of deciding on their own whether to get the vaccine.

Alberta's *TRB v KWPB*

On December 14, 2021 in *TRB v KWPB*, the Alberta Court of Queen's Bench decided in favour of vaccination for two children, aged 10 and 12. This case follows the latest round of approvals for children aged five to eleven.

In this case, the mother was for vaccination and the father against. The mother was asking the court to vary the parenting order to give her sole decision-making authority on *all* medical and health-related issues, including the COVID vaccine.

Of course, the court considered the best interests of the children. The court decided

the mother should not have sole decision-making authority over all health issues as the parents had made these decisions jointly before. Instead, the court gave the mother the deciding vote if they were at odds (which seems a lot like sole decision-making authority). The court also gave the mother authority to have the children vaccinated without the father's consent, and sole decision-making authority over all COVID-related health decisions. The father's position of 'waiting to see' was not in the children's best interests.

The mother proposed to make sure the children were emotionally ready for the vaccine. However, the court did not make any specific order about this. But the court did go on to order that, like in *Saint-Phard v Saint-Phard*:

- the father not discuss or allow anyone else to discuss the vaccine or COVID generally with the children, or give information about the vaccine or virus to the children
- neither parent discuss the litigation with the children, and
- neither parent speak negatively about the other in front of the children, generally and with respect to COVID.

I am sure there will be many more cases on this issue. But given the trend of the case law so far, parents advocating against vaccination will have to bring something big to the table to succeed.

Jessica Steingard

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Pandemic Impacts Spur Immigration Changes

January 4, 2022 by John Cooper

Even as COVID-19 continues to pose challenges, the flow of immigrants into Canada will continue.

Among the proverbial game-changers in the life of the world, COVID-19 was a big one. The pandemic forced change to happen. We saw the vaccination of increasing numbers of people, the provision of long-term information (and disinformation) campaigns, the politicization of medicine, the impact of the pandemic on race and culture, the management of discord, and the need to explain a complex issue in clear, simple terms.

For many it allowed an opportunity to work from home and reconnect with themselves and others in ways they never considered pre-pandemic. But for others, the pandemic's human costs included lives lost, job losses and, for those seeking a new life in Canada, a barrier to realizing their dream.

Many people seeking to immigrate found their plans spoiled by COVID, a wrench tossed into a sometimes-slow-moving machine designed to allow people to shift from one place to another. Despite this, Canada's proactive immigration policy sees immigration numbers approaching one percent of Canada's total population, edging close to 400,000 per year. Currently, more than one in five Canadians (21.5%) is an immigrant, and it is a number that will grow. In 2020, the Migrant Integration Policy Index (MIPEX) placed Canada in the top five countries for integration. According to MIPEX, these countries "adopt a comprehensive approach to integration, which fully guarantees equal rights, opportunities and security for immigrants and citizens." Along with Canada were Finland, New Zealand, Portugal and Sweden.

As geopolitical specialist Parag Khanna pointed out on the public affairs show *The Agenda* in November 2021, Canada needs immigrants. The latest generation, called Alpha (those born 2013 to 2025), comprises (mostly) the children of Millennials but represents a population decline. Generation Z (those born 1997 to 2012) is the biggest cohort in human history, Khanna said. But the subsequent numeric decrease with Alpha means that immigration is not only desirable but necessary. People have never stopped moving from one place to another, and COVID has done little to slow migration. As such, Canada will be a "role model" and key target for immigrants, "not just some kind of fanciful future dream but a place that's getting it right, right now," Khanna said.

Building economies

It is no secret that migrants take jobs others often do not want. They build economies and support families in their home countries. While migrants are vulnerable to COVID in countries affected by the pandemic spread, those from the "20 countries with the highest number of COVID-19 cases" accounted for a third of the "total international migrant stock" and "36% of all remittances to their countries of origin" in 2020, according to the website Migration Data Portal.

Yet according to a Stats Canada labour force survey, COVID's social and economic

hardships also spurred some immigrants to return to their home countries. The number of permanent residents with less than five years in Canada declined by four percent by the end of 2020, to 1.02 million. This is a serious shift given the number had grown a steady three percent a year over the past decade. On top of that, the number of permanent residents in the five- to 10-year range dropped from 1.17 million in 2019 to 1.15 million in 2020.

Photo by Anugrah Lohiya from Pexels

During the pandemic, a Government of Canada immigration website encouraged immigration applicants to continue applying:

> *Our ability to review and process (applications) is still being affected by COVID-19. … We can't currently estimate any processing times … If you can't get a (supporting) document because it's delayed due to the COVID-19 pandemic, you can send proof that you're trying to get it (like a receipt).*

Impacting business lines

Raj Sharma – lawyer, immigration specialist, and founding partner at Calgary firm Stewart Sharma Harsanyi – said in an interview that the uniqueness of COVID, and its impact on "every business line of immigration", made it stand out.

"COVID presented a challenge and an opportunity for government," said Sharma, who recently authored the immigration law book *Inadmissibility and Remedies* with Aris Daghighian. Among COVID's "silver linings" was a shift to a paperless application process, said Sharma.

In November 2020, Sharma made a presentation to the federal Standing Committee on Citizenship and Immigration. He reported to the standing committee that "COVID-19 has caused an unprecedented disruption to our immigration system… IRCC (Immigration, Refugees and Citizenship Canada) was caught flat-footed, as were we all." Among the areas affected:

- IRCC workers having to work remotely
- the suspension of visitor visa applications, biometrics, and medical examinations for months
- the separation of families by borders or travel logistics
- the delay of citizenship ceremonies and landings for permanent residents
- significant delays in processing submitted applications

"There was and continues to be massive uncertainty as immigration policy is being made almost daily via websites," Sharma told the standing committee. He continued:

> *COVID-19 has demonstrated the importance of front-line workers. During this pandemic we continue to exploit and put migrant agricultural workers and new immigrants in harm's way. Persons of colour and new immigrants are disproportionately affected by COVID-19 because they are also disproportionately on the front lines as health care workers and essential workers in transit and in meat and agricultural processing … There should be greater employment mobility and a clear pathway to permanent residency for all essential and front-line workers irrespective of whether they are in so-called low-skill jobs. This change can be made easily through expanding the existing express entry system.*

According to Sharma, subtle discrimination exists in the immigration system, and

this has been impacted by the pandemic. "Different groups are impacted in different ways (especially with) some community-sponsored family members. The impact is felt disproportionately among racialized communities because racialized communities have family members back home."

Economic costs

The costs to the economy of reduced immigration are measurable. For example, international students, many of whom seek permanent status after finishing their studies, contributed almost $20 billion to Canada's economy in 2018. In April 2021, then-Immigration, Refugees and Citizenship Minister Marco Mendicino announced a pathway to permanent residence "for over 90,000 essential workers and international graduates who are actively contributing to Canada's economy," a government news release said. The policies would grant permanent status to temporary workers and international graduates "already in Canada and who possess the skills and experience we need to fight the pandemic and accelerate our economic recovery."

The policy focus is on workers in three streams:

- 20,000 applications for temporary workers in health care
- 30,000 applications for temporary workers in other selected essential occupations
- 40,000 applications for international students who graduated from a Canadian institution

Mendicino's successor, Nova Scotia MP Sean Fraser, who took on the immigration minister job in late October 2021, told media in November that the challenges continue to be many. His department's statistics cited more than 561,000 people in line for permanent residency, almost 750,000 with pending temporary residence applications (students, visitors and workers) and a 375,000-strong citizenship backlog.

One thing is certain: as we continue to work our way through the pandemic, the flow of immigrants into Canada will continue. This situation is not only desirable, but necessary, as the country continues to grow.

John Cooper

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What To Do If Your Visa or Immigration Application is Delayed

January 10, 2022 by Babajide Kupoluyi and Tianyang Min

In the event of an undue processing delay, applicants can follow-up with the IRCC in several ways before requesting an Order of Mandamus from Federal Court.

Photo by Jonathan Emili from Pexels

People who want to study, work or immigrate to Canada must submit a complete and accurate application package to Immigration, Refugee and Citizenship Canada (IRCC). Sometimes though, even when the applicant has done this, the processing period can drag on for months or even years.

In the event of an undue processing delay, and as a last resort, one can request an Order of Mandamus from Federal Court to compel the IRCC to decide the case. Before doing so though, the applicant must exhaust all other options of following up with IRCC after the expected processing time has passed.

Follow-up Options

Applicants have a few options for following up on their application:

1. For applications submitted after 2010, file an **ATIP (Access to Information and Privacy) application** requesting their GCMS (Global Case Management System) notes. If the application was submitted before 2010, the applicant can request their CAIPS (Computer Assisted Immigration Processing System) or FOSS (Field Operations Support System) notes, along with GCMS records. (GCMS replaced both CAIPS and FOSS around 2010.) Due to COVID-19, if the ATIP application was submitted by paper outside Canada, it can take six to twelve months to process it in some countries. The GCMS notes may give you an idea if anything is wrong. If the IRCC officer has noted concerns or doubts, take this opportunity to submit additional evidence addressing those doubts, especially if the immigration application is in its early stages of processing.
2. File one or more **webform inquiries** or call the IRCC customer center to see if the IRCC can provide a substantive response.
3. If inquiries to the IRCC do not work, try asking the **local Member of Parliament** to file a status update request. This is normally an unpaid service.
4. If the applicant submitted their application by themselves and completed the above actions, **ask a lawyer** to submit a formal request letter via the IRCC webform.

Applicants and their lawyers are not required by law to complete all the above actions. But if they have exhausted all attempts to get

information from the IRCC, they have a better case for a mandamus application.

In practice, many applicants regularly ask the IRCC for updates about the status of their application. But unfortunately, some applicants may be asking for information outside of what the IRCC can provide. For example, some applicants have used the IRCC inquiry form to ask whether they can leave Canada while waiting for their Open Work Permit. This question is asking for legal advice instead of following up on their application status. A better inquiry would be: "I am writing to you to follow up whether my application is complete and whether I need to provide additional documents." The applicant can submit any number of inquiries, but they should focus only on asking for information the IRCC can provide.

If an applicant still cannot get any substantive update regarding their application status, they can consider other options. For example, asking a local Member of Parliament to file a status update request or hiring a lawyer to send a formal request. Regardless of what method the applicant adopts, they must remember to write politely instead of blaming the IRCC for the delay.

Applying for an Order of Mandamus

If the average processing time the IRCC posted has passed and the efforts described above were unsuccessful, then the last resort is to apply for an Order of Mandamus. The Federal Court hears requests for these orders, which compel the IRCC to make a decision about the application. The applicant might think about hiring a lawyer to help them.

Before applying to court though, the applicant and their lawyer should consider three basic questions:

1. Is the application complete?
2. Have they exhausted all other options to follow up with the IRCC?
3. Has there been an unreasonable delay in the processing time?

If the application is not complete, this will cause delays. Hence the suggestion for confirming with the IRCC in an inquiry whether the application is complete. If the IRCC asks the applicant to submit additional documents during the processing, this will extend the processing time. If the IRCC replies that the client's application is complete and still in processing, the applicant can move to the next step in following up.

Regarding the second question, a formal lawyer request letter is often a good choice before applying for an Order of Mandamus. Unlike a demand letter, a formal lawyer request letter not only emphasizes how much the processing time has exceeded the average processing time, but also the applicant's efforts to follow up with the IRCC. More importantly, this letter focuses more on how the delay has negatively impacted the applicant.

In Canada, the threshold for an Order of Mandamus is high. There are eight conditions that should be satisfied to warrant an Order of Mandamus, as per the 1994 Federal Court of Appeal case of *Apotex v. Canada*. And one of the conditions is "balance of convenience".

One example of balance of convenience that may be in favour of an applicant who is already in Canada is the applicant not being able to renew their driver's license unless they provide the registry office with a valid work permit rather than a document showing the client has "maintained status" . Another example is that the applicant's health card will likely not be renewed until the applicant presents an unexpired study permit or work permit. If the applicant has good evidence to show the balance of convenience favours them, the lawyer's letter will be more convincing.

Regarding the third question, in 2021 the Federal Court held in *Ghufran Almuhtadi v*

Canada that a delay may be unreasonable if the following three criteria are met:

1. the delay in question is prima facie (at first glance) longer than the nature of the process required
2. the applicants are not responsible for the delay, and
3. the authority responsible for the delay has not provided satisfactory justification.

Patience is Key

In conclusion, no matter how confident an applicant and their lawyer are, going to court is a stressful process that takes time and money. If the applicant is waiting double or triple the average processing time – which starts the day the IRCC receives your complete application and ends when the IRCC decides on it – it may be worth going to court. But usually, I encourage applicants to be patient and try all efforts to work with the IRCC to process their application and come to a decision quickly.

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Inadmissibility and Deportation of Permanent Residents in Canada

January 17, 2022 by Myrna El Fakhry Tuttle

Unlike Canadian citizens, non-citizens can be deported from Canada for various reasons, including criminal offences without an opportunity to appeal.

Unlike Canadian citizens, non-citizens can be deported from Canada for various reasons. For example, for committing crimes, for breaching immigration laws, for being a security threat, for political reasons, etc. Deportation occurs when immigration authorities order individuals to leave a specific country. People who are deported are usually sent back to their country of origin.

Under the Canadian Constitution, the federal government enacts immigration laws and is in charge of deporting non-citizens from the country. In 2001, Canada enacted the *Immigration and Refugee Protection Act* (the *IRPA*).

The *Immigration and Refugee Protection Act* (the *IRPA*)

Under the *IRPA*, permanent residents have a limited right to enter and remain in Canada. Unlike citizens, permanent residents do not have a constitutional right to stay in the country. See section 6 of the *Charter of Rights and Freedoms* (the *Charter*).

The *IRPA* determines who is admissible to Canada. If a person lives in Canada and becomes inadmissible, that person may be subject to a removal order and might be deported.

Sections 34-42 of the *IRPA* list nine categories of inadmissibility, among them serious criminality, health grounds and financial reasons. This article will focus on inadmissibility on the grounds of serious criminality.

The *Faster Removal of Foreign Criminals Act* (the *FRFCA*)

In June 2013, *Bill C-43* or the *Faster Removal of Foreign Criminals Act* (the *FRFCA*) came into effect. The *FRFCA* included changes related to admissibility and the right to appeal.

The *FRFCA* amended section 36(1) of the *IRPA* whichnow states:

> ***A permanent resident or a foreign national is inadmissible on grounds of serious criminality for***
>
> ***a) having been convicted in Canada of an offence … punishable by a maximum term of imprisonment of at least 10 years, or of an offence … for which a term of imprisonment of more than six months has been imposed…***

The *FRFCA* also amended section 64 of the *IRPA* which reads:

> ***(1) No appeal may be made to the Immigration Appeal Division … if the foreign national or permanent resident has***

> *been found to be inadmissible on grounds of … serious criminality ….*
>
> *(2) … serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months…*

Consequently, Canada can deport permanent residents who are convicted of an offence and sentenced to jail for more than six months. The deportation decision cannot be appealed.

Criminal Code Changes

In December 2018, *Bill C-46* (section 320.19 (1)) amended the Canadian *Criminal Code* to include tougher immigration consequences for permanent residents and foreign nationals convicted of an impaired driving offence.

Impaired driving offences are punishable, under the updated *Code*, by a sentence of up to ten years of imprisonment rather than up to five years. This will render them a "serious crime", which falls under section 36(1) of the *IRPA*. Therefore, permanent residents could lose their status and face deportation if they get convicted of an impaired driving offence in or outside Canada.

Criticism of the *FRFCA*

If a permanent resident receives a removal order, they cannot legally stay in Canada. They must leave the country. Permanent residents can lose their permanent resident status if a removal order is made against them and comes into force.

Under the former *IRPA*, permanent residents sentenced to a period of imprisonment of **two years** or more lost their right to appeal the removal order to the Immigration Appeal Division (IAD). The *FRFCA* amended this requirement and stated that permanent residents sentenced to **six or more months** of imprisonment become inadmissible on the grounds of serious criminality and lose their appeal rights to the IAD (section 64 of the *IRPA*).

The *FRFCA* made the change by amending the definition of "serious criminality" and consequently denying these individuals their right to appeal.

Photo by Daniel Joseph Petty from Pexels

When it comes to the importance of the IAD, the Canadian Bar Association (CBA) stated:

> *The IAD considers the seriousness of criminality, likelihood of rehabilitation, establishment in Canada, level of community and family support, and hardship on family in Canada. It balances the need to protect Canadian society from further criminal behavior, and consideration of the circumstances of the permanent resident. It is a rational, transparent and necessary process. In some cases, a stay order is the sensible resolution: the permanent resident is given the opportunity to demonstrate that they should be allowed to remain in Canada. In other cases, deportation is appropriate.*

The fact that the *FRFCA* denied permanent residents the right of appeal means these individuals will be removed automatically without an independent decision-maker looking into their unique situation, which might include:

- The fact that they came to Canada as a child and have lived effectively all their life in this country. They may have no family or connections in the country of their birth and may not even speak the language.
- They are suffering from mental health problems, which contributed to the commission of the crime.

However, in some criminal cases, sentencing judges take these considerations into account to avoid deportation.

In the 2018 case of *R v Belakziz*, Ms. Belakziz was a permanent resident born in Morocco. She was convicted of conspiracy to rob a bank. After she pled guilty, the Alberta Court of Queen's Bench rejected the joint submission of the Crown and defence asking for a sentence of six months less one day, plus two-years probation. She was sentenced to two years less one day, reduced to 18 months for pre-trial custody and delay. Ms. Belakziz appealed the sentence.

The Court of Appeal stated:

> ***The defence and the Crown were entitled to take into account the severe collateral immigration consequence that would result from a sentence over six months. The appellant was born in Morocco and had never become a Canadian citizen despite having lived most of her life in Canada. She had no family in Morocco, was relatively youthful, and had no prior criminal record. Deportation or the threat of deportation would be a particularly harsh consequence for this appellant.***

The Court of Appeal reduced Ms. Belakziz's sentence to six months less one day of imprisonment, followed by two years of probation.

Violation of the *Charter*

The consequences for a permanent resident of receiving a sentence of six months or more may violate the principles of fundamental justice under section 7 of the *Charter*. The denial of an appeal under *IRPA* section 64(2) violates the principles of fundamental justice in section 7 by not looking into the relationships that permanent residents developed in Canada through family, education, culture, work, etc.

The principles of fundamental justice determine what is at stake. Liberty and security will be removed from permanent residents, who may be deported to a country they have no relation to or have never been to, where they do not speak the language and will be separated from their family in Canada.

In addition, imposing a six-month sentence under the *IRPA* on permanent residents may be considered cruel and unusual punishment under section 12 of the *Charter*. Individuals can be deported to countries where they may be facing persecution and torture.

Commentary

Forbidding permanent residents from appealing the inadmissibility findings and the removal order can be cruel—especially for those who have been living in Canada for a long time.

Not all permanent residents with imposed sentences of six months or more should be deported from Canada without looking at other factors. The amended *IRPA* does not take into consideration whether:

- this was a single conviction or the individual had previous convictions as well
- family and children are dependent on the individual for care and support
- the individual has been in Canada for a short or long time
- the individual moved to Canada as a child
- the individual can be rehabilitated

Therefore, the federal government should revise sections 36(1)(a) and 64(2) of the *IRPA*. In addition, the IAD should look into, when it comes to removal cases, the seriousness of the criminality, the country to which permanent residents would be deported, their connections in Canada, and the effect of deportation on their family in Canada.

Myrna El Fakhry Tuttle

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Celebrating 50 Years of Pro Bono in Alberta

January 24, 2022 by Calgary Legal Guidance

Calgary Legal Guidance started in 1972 through the work of law students wanting to help people experiencing poverty and homelessness in the city.

A half century ago, a group of law students decided to do something to help the many people experiencing poverty and homelessness in Calgary, Alberta. Before Legal Aid Alberta or any other pro bono clinic existed, Calgary Legal Guidance (CLG) was born.

"I was proud to learn that CLG pre-dates any other low bono or pro bono legal service in Alberta!" says Marina Giacomin, CLG's Executive Director since 2016. She added:

> *While I've always been in awe of the work our volunteer lawyers and non-profit lawyers do, I just hadn't really considered that we were the first ones in this province to try to help people access justice through free lawyers when they had no where else to turn. That handful of law students back in 1971 understood that the law was not accessible to everyone, and they led the way for CLG to help thousands of people with free legal support every year for the past fifty years.*

Calgary Legal Guidance has been a leader in offering unique legal programs through a trauma-informed lens to thousands of vulnerable Albertans. Today, almost 200 lawyers volunteer at CLG's summary legal advice clinics. The demand for services has increased as Calgary has grown, and the continuing pandemic has made it necessary for pro bono clinics to deliver legal services in different ways.

Image credit: Calgary Legal Guidance

In the last year alone, CLG received over 14,000 calls for help. And the award-winning Domestic Violence Family Law Program has helped hundreds of survivors who have been at even greater risk because of being unable to leave abusive situations during the pandemic.

Another award-winning program at Calgary Legal Guidance is the Indigenous access to justice support offered through the Sahwoo mohkaak tsi ma taas (Blackfoot for "Before Being Judged") program. The first of its kind in Alberta, it has helped several local Indigenous people and those in nearby communities. The program provides free legal support using culturally sensitive and traditional First Nations approaches to helping people as they navigate a colonial legal system.

Despite the challenges of offering free legal help during a global pandemic, Calgary Legal Guidance launched a few new and innovative programs in the past year:

- the pre-apprehension Child Welfare law project (the first of its kind in the province)
- an educational program to help family lawyers understand how best to serve people experiencing domestic violence

"So fifty years later, we continue to follow in the footsteps of those amazing students who started this work, and we look for the ways we can help fill the gaps in access to justice that people need to make their lives better." says Giacomin.

To celebrate its 50th year in 2022, CLG will host several events and campaigns to showcase its services. "We'd love for more lawyers and firms across the province to get involved with this work and help make access to justice something every Albertan can experience."

If you would like to volunteer or help Calgary Legal Guidance, you can learn more by visiting www.clg.ab.ca.

Calgary Legal Guidance

CLG is a non-profit pro bono organization that provides free legal guidance to those who do not have access to paid services.

Learn more at clg.ab.ca

Alberta's *Critical Infrastructure Defence Act*: How is it working?

February 2, 2022 by Jessica Steingard

In force since June 17, 2020, the law is meant to protect essential infrastructure from trespassers, damage or interference of any kind.

No one can read or watch the news right now without some mention of the blockade in Coutts, Alberta, or protests in Ottawa, apparently related to the "Freedom Convoy".

To deal with the situation in Alberta, there have been talks about using Alberta's *Critical Infrastructure Defence Act*. What is this Act and what happens to those who contravene (disobey) it? And how has it been used so far?

What is the *Critical Infrastructure Defence Act*?

The law came into force on June 17, 2020. It was introduced by the UCP government in February 2020 when blockades over a pipeline dispute in northern British Columbia had shut down much of Canada's rail network.

The legislation is quite short – only five sections. The essence of it is protecting essential infrastructure from trespassers, damage or interference of any kind. This could include protests like the one in B.C.

Essential infrastructure means buildings, plants, roads, facilities and more largely related to oil and gas, utilities (water, electricity, gas, telecommunications, etc.), and agriculture. It also includes highways, railways, and transportation systems (including urban rail transit systems). The long list of infrastructure concludes with a catch-all "a building, structure, device or thing prescribed by the regulations". This means the government can quickly add infrastructure to the list without changing the legislation.

And they did just that in October 2021. The government added hospitals, healthcare facilities and emergency services to the list of essential infrastructure by way of the *Critical Infrastructure Defence Regulation*. This regulation expires on October 31, 2022 unless government repasses it.

Photo by Kevin Bidwell from Pexels

What happens to those who contravene the Act?

A person who contravenes the Act is guilty of an offence. The Act also says anyone who aids, counsels or directs another person to commit an offence is also guilty of an offence. A person suspected of contravening the Act can be arrested by a peace officer without a warrant.

If the offender is an individual (meaning not an artificial person, such as a corporation), they can be:

- for a first offence, fined between $1000 and $10,000, jailed for up to six months, or both

- for a second or later offence related to the same location, fined between $1000 and $25,000, jailed for up to six months, or both

If the offender is a corporation, they can be fined between $10,000 and $200,000. As well, any officer, director or agent of the corporation who directed or took part in committing the offence is guilty of the offence as an individual. They can be convicted even if the corporation is not convicted of the offence.

Note also that every day the person interferes with the critical infrastructure is a separate offence. So, a five-day blockade means the person committed five separate offences.

Commentary

When the law was introduced, it was meant to prevent blockades like the railway blockade in British Columbia. But environmental groups, unions, Indigenous rights advocates and more have heavily criticized the law. Their concern is that even peaceful protests will be offside under the law (though government officials have said peaceful protests would not lead to arrests).

Six days after the law came into force, the Alberta Union of Provincial Employees (AUPE) launched a constitutional challenge against the law. They claimed the law violated their rights under the *Canadian Charter of Rights and Freedoms*, among other things. The case started in the Court of Queen's Bench and then went on to the Court of Appeal. In December 2021, the Court of Appeal struck out the Statement of Claim, effectively ending the lawsuit. The court said there was no factual record on which to decide if the Act is unconstitutional. AUPE had not been convicted under the Act and was basing its arguments only on hypotheticals.

The fall of 2021, and yet another wave of COVID-19, saw protesters pop up in front of hospitals to rally against government restrictions and vaccine mandates. This prompted the government to include hospitals and other healthcare facilities as essential infrastructure. The change was by regulation only, likely due to time being of the essence, but meaning it expires in October 2022 unless repassed. Will the government amend the legislation to permanently include these facilities?

And now in early 2022, we are seeing blockades of the highway in Coutts, Alberta, near a major Canada-U.S.A. border crossing. As of the day this article was posted, the blockade continued. Police have said safety is their first concern, and they do not want violence to erupt.

We do not know whether any arrests or charges have been laid under this Act since it first came into force. So, the question is how and when will this law be enforced?

Jessica Steingard

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

What happens when a business owner divorces? Part 1

February 4, 2022 by Ken Proudman

In this part, let's look at buying spouses out and corporate assets.

Whether you are a business owner, the spouse of a business owner, or in business with another family, you may be curious about what impact a divorce can have on the business. If your business partner is divorcing or you are considering going into business with another family, there are also steps you can take to protect the business.

Photo by cottonbro from Pexels

How is a spouse bought out?

There are many potential solutions, such as:

1. When we are dividing family property, we typically look at all the assets and all the debts. That means that we do not need to address the company and every other asset separately. For most small businesses, there are enough other assets that the business can stay with one spouse, and the other is compensated with more of the remaining family property.
2. Spouses might also receive credit for property they had before the relationship, or property that was inherited, received as a gift, insurance proceeds, or a personal injury settlement. There are complex rules about what qualifies and the amount of the credit. The point is that sometimes only part or maybe even none of the business's value is shared with the other spouse.
3. Sometimes a spouse might get bank financing or a loan from family or friends to buy out the other spouse. Or maybe there are enough liquid assets in the business to buy out the other spouse. But buying out the other spouse may not be possible where there are other shareholders or doing so would not be financially feasible, maybe because of the size of the loan payment, lack of available financing, or because taking out funds would leave the business with insufficient funds to operate. Withdrawing assets also leads to significant tax consequences, although those can sometimes be addressed with the help of a tax professional. If the spouse being bought out has no interest in ever starting their own business, we might use up their lifetime capital gains exemption, which minimizes the eventual tax liability of the business when it is eventually sold or liquidated.
4. Where a buy-out is not possible, spouses might both become shareholders. This is usually a last resort because spouses are generally looking to sever ties. Courts might also refuse to keep them in business together where there is a high risk of a spouse being mistreated by the company

due to a history of corporate misconduct.

5. Sometimes a Unanimous Shareholders Agreement (USA) with other shareholders prevents a spouse from becoming a shareholder. While the courts have upheld ordinary USAs, they have sometimes declared that a spouse holds some of their shares in trust for the other spouse. This is generally accompanied by court-ordered rules setting out the obligations of the shareholding spouse and granting the non-shareholding spouse the right to sue the company if their shares are intentionally devalued. Sometimes the court does not uphold unusual or overly-aggressive clauses in USAs.

6. Sometimes the business or some of its shares are sold, or the company is liquidated. This is very rare and usually not in anyone's best interests. Selling a business is not like selling a house as there often is not a large market of potential buyers. Maximizing value typically depends on finding the right buyer, which sometimes means a competitor or entity looking to enter the industry. Selling the business at the time of the divorce may also not be the best time to sell it. You might end up receiving much less if ideal buyers are not looking to buy at that moment. If you only own part of the business, there might also be a minority discount, which means a lower sale price because potential buyers may not be as interested if they do not have control, or if they must share and interact with other shareholders. Many smaller businesses would fall apart without a key shareholder's involvement, if it is not possible to simply replace them with a manager. It's rare that courts will order the sale of a business, unless neither spouse wants to keep the business or the conflict between spouses means continued operation is unsustainable. If the business is more valuable as an income stream than the sale proceeds, selling it might be killing the goose that lays the golden egg. There are people whose job it is to sell businesses, similar to realtors. Some of them might even have a Chartered Business Valuator on staff, so that you can receive some information about the potential sale price (although hiring your own Chartered Business Valuator would still be more reliable, if you can afford one). They can list businesses anonymously and can require potential purchasers to sign non-disclosure agreements. These agreements make it unlikely for competitors to take advantage of a sale, and for employees and other stakeholders to find out about the sale and jump ship.

7. There could be a buy-out over time. Although if the period is too long and they are not receiving any other advantage, the non-shareholding spouse might be further ahead to become a shareholder and share the profits.

8. Sometimes creative solutions can come out of tax reorganizations.

9. If a business has multiple locations and both spouses are sophisticated and involved with the business, they could divide the branches.

10. If the spouses anticipate the children taking over the business, sometimes we will start planning the transition. For example, implementing an estate freeze with the advice of a tax professional.

While the courts are limited in what they can order, negotiating a resolution often results in a much more advantageous resolution to both spouses. And there are many more creative solutions beyond the options described above.

Can a spouse go after a corporation's assets?

Usually, the property we are dividing is the shares, not individual assets. The corporation owns the assets, not the spouses directly.

Sometimes the corporation's shareholders will voluntarily agree to withdraw an asset from the company to buy out a spouse, especially if the spouses are the only shareholders. Doing so is often more advantageous to everyone than both spouses continuing to be shareholders or selling/liquidating the business.

What happens if a history of questionable corporate conduct means the spouses should not both be shareholders? And a lack of other options means that pulling an asset or funds out of the company is the only way for a spouse to be paid out? Our Court of Appeal had this issue come before them in the case of *Aubin v Petrone*. In that case, even though there were legitimate third-party shareholders and a Unanimous Shareholders Agreement, the Court granted the estranged spouse a mortgage over the business's office building. It later ordered that if the business did not make significant payments as scheduled, the mortgage could be enforced, putting the office at risk of foreclosure. There were extreme circumstances in that case though. The result was not ideal for anyone, as the spouses and company are still fighting in court. The first trial decision was released in 2018, and there have been several court decisions since, including one within a month of writing this article.

Again, whenever assets are to be removed from a company, consult a tax professional. Some accountants have additional training in tax, and some circumstances even warrant involving a tax lawyer.

Part 2 of this article addresses how to insulate a business from a divorce's potential negative impacts, both proactively and if the divorce is already underway. It also addresses what steps to take if you are divorcing and you or your spouse owns a business, and how a self-employed spouse's income is calculated for child and support purposes.

Ken Proudman

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What happens when a business owner divorces? Part 2

February 15, 2022 by Ken Proudman

In this second part, let's look at protecting a business, and calculating child and spousal support.

Part 1 of this article explained the various ways a divorcing spouse can be compensated for their family property claim to a business. Part 2 now looks at how to insulate a business from the negative effects of a divorce, what steps should be taken by a shareholder or their spouse when they're divorcing, and how a self-employed spouse's income is calculated for child and spousal support purposes.

How do I protect a business?

The most effective way to minimize the impact of a separation on a business is to enter into a Pre-nuptial Agreement or other domestic contract. These agreements can even be signed after the couple marries or if they have no plans to marry. They set out rules about how to divide property on the divorce or death of the spouses. A common agreement is "what's mine is mine, what's yours is yours", however there are several potential agreements. For example:

1. one spouse keeps the business, but the rest of the family property is divided normally,
2. one spouse keeps the business, and the other spouse keeps another major asset, such as the house or investments, or
3. there could be a payout amount agreed to in advance, while everyone is still on amicable terms. Sometimes it is a formula based on the length of the relationship.

Photo by cottonbro from Pexels

Pre-nuptial and other domestic contracts can also address spousal support (alimony) in advance.

You may not want to be in business with a business partner's estranged spouse. Where there are multiple families or shareholders other than the spouses, all shareholders can sign a Unanimous Shareholders Agreement (USA). Among other terms, these agreements typically aim to prevent a spouse from owning shares directly, or from the shares being sold without the other shareholders' consent. They may also include buy-out provisions. Even if you are not worried about a divorce, USAs can be very beneficial where there are multiple shareholders and may help to avoid a future court battle. Business law lawyers can help you draft USAs.

There are other creative arrangements as well. For example, where there are multiple divisions or locations, perhaps each family owns a separate division. A joint venture agreement or licensing agreement can address their interconnectedness.

If there are multiple shareholders and another shareholder family is separating, you will want to make sure there isn't any corporate

misconduct against an estranged spouse. Misconduct can put the corporation's assets at risk as occurred in *Aubin v Petrone*, discussed in Part 1 of this article. If the divorcing shareholder is the company's President, CEO, or otherwise controls the business, it may be a good idea to have someone neutral manage the business instead, at least until the divorce is concluded. That person should be truly independent and not the spouse's puppet. Part of the rationale in *Aubin v Petrone* was that the spouse had a history of treating the company's assets as their own personal assets, even though there were other shareholders. Proper corporate governance and board of director oversight can be helpful, as well as avoiding intermingling corporate and personal funds. Do not get drawn into their divorce as it can harm your investment, and in some cases, you can even be sued yourself. Frequent board meetings can help you become aware of shareholders separating from their spouses when it happens and might help to keep the company from being drawn into the separation.

Avoid making changes to the share structure, or any other significant unilateral changes which could devalue the shares or prejudice the spouse. For example, do not start a new company or enforce loans against the spouse. Get written consent from the estranged spouse for these changes, do not assume their spouse is speaking on their behalf. There are cases where a spouse did not tell their business partners that they had separated, and they took steps on behalf of the corporation designed to harm their spouse. Even terminating an estranged spouse's employment might be problematic, although sometimes that is necessary because of the negative impact on business operations. Sometimes a restraining order is even necessary, or court orders to return corporate property.

It is very important to consult a family law lawyer with significant experience dealing with businesses before you take these types of steps. Being careless or overly aggressive can backfire. Speaking to a business law lawyer can also be helpful but usually is not enough on its own. Business law lawyers typically focus on the rights of the shareholders and employers rather than how the family courts might react.

How is child and spousal support calculated when someone is self-employed?

When a person is self-employed, we do not usually use their total income in their tax return to calculate their income for child and spousal support purposes.

Sometimes their reported income is too high, particularly where they receive large dividends. Dividends appear larger in personal tax returns due to something called a "dividend gross-up", which we deduct when calculating support.

In most cases, their reported income is too low:

- Owning a business means being able to deduct expenses. Family courts do not have to follow the same rules as CRA when it comes to deductions. The court assesses what it thinks was a legitimate and reasonable business need, and may add a part of the expense to a person's income. Sometimes even the CRA would not allow the deduction, but the company has not been caught yet. For example, some shareholders deduct vacations. I have even seen people try to deduct all their living expenses, although that level of impropriety is rare.
- Income might be kept in a company rather than being paid out as a salary or dividends. If there is no legitimate corporate need for that money, all or part of that undistributed profit might also be added back to their income.
- Where a new partner, family member, or close friend is compensated by the

company, the courts can look at whether that compensation and any benefits are reasonable.

- There are many other adjustments the courts can make. The onus is generally on the business owner to provide evidence and explanations about each of these items. Failing to properly do so could lead to paying more in support than they should be.

Sometimes the company does not expect past revenues or expenses to reoccur, which might mean excluding them. A change in circumstances may mean predicting what a true ongoing amount might be, or retroactively adjusting later.

We will often hire a financial expert to calculate what a business owner's income should be for support purposes. Some Chartered Business Valuators have experience with child support rules and can draft a "Guideline Income Report".

I'm separating from my spouse, what now?

There are resources and guides to help you navigate your separation and articles about minimizing parenting disputes. If you are divorcing and have children under 16 years of age, you'll need to take the Alberta government's Parenting After Separation course. Taking time to go through these resources and prepare can save you a lot of headaches. Judges often chastise both spouses for their bad behaviour. If you want a judge to see you for the upstanding human being and excellent parent that you are, make sure your behaviour is pristine. Even if you think your former spouse is the source of conflict, do not sink to their level.

Courts and lawmakers have developed many rules to address the unique issues that arise when there is a business. Whether you are the business owner or their spouse, if you separate, it is critical that your family law lawyer have plenty of experience with businesses. Ask them questions to gauge their knowledge.

When a separation occurs and there is a business involved, it can be advantageous to choose better alternatives than going to court. Divorces involving businesses are often too complex for most court hearings to address. The Court of Queen's Bench does not have separate family law judges, and you do not get to choose which judge you appear before. You will not know if your judge has much experience with businesses, family law, or divorces involving businesses. For example, before becoming a judge they may have prosecuted a candy bar theft. Mediation, arbitration, and their hybrid med-arb are excellent alternatives to the courts, for both business owners and their spouses. Through those processes, you can choose a family law mediator/arbitrator with experience dealing with businesses to help come to a resolution that is fairer, more attentive, less costly, and faster than through the courts.

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Ken Proudman is a partner, family law lawyer, and arbitrator at BARR LLP. He leads BARR LLP's practice group of lawyers who focus on divorces involving businesses. He teaches the Advanced Family Law course at the University of Alberta Faculty of Law and teaches at MacEwan University's School of Business. He is the President of the Alberta Legal Coaches and Limited Services Society, and he is proud to be a director of CPLEA, which publishes LawNow.

Small Business Essentials: An employment lawyer's perspective

February 22, 2022 by Andrew Skeith

Three essentials all small business owners should have in place are employment agreements, policies, and termination letters and releases.

One of the most common mistakes small business owners make is assuming a small number of employees means proper employment documents are less important. On the contrary, the best time to speak to an employment lawyer and get help with the necessary contracts and policies is when your business is first thinking of hiring an employee.

While employment lawyers can help small business owners in a variety of ways, below are three essentials that all small business owners should have in place.

Employment Agreements

Having properly written employment agreements signed by your employees when they are first hired can help your business reduce risk, liability, and legal costs down the road. While an employment agreement can have several important provisions, one of the most important to include is a termination clause.

The *Employment Standards Code* is legislation that governs minimum standards applicable to workplaces in Alberta. Among other things, the *Code* sets out minimum amounts of termination pay an employer must pay an employee if they let them go without cause. Employers cannot contract out of these amounts, but they can agree to pay employees more severance.

Photo from Pexels/Pixabay

If an employee does not have a termination clause in their employment agreement, they will also have a right to "common law" reasonable notice if they are terminated without cause. How much common law reasonable notice an employee is entitled to receive depends on several factors such as length of service, age, and position. But in most cases, an employee will be entitled to much more common law reasonable notice than they would be if they only received their employment standards minimums. For example, a 60-year-old shop manager with 25 years of service with an employer could be entitled to anywhere from 16 to 24 months of compensation at common law. Under the *Employment Standards Code*, that employee is only entitled to 8 weeks of wages. As you can see, that is a tremendous difference.

Employers may, for entry level positions, want to limit that employee's entitlements

on termination to the *Employment Standards Code*. For more senior or managerial roles, an employer may want to reward those employees by agreeing on a set formula for termination, such as two weeks of wages for each year of service. The important point is that, without a written employment agreement and a termination clause, employers do not get to decide what their employees are entitled to on termination. They are stuck paying what can be a significant amount of funds to an employee based on that employees' common law reasonable notice.

Policies

Policies are documents setting out the standards, rules, and expected behavior within a workplace. Employers can write policies affecting nearly every activity you can think of. But the most important policies to put in place are those setting up a progressive discipline regime, and those setting out what kinds of misconduct can lead to an employee being disciplined or terminated.

Progressive discipline is the idea that for most types of misconduct in the workplace, an employee is entitled to know:

- what they did wrong,
- that they need to fix it, and
- if they do it again, they will be disciplined.

If the employee continues to act out despite the employer's warnings, the employer can terminate them for "just cause". If an employee is terminated for "just cause", the employee does not get any reasonable notice of termination, or compensation in lieu.

It is important to put the specific progressive discipline "steps" into a written policy that is then given to all employees to read and acknowledge. This ensures employers can discipline employees and, if need be, rely on that disciplinary history to terminate for just cause.

If an employer has a progressive discipline policy in place, they should also have policies listing the kinds of things that are viewed as "misconduct" in the workplace. The policy should be clear that an employee doing those things will lead to discipline and eventually termination. For example, a bullying and harassment policy prohibiting bullying or harassing conduct is one of the most basic policies that employers should have in place. Another example would be a policy setting out an employer's drugs and alcohol in the workplace policy.

Termination Letters and Releases

Unfortunately, despite best intentions there will always be situations where an employer must let an employee go, or "terminate" their employment. It could be because the employer does not have enough work for the employee, or that the employee is not doing their job or doing it poorly, among many other reasons. Despite common belief, an employer has the right at any time to terminate an employee for any reason, or no reason at all. The one exception are reasons that are discriminatory under human rights legislation.

When an employer must terminate an employee, best practice is to provide that employee with a termination letter. That letter usually will tell the employee if they were terminated with or without cause. The termination letter can also include an offer to the employee for additional severance if the employee signs a release. A release is a legal agreement where the employee agrees to give up their rights to sue the employer for anything related to their employment in exchange for money. For example, if a long-service employee with a significant common law reasonable notice entitlement signed a release in exchange for more severance, they would not be able to later sue the employer for wrongful dismissal.

In those cases, it is well worth providing the employee with some added severance

in exchange for a signed release. Having a signed release on hand means that you as the employer can rest easy. Even if that employee later decides they want to sue you for wrongful dismissal, any such claim would easily be dismissed, saving you significant legal fees. The alternative is having an employee out in the world with the risk of being served with a wrongful dismissal lawsuit when you least expect it, bringing unwanted stress and legal costs.

Andrew Skeith

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What Does "Freedom" Mean in Canadian Law?

February 25, 2022 by Linda Mckay-Panos

The courts have interpreted and applied sections 1 and 2 of the *Charter*, including in the case of Occupy Toronto in 2011.

In recent days, the word "freedom" has been used in the context of regulating protests and blockades at various locations in Canada. The *Canadian Charter of Rights and Freedoms* (*Charter*) provides guidance about our rights and freedoms in Canada. Over the years, by a process called "judicial review", the Canadian judiciary has interpreted the scope of our rights and freedoms. The courts have also developed legal tests for reasonable and justifiable limits on our rights and freedoms.

In Canada, when the courts are asked to interpret and apply the *Charter* in a particular situation, they use the following analysis:

1. What is the scope of the right or freedom relied on by the claimant?
2. Is the right or freedom violated?
3. If yes, can the violation nevertheless be reasonably justified in a free and democratic society?

2011's Occupy Toronto

In the context of a 2011 protest during "Occupy Toronto" in *Batty v City of Toronto* (*Batty*), Ontario Justice DM Brown stated:

> *[2] ...Canada has not chosen anarchism. Instead, when we collectively adopted the Charter some 30 years ago, we embraced, in a constitutional way, a political philosophy which places great emphasis on the liberty of the individual — as can be seen from the various rights and freedoms set out in ss. 2 through 15 of the Charter — while at the same time reiterating that those rights and freedoms are not absolute. Indeed, the first section of our Charter reminds us that individual action must always be alive to its effect on other members of the community: it states that limits can be placed on individual action as long as they are 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. [underlining added]*

Photo by Amy Chung from Pexels

In *Batty*, protesters had been camping in a public park in downtown Toronto as part of the "Occupy Toronto" movement for a month. The City served them with a notice under the *Trespass to Property Act* stating that, "in accordance with the City's Parks By-law, they were prohibited from installing, erecting or maintaining a tent, shelter or other structure in the park and from using, entering or gathering in the park from 12:01 a.m. to 5:30 a.m." (*Batty*, para 4). The applicants challenged the validity of the Trespass Notice, claiming it violated their rights under section 2 of the *Charter*.

Section 2 of the *Charter*

Section 2 of the *Charter* reads:

> ***Fundamental freedoms***
>
> *2. Everyone has the following fundamental freedoms:*
>
> *(a) freedom of conscience and religion;*
>
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
>
> *(c) freedom of peaceful assembly; and*
>
> *(d) freedom of association.*

In *Batty*, the Applicants argued their freedoms were violated as follows (para 56):

> *(a) Section 2(a) — Freedom of Conscience*
>
> *Ejection from the park and the disbanding of the encampment infringes the Applicant's freedom of conscience by limiting their freedom to express and enact their political beliefs. The Applicants believe that the act of 'occupying' a space is central to their commitments to solidarity, community, and democracy. Their organization of the physical space of the encampment and the social organization of the community of protesters is a mechanism through which the Applicants and fellow protesters practice direct democracy and consensus- based decision making.*
>
> *The encampment and its activities are an exercise of the Applicants' and fellow protesters' conscience and political beliefs. The Notice under the* Trespass to Property Act *and any government action taken to enforce that Notice substantially interfere with the Applicants' and fellow protesters' freedom of political belief and conscience.*
>
> *(b) Section 2(b) — Freedom of Expression*
>
> *Ejection from the park and the disbanding of the encampment infringes the Applicants' freedom of expression by denying the Applicants and fellow protesters at St. James Park an essential means by which to convey their message. The physical act of 'occupying' a space is central to the message being communicated by the Applicants and fellow protesters. If they are denied the opportunity to 'occupy' St. James Park because of the Notice under the* Trespass to Property Act *and any government action taken to enforce that Notice, the protesters will be inhibited in their ability to convey information and raise awareness about their social concerns.*
>
> *The applicants are engaged in a prolonged protest which involves various forms of protected expression. Further, the actual encampment at St. James Park is a physical act that conveys or is attempting to convey meaning to … members of Canadian society. Both the protest and the encampment are intended to convey various messages, including messages about the disproportionate distribution of wealth in society and about democracy.*
>
> *Protesting and picketing are forms of expression which are highly protected by s. 2(b) of the* Charter. *The Supreme Court of Canada has recognized that the forms of expression that are protected by s. 2(b) are infinitely varied and can include the written or spoken word, the arts, and even physical gestures or acts. The Supreme Court has recognized that even the physical act of parking a vehicle might constitute protected expression if the vehicle was parked in an attempt to convey a meaning. The Applicants' and fellow protesters' encampment is a form of political expression which should be sedulously protected by the Court.*
>
> *(c) Section 2(c) — Freedom of Assembly*
>
> *Ejection from the park and the disbanding of the encampment directly infringes*

> *the Applicant's freedom of assembly, by disrupting a peacefully gathering in which the Applicants and fellow protesters are collectively voicing their political beliefs and concerns. The encampment at St. James Park is the site and form of the Applicants' and other protesters' assembly, and the Notice under the* Trespass to Property Act *and any government action taken to enforce it directly inhibit the Applicants' rights to peacefully assemble.*
>
> *(d) Section 2(d) — Freedom of Association*
>
> *Ejection from the park and the disbanding of the encampment infringes the Applicant's freedom of association, by preventing them from working collectively to understand and resolve the confounding social and political problems we all face. The encampment is Occupy Toronto's primary site for collective action, solidarity, community, debate and discussion towards such understanding and resolution. The Notice under the* Trespass to Property Act *and any government action taken to enforce it directly inhibit the Applicants right to associate by disrupting their structures of collective organization and substantially interfering with their ability to work together toward common goals.*

Justice Brown held that the protesters' freedoms under section 2 of the *Charter* were violated. Next, Justice Brown noted that the key issue was whether the violation could be justified under section 1 of *Charter*.

Section 1 of the *Charter*

Section 1 of the *Charter* reads as follows:

> *1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [underlining added]*

The Supreme Court of Canada (SCC) has developed a legal test to determine when the government can rely on section 1. The test is found in paragraphs 69 to 70 of *R v Oakes*, a 1986 Supreme Court of Canada decision:

> *To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. **First**, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom.'* R. v. Big M Drug Mart Ltd.*, 1985 … The standard must be high to ensure that objectives that are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are **pressing and substantial** in a free and democratic society before it can be characterized as sufficiently important.*
>
> ***Second**, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are **reasonable and demonstrably justified**. This involves 'a form of proportionality test':* R. v. Big M Drug Mart Ltd. *… Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a **proportionality test. First**, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be **rationally connected** to the objective. **Second**, the means, even if rationally connected to the objective in this first sense, should **impair 'as little as possible'** the right or freedom in question:* R. v. Big M Drug Mart Ltd.*, … **Third**, there*

> *must be a **proportionality** between the effects of the measures which are responsible for limiting the* Charter *right or freedom, and the objective which has been identified as of 'sufficient importance'. [emphasis added]*

The third aspect of the proportionality test was later expanded upon by the Supreme Court of Canada in the 1994 case of *Dagenais v Canadian Broadcasting Corp* (at para 888):

> *[T]his Court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of impugned legislation against its deleterious effects, rather than merely considering the proportionality of the objective itself.*

Applying the *Oakes* test in *Batty*, Justice Brown found that the regulation of structures in public parks and the use of parks during midnight hours is a pressing and substantial objective (para 96) since "without some balancing of what people can and cannot do in parks, chaos would reign; parks would become battlegrounds of competing uses, rather than oases of tranquility in the concrete jungle" (para 91). Further, the measures chosen were rationally connected to the objective since they simply asked "one group of the public to let go of their monopoly over the use of the Park and share [it] with other people in Toronto" (para 97).

Next, the measures were found to impair the guaranteed freedom as little as possible. The Court accepted that the encampment of the park was an integral element of the message being conveyed as a manifestation of a political commitment to a horizontally democratic, grassroots process (para 8). Justice Brown quoted the affidavit of the applicants which described the encampment as a "symbol of the evolution of humans from the nationalist rhetoric of our forefathers, to a true unification of all humankind" (para 36). The Court held that compliance with the trespass notice entailed minimal impairment because it did not amount to a total eviction of the protesters from the park (para 122).

Finally, the court found there was adequate proportionality between the deleterious and salutary effects of the measure (para 123). This conclusion was supported by a description of the negative effects of the encampment on the serene park grounds ("the occupied areas are largely covered with grass and are gently undulating. They are also well treed, with mature trees") (para 26) and affidavits of residents and nearby business owners. Thus, the conditions imposed on the protest struck the appropriate balance relating to private expression in public places and were thus "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". (See: "Freedom of Expression, the 'Occupy' Movement, and the Dismantling of Tents: A Case Comment on Batty v City of Toronto" Marina Chernenko – The Court, 2014).

A Balancing Act

Hopefully, this summary of the *Batty* case demonstrates that while Canadian courts will widely protect Canadians' freedoms, they must also allow the government to impose reasonable limits when individuals exercising freedoms adversely affect other members of the community. Thus, freedom in Canada is not an absolute right.

Linda McKay-Panos

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Is Incorporation Right for your Business?

March 1, 2022 by Jordan Thorne

Before incorporating, a business owner should think about tax implications, a corporation's perpetual existence, and protection from liability.

A common question among small business owners is whether to incorporate a company to carry on their business. However, this simple query often leads to a much more in-depth decision-making process than many business owners expect.

A company is a separate legal entity incorporated for the purpose of carrying on some form of commercial activity. It is important to understand that as a separate legal entity, a company is considered separate from its owners (the shareholders). It can therefore own property and enter into contracts in its own right. Significant implications can arise because of this separate legal entity status that a business owner should carefully consider before incorporating.

1. Tax Implications

First, a company must file and pay taxes as a separate taxpayer from its shareholders. Corporate tax rates vary from individual tax rates. In the case of small, Canadian-owned companies, the different corporate tax rates are often (though not always) quite favorable. Small, Canadian-owned businesses may also be eligible for the lifetime capital gains exemption on the eventual sale of the business. As a result, it is crucial that business owners get accounting advice early on. The tax implications of incorporation are often the primary determining factor when deciding whether to incorporate.

Photo by Oleg Magni from Pexels

It is also important to keep in mind that the separate taxation of a company comes hand in hand with additional administrative work and professional fees in keeping up with these necessary corporate tax filings.

The business owner must also think about how they are going to move profits earned by the company out to them personally. A business owner cannot treat the company's income as their own or use the company to pay their personal expenses. For business owners who are used to operating as a proprietorship, keeping company and personal profits separate can take some serious getting used to. The company may choose to pay the business owners an employment or management wage, or the shareholders of the company a dividend. Again, this means more administrative work for the business owner, but it gives them more control of the amount of personal income they receive in any given tax year.

2. Perpetual Existence

The second implication of a company's separate legal entity status is that a company's existence is not tied to the lifetime of its shareholders. This means the company can continue in perpetuity (forever). As a result, incorporation can be a useful estate planning

tool, particularly for long-standing family-owned businesses. If the company owns commercial real estate, it can save in Property Transfer Tax when passing the real estate down to the next generation.

Business owners must take steps to keep their company in existence. Most corporate registries require a company to file an annual report to remain in good standing, which involves some administrative work and some modest annual fees. If the corporate representatives fail to keep up with these required annual corporate filings, the corporate registry may dissolve the company. The involuntarily dissolution of a company by the corporate registry can create a serious problem if the company owns property. And it can be costly to undo. Therefore, it is essential that a company's owners stay up to date on their corporate filings.

3. Protection from Liability

The third consideration when deciding whether to incorporate relates to liability. Operating a business through a company provides a certain measure of protection to the individual business owners and their personal assets. For example, if a company enters into a contract with a customer that the company is unable to fulfil, the customer will have the right to sue the company, not the individual shareholders. If the court makes an order awarding damages against the company, the customer may seize the company assets to satisfy the court order. The customer would not, however, be able to access the individual shareholders' personal assets to satisfy the judgment. The result is a measure of protection to the shareholders' personal assets, so long as the contract was entered into in the company name, and it was made clear to the customer that the company (and not the individual shareholder) is the party to the contract.

On the other hand, business owners should be aware that the separation of company and individual for liability purposes is not absolute. If the company needs third-party financing, most financial institutions require a personal guarantee of the loan from the individual owners, placing the owners on the hook if the company defaults on the loan. Additionally, there is legislation in most provinces that makes corporate directors personally liable for unpaid corporate income tax, GST, payroll remittances such as CPP and EI, up to six months worth of unpaid employee wages, and some environmental and safety penalties.

Get Advice

Given the many factors to consider when deciding whether to incorporate, it is best to consult with your professional advisors about the business structure that is right for your business.

Jordan Thorne

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