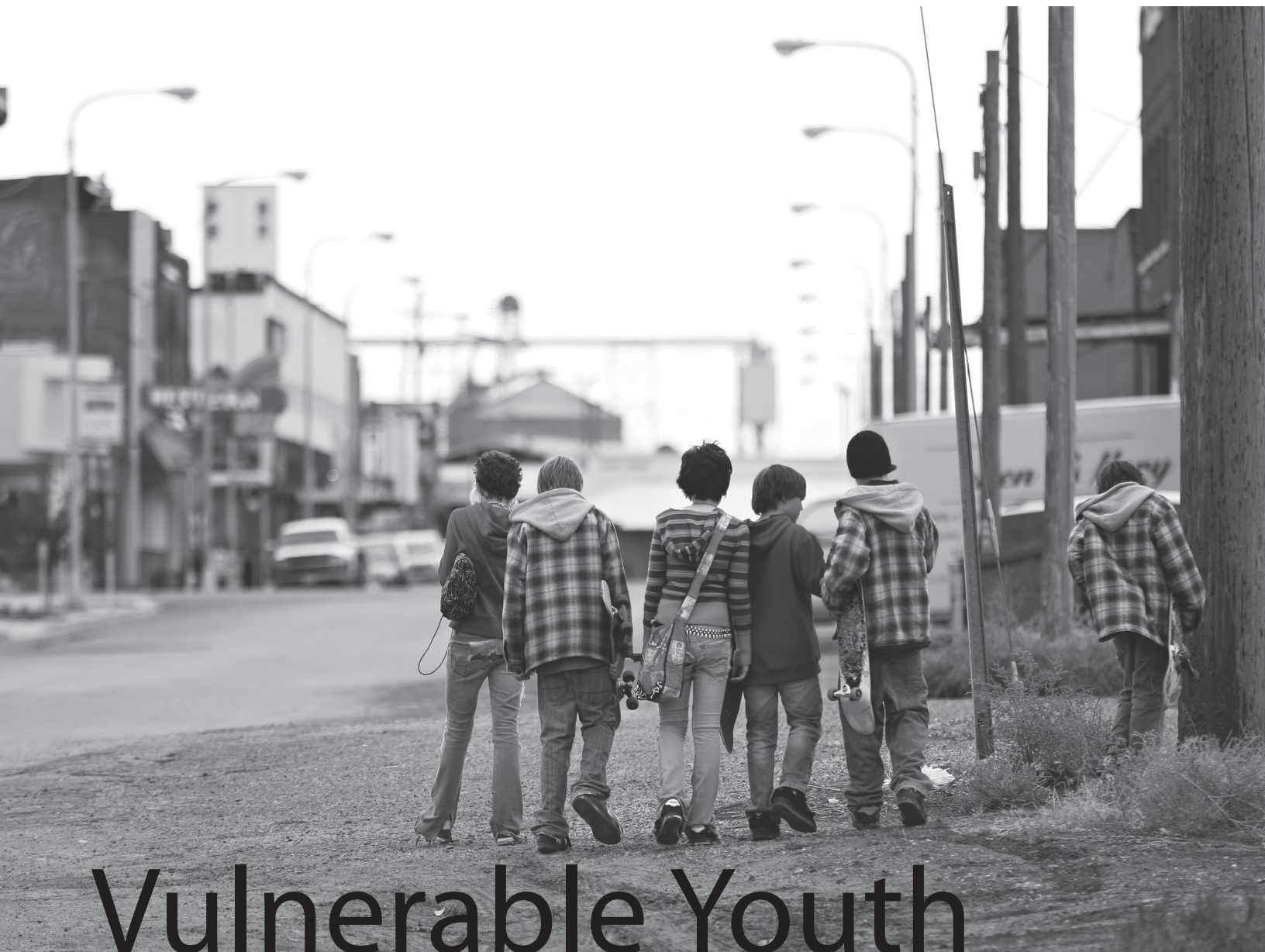


# LAW NOW

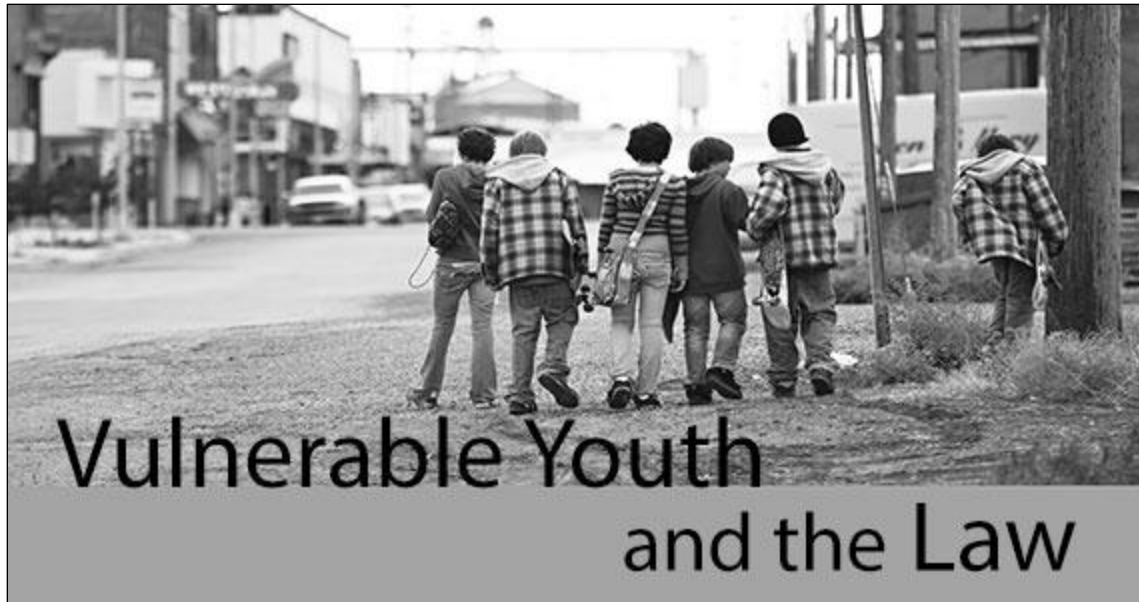
relating law to life in Canada



## Vulnerable Youth and the Law



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# The State of Your Children: The Top Five Things you need to know about your children



This spring, UNICEF released Report Card 11 ranking the well-being of children in rich countries. Well-being is measured by a wide range of factors that make life better for children including healthy behaviours, positive relationships with peers and parents, high educational achievement and low levels of child poverty.

## Here's how Canada's children rank:

### 1. Our children are “stuck in the middle”

It may surprise you to learn that Canada ranks 17<sup>th</sup> out of the world's richest 29 countries in overall child well-being. We seem to be “stuck in the middle” since this overall ranking hasn't changed in a decade.

### 2. We rank high for educational achievement

Canadian children rank second out of 29 countries when it comes to educational achievement.

### 3. Canadian children know to say “no” to smoking cigarettes

Children in Canada have a very low rate of cigarette smoking; in fact, we rank third out of 29 countries.

However, high levels of alcohol consumption and cannabis use remain a concern. Maintaining open lines of communication with children before and during the adolescent years about the risks associated with these behaviours can go a long way towards reducing detrimental choices.

### 4. Our children are still not as healthy as they should be

When it comes to healthy weight, Canada continues to rank very poorly – 27<sup>th</sup> out of 29 countries. We can all promote the maintenance of healthy weight by choosing healthier food options, eating fresh, unprocessed



foods packed with nutrients, and decreasing our intake of sugar and sodium.

## **5. Bullying is a serious issue for our children**

The rate of bullying in Canada amongst children and youth is high and a cause for concern. In this area, we rank 21st out of 29 countries. There is more that governments can do to address this issue but there is also much we can do as individuals, communities, families and in school settings. Modelling kindness and good conflict resolution, speaking up when we see bullying, and demanding help for all concerned from responsible authorities are simple but powerful ways to curb bullying anywhere it occurs.

We all have a role to play in improving the lives of children and youth in Canada – our own and other children – and this includes listening to children and youth about what they think is needed to address the challenges they face.

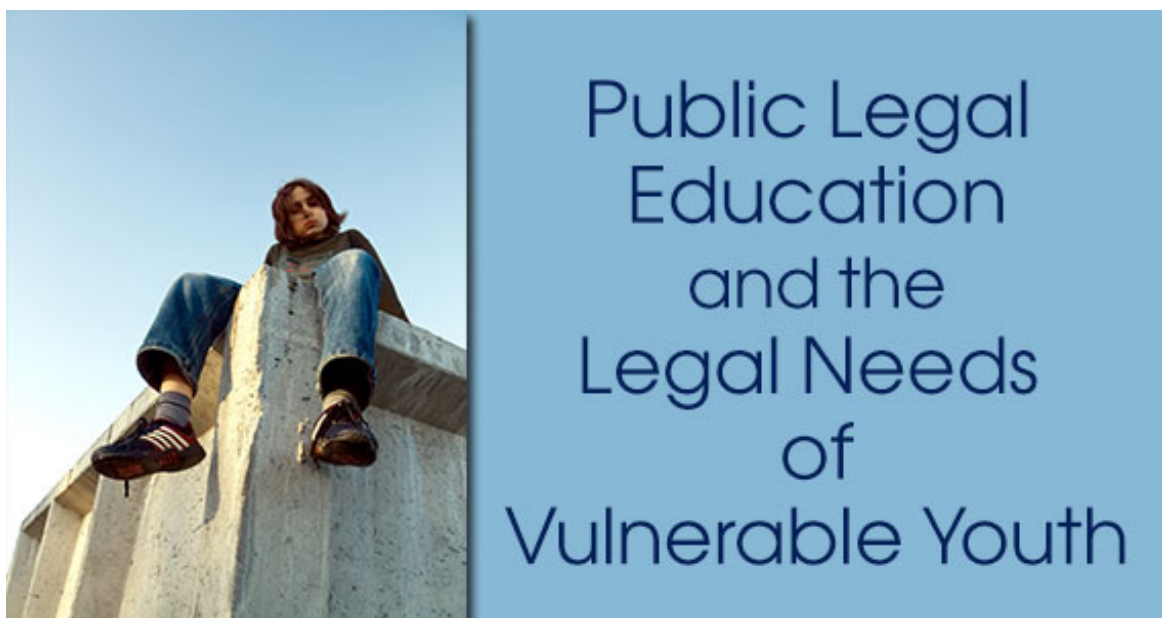
To see pictorial displays of more statistics from this report, see the [full article \(PDF\)](#).

To learn more about child well-being in Canada, including information about how to take action, please visit: [unicef.ca/irc11](http://unicef.ca/irc11)

This article was originally published in the Fall 2013 issue of For Every Child, a [publication of UNICEF Canada](#), and is reprinted with permission.



# Public Legal Education and the Legal Needs of Vulnerable Youth



## Vulnerable Youth and the Law

Young people face many challenges as they prepare for and transition into adulthood. These challenges can easily transform into problems with the legal system. For marginalized youth, legal problems are compounded by other social problems. Some of the extra hurdles marginalized youth face include:

- unmet basic needs which take a greater priority;
- lack of a stable or adequate support network;
- transportation problems; and
- lack of respect from professionals. ([Stewart et al. 2010](#))

There remain a number of barriers to solving the legal problems youth encounter. For one, youth are considerably more likely to not obtain legal advice and do nothing to solve a legal problem ([Buck et al. 2007](#); [Kenrick 2002](#)). Young people are also the least likely to recognize they need advice and to know where to go for help ([Kenrick 2002](#)). The transition to adulthood is a tumultuous time for all youth, but marginalized youth face additional problems that make this transition even more precarious. PLE can play an important role in early intervention by catching youth before they fall through the cracks. When a young person decides to take action they often do not have basic knowledge of where to go for help ([Public Legal Education Network 2009](#)). As a result, youth often have a limited awareness and familiarity with their rights and the operation of the legal system.

Public legal education (PLE) organizations play a fundamental role in helping vulnerable youth populations. “Improving levels of legal capability through the provision of legal education,” attests Lisa Wintersteiger of the Public Legal Education Network, “not only means individuals are better equipped to cope with risks and challenges, but also to recognize and take advantage of the opportunities they encounter” (2008, p. 1). PLE serves as a tool of social empowerment to address the inequalities experienced by vulnerable youth.



## Information Seeking Habits of Youth

It is not surprising given the wealth of information freely available online that the Internet is an important tool in youth problem-solving behaviour. The Internet is the most likely source of information on a range of subjects for youth. Youth are most likely to turn to the Internet for information on sensitive topics that they are not comfortable discussing with others, especially topics like drugs, sex and alcohol. One major challenge is that youth find it difficult to identify reliable and accurate information online. ([Di Antonio 2011](#))

Youth generally seek advice from within their social network and “approach non-expert sources of help, often individuals, in preference to professional advice agencies” ([Kenrick 2002](#)). Non-expert sources of information include friends, parents, teachers, community members, and support workers.

There is considerable research that indicates that youth are not seeking advice from mainstream expert sources. Youth generally seek advice from within their social network and “approach non-expert sources of help, often individuals, in preference to professional advice agencies” ([Kenrick 2002](#)). Youth are more likely to use expert advice or services if they are:

- face-to-face; ([Stewart et al. 2010](#))
- friendly;
- non-judgmental;
- informal; ([Kenrick 2002](#))
- holistic and address emotional and social problems; ([Michael Bell Associates 2007](#))
- confidential;
- age-specific/appropriate; ([Kenrick 2002](#); [Michael Bell Associates 2007](#))
- honest and objective; and
- not contradictory to their own life experience ([Mah 2011](#)).

Many of these characteristics were seen to contribute to a relationship of trust, an important factor in a young person’s decision to get expert advice ([Stewart et al. 2010](#)). Youth may even test a mainstream expert source with a trivial or small inquiry before seeking help for complex and sensitive problems ([Kenrick 2002](#)).

## Successful PLE Strategies for Vulnerable Youth

Organizations must adapt to and embrace the tools and social media platforms of the twenty-first century to which this generation of youth are most receptive. They must also take advantage of the support systems vulnerable youth use, because they can provide information to a greater number of individuals than PLE organizations alone.

Working with service providers that support vulnerable youth should be a focus in any approach to provide legal support to youth. Organizations must adapt to and embrace the tools and social media platforms of the twenty-first century to which this generation of youth are most receptive. Service providers have established relationships and are more likely to be a first point of contact for youth with legal problems than other expert sources. It is important that service providers have a basic understanding of the legal system and are capable of making appropriate referrals. PLE outreach to service providers can help to prevent situations where outreach workers with good intentions provide harmful information.

The transition to adulthood is a tumultuous time for all youth, but marginalized youth face additional problems that make this transition even more precarious. PLE can play an important role in early intervention by catching



youth before they fall through the cracks. Youth tend to leave problems unattended until the consequences have become so dire they can no longer be ignored. An early intervention strategy is needed to fight back against this tendency through education and awareness. It is important that youth have access to accurate legal information where they will look for it. Legal information needs to be age-appropriate, available online, and in the hands of non-expert sources they trust.

This article has been adapted from a report published by the Centre for Public legal Education Alberta, [Vulnerable Youth in Alberta and the Law: An Overview of Needs, Challenges and Supports Available \(2013\)](#) .



## Vulnerable Youth in Canada's North



Any discussion of “vulnerable youth” must begin by defining the scope and meaning of that term. In this article, I include those persons under the age of 18 years who are particularly vulnerable to neglect, and/or harm of various sorts. Sometimes this is a result of poverty alone, and parental inability to provide as completely for all of the child(ren)’s needs as we would hope, given the wealth in Canadian society. In other situations, the needs of a child go beyond this, and include the requirement to be protected from direct harm. This includes sexual, physical and emotional abuse, as well as harm which can be caused by, or which can flow from, exposure to substance abuse problems of parents or other caregivers, and parental or other forms of adult violence.

By all accounts, the situation for vulnerable youth in Canada's North is even more dire than in the southern regions of our country. Statistics Canada figures for 2010 show that children in Nunavut and the Northwest Territories are at far greater risk of being a victim of violence than anywhere else in the country. Figures for 2007 showed rates of removal of children from their homes and placement into what are considered to be safer, protective settings (foster homes and the like) to be much higher in the N.W.T than in any other jurisdiction. And 2011 figures showed children in Nunavut were 10 times more likely to be the victim of a sexual offence than children in the rest of Canada.

Reasons for these are varied. However, it cannot be disputed that in the N.W.T (where a [2014 Auditor General report](#) found that 95 percent of the children in need of assistance from child protection authorities are aboriginal) one, if not the main, factor is historical in nature: the overall disruption of aboriginal society and culture by way of the Residential Schools system.

If one were ever to try to devise an experiment to determine the results of the wholesale disruption of the social and cultural ways of a people, it is hard to imagine anything more grotesque than the system of Residential Schools which existed in Canada for about a century starting in the late 1800s. For decades, generations of aboriginal children were required by law to attend the schools which were operated by the Government of Canada, along with various mainstream churches. Because attendance was compulsory, police were often enlisted by school authorities to find, round up, and forcibly take the children of school-age away from their families and homes.



Once at the schools (and consistent with other aspects of general government policy at the time), authorities sought to eradicate all aspects of aboriginal culture, and to “re-educate” children to be “white” and “European”. Children were punished if they spoke their own languages or attempted to follow or practice any of their own traditions. In addition to these efforts at what has been (properly, in my view) called a form of genocide, individual children were often abused physically and sexually by priests, nuns, teachers, and other adults operating the school facilities.

Survivors of the schools often returned to their home communities having no true sense of belonging, to families they no longer knew, and to cultures and traditions with which they had lost touch. Generations of former students have suffered the results of their time at the Residential Schools and many turned to alcohol in an effort to escape the memories and the pain. Many others vented their pain by lashing out and becoming violent towards those around them, including loved ones with whom they had the closest contact. This, in turn, led to an increase in the incidence of violence and abuse in aboriginal homes, and higher rates of children in need of protection and assistance.

There can be no doubt that in Canada’s North, where the aboriginal population is highest, the intergenerational effects of the Residential Schools – decades after the last one closed its doors – are most acutely felt.

Survivors of the schools often returned to their home communities having no true sense of belonging, to families they no longer knew, and to cultures and traditions with which they had lost touch. Even now, children whose parents were not in the schools continue to suffer the legacy. People who are now grandparents eventually returned from the schools and had families and children of their own. Being housed in the school system throughout their own formative years, of course, meant many ended up as adults with no actual experience of what it was like to be in a loving, supportive, caring home environment where real parents (and not teachers, nuns or priests) performed their traditional roles. This affected the situations of their own children (the first post-Schools generation), who often grew up in homes where violence and substance abuse were common. *These people are now adults with children of their own: this second post-schools generation of young people is now being raised by those whose own parents had been students in the schools. The “ripple effect” of the lack of true experience in parenting is being passed down through the years.*

This situation is illustrated virtually daily in court proceedings in the North. A particularly poignant example of this was brought home to me in a case of a young person who was charged with sexually assaulting another teenager. His mother approached me and told me that she felt somewhat responsible for her son’s misbehaviour because her generation had failed in its traditional roles when it came to educating children about proper sexual conduct. She told me that among her people it had traditionally been aunts and uncles who spoke to girls and boys about sexual customs and conduct, but this tradition had been completely disrupted when generations were sent away to Residential Schools. There, what little sexual education took place was delivered by teachers, priests and nuns. When the students returned to their communities, later generations were left without anyone to guide and teach them. Parents had never done so, and aunts and uncles no longer did so because, having been sent to the Schools, they did not return with an appreciation for this tradition.

In a Report issued in March, 2014, the Auditor General of Canada found the state of child protection services in the Northwest Territories to be well below what is necessary to properly respond to the needs of vulnerable children.

Even where the legacy of the Schools does not directly impact a family or individual, other, more common factors which also contribute to the rates of children in need are more prevalent in the North. In general, poverty, unemployment and substance abuse are more widespread. In many communities, the main employers are the territorial and local governments, and many jobs are seasonal only. Housing is an on-going challenge, especially for those living on the lower rungs of the economic ladder. In many situations, a small, single family dwelling is occupied by various members of the extended family.



Sadly, the high levels of need in this part of Canada are not matched by a suitably high level of resources. In a Report issued in March, 2014, the Auditor General of Canada found the state of child protection services in the Northwest Territories to be well below what is necessary to properly respond to the needs of vulnerable children. This report echoes one released in 2011, also by the Auditor General, about the dismal state of the child welfare system in Nunavut.

Like the reasons behind the needs, the reasons for the poor government responses are varied and multi-faceted.

To begin with, it is often difficult for governments to attract qualified and experienced child protection workers. In a small isolated northern community a child protection worker is likely to literally be a neighbour of the persons directly impacted by his or her decisions and actions; this only adds to the stresses and difficulties workers have to face and address on a daily basis. Most communities in which workers are placed are isolated and remote. And in Nunavut especially, a southern Canadian will also likely experience linguistic isolation, as many Inuit in small, remote communities speak little or no English. This leads to a situation where governments are desperate to fill positions and often have to select from applicants with little or no training or experience in the area, compared to the situation of social workers and child protection authorities in the South.

Furthermore, the small size of most communities in the North adds special challenges for someone in the position of a child protection worker. It is not uncommon for children to be apprehended and taken out of homes where they may have been exposed to violence or substance abuse, or both. And even where a child is not actually removed from a family's home, the child welfare worker may come to know various sensitive and personal details of the people who live there. It is one thing for a worker to play such a role in a large southern Canadian city, where he or she is not likely to encounter the persons involved in cases and files outside of the work environment; it is quite another for a worker to have to perform such an often unpopular role in a small community of only 400 or 500 people. In a small isolated northern community a child protection worker is likely to literally be a neighbour of the persons directly impacted by his or her decisions and action. This only adds to the stresses and difficulties workers have to address on a daily basis.

When it comes to assessing the needs of children at risk, and placing them into safe settings when they have been removed from their family homes, resources are again very limited and restricted in northern Canada. The Auditor General's report noted that in the N.W.T., the rates of suicide, substance abuse, pregnancy and crime for youth aged 16 to 18 are "markedly" above the national average, yet this age group receives the least assistance from child protection and other government authorities. The March 2014 Auditor General's report found substandard investigations in almost 30% of the cases reviewed. No long-term risk assessments were being conducted, despite this being a mandatory requirement under the governing legislation. Children placed into the care of the child protection authorities were not being properly monitored and 69% of foster homes were not properly screened to ensure a safe environment for children placed there.

There is also a certain cultural tension when it comes to housing children in need of protection. Most aboriginal communities want to keep their children if possible, in order to ensure they grow up being aware of their cultural and traditional backgrounds and histories. Placement to outside, larger, southern Canadian centres is usually resisted. However, efforts to involve local community members on a long-term basis have generally failed. While the N.W.T. legislation contemplates local committees which would take an active role in child welfare matters, in most communities, efforts to establish such groups have failed.

The Auditor General's report addresses the situation of what is perhaps the most vulnerable group: youth between the ages of 16 and 18. Under the governing legislation, children are no longer entitled to protection when they reach the age of 16 years, and yet also cannot qualify for other forms of assistance (such as income support) until they turn 18. If they are already in care, they may choose to extend that assistance until they turn 18. Otherwise, at the discretion of child welfare workers, they may be offered a support agreement,



but this is usually linked to specific needs or factors, such as continued attendance in school or counselling assistance. The Auditor General's report noted that in the N.W.T, the rates of suicide, substance abuse, pregnancy and crime for youth aged 16 to 18 are "markedly" above the national average, yet this age group receives the least assistance from child protection and other government authorities.

Unfortunately then, in this part of Canada, where the need for proper child protection services and facilities is highest, there are additional inherent challenges and difficulties in properly meeting those needs. Experience teaches us that failure to properly protect children from neglect and abuse will only contribute to repetition of the cycles which led to those needs in the first place.

Among aboriginal communities in the North, there is an on-going effort to heal, and to return to something closer to more traditional ways of life. Combating substance abuse is a continuous effort, as are attempts to provide more employment and better housing, and encouraging youth to complete their education. While it will take many years to reverse the harm which has been done to aboriginal societies and traditions over the last 250 years, changes for the better are happening, slowly but surely. As the situation improves, the need for child protection assistance may begin to decline. In the meantime, all Canadians should remain concerned about the situations of vulnerable youth in every part of the country.



# The Protection of Young Workers in Canadian Employment Law

## Protection of Young Workers in Canadian Employment Law



In this article we briefly examine the justification for special laws relating to the employment of younger workers, and then set out those special laws.

### The Reason for Protective Laws for Young Workers

Employment is a legal relationship between an employee and an employer. It is thought that there remains such a serious power advantage of employers over workers that government must intervene to regulate and protect workers from the abusive tendencies of their employers. This legal protection is even more important for young workers. Young workers continue to develop their physical, social and mental skills and judgment. They may find it more challenging to protect themselves from injury or overwork. Unscrupulous employers in an otherwise unregulated, competitive free market – at least in theory – may seek to take advantage of young people wanting to work and earn income by paying and training them less while working them harder and in more dangerous tasks. Youth are perhaps the most at risk of falling into such exploitation.

Historically, this phenomenon occurred during the industrial revolution. The story of *Oliver Twist* can act as a good example of youth exploitation driven by capitalistic myopia. *Oliver Twist* was published in 1836, three years after the *Factories Act* of 1833 was passed in England. This legislation limited children's work hours, but was only the first step in protecting young workers. Since then, youth workers have been protected by legislation, especially in the developed world.

While youth are at risk of exploitation and disadvantage in the workplace, there is a value, indeed a social necessity, in youth learning the discipline of paid work and its benefits. Historically, this phenomenon occurred during the industrial revolution. The story of *Oliver Twist* can act as a good example of youth exploitation driven by capitalistic myopia. Youth employment is an essential bridge into adult employment. Employment provides not only financial support, but also a contributory role in society. It can furnish a great sense of self-worth and dignity. (*Re: Public Service Employee Relations Act*, (Supreme Court of Canada, 1987)) Youth work legislation seeks to strike a balance between allowing for youth to learn, gain experience and earn some income on one hand, and protection from obvious employer exploitation and injury on the other hand.



## Federal Legislation

Child welfare and employment are within provincial jurisdiction in the Canadian Constitution. This means that, by far, most of the young worker legislation is created at the provincial level. This means each province has enacted different legislation according to its own priorities, standards and coverages. These are briefly reviewed below and in greater detail in the chart that is referenced later in this article.

The federal government also sets standards for young workers within its jurisdiction, referred to as ‘federally regulated industries.’ While these federal rules are mirrored in provincial legislation, remember that the federal government regulates only a tiny percentage of Canadian workers. Almost all workers are regulated by provincial legislation. These include the federal public service, banks, railways, nuclear energy, shipping and interprovincial trucking, telecommunications, aeronautics and so on. The [Canada Labour Standards Regulations](#) state that persons under 17 years of age may be employed provided that:

- they are not required by provincial law to attend school;
- the work is not likely to endanger their health or safety;
- they are not required to work underground in a mine or in employment prohibited for young workers under the *Explosives Regulations*, the *Nuclear Safety and Control Act and Regulations*, or the *Canada Shipping Act*; and
- they are not required to work between 11 p.m. on one day and 6 a.m. on the following day.

While these federal rules are mirrored in provincial legislation, remember that the federal government regulates only a tiny percentage of Canadian workers. Almost all workers are regulated by provincial legislation.

## Provincial and Territorial Legislation

In this [chart \(PDF\)](#), we show how each province and territory protects young workers. Each province does it in a slightly different way. The common element among provinces is that the child’s education, health and well-being are protected foremost. Youth work legislation seeks to strike a balance between allowing for youth to learn, gain experience and earn some income on one hand, and protection from obvious employer exploitation and injury on the other hand. Parents, employers, directors, teachers, and government labour officers must be aware of their provincial legislation and standards and to do their part to help protect young workers.

Most provincial and territorial law is contained in ‘minimum employment standards’ Acts, Codes and Regulations. For example, in Alberta, the [Employment Standards Code](#) covers hours of work (Division 3). The Alberta [Employment Standards Regulation](#) covers minimum wage (Part 2). Minimum wage rates per hour vary across the nation but all are around \$9 – \$11. Other specific laws regarding adolescents and young persons are found in Part 5 of the Alberta *Regulation*. A few jurisdictions, notably Ontario, Saskatchewan and Yukon, set their limitations on youth employment in other statutes. Overall, young worker protections relate to minimum wages, working hours and types of jobs youth can perform.

## Some Highlights from Alberta

### Age Threshold for Young Workers

What is the legal classification of a young worker? Section 51 of the Alberta *Employment Standards Regulation* delineates two categories of young workers. In Part A, “adolescent” is an individual 12 to 15-years-of age. In Part B, a “young person” is any individual from 15-years-old to their 18<sup>th</sup> birthday. In Alberta, at least, a young



person is *older* than an adolescent. There are different rules for each category relating to kinds of work, hours, shifts, required supervision, etc.

Both adolescent and young person workers are entitled to the minimum wage, which is \$9.95 per hour in Alberta (section 9 of the *Regulation*). Adolescent and young workers also are entitled to all other minimum standards of employment relating to termination notice, holidays, shifts and vacation pay that are set out in the *Code*.

## Adolescent Employment

Adolescents are limited by the types of jobs and hours they are allowed to work. They can work outside of normal school hours as defined in the Alberta [School Act, RSA 2000, cS-3](#) if they are employed as a delivery person of small wares for a retail store, clerk or messenger in an office or retail store, delivery person for the distribution of newspapers, flyers, etc., or an occupation that is approved by the Director of Employment Standards. The employment must not be injurious to the life, health or welfare of the adolescent worker. The employer must complete a Safety Checklist and ensure compliance with it in order to employ an adolescent.

A parent or guardian must consent in writing to the employer for the adolescent to be employed. Adolescents must not work for longer than two hours outside of normal school hours on a day in which they are required to be at school, or work for longer than eight hours on a day in which they are not required to be at school. These restrictions on hours also relate to shifts, as no adolescent is allowed to work overnight from 9:00 p.m. to the following 6:00 a.m. Adolescents must also be constantly supervised by someone over 18 while at work. Adolescent employment in Alberta is set out completely in *Employment Standards Regulation*, section 52.

## Young Person Employment

Young persons, being slightly older than adolescents, enjoy more flexibility in work. There are no restrictions on the *type* of work for young persons. If a young person works in any retail business selling food or beverages, any other goods or in the hospitality industry during the period between 9:00 p.m. and 12:01 a.m., the young person must be supervised continuously by at least one other adult. From 12:01 a.m. to 6:00 a.m., no young person can work unless the employer receives written consent from a parent or guardian and the young person is under constant supervision of an adult.

In most cases where a violation occurs, the province typically issues a cease-and-desist order and demands financial restitution for the young worker, if applicable. [1] Most cases do not go to trial so there is no readily accessible public record. In 2009, at Edmonton's Capital EX summer fair, Shelby Amusement Services employed a 15-year-old who was found working alone, serving refreshments after 9:00 p.m. He worked until after midnight, also in violation of these laws. The teen's employer was found to have violated Alberta's *Employment Standards Code* and the *Employment Standards Regulation*. The employer faced fines up to \$300,000 for the violations. [2]

## A Glance at Three Other Provinces

### British Columbia

British Columbia does not separate young workers into two categories like Alberta. Overall, young worker protections relate to minimum wages, working hours and types of jobs youth can perform. Rather, this province places conditions of employment for children 12 to less than 15 years of age, unless they are in the entertainment industry, where they can work from the age of 15 *days*. A child must not work more than four



hours on a school day and more than seven hours on a non-school day unless the employer receives approval from the Director. They must not work more than 20 hours in a week that has five school days, and in any case, more than 35 hours in a week. A child may only work if under the direct supervision of a legal adult (someone at least 19-years-old). The entertainment industry in British Columbia has more rules regarding child workers, relating to chaperones, daily hour limits, split shifts and hours free from work. ([Employment Standards Regulation, BC Reg 396/95](#))

## Manitoba

Manitoba restricts the employment of children under 16 and between the ages of 16 and 18. In section 83(1) of the [Employment Standards Code, CCSM cE110](#), no child under the age of 16 may be employed without a permit issued by the Director. A child cannot be employed if under 12 years-of-age, or if the work adversely affects the child's well-being. Children under 16 years cannot work more than 20 hours during a school week or between 11:00 p.m. and 6:00 a.m. unless permitted by the Director. Children under 18 cannot work alone; they must be supervised between 11:00 p.m. and 6:00 a.m. and they may not be employed in certain stipulated industries.

## New Brunswick

Under its [Employment Standards Act, SNB 1982, c E-7.2](#), New Brunswick defines children as those under 16. No industrial undertaking, forestry, construction, hotel or restaurant work is permitted under the age of 14. Between 14 and 16, work may be performed that is not harmful, up to 6 hours in any day, or up to 3 hours on any school day outside of school hours, and not between 10:00 p.m. and 6:00 a.m. Directors' permits may allow exceptions.

## Conclusion

Legislation exists in all 14 jurisdictions to protect young workers in Canada. The rules relating to the nature of work, number of hours and when they can be worked (not during school or overnight), the age brackets for classifying young workers, supervision requirements and Directors' overrides are all slightly variable across the country but they have similar intents, purposes and effects to protect the interests of young workers.

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### Notes:

1. B. Barnetson, [Effectiveness of Complaint-Driven Regulation of Child Labour in Alberta](#) (2010)
2. Employment Law Today, [Teen Employee Worked Too Late, Alone At Edmonton Fair](#) (2009)

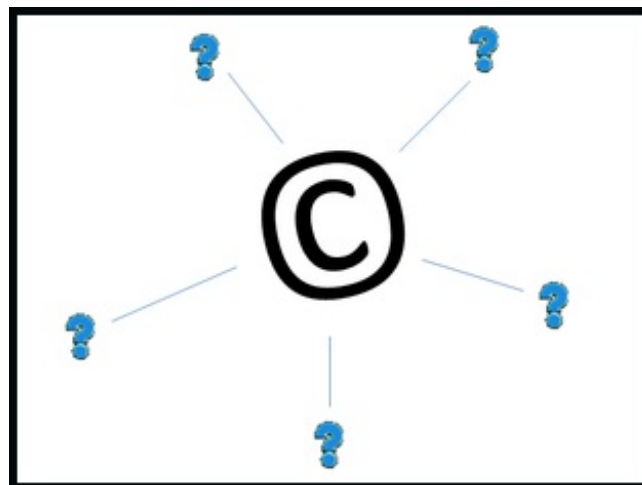


# Common Misconceptions about Copyright

As an intellectual property lawyer, I am often consulted by creators of works protected by copyright. Here are five of the most common misconceptions I have encountered in my practice, and my comments on them:

## **If a work is not marked with the © claim, it is not protected:**

Annotation of the copyright claim is not required by the Canadian [Copyright Act](#). Rather, the word “copyright” or the © marking is required by the [Universal Copyright Convention](#), followed by the year of publication (or if not published, the year of creation) and the name of the owner. Canada belongs to this Convention, as well as to the [Berne Copyright Convention](#), which does not require the marking.



Until recently, the United States was a member of the Universal Copyright Convention, but not the Berne Convention, and so use of the copyright claim was necessary to protect works that would be published in a U.S. market. Now that the U.S. has joined Berne, the use of the copyright claim or © marking for U.S.-destined works is not imperative.

Even if not required, however, the © annotation is useful in that it serves as a well-recognized notice to all that the work is copyright-protected.

## **If a work is not protected under the *Copyright Act*, it is not protected:**

Copyright in a work arises not by virtue of *registering* it, but rather by virtue of *creating* a fixed work, provided that the creator was a citizen of Canada, or of another country which belongs to the same international conventions to which Canada belongs (Berne, Universal, etc.), or of any country to which the federal government has extended protection. Therefore in Canada, copyright registration is not mandatory to the enjoyment of copyright by a creator.

However, one significant advantage to copyright registration is that it can greatly assist a creator in cases of copyright infringement. The Certificate of Registration is proof in a court of law that copyright subsists in a work, and that the named owner owns that copyright. Submission of the Certificate of Copyright registration in court creates a rebuttable reverse onus of proof, which is highly useful in an infringement claim. A creator can register copyright in his or her work by filing either a paper document (government fee = \$65), or an electronic one (government fee = \$50). For more information, and to click through the application process, visit the federal government website, [www.cipo.ic.gc.ca](http://www.cipo.ic.gc.ca). Unlike the U.S. Copyright Office, no copy of the subject work is to be submitted with the application to the Canadian Copyright Office.

## **Copyright protects ideas:**

In fact, copyright only protects the *expression* of the ideas, not the ideas themselves. Here is a partial list of what is *not* covered by copyright, apart from ideas: titles, themes, catch-phrases, names, short word combinations, slogans, short phrases, methods (e.g. a method of teaching), plots or characters, and factual information. Facts, ideas and news are all considered part of the “public domain”, i.e. they are everyone’s



property and may be used freely by all.

**Once you sell the copyright in your “work” you lose all control over it:**

Unless he or she has waived them, a creator still has certain rights in respect of the work, called “moral rights.” There are three types of moral rights:

1. The right to prevent distortion, mutilation, or other modification of a work that is prejudicial to the honour or reputation of the creator, even if another person owns the copyright in the work;
2. The right of the creator to have his or her name associated with the work, or to remain anonymous;
3. The right of a creator to prevent his or her work from being associated with a product, service, cause or institution in a way that is prejudicial to the honour or reputation of the creator, without his or her permission.

Unlike copyright, moral rights cannot be assigned. However, moral rights can be waived.

**Up to 10% of a work can be taken without risking an infringement action:**

Copyright is deemed to be infringed by any person who, without the copyright owner’s consent, does anything that only the owner has the right to do. Taking a “substantial part” of a work is one type of infringement. What constitutes the taking of a substantial part of a work is different depending upon the type of work in question. There are no hard and fast rules about the number of words, the percentages of text, or the like. For example, the lyrics and melody of a short refrain in a song may constitute far less than 10% of the musical work, but the taking of it without consent could well constitute infringement. In short, whether the taking is substantial is a matter for courts to determine on a case-by-case basis.

The foregoing are general comments only. For an analysis applying the law to any specific fact situation, it is critical to consult a lawyer.

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# Copyright in the Classroom

Copyright, a category of intangible proprietary rights, has always been an important consideration in the delivery of Canadian primary and secondary education (“K – 12”). This is because K – 12 educators and students make up two prominent groups of copyright *users* – those who use the property of copyright *owners* for educational purposes. But why has copyright law become so popular within the K – 12 sector, both as a study topic and topic of hot debate? The answers to these questions may be complex, but they are undeniably relevant to both educators and students alike now more than ever before.

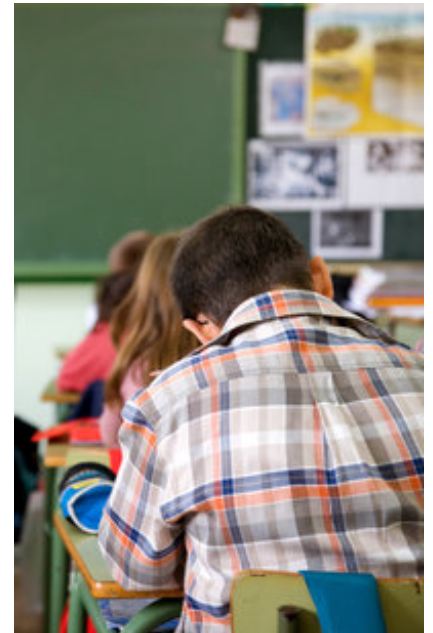
What exactly is copyright? In the simplest terms, “copyright” means “the right to copy.” In general, *copyright* means the sole right to produce or reproduce a *work* or a substantial part of it in any form.

What then is a work? The legal definition holds that a work is the product of original creative effort, or *authorship*, reduced to fixed expression in a tangible form. In practical terms, a work subject to copyright may fall within any one of the following categories: literary, artistic, musical, dramatic, photographic, sound recording, film, live performance and even software code. Copyright includes the sole right to perform the work or any substantial part of it or, in the case of a lecture, to deliver it. If the work is unpublished, copyright includes the right to publish the work or any substantial part of it.

When delivering K – 12 educational content, educators necessarily use works subject to copyright protection. In practical terms, a work subject to copyright may fall within any one of the following categories: literary, artistic, musical, dramatic, photographic, sound recording, film, live performance and even software code. Equally, when students receive educational content and further pursue educational goals set for them, they use works subject to copyright protection. These are simple truths. However, firmly placed in the background of our educational system is a *balancing* of legal rights. Put simply, copyright law seeks to find a balance between opposing interests. On the one side are the interests of copyright owners; those who have created works and are seeking both commercial return and creative control over those works. On the other side are the interests of users of copyrighted works; those who seek to use existing works to build and create new works for the amelioration of both individual and society.

Copyright owners have long used fee-based copyright permission regimes to allow for use of copyright-protected works within the K – 12 sector. Use of copyright-protected works without such permission is known as *infringement* unless the use can be justified under one or more legal heads of *exceptions to infringement*.

However, the context in which K – 12 education is carried out has changed – and continues to change rapidly. First, in this digital age, copyright-protected works may be used and disseminated more freely than ever before. Both copyright owners and users have benefited from this change, but the traditional distribution models for copyright-protected works have been disrupted. This disruption has caused both sides of the issue to focus on the idea of *technological neutrality* in an attempt to rebuild the balance of rights in the digital dimension. However, the result of such efforts remains uncertain, due entirely to the head-on challenge digital media presents to the idea of control over copying.





Second, copyright law in Canada has recently undergone an interpretive shift by virtue of a suite of decisions handed down by the Supreme Court of Canada in July, 2012. One decision in particular, [\*Alberta \(Education\) v. Canadian Copyright Licensing Agency \(Access Copyright\) 2012 SCC 37\*](#) (“*Access Copyright*”) is most relevant to the K – 12 sector. The *Access Copyright* decision introduced a new exception to copyright infringement, the *educational purpose*, as part of Canada’s general law of *fair dealing with copyright*. Thereby, the *Access Copyright* decision undoubtedly affirmed a place for user rights in the context of Canada’s copyright law and recalibrated the traditional balance between copyright owners and users.

Building upon its earlier approach to *fair dealing with copyright* as one that requires a ‘large and liberal’ interpretation of *research* and *private study* (both exceptions to copyright infringement), the Supreme Court made it clear that the relevant perspective is that of the copyright user when considering the permissible scope of fair dealing. The *Access Copyright* decision introduced a new exception to copyright infringement, the *educational purpose*, as part of Canada’s general law of *fair dealing with copyright*. The Court found that if a copyright user is engaged in research or private study when using copies of copyright-protected works, the copier of such works (on the facts, educators who distributed copies of content excerpted from text books) may also be considered to be engaged in research and private study. In other words, the copier’s actions should not be artificially cleaved from the actions of the copyright user if the predominant purpose of the copyright user is allowable under the scope of fair dealing.

The *Access Copyright* decision clarifies that educators of primary and secondary students, when copying short excerpts of copyright-protected works and providing such copies for students’ research and private study, do not engage in a separate purpose of “instruction”. Rather, by providing such copies, the “teacher/copier shares a symbiotic purpose with the student/user who is engaging in research or private study”.

Key to the Court’s ruling in the *Access Copyright* decision is the finding that educators “have no ulterior motive when providing copies [of reading materials] to students”. In other words, an educator is engaged in the same allowable purposes under fair dealing as his/her students. The educator’s purpose, along with his/her students’ purpose, is fair.

However, the *Access Copyright* decision does not disturb the test for *fairness* in fair dealing as set out by the Court in its earlier decisions.

For instance, the majority of the Court agreed that the educators in question restricted themselves to copying short excerpts from copyright-protected works. Key to the Court’s ruling in the *Access Copyright* decision is the finding that educators “have no ulterior motive when providing copies [of reading materials] to students”.! A short excerpt, while not expressly defined, is measured upon examination of the proportion between the excerpted content and the entire work. Further, the Court emphasized the importance of maintaining a distinction between the amount of the copying from one work (the ‘proportionality’ factor) and the character of the copying (the ‘cumulative’ factor or the aggregate number of pages distributed to multiple students). By focusing only on the cumulative amount of copying for multiple students, one may overlook that only a limited portion of a copyright-protected work is actually copied. When considering alternatives to the copying and the effect on the work caused by the copying, the Court underscored the limited resources available to primary and secondary schools. The Court found that it was not reasonable in all of the circumstances for schools to purchase multiple copies of text books. The reproduction of short excerpts for students’ use did not replace a thriving market for text book sales.

In the result, we are left with an interpretation of copyright law that favours users engaged in an educational purpose that is fair. What does this mean in practice for our educators and students? Clearly, it does not mean that use of copyright-protected works is without legal bounds. Instead, it means that copyright users should be knowledgeable about the proprietary rights that exist in the background of everyday learning activities so that they may exercise their user rights to the fullest extent possible. Such knowledge and the resulting confidence in user rights only benefits the educational mandate.



## Balancing Copyright and Privacy Rights

Many Internet users assume that they can surf the Internet and remain anonymous. Nothing could be further from the truth. Where serious harm is done by an anonymous Internet user the injured party is often able to compel third parties to disclose who the Internet user is.

In Canada and other countries this occurs, among other means, under a *Norwich* Order. Such an order is a discovery mechanism occurring before a lawsuit is filed that compels a third party to provide certain information in its possession.

Recently, the courts have begun to become aware that sometimes plaintiffs used this information to seek to intimidate the alleged defendants to agree to settlements. Where such intimidation tactics are based on claims of copyright infringement, such plaintiffs have been described as 'copyright trolls'. As a result, the courts have begun to set limits on the information about the anonymous Internet user and balance the needs of justice and expectations of privacy.



To bring some context to the discussion it is important to note that, over the past few decades, there has been a continuing drive to expand copyright protection with new and additional rights, longer terms, and increasingly, to provide for statutory damages that bear no resemblance to the actual damage caused. Statutory damages are amounts that a court can award without the plaintiff having to prove any actual harm. With the increase in such rights of copyright owners there has begun a new troubling development, copyright trolls.

Copyright trolls refer to a business model where an alleged copyright holder sends demand letters to a large number of alleged defendants and asserts infringement of copyright and seeks to assert a claim for fairly significant damages which it seeks from the alleged defendant to settle the case. In Canada and other countries this occurs, among other means, under a *Norwich* Order. Such an order is a discovery mechanism occurring before a law suit is filed that compels a third party to provide certain information in its possession. . The plaintiff often obtains details of the alleged defendant's identity under a *Norwich* Order. In many cases the third party (often an ISP) typically does not defend and so there is no one looking at the interests of the alleged defendants. Such persons may be innocent of the alleged infringement, for example, as the account holder of an IP address may not in fact be the infringer or the taking may not in some cases be infringement.

The Federal Court in *Voltage Pictures LLC v. John Doe and Jane Doe*, 2014 FC 161 (not yet published online), provides insight into the growing business model of copyright trolls, giving rise for the courts to be more mindful of playing a role in this potentially abusive behaviour.

In the *Voltage* case, while the ISP did not participate in the proceeding, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) was granted leave to intervene and opposed the motion, filing evidence as to copyright trolling behaviour and directing the court's attention to U.S. and U.K. jurisprudence.

The CIPPIC evidence was that, in a number of cases, the demand letters may be quite misleading and may misstate the rights or positions of the parties. Often, the alleged defendants will pay the demanded amount, or settle for some payment as they do not want to incur the cost of litigation, or are embarrassed (in the case of allegations pertaining to infringement of pornographic videos).



## **Norwich Orders**

A copyright owner may not know the identity of an infringer and may require the assistance of a third party to obtain that key information.

Such an order is an extraordinary order and is discretionary. In [BMG Canada Inc. v. Doe, 2005 FCA 193 \(CanLII\)](#) the Federal Court identified the following principles as governing a decision to grant such relief:

- a plaintiff must have a *bona fide* case;
- a non-party must have information on an issue in the proceeding;
- an order of the court is the only reasonable means of obtaining the information;
- fairness requires that the information be provided prior to trial; and
- any order made will not cause undue delay, inconvenience or expense to the third party.

A copyright owner may not know the identity of an infringer and may require the assistance of a third party to obtain that key information.

The Court also addressed privacy arguments by noting that the enforcement of the plaintiff's copyrights outweighs the privacy interests of affected Internet users. The Court did note that the courts must ensure that, in granting a *Norwich* Order, privacy rights are invaded in the most minimal way possible.

## **Limitations on a Norwich Order**

The Court reviewed the principles arising from U.S. and U.K. jurisprudence dealing with similar orders, and the abuses and egregious tactics identified where no safeguards were put in place in such orders. Judicial reaction to the copyright troll behavior has included this observation "So now, copyright laws originally designed to compensate starving artists allow starving attorneys in this electronic-media era to plunder the citizenry."

The Court also noted that the damages claimed in these mass infringement cases often far exceed any actual harm that may have occurred.

The Court identified a non-exhaustive list of considerations for a Canadian court to consider in these cases:

- the plaintiff must demonstrate a *bona fide* case;
- safeguards must be put in place so that alleged infringers receiving any "demand" letter from a party obtaining a *Norwich* Order not be intimidated into making a payment without the benefit of understanding their legal rights and obligations;
- when issuing a *Norwich* Order the court may retain authority to ensure that it is not abused by the party obtaining it and can impose terms on how its provisions are carried out; Copyright trolls refer to a business model where an alleged copyright holder sends demand letters to a large number of alleged defendants and asserts infringement of copyright and seeks to assert a claim for fairly significant damages.
- the plaintiff enforcing the *Norwich* Order should pay the legal costs and disbursements of the innocent third party;
- Specific warnings regarding the obtaining of legal advice or the like should be included in any correspondence to individuals who are identified by the *Norwich* Order;



- limiting the information provided by the third party by releasing only the name and residential address but not telephone numbers or email addresses;
- ensuring there is a mechanism for the court to monitor the implementation of the *Norwich* Order;
- ensuring that the information that is released remains confidential and not disclosed to the public and be used only in connection with the action;
- requiring the party obtaining the order to provide a copy of any proposed “demand” letter to all parties on the motion and to the court prior to such letter being sent to the alleged infringers;
- the court should reserve the right to order amendments to the “demand” letter in the event it contain inappropriate statements;
- letters sent to individuals whose names are revealed pursuant to a court order must make clear that the fact that an order for disclosure has been made does not mean that the court has considered the merits of the allegations of infringement against the recipient and made any finding of liability;
- any “demand” letter should stipulate that the person receiving the letter may not be the person who was responsible for the infringing acts;
- a copy of the court order or the entire decision should be included with any letter sent to an alleged infringer; and
- the court should ensure that the remedy granted is proportional.

The Court noted that the remedy was discretionary, and while there was some evidence that Voltage had been engaged in litigation which may have had an improper purpose, the evidence was not sufficiently compelling for the Court to make a definitive determination of Voltage’s motive. Hence, with the *BMG* factors being met, the Court granted the order, albeit with safeguards.

The rise of copyright trolling behaviour has resulted in the courts balancing privacy and principles of justice to put in place safeguards while still providing a remedy available for plaintiffs pursuing infringements of their rights.



# Viewpoint 38-5: Ten Steps to Creating Safe Environments for Children and Youth

**A Risk Management Road Map to Prevent Violence and Abuse for all organizations that intersect with young people**



*What constitutes abuse? violence? bullying? harassment? Why do bad things happen in even the best organizations? What is the duty of care and what is your organization's liability? How can you help protect every young person your organization serves?*

Organizations must be able to answer these questions.

RISK MANAGEMENT is the process of developing a culture, policies and structures to diminish the risk of an incident that would harm a vulnerable person.

Effective risk management requires comprehensive prevention planning. This means identifying and analyzing potential risks and the harm they can do, developing a comprehensive plan to control the risk, and putting policies and procedures in place to properly handle an occurrence and reduce the negative effects on both an individual and the organization.



CANADIAN RED CROSS is a national leader in helping organizations manage the risk and protect young people. Its ten-step process that encompasses a constellation of programs and services called RespectedED. These include presentations, workshops, training, organizational consulting and manuals on prevention. All can be tailored to your specific requirements. Prices vary, depending on the services required. Take Ten Steps, and



make the journey to safer environments for all of our young people!

For more information contact: Monique Methot, 780-702-2543, [monique.methot@redcross.ca](mailto:monique.methot@redcross.ca)



# Navigate Legal Information with Alberta Law Libraries: Copyright

If you are creator or publisher of original creative works, you will want to know about copyright law. The digital world has made the practical application of copyright more complicated than in the past. What about downloading and file sharing, what about [digital rights management](#)? And, in our shrinking world of the Internet, what happens when works of art are disseminated outside of Canada?



These are just some of the questions that may arise for creators and publishers of works that are protected by copyright. This article will provide some guidance on how to find information that answers your questions.

## The Law

Copyright law is concerned with the rights to control the production, reproduction and dissemination of original creative works. These rights in Canada are protected by virtue of the [Copyright Act, R.S.C., 1982, C-42](#). The statutes and regulations of Canada can be found online and the official source is at the [Justice Laws Website](#).

Canadian law is adjudicated under a common law system, with the exception of Quebec. In a common law system, the courts are the arena in which adjudication on issues of law occurs. The decisions of the courts, called case law, are the authoritative guide to the application of the law in particular fact situations. So, for a thorough understanding of copyright law, a review of the case law is needed. You may have more practical questions about registering copyright, or how to manage copyright. Reviewing the key cases, especially those of the Supreme Court of Canada, will help you to understand how the law is applied. You can search for free and review case law through the [Canadian Legal Information Institute \(CanLII\) database](#). There are also databases for which a paid subscription is needed, such as Westlaw Canada and Quicklaw. Alberta Law Libraries' locations have these databases available for use in the library ([Quicklaw](#) in Edmonton and Calgary, and [Westlaw](#) in our other branches).

## Understanding and Applying the Law

Some legal issues will not have gone through the courts; some because a dispute has not arisen, and some because the particular point of law is not controversial. In those situations, you may want to review some secondary legal materials. These are resources like textbooks, articles, blogs and other commentary written by people who are experts in the area of copyright law or the broader area of intellectual property. These resources are not law, but they will have been written based on expert study and experience in the area of law.

You may have more practical questions about registering copyright, or how to manage copyright. You can find resources such as the [Canadian Intellectual Property Office website](#) to learn about registration of copyright and find related information. There are also certain industry-specific resources that may help. For example, the [Society of Composers, Authors and Music Publishers of Canada \(SOCAN\)](#) collectively provides a service that represents the Canadian performing rights with respect to composers and publishers of music. Its website provides information about copyright as well as other matters that may be of interest. Examples of associations that may provide resources for authors are The [Writers Union](#) of Canada and the [Canadian Authors Association](#).



At the international level, the [World Intellectual Property Organization \(WIPO\)](#) has a website that includes an extensive collection of international materials including treaties and laws. Under its *About IP* tab, you will find a section specifically on [Copyright](#).

## **Alberta Law Libraries can help**

At Alberta Law Libraries, we are legal information experts who can help you find resources and show you how to do legal research. Alberta Law Libraries is a network of libraries with services and materials focused on legal materials and research. Our [website](#) can help guide you through our collection and point you to additional sites that may be helpful in your research. Check out our [Intellectual Property Research Guide \(PDF\)](#) for a starting point to researching copyright law. Check the [Find Us](#) tab for our locations and hours.



# Professional Bodies are Subject to Alberta Human Rights Act

A recent Human Rights Tribunal decision, *Mihaly v The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1* (*CanLII*), (“*Mihaly*”) about the actions of the Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA), has sparked a fair bit of critical commentary. The issue of recognition of foreign professional credentials has emerged over the past few years, as many are concerned about the number of highly trained individuals who are not working in their chosen fields across Canada.



Mr. Mihaly was born in Czechoslovakia and has Masters degrees from the Slovak University of Technology in Bratislava, and from the Institute of Technical Technology in Prague. APEGGA received his application and asked Mihaly to write the National Professional Practice Exam (NPPE). It tests knowledge of law, ethics, professionalism, professional practice, professional responsibility, and understanding of the governing legislation. Later, APEGGA added three confirmatory exams plus a course in Engineering Economics or the Fundamentals of Engineering Examination (“FEE”) to its requirement. These additional exams were required because the educational institutions Mihaly attended were listed on the Canadian Council of Professional Engineers Foreign Degree List (“FDL”).

After several years of negotiations with APEGGA, and three times failing the NPPE, Mihaly did not write the required additional exams, and on August 5, 2008, filed a complaint with the Alberta Human Rights Commission. He alleged that he was discriminated against when he was denied registration as a Professional Engineer (PEng) and that the requirements imposed upon him by APEGGA for registration were contrary to the *Alberta Human Rights Act RSA 2000 c A-25.5* (“AHRA”).

Section 9 of the AHRA provides as follows:

No trade union, employers’ organization or occupational association shall

- (a) exclude any person from membership in it,
- (b) expel or suspend any member of it, or
- (c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or member.

Section 44(1)(j) defines “occupational association” as meaning:

“occupational association” means an organization other than a trade union or employers’ organization in which membership is a prerequisite to carrying on any trade, occupation or profession;

An individual cannot practice engineering in Alberta unless he/she has been approved for registration as a PEng, licensee, permit holder or certificate holder by APEGGA under the *Engineering and Geoscience Professions Act RSA 2000 c E-11*. APEGGA admitted Mihaly under the discretionary category of an “Examination Candidate”, thus Mihaly was required to meet the following conditions as set out in the *Engineering and Geosciences Professions General Regulation*.

13(1) A person who meets the following requirements and applies to the Registrar for registration is entitled to



be registered as a professional member:

...

(e) the applicant meets one of the following requirements:

..... After several years of negotiations with APEGGA, and three times failing the NPPE, Mihaly did not write the required additional exams, and on August 5, 2008, filed a complaint with the Alberta Human Rights Commission.

(iii) the applicant is admitted as an **examination candidate** and

(A) has completed the examinations referred to in section 8(b), and

(B) has obtained at least 4 years of experience in work of an engineering or geoscientific nature that is acceptable to the Board of Examiners;

While APEGGA argued that the Commission did not have jurisdiction to hear a complaint about discrimination based on “place of origin of academic qualifications”, Tribunal Chair Jiwaji concluded that “place of origin” is broad enough to include any adverse treatment based on one’s foreign credentials.

Evidence at the hearing indicated that Internationally Educated Graduates (IEGs) who come from countries that have not entered into Mutual Recognition Agreements (MRAs), with APEGGA (i.e., those in Europe, Africa and Asia), are assessed using an Examination and Experience Standard and the Fundamentals of Engineering (FE) exam. If the applicant has other attributes, such as a Masters or Doctoral degree in Engineering completed at a Canadian institution or a country with which there is a MRA, then APEGGA may consider waiving the exams. In addition, exams may be waived if the applicant has ten years of progressively responsible engineering experience acceptable to APEGGA. In addition, all applicants are required to pass the NPPE.

Mr. Mihaly alleged that he had been adversely impacted by the APEGGA’s process, in that he had to successfully complete the confirmatory exams and the FEE, while engineering graduates from Canada and those countries with which APEGGA has MRAs do not. This amounts to *prima facie* discrimination on the basis of place of origin. Chair Jiwaji concluded that the underlying assumption made by APEGGA is that engineers with qualifications from foreign countries with which APEGGA has no MRAs have qualifications that are not equal to Canadian engineering accreditation standards. Further, the complainant need only show that “place of origin” was a factor in the adverse impact experienced by Mihaly. Also, many Eastern European and immigrants from Africa and Asia experience disadvantage and discrimination in the workforce because of language, culture and racial prejudice. The imposition of additional exams and/or requirements without appropriate individualized assessment restricts these immigrants from working in their professions and perpetuates disadvantage in these groups.

Because Chair Jiwaji found that a *prima facie* case of discrimination was made out, APEGGA had the opportunity under the *AHRA* to justify its actions under section 11, which provides that a contravention of the *AHRA* will be deemed not to have happened if “the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.” The regulator must show:

**1. Rational Connection:** Chair Jiwaji noted that APEGGA’s Board of Examiners had exercised their discretion to place Mihaly in the category of Examination Candidate. This meant that he would have been registered as a PEng if he had satisfied the requirements set out in section 13(1)(e)(iii) of the regulation (above). Since APEGGA assesses the educational qualifications and the experience of international engineers in order to ensure that the public is protected from harm, using the Examination Standard and the Experience Standard as adopted to ensure safety and competency are rationally connected to APEGGA’s functions.



**2. Good Faith:** Chair Jiwaji held that APEGGA adopted the standards in good faith.

**3. Standard IS Reasonably Necessary:** Finally, Chair Jiwaji analyzed whether the standards **are** reasonably necessary to the accomplishment of the legitimate work-related purpose. APEGGA must show that the standards used are reasonably necessary for the accomplishment of protecting the public and ensuring that IEGs perform competently.

Chair Jiwaji noted that in considering whether the Examination Standard is reasonably necessary to accomplish APEGGA's purpose, one must examine the purpose and process followed in preparing the FDL. The original purpose of the List was to provide Canada Immigration information for its point system to assess the suitability of engineers immigrating to Canada. The FDL process does not look at particular engineering programs at the institutions and assess them. Chair Jiwaji noted that this process is a "poor substitute for directly assessing the education of IEGs who come from many different countries." It is also insufficient as a measurement of what is required to correct a perceived deficiency as required in the legislation. **The imposition of additional exams and/or requirements without appropriate individualized assessment restricts these immigrants from working in their professions and perpetuates disadvantage in these groups.** APEGGA must use current, reliable and more detailed information on institutions. The crucial categorization of qualifications must not be based on secondary information using a tool that was originally developed for immigration purposes.

The Fundamentals of Engineering Exam ("FEE") is prepared in the United States. It parallels the Canadian Accreditation Standard. However, the exam fails to take into consideration an individual's background, experience and training. Under the regulations, the exams are instituted to correct a "perceived academic deficiency." Because APEGGA does not perform a meaningful individualized assessment of an engineer's skills and experience, and the exams chosen are related to the particular engineering discipline the document review indicates the applicant falls under, these are not for the purpose of correcting a "perceived academic deficiency". Further, the reviews of Mihaly performed by APEGGA were not to identify a deficiency in his academic credentials so that recommendations could be made to cure or correct any perceived deficiency in knowledge and/or training.

Mihaly was also required to take the NPPE, which he took three times and failed. There was no evidence that APEGGA explored any alternatives to the exam or offered any courses or instructions for exam preparation. Once again, there is a "one size fits all" approach like that taken with the FEE, which is particularly unhelpful to foreign trained engineers.

Chair Jiwaji held that APEGGA must explore other evaluation methods that are less discriminatory, yet allow engineers to practice in a competent and reasonably safe manner. APEGGA had not demonstrated that it had properly considered alternatives or that it would suffer undue hardship by exploring or implementing alternatives to the Examination Standard.

With respect to the Experience Standard ("one year Canadian experience"), Chair Jiwaji said that this standard fails to consider the "serious challenges foreign professionals experience when looking for employment in the engineering field when the applicant is not a professional engineer or otherwise". He concluded that the Examination Standard and the Experience Standard used by APEGGA used to assess educational credentials, without more individualized assessment or exploration of other options constitutes discrimination which cannot be justified under the *AHRA*.

Chair Jiwaji ordered APEGGA to:

- review Mihaly's transcripts and experience in direct consultation with his educational institutions in order to better identify his skills and qualifications;



- grant Mihaly the option to challenge specific examinations in areas where he is not granted an exemption by APEGGA;
- form a committee including foreign trained engineers to explore ways to assess and correct any of Mihaly's deficiencies;
- match Mihaly with a Mentor to help guide him in integrating into engineering;
- direct Mihaly to networking resources with other foreign trained engineers; and
- direct Mihaly to community resources that will increase his fluency and facility in English language.

APPEGA (now APEGA) is appealing this decision to the Court of Queen's Bench.

At its core, the decision by Tribunal Chair Moosa Jiwaji did not take any power away from APEGA or order it to give Mihaly PEng status. The decision was one about fairness towards foreign engineers in that APEGA should re-evaluate its procedures and systems in determining whether or not they are fair to all.

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# Vicarious Liability: The Legal Responsibility of Employers

*"It is right and just that the person who creates a risk bears the loss when the risk ripens into harm."*  
 - *Bazley v. Curry*, 1999 CanLII 692 (SCC)

## Introduction

After the massive train derailment disaster last summer in Lac Mégantic, Quebec, the chief executive of the train company was roundly criticized for what appeared to be placing the blame for the calamity on an employee. True, that employee may have been personally responsible in a direct sense, but his large corporate employer is the one who hired, trained and supervised him and made money from his service. The employer is the person who chose to make a profit by running highly inflammable crude oil through the town that night. The public refused to allow the employer to deflect all blame and accountability to the worker.



As it turns out, legal responsibility operates in the same way. Vicarious liability holds employers accountable for the wrongful negligent or intentional tort actions of their employees, while they are acting in the course of their employment. Put another way: one who is injured by an employee who is working at the time for an employer can sue both the employee (as the principal person responsible in law) *and* the employer (who is deemed by the law to be indirectly, or vicariously, responsible for the same injury).

## Rationale

There are at least three reasons for this rule:

Vicarious liability holds employers accountable for the wrongful negligent or intentional tort actions of their employees, while they are acting in the course of their employment.

1. by hiring employees, the employer creates the risk of harm to third parties by its employees' negligence. Where it benefits from the use of employees, the employer should also accept all the risk that comes with those employees;
2. it provides an incentive for employers to exercise care in the selection, training and supervision of all employees. A business should see such "in the course of employment" liability as one of the many overall costs of doing business. An employer can insure against the risk of injury at lower cost than the victim. The rule also instills a sense of social responsibility; and
3. most employers have "deeper pockets" than their employees, which means that if the employee does not have sufficient resources to pay for the injury, the employer's superior economic position will help ensure the injured party will be properly compensated. We note, however, in some cases (such as the Lac Mégantic tragedy) even the pockets of employers and their insurers may not be deep enough to satisfy all claims. Some large scale incidents will drain and bankrupt a company.

The purpose of vicarious liability is to obtain a just and practical remedy for the victim so far as possible and to deter future harm.



Vicarious liability is sometimes referred to as strict, or no-fault, liability because the employer itself is not actually or personally at fault. Indeed, vicarious liability does not apply only to employers and employees. The law holds “one person responsible for the misconduct of another because of the relationship between them,” ([eText on Wrongful Dismissal and Employment Law](#)) such as a parent and child and sometimes, spouses. We will focus on the employment context.

## ***Bazley v. Curry***

Up to 1999, the *Salmond* “scope of employment” test meant that the employee was doing what she was told to do. It did not matter *how* one did that work. The employer was vicariously liable for: (1) employee acts authorized by the employer; and (2) unauthorized acts related to the work. If the employee committed a tort while doing the job the employer was liable.

In [Bazley v. Curry](#), the Supreme Court of Canada in 1999 reconsidered the contentious second basis of liability; whether vicarious liability should be imposed on the employer when the employee’s act was only “coincidentally linked” to the job. The purpose of vicarious liability is to obtain a just and practical remedy for the victim so far as possible and to deter future harm. The new test would be whether the employee’s wrongful act was “sufficiently related” to conduct authorized by the employer. That is to say, to hold an employer legally responsible, one would have to show “a significant connection between the creation or enhancement of a risk and the wrong.” Some relevant factors are:

- a) the opportunity the employer gave the employee to abuse his power;
- b) the extent to which the wrongful act may have furthered the employer’s aims (more likely to be committed by the employee);
- c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s business;
- d) the power conferred on the employee in relation to the victim; and
- e) the vulnerability of potential victims to wrongful exercise of the employee’s power.

In the *Bazley* case, the Children’s Foundation was a non-profit organization in British Columbia. It hired Curry to act as a substitute parent for troubled children, not knowing he was a pedophile. He acted as an actual parent would, including bathing them and tucking them in. However, he went further and took advantage of his position by sexually abusing a young boy, Bazley. The Children’s Foundation was found vicariously liable for Curry because the abuse arose from his job responsibilities to tuck children in for the night.

While the employer can be vicariously liable, the rogue employee can also be directly liable for the same wrong, both civilly and criminally, if the wrongful act is a criminal offence. In this case, Curry was also charged under the *Criminal Code* of Canada. An employee can also be terminated from employment for the wrong.

## **Vicarious Liability and the Moral Hazard Problem**

Employees know that their employers will be held vicariously liable to third parties for their wrongs. While they may be sued civilly for their wrongs, rogue employees know, as a practical matter, it is the employer who will pay for it, and the employee has less incentive to avoid the harm. Some employment contracts contain hold-harmless or indemnity clauses, but these offer little protection for employers, who are as likely to recover compensation from reckless, indifferent employees as injured third parties are able to recover damages.



## The Royal Oak Mines Case

We conclude with another tragic example that demonstrates the challenge of applying vicarious liability consistently. A strike occurred at Giant Mine, one of Royal Oak's mines. The strike quickly escalated into violence. Royal Oak wanted to keep the mine open, so it hired Pinkerton's security, as well as replacement workers. The workers were represented by CASAW Local 4, a local union that was a part of CASAW National.

There were a few minor incidents, including explosions. Then on September 18, 1992 Roger Warren, one of the miners on strike, slipped into one of the mine shafts and planted explosives, which killed nine miners. The families of the murdered miners sued, and were awarded \$10.7 million in damages. The companies involved were found jointly and severally liable. Warren was charged and convicted under the *Criminal Code* on nine counts of murder.

CASAW National was originally held vicariously liable for its local union CASAW Local 4. It appealed and that decision was overturned. The union was found *not* vicariously liable for the actions of Warren because the unions "are distinct legal entities which are not generally liable at law for the actions of the other." In this case, vicarious liability could be imposed only on the employer, not another party such as a union.

CASAW Local 4 also successfully appealed the ruling that it was vicariously liable. Despite Warren having done an act on his job site that related to mining, he was considered acting as a "rogue" member of the union. The Court said his union could not be held liable for that, ([Fullowka v. Pinkerton's of Canada Ltd., 2010 SCC 5 \(CanLII\), \[2010\] 1 SCR 132](#)) but it seems clear that Curry was a "rogue" employee too.

Each case will be analyzed separately to determine if there is sufficient relation between the wrongful act committed and the creation of a risk by the employer.



## A Brief Primer on Child Support: Part Two

This article is the second of a two-part series on the basics of child support. In the [first article](#) I talked about who can ask for support and who has to pay it. In this article, I'll talk about how much child support is paid, including how children's extraordinary expenses are covered.



### How Much Gets Paid as Support

Most of the time, the amount of child support payments is determined by looking up the payor's income, and the number of children child support is being paid for, in the [tables](#) attached to the [Child Support Guidelines](#). For example, someone with an income of \$58,000 per year who is supporting three children, would find his or her income in the table for three children and pay the amount set out, in this case \$1,093 per month.

There are some exceptions to this general rule that allow the court to order, or the parents to agree to, payment in a different amount than the Guidelines tables require:

- if the payor earns more than \$150,000;
- if the child is 18 or older;
- if the payor stands in the place of a parent to the child;
- if each parent has the primary residence of one or more siblings, called "split custody";
- if the payor has the children for 40% or more of their time, called "shared custody"; or
- if payment of the table amount would cause "undue hardship" for either the payor or the recipient.

In cases of split custody and shared custody, most of the time the amount paid is the difference between the parents' obligations under the Guidelines tables. In all other cases, the court and the parties can decide the amount that is fair and necessary to meet the child's needs.

The amount of support payable is usually adjusted once each year, to keep the amount of support payments in line with the payor's income.

### How Extraordinary Expenses Are Covered

Child support payments are meant to cover all of the payor's responsibility for a child's living expenses, from groceries to clothes to the child's share of the rent. The Child Support Guidelines require that both parents contribute to a child's extraordinary expenses. Parents cover the cost of extraordinary expenses, net of any deductions and benefits, in proportion to their incomes. These expenses are usually for big-ticket items like daycare, orthodontics, summer camp, school trips and extracurricular activities.

Not every large expense will qualify as an extraordinary expense to which both parents must contribute. In general, the court looks at the reasonableness of the expense in light of the parents' incomes and the child's needs. For example, hockey costs might be too expensive for a low-income family, but equally expensive tutoring might qualify as an extraordinary expense if the child is falling behind in class.

Parents cover the cost of extraordinary expenses, net of any deductions and benefits, in proportion to their



incomes. If Parent A has an income of \$30,000 and Parent B has an income of \$20,000, for example, Parent A's income is 60% of their combined incomes of \$50,000 and would pay for 60% of the net cost of a qualifying expense.

**Math:** To figure out how much each parent's proportionate share of extraordinary expenses is, add the parents' incomes together and divide each parent's income by their total income:

- Parent A's income      \$40,000
- Parent B's income    + \$20,000
- *Total income*            = \$60,000
  
- Parent A's income              \$40,000
- Total income                      ÷ \$60,000
- *Parent A's proportionate share*   = 0.67 or 67%
  
- Parent B's income              \$20,000
- Total income                      ÷ \$60,000
- *Parent B's proportionate share*   = 0.33 or 33%

## How Income Is Determined

For the purposes of child support, "income" means the payor's annual income from all sources, except for any spousal support, welfare payments or universal child care benefits he or she may receive. It includes the actual amount of dividends and capital gains, bonuses, taxable benefits and self-employment income. However, most of the time, the payor's income is the amount set out at Line 150 of his or her [income tax return](#) (PDF).

For the purposes of child support, "income" means the payor's annual income from all sources, except for any spousal support, welfare payments or universal child care benefits he or she may receive.

For people with incomes that change from year to year, the income used is the payor's income for the most recent complete tax year. This means that there can be a lag from one year to the next, so that, for example, the amount of support paid in 2014 is based on the payor's income in 2013.

The Child Support Guidelines also allow income to be imputed to the payor – to make an order for support based on a higher amount of income than the payor claims to have – if the payor is underemployed, has diverted income, unreasonably deducts expenses from his or her income, or lives in a place with a lower tax rate.

**Myth: You don't have to pay child support if you quit your job.** In fact, if a payor quits his or her job, or even starts working fewer hours, the court can make the payor pay child support based on his or her normal income.

For payors whose income fluctuates significantly from year to year, the Guidelines allow income to be calculated as a rolling three-year average, so that the amount paid in 2014 would be based on the average of the payor's income in 2011, 2012 and 2013, and the amount in 2015 would be based on the payor's income in 2012, 2013 and 2014. This helps to even out the amount payable, so that the recipient can budget more reliably and the payor is protected from paying high amounts of support in low-earning years.



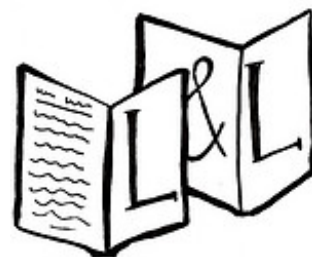
## Resources on Support

The federal government maintains a very useful [website](#) on child support, which includes a [look-up tool](#) for the table amounts of support. Alberta Justice also has some information about child support on its [website](#), including the [Child Support Recalculation Program](#).



## A Film Series: “Do the Rights Thing”

LawNow’s long-time Law and Literature columnist Rob Normey has been deeply involved in the development of a monthly film series called **Do the Rights Thing: Standing up for Human Rights in History**. The film series was developed by the **John Humphrey Centre for Peace and Human Rights** and is being presented in partnership with Whitemud Public Library, in Edmonton Alberta. The films explore difficult and pivotal moments in Canadian and American history where the need to speak up on behalf of fundamental rights and freedoms was of particular importance. They examine fascinating legal cases or legal situations as well as champions of rights who emerged in those challenging times.



The second session will be held May 25, 2014 at 2 pm and is titled **From Black Tuesday to Building Jerusalem in a Cold Climate**. It will include the film **Black Tuesday** (which explores the Estevan Mining Massacre of 1931) together with key episodes from the life of Tommy Douglas, in **Tommy Douglas: Keeper of the Flame**.

Following each of the films, there will be a dialogue and discussion led by Rob Normey, who has selected the films to highlight ground-breaking court cases and rights advocacy. He is a long-time constitutional lawyer who has practiced both private and public law, and has also been an avid supporter of human rights organizations and civil rights causes. Mr. Normey has previously taught Law and Literature and Constitutional Law at the University of Alberta for a number of years.



Kiefer Sutherland with a statue of his grandfather, Tommy Douglas, in Weyburn, SK, on Sep. 10, 2010

This initiative provides a free educational opportunity for those who are interested in history, law, and human rights and aims to provide a space to enhance knowledge, appreciation, and understanding of Canada’s historical evolution in the field of human rights through an interactive learning experience.

The first film in the series was presented on April 27: **Woody Guthrie: Ain’t Got No Home**. This was a fascinating look at the most significant songwriter in folk music, his troubled life and his moving songs on issues of freedom and fundamental rights. If you are interested to experience some of this, check the John Humphrey Centre website for Rob’s posting of 10 Great Songs on Freedom and Rights by Woody Guthrie and his Musical Friends and his suggestions for further reading.

Films to come as the series continues include:

### **Scottsboro: An American Tragedy** (PBS)

This is a landmark series of court cases, including rulings by the U.S. Supreme Court that dramatically altered American criminal justice. The case involved a tragic miscarriage of justice, brought about by racial discrimination. It takes a hard look at the desperate lives of Afro-Americans in the Deep South of the 1930s and beyond.

### **Los Canadienses** (NFB)

This film depicts the courageous young men who volunteered in the Mackenzie-Papineau Regiment formed in defiance of the Canadian government, to go to Spain to fight for democracy and against the fascists, who



would shortly thereafter continue their aggression and provoke a world war.

**The Chiefs: Sitting Bull (part 2 – his years in Canada) (NFB) and The Temptation of Big Bear (CBC) – individual scenes**

Two great chiefs displayed great wisdom and tried heroically to obtain recognition of their people's rights. Sitting Bull crossed the Medicine Line with some members of his tribe, hotly pursued by the U.S. Cavalry and became what we would today consider refugees, under the protection of Major Walsh of the North West Mounted Police. Big Bear was one of the greatest of the Cree chiefs and tried to hold out for more reasonable treaty terms for his people. The Frog Lake Massacre would lead to tragedy for him, despite his valiant efforts to prevent any bloodshed from occurring.

**On Guard for Thee: The Most Dangerous Spy (NFB)**

This film was directed by surely one of the greatest documentary film makers ever, Donald Brittain. This tells the dramatic story of the Gouzenko Affair, involving the Russian cipher clerk in Ottawa who initiated the Cold War and led the Canadian authorities to run roughshod over fundamental rights, leading to a growing call for an entrenched Bill, or *Charter of Rights*.

**The Sterilization of Leilani Muir (NFB)**

This explores a major court case and the courageous and fascinating woman who brought the matter to light. It also looks at the history and the dark legacy of Alberta's sexual sterilization legislation.



## Criminal Defence Law in the North: Part Three

In my earlier two columns, I discussed substantive aspects of criminal law in the North ([Part One](#)). I briefly reviewed some aspects of the crimes we deal with in court, some of the underlying causes, and certain aspects of sentencing for those offences ([Part Two](#)). I want now to describe some features of daily life as a criminal defence lawyer in this exciting and beautiful land.



Compared to southern Canada, there are relatively few defence lawyers in the Northwest Territories. Most of us are based in Yellowknife, though virtually all of us spend time in other communities when the courts travel there on circuit. This is a tradition which goes back more than a century, to when courts – in the English model – first began sitting in western and northern Canada (at the time, everything between the Great Lakes in Ontario, and British Columbia, were considered the Northwest Territories, and before that, Rupert's Land). Back then, judges based in Winnipeg, and later, Edmonton would travel throughout the year to settlements scattered across the territory to hear and decide all types of cases. (In fact, the circuit court tradition goes back even further: in medieval times English judges would travel and hold court in towns and villages across the British Isles from time to time.)

Now, most defence lawyers in the N.W.T travel for at least one week each month, with Territorial Court judges, court reporters, Crown prosecutors and various support staff, from Yellowknife to the various smaller communities around the Territory. For most circuits, the Court is based out of the largest of the local communities (Norman Wells, Inuvik or Hay River) and from there the court party flies to the smaller, more remote locations in small chartered aircraft. In Inuvik and Hay River court usually sits in that location for the first two days of the week, and then travels for the rest of that period. From Inuvik we fly to the various communities in the Beaufort Delta (the Gwich'in communities of Aklavik and Fort McPherson) and on the Arctic coast or islands (the Inuvialuit communities of Tuktoyaktuk, Paulatuk, Sachs Harbour and Uluhaktuk). From Hay River, court travels to Fort Resolution, Fort Providence, Fort Simpson and Fort Liard (communities mainly comprised of Chipewyan and Metis peoples, and Slavey peoples, respectively). Now, most defence lawyers in the N.W.T travel for at least one week each month, with Territorial Court judges, court reporters, Crown prosecutors and various support staff, from Yellowknife to the various smaller communities around the Territory. Norman Wells serves as our base point for court in the MacKenzie Valley (Tulita and Fort Good Hope) and also for Deline, a tiny settlement on the edge of Great Bear Lake.

Most of the communities to which we travel are very small (usually between 500 and 800 persons) and access is very restricted; boat in the summer and winter road after freeze up. Air access is usually year round, but often prohibitively expensive. The communities south of Great Slave Lake are also accessible by all-weather highways. We usually arrive in the community around 9:30 or 10:00 a.m., though we are sometimes delayed by weather (sometimes conditions prevent us from traveling into communities completely, and all matters on the court docket then have to be adjourned – usually by telephone – to the next circuit date). Court sits in local community centres and recreational facilities (sometimes we use boardrooms in band (municipal) offices), for as long as necessary to get as many matters completed as possible. Air conditioning is rare, and it is very surprising that in the summer, places in the North can be as hot as anywhere in southern Canada! Judges are often still hearing trials and making their decisions as late as 7 or 8 p.m., or even later. Then, at the end of a court day, we get back into the small airplane in which we arrived, and fly back to our base point.

So as not to leave any misleading impressions, though, I should point out that we are not flying around in luxury executive jets! The aircraft we most usually fly in are sturdy, dependable, fairly slow Canadian-made



Twin Otters which take time to heat up in the winter, and which have no air conditioning to help alleviate the surprising heat in the summer. (More than once I have marveled at how amazingly cold is the very same plane into which I climbed only six months earlier, in the middle of summer when the cabin was a sweltering sauna!) In the wintertime (October to April), flight regulations require that we wear proper snow boots and pants, as well as parkas and other gear in the hope that we may survive any mishaps which take place until we can be rescued if need be.

As one can tell from the map, the places we go as we try to bring the court “to the people” are remote, and exist on the edge of wilderness. We are reminded of this from time to time when wildlife is encountered. The aircraft we most usually fly in are sturdy, dependable, fairly slow Canadian-made Twin Otters which take time to heat up in the winter, and which have no air conditioning to help alleviate the surprising heat in the summer. Once we were met in Fort Liard by a couple of bison grazing across the street from the community centre where court is held. In other communities (also in the southern part of the Territory) the plane sometimes has to “buzz” the airstrip before landing to make sure bison get off the runway and leave the area before we can safely land. And once, after we landed in Fort Good Hope, we had to wait for the R.C.M.P. officers to get us from the airport (in most communities the local constables drive us to and from the airport; there are no taxis in most places) because they first had to deal with some black bears which were wandering through town. And in the summers, at least, the legendary black flies and mosquitoes make their presence known to us all!

But for all of what some might see as “drawbacks” – long days, uncomfortable conditions, the stress of travel and so on – nothing compares to the commute when we are on circuit! For years as I practiced law in Edmonton, I spent 20 or 30 minutes driving through the smog and traffic of suburbia, into the downtown “concrete canyons”, where I then spent my days surrounded by steel and glass.

Now, when I am on circuit my commute is over hundreds of kilometers of untouched wilderness. Nothing compares with the vastness of the Arctic ice as we fly up to one of the small settlements on the coast; or the wetlands of the Beaufort Delta; or the mountain ranges of the Sahtu area around Norman Wells, on the banks of the MacKenzie River. Instead of walking out of court in downtown Edmonton onto the sidewalks or malls, court breaks are now spent in magnificent settings such as the banks of the MacKenzie River, or Great Bear Lake, or the Arctic Ocean! And as clichéd as it sounds, I will never forget the night I finished court and looked up as I left, to see the Aurora Borealis dancing in the sky above!

Much as I enjoyed my career during the years I was in Edmonton, I could never go back to practicing in the middle of a big southern city. I am in the North to stay; this is now my home!

The views and opinions expressed in this article are entirely those of the author.



# Whatever Happened to ... Mustapha v. Culligan: “Judge, There was a Fly in my Water!”

On November 21, 2001, while Waddah Mustapha and his wife were replacing the water dispenser at home, they spotted a dead fly and part of another inside the new, sealed Culligan water bottle. At the sight of the fly, Mrs. Mustapha vomited immediately. Mr. Mustapha became nauseous and suffered of abdominal pains. From seeing the fly in the water, he said he developed major depressive disorder, phobia, and anxiety. He said the fly in the water ruined his life, even wrecking his sex life. He said for months he could not drink coffee made with water, and feared letting the shower water hit his face directly. His regular nightmares involved flies flying on top of feces.



Mr. Mustapha demanded financial compensation for his psychiatric injury caused by Culligan’s negligence in allowing the fly into the water bottle. (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 SCR 114)

## Background

Mr. Mustapha emigrated from Lebanon to Canada in 1976 at the age of 16. He was trained as a hair stylist and opened Martin’s Coiffure & Spa in Windsor, Ontario in 1986. The business was successful enough to expand to two more Windsor outlets. His hair salons and spa attracted celebrities. Some 30 years later, he was about to become a sort of legal celebrity himself.

The Mustaphas were always both concerned about their hygiene and health, keeping their house clean at all times. They heard that Culligan water provided health benefits over city water. They installed Culligan water dispensers in both the salons and their home. For 15 years they were loyal customers of the brand.

## Legal Outcomes

Justice Brockenshire, the trial judge in Ontario Divisional Court found Culligan liable in negligence, and awarded Mr. Mustapha with \$80,000 in general damages, \$24,174.58 in special damages, and \$237,600 for loss of business.

Culligan was concerned about the precedent of having to pay major financial compensation for relatively minor lapses such as this. Other customers might make similar claims for extraordinary compensation on the basis of a fly in the water, or even less. It appealed successfully to the Ontario Court of Appeal, which overturned the trial decision on the basis that Mr. Mustapha’s reaction to the dead fly was not reasonably foreseeable, and hence did not give him a right to compensation. (*Mustapha v. Culligan of Canada Ltd.*, 2006 CanLII 41807 (ON CA))

Mr. Mustapha appealed to the Supreme Court of Canada, which agreed there should be no compensation paid by Culligan to Mr. Mustapha.

Culligan, as a producer of drinking water, owed Mustapha a duty of care to ensure he was not injured by its negligence. It must take reasonable care that the water is not contaminated by foreign elements. Culligan breached its duty of care by allowing a fly into the bottle during the sealing process.



Was Mr. Mustapha's injury caused by the Culligan's negligence? Medical evidence supported that Mr. Mustapha had developed a major depression disorder with associated phobia and anxiety from the fly in the water. The dead fly trapped inside the water bottle triggered Mr. Mustapha's psychiatric injury. Was Culligan's negligence, which caused his damage, too remote to warrant compensation? In other words, was the injury reasonably foreseeable by Culligan?

The famous *Wagon Mound* case set the reasonable foreseeability requirement as "*the foresight of a reasonable man*". (*Overseas Tankship (UK) Ltd. v The Miller Steamship Co. (The Wagon Mound, No. 2)*, [1967] 1 AC 617) While some people are more susceptible than others to serious psychiatric injuries, it would not be reasonable to require third parties to be aware of such possibilities. Unusual or extreme events caused by negligence are imaginable but not reasonably foreseeable. The law of negligence draws the line for compensability of damage. One cannot use unique frailties as a form of insurance.

On the other hand, if the defendant knows of the plaintiff's greater sensitivity, then the plaintiff's injury might be considered reasonably foreseeable. In order for a damage to be considered a legitimate psychiatric injury, the plaintiff must have suffered a recognizable psychiatric injury and this must have been reasonably foreseeable by the defendant. Culligan did *not* know about Mustapha's personal psychiatric vulnerabilities. The Supreme Court of Canada did not find objective reasonable foreseeability of this extremely unusual injury in this case.

Unusual or extreme events caused by negligence are imaginable but not reasonably foreseeable. The law of negligence draws the line for compensability of damage.

In a more recent Canadian case, *Devji v. District of Burnaby et al* 1999 BCCA 599 (CanLII), Yasmin Devji lost her life after losing control of her vehicle while driving and colliding with another. Following the incident, Yasmin's family went to the hospital to identify the body. The Devji family sued the Municipality of Burnaby, alleging that it failed to maintain safe road conditions and claiming to have suffered a nervous shock injury after seeing Yasmin's body. The trial judge decided this was an indirect consequence of the incident, and not because of the direct impact of the negligent conduct of the defendant. No compensation was awarded. The law cannot impose liability for the unique fragility of certain individuals. We can expect people to be reasonably robust and resilient.

## Other Case Examples

In *Chinsang v. Bridson*, 2008 CanLII 67408 (ON SC), Michael Chinsang suffered of memory loss, elevated anxiety, and increased depression after a vehicle collision with Mr. Bridson. He sued for psychiatric damages. Mr. Bridson successfully defended with *Mustapha v. Culligan*, arguing that the damages suffered by Mr. Chinsang were too remote for compensation.

In *Healey v. Lakeridge Health Corporation*, 2010 ONSC 725 (CanLII) two patients located in the Lakeridge Health Corporation, a public hospital, were infected with tuberculosis. As soon as the hospital found out, they informed Durham Public Health which, in turn, notified 4,402 other persons who had been in contact with those two patients. Only two of them tested positive for tuberculosis. However, 3500 of the other 4400 people claimed damages for psychological injury, even though they were uninfected. Lakeridge invoked *Mustapha v. Culligan*, arguing those claims were too remote in law. The jury agreed with Lakeridge and did not award any damages.

These, and many more judicial decisions, demonstrate the impact *Mustapha v. Culligan* continues to have on Canadian law.

## Where are these Parties Today?



Waddah Mustapha continues to operate his salons in Windsor, Ontario. Even though his case attracted much national media attention and cost him a lot of money, his businesses seem unaffected because of it. After the incident, some people made fun of Mr. Mustapha's reaction to the fly in the bottle. Mr. Mustapha carries on and continues his hygiene practices.

Culligan of Canada Ltd. continues to operate. The company, headquartered in Rosemont, Illinois, is still in the water treatment industry and no other similar cases of water contamination have arisen since *Mustapha*.



# What's happening with Truth and Reconciliation in Canada?

At the end of March 2014, the Truth and Reconciliation Commission of Canada held its last national gathering in Edmonton, Alberta. It now has one more year to finish poring through mountains of documents and to compile its report. It seems an apt time to pull together some online resources that can help in understanding this process with its implications for our national identity and our future.



## First a look at the Big Picture

A [Wikipedia article](#) says “A truth commission or truth and reconciliation commission is a commission tasked with discovering and revealing past wrongdoing by a government (or, depending on the circumstances, non-state actors also), in the hope of resolving conflict left over from the past. ... As government reports, they can provide proof against historical revisionism of state terrorism and other crimes and human rights abuses.” The process can be seen as a form of [restorative justice](#) which can be defined as “a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights.” These commissions are a creation of the last half of the twentieth century; possibly the most well-known is the [South African TRC](#) set up in 1995 to help deal with what happened under apartheid. For those interested in digging deeper into the international experience, the [Truth Commissions Digital Collection](#) contains decrees establishing truth commissions and similar bodies of inquiry worldwide, and the reports issued by such groups. [Strategic Choices in the Design of Truth Commissions](#) has organized the leading research on past Truth Commissions in a manner that is oriented towards decision-making, to enable designers of future Commissions to identify the critical factors relevant to their societies. Any scholar who wants to get a sense of the scope of the burgeoning literature, its depth and thematic concerns may enjoy “[Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography](#)” by Kevin Avruch and Beatriz Vejarano.

## What's happening in Canada?

A helpful overview is provided by this [timeline of residential schools and the Truth and Reconciliation Commission](#) created by the Edmonton Journal. The three main goals of the [Truth and Reconciliation Commission of Canada](#) are: to prepare a complete historical record on the policies and operations of residential schools; complete a public report including recommendations to the parties of the Indian Residential Schools Settlement Agreement; and establish a [national research centre](#) that will be a lasting resource about the IRS legacy. At the TRC website you can access videos of statements made to the Commission, find FAQs and resources about Indian Residential Schools and read about the mandate and process of the Commission. The Commission has produced a 124-page, plain language history titled “[They Came for the Children](#)”. In the preface they say, “For the child taken, and for the parent left behind, we encourage Canadians to read this history, to understand the legacy of the schools, and to participate in the work of reconciliation.”

The [Indian Residential Schools section](#) of Aboriginal Affairs and Northern Development Canada provides a look at the reconciliation process from the point of view of the Government of Canada. It includes information on the Settlement Agreement, Canada's Gestures of Reconciliation, and the creation of a commemorative stained glass window in the Centre Block of Parliament.

## Where do we go from here?



[Reconciliation Canada](#) is one organization that is working to create opportunities for learning and dialogue focused on understanding our shared history beginning with the stories of Aboriginal people and the Indian residential school system. Check its website for ways to participate.

The Aboriginal Healing Foundation has created three publications and a reader of selected essays to help people explore the history and where we go from here. They can be freely loaded as either PDFs or e-book reader files at [Speaking My Truth](#).

The Living Language Foundation, a non-profit organization in B.C., has developed a [Truth and Reconciliation Project](#) to continue the momentum of the TRC by insisting that non-Aboriginal Canadians and their elected representatives talk openly about Canada's colonial legacy and begin to think about 'What's next?'

As major players in the Indian Residential School history, the churches have also been major players in the process of reconciliation. The United Church of Canada has invited their congregations "to 'live out' the church's apologies through education and action that leads to reconciliation and right relations with First Nations peoples." To this end it has created a workshop to help groups respond to the question from the Commission, "[Reconciliation: What Does It Mean to Us?](#)" The materials could well be adapted to any group that may want to engage with this question.

It seems appropriate to conclude with words from Justice Murray Sinclair in an [April 18, 2014 article](#) for the CBC, "It is an opportunity for everyone to see that change is needed on both sides and that common ground must be found. We are, after all, talking about forging a new relationship, and both sides have to have a say in how that relationship develops or it isn't going to be new."