RULE OF LAW REPORT

VOLUME 6, ISSUE 4
DECEMBER 2023

LexisNexis®

LAWSUIT AGAINST FEDERAL MINISTERS' BLOCKING ON X HIGHLIGHTS WIDER CHARTER VIOLATION, SAYS LAWYER

By Christopher Guly,
(Originally published on Law360 Canada, formerly, *The Lawyer's Daily*,

A lawsuit by Rebel News' owner and founder, Ezra Levant, and two of his colleagues from the online conservative news site against three federal cabinet ministers who blocked them from their accounts on X, formerly known as Twitter, is shining a light on a wider problem of the federal government and ministers violating the Charter by determining who can and cannot see their social-media posts, according to one of Canada's top Internet lawyers.

"I've seen government accounts that purport to have a social-media policy that they impose on people that follow them, which is complete crap. They can't do that," said David Fraser, a partner with McInnes Cooper in Halifax.

"That's not prescribed by law as a reasonable limitation," he explained, referring to section 1 of the Charter.

For instance, Transport Canada's X account features terms of use stating that "comments in violation" of them "may result in Transport Canada blocking the user in question to prevent further inappropriate tweets."

Similar conditions exist for Facebook, Instagram and YouTube.

Air passenger rights activist Gabor Lukacs had an online run-in in 2017 with the Canadian Transportation Agency, which deleted a critique of the agency hundreds of times as he continued to repost it for several reasons, including that it "puts forward serious, unproven or inaccurate accusations against individuals or organizations."

According to a CBC News report in November of that year, federal government departments blocked nearly 22,000 Facebook and Twitter (now X) users, with Global Affairs Canada accounting for nearly 20,000 of the blocked accounts. Nearly 1,500 posts — "a combination of official messages and comments from readers" — were deleted from various government social media accounts since January 2016.

The terms of use for Health Canada and the Public Health Agency of Canada's X account indicate a broader federal government policy on blocking based on several criteria, including whether "the comments or contributions:

- include personal information;
- include protected or classified information of the government of Canada;
- infringe upon intellectual property or proprietary rights;
- are contrary to the principles of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982;*
- are racist, hateful, sexist, homophobic or defamatory, or contain or refer to any obscenity or pornography;
- are threatening, violent, intimidating or harassing;
- are contrary to any federal, provincial or territorial laws of Canada;
- constitute impersonation, advertising or spam;
- encourage or incite any criminal activity;
- are written in a language other than English or French; and
- otherwise violate this notice."

Fraser said that the government "can't do that. It's not prescribed by law."

"If a public servant on an official account or even a personal account used for official purposes blocks somebody on X, you're affecting their Charter rights to receive information from the government and to communicate with the government," he explained.

"The effect of a block on social media is that if you have a minister of the Crown who uses it to make announcements that are newsworthy, anybody who's blocked doesn't have access to that, and is not able to reply or forward those messages."

In its notice of application filed last month in the Federal Court, Rebel News Network Ltd. alleges that three federal cabinet ministers are in violation of both s. 2 (b) of the Charter regarding freedom

of expression, “which includes the right to access government information vital for meaningful public discourse,” and s. 3, which protects the right to “effective representation.”

Levant, Rebel News’s social media manager, Yaaokov Pollak, and Sheila Gunn Reid, its editor-in-chief, were blocked from accessing the official government accounts on X of Marci Ien, the federal minister of women and gender equality and youth; Ya’ara Saks, the minister of mental health and associate minister of health; and Government House Leader Karina Gould, respectively “thereby limiting the applicants’ ability to, among other things, access and communicate important information, participate in public debate, express views on matters of public concern, have a voice in the deliberations of government, and bring grievances and concerns to the attention of government representatives,” according to the notice.

The Rebel News applicants have asked the court to order the three ministers to unblock their official X/Twitter accounts “and to refrain from further blocking for so long as they hold elected public office.”

Ien’s and Pollak’s press secretaries told Law360 Canada that the ministers would not comment on the lawsuit. Gould’s office did not respond to our request for comment.

Rebel News’ counsel, Chad Williamson, who heads Calgary law firm Williamson Law, said in a statement to Law360 Canada that “our clients are steadfast advocates for freedom of speech and freedom of the press. It is wrong for public officials and publicly-funded government social media teams to block Canadians — and especially journalists — from receiving government information on social media.”

Previously, Levant also accused federal Environment and Climate Change Minister Steven Guilbeault of freezing him out of his verified government X account.

In September, Federal Court Justice Russel Zinn issued a consent order that called on Guilbeault to “immediately cause the account @s_guilbeault to unblock the following account on ‘X’, the platform formerly known as ‘Twitter’ and together with any other successor platform(s) to Twitter or X [Twitter]” for Levant’s account, @ezralevant.

“At any time while Minister Guilbeault is a Member of Parliament, Minister Guilbeault shall not cause or permit anyone acting on his behalf to cause the account @s_guilbeault on Twitter to block the following account: @ezralevant,” ordered Justice Zinn, who also awarded Rebel News and Levant $20,000.

In 2019, the judge ordered the federal Leaders’ Debates Commission to grant Rebel News media accreditation for the English and French-language debates.

Levant said that seven federal government lawyers “tried to get me to sign a confidentiality clause, banning me from disclosing the details of his settlement. Even as he was admitting he had violated our rights, he wanted to keep it a secret.”

Levant, a former lawyer, did not respond to Law360 Canada’s request for comment on his suit against the environment minister and his latest action against the other three ministers.

Guilbeault also did not reply to our request, and his press secretary declined to provide a comment on the record.

University of Ottawa law professor Amir Attaran considers Rebel News’ current s. 3 claim “unserious” as the matter does not affect democratic rights.

However, he believes the s. 2(b) argument “has merit.”

“It could even win,” Attaran offered. “But it will never get to trial because the respondents will simply unblock Levant and Co before it does,” which he said happened with the Guilbeault case.

“Last time it took two years, and that will probably be the case again this time,” said Attaran, who added that there is “no way this will go to trial.”

"And any settlement is so far off that these respondents may not even be ministers by then."

But the federal cabinet ministers are not alone in blocking people from X.

In 2018, former Ottawa mayor Jim Watson, who often blocked his critics on his public account of what was then known as Twitter, was forced to unblock everyone after he faced a lawsuit from three litigants who accused him of infringing on their constitutional right to freedom of expression.

Fraser said that a Charter violation is triggered "where there is a government actor involved."

"The Charter protects my freedom of expression from being regulated or affected by the government. But the Charter isn't engaged when I'm dealing with a private actor, so Meta [which owns Facebook and Instagram] or X can delete my account for mischief," explained Fraser, who teaches Internet and Media Law at Dalhousie University's Schulich School of Law and who discusses the Rebel News-Guilbeault case in a YouTube video.

"There is a category of speech that is often referred to as the core of Charter values, and expression that is part of political engagement is right at the heart of what the courts have said are the Charter values that animate section 2(b)," he said. "So a politician blocking somebody whom he disagrees with is significantly restricting the expression of the rights of the blockee."

"Ultimately, it should be up to a court to determine whether it's appropriate to remove a comment or whether it is unlawful."

Fraser said that with the federal government's social-media policy prohibiting "hateful" comments, he explained that "there is no such thing as hate speech in our criminal law. It's incitement to hatred."

"There is a lot of hateful stuff that is awful, but lawful," he added.

Fraser said that a decade ago in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, 2013 SCC 11 (S.C.C.), the Supreme Court of Canada set out "the last word on where the line is drawn when it comes to incitement of hatred" in a case involving the distribution of flyers that promoted anti-gay hatred and in which the top court said that "the statutory prohibition against hate speech at s.14(1)(b) of the [Saskatchewan Human Rights] Code infringes the freedom of expression guaranteed under s. 2(b) of the *Charter*" and that its purpose "is to prevent discrimination by curtailing certain types of public expression."

Fraser explained that while parliamentarians' social media accounts would not be regulated by the Charter in the same way the government is, "as soon as they become a cabinet minister or a parliamentary secretary to a cabinet minister and their social media accounts are used for government announcements or for collective feedback from the public, then that line is crossed and the section 2(b) right is implicated if that account starts blocking other people from interacting with it."

"After the Guilbeault settlement, if the government of Canada and cabinet ministers and others did not unblock everybody from their accounts, I think they made a mistake," he said. "If the Department of Justice didn't advise them to do that, then the Department made a mistake."

> "[T]he reality is that in many cases the people at the leading edge of freedom of expression litigation are people who have expression that is not popular with the powerful."

Law360 Canada reached out to Justice Canada for a comment on Rebel News' recent X-related claim and was referred to the Privy Council Office, whose spokesperson, Irfan Mian, said by email that "as this is a judicial matter before the court, it would not be appropriate for us to comment at this time."

However, in Fraser's view, "the reality is that in many cases the people at the leading edge of freedom of expression litigation are people who have expression that is not popular with the powerful."

ONTARIO ATTORNEY GENERAL ANNOUNCES INCREASE IN LEGAL AID RATES FOR PRIVATE BAR

By Terry Davidson, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Ontario will be increasing what it pays to private bar lawyers who take on legal aid cases, according to the province's attorney general.

On Sept. 28, during the opening of the Ontario courts ceremony, Minister of Justice and Attorney General, Doug Downie, said the rates paid to private bar lawyers who take on Legal Aid Ontario work will increase by five per cent per year, over three years.

A spokesperson with Ontario's Ministry of the Attorney General later clarified that the legal aid rate would increase by five per cent per hour, and that there will be similar increases in what is paid for "block fees" as well. In addition, there will be an increase in the number of hours "allocated in certain proceedings."

The increases came into effect Oct. 16.

"We talk a lot about legal aid; we talk a lot about helping people – where they are, and making sure they have what they need," said Downey. "And I want to help support changes that will help ensure private bar lawyers continue to take on legal aid cases, and that Legal Aid Ontario continue to retain lawyers to do just that."

Downey acknowledged that "the hourly and block fee rates in Ontario have not changed since 2015."

"Many things have, the rates have not," he said. "But today I'm happy to say that we have some good news to share on this front. Just over two weeks from now … the Legal Aid Ontario fees for private bar lawyers will be increasing."

The increase would cover the areas of criminal, family and immigration law, he said.

> "As someone who took legal aid certificates in private practice, I want to thank those who continue to serve clients this way – it is critical to our system that we have representation."

"As someone who took legal aid certificates in private practice, I want to thank those who continue to serve clients this way – it is critical to our system that we have representation."

Ontario lawyers who take on legal aid work – as well as others is the sector – have long been voicing concerns about the stagnation of legal aid rates. There have also been issues raised around the amount of time lawyers are given to complete certain tasks.

Downey's announcement is timely, given the ongoing spike in inflation and the overall cost of living.

A request for further comment sent to spokespeople for the Attorney General was not immediately returned.

According to the Legal Aid Ontario website, there are four different hourly rates paid to lawyers. The first three range from $109.14 to $136.43, depending on a lawyer's experience. The fourth, which is for complex criminal cases, sits at $161.05.

Legal Aid Ontario has seen some dark days, particularly in late 2019, when the provincial government began making big funding cuts to the legal service provider.

A FAMILY COURT OFF-RAMP IF WE CARE ABOUT THE LITIGANTS

By Joel Miller, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The first four parts of this series (see below for links) looked at how game theory analysis shows that family court is the place where failed or unexplored settlement opportunities go to fight in a system that encourages short-term thinking that's contrary to a party's long-term goals and works against meaningful restructuring of the lives of separated families.

Now we'll turn to two suggestions that modify what we already have to make the family law process more constructive. This deals with matters that have reached court after efforts to settle, if any, have failed.

Not all parties in a family law dispute want to work towards a co-operative resolution of their issue. If both did, the matter would have been resolved before getting to court. And there are complex family law cases requiring a full, vigorous hearing to be resolved. These people and cases are the lifeblood of family litigators. But even more are the people caught in the court system who would value an off-ramp if it was readily available. Here are two suggestions.

1. I WILL IF YOU WILL

This has parties sign a document when they file their first court document checking off yes or no to the question, "Would you be willing to try mediation if the other party would also be willing?" The answer would be confidential and out of any public filing, but if there was a yes match the parties would be transferred to a court affiliated mediator.

This isn't compulsory mediation. It allows a party who is uncertain about what the other party thinks, or a party who knows that mediation was already refused, to answer yes, just in case the other side hadn't considered it or has changed their mind.

The idea is that more people are likely to answer yes if their answer is confidential and the other side might surprisingly answer yes. The use of existing mediation services would increase and shift the inevitability of a confrontational court battle towards a co-operative resolution. Diverting court resources to expanded mediation instead of litigation would be a cost saving to the government and a cost saving and a social benefit to litigants. What's to lose, other than the litigation fees?

2. A JUDGE-CENTRIC ALTERNATIVE: BINDING JUDICIAL DISPUTE RESOLUTION

Ontario's Binding Judicial Dispute Resolution (Binding JDR) project, an existing pilot project, is the best kept secret in Ontario. (Check out the *Practice Advisory Concerning the Superior Court of Justice's Binding Judicial Dispute Resolution Pilot Projects*, effective May 14, 2021, and *SCJ Updates Practice Advisory for the Binding Judicial Dispute Resolution Pilot Project*, effective Aug. 1, 2023.)

The Practice Advisory explains, "In Binding JDR, the judge meets with the parties (and their lawyers, if any) to explore possibilities for resolution. Each party is expected to explain their proposal to resolve the outstanding issues as well as the key facts that support their position. If the parties cannot reach an agreement, the judge will hear from both parties regarding the orders that they are seeking. The judge may ask questions and request additional information from the parties, if necessary, to reach an informed and fair decision. The judge will also be able to hear anything that they consider important and relevant to the issues that need to be decided, *regardless of the formal rules of evidence*. At the conclusion of Binding JDR, the judge will provide a final decision on all outstanding issues, including those that have been resolved on consent." [Italics added.]

> "Without the formal rules of evidence applying, the judge is able to ask whatever they feel is relevant to get to the bottom of the issue and has the option of a creative solution, designed to resolve both the issue at hand and assist in dealing with future issues."

Binding JDR is judge-centric, but not rules-centric. The judge may hear anything the parties feel is "important or relevant … *regardless of the formal rules of evidence*" to "reach an *informed and fair decision*." [Italics

added.] This is no longer a zero-sum game without information about the other party's position or intentions. It doesn't require, but allows, lawyers. It doesn't focus on proof over truth. Without the formal rules of evidence applying, the judge is able to ask whatever they feel is relevant to get to the bottom of the issue and has the option of a creative solution, designed to resolve both the issue at hand and assist in dealing with future issues.

There's no cross-examination with the potential, or fear, of abusive questioning, no witnesses, and it's currently an opt-in process subject to approval by a judge. The hostility and negativity of our traditional adversarial court hearing is eliminated or substantially reduced.

If lawyers encourage this process, parties will see what they can agree upon to identify what needs a judge's input in a non-adversarial setting. "The expected benefits of this pilot are quicker, simpler and less costly processes to obtain a final order for straightforward family law disputes." It's a cheaper, faster process focused on a fair result without the damaging aspects of traditional court. What's wrong with this?

USE A TWO-TRACK SYSTEM

The suggestion is to make Binding JDR a full partner process and available as a gateway decision before any non-emergency litigation is commenced, as well as an off-ramp available at any time by motion to a judge. Binding JDR has "been developed to provide a streamlined way to reach a final resolution of family law cases, consistent with the objectives of the Family Law Rules as expressed in subrules 2(2) to 2(5)." So, let's make using it an essential first question or something a judge can decide later in the interests of the parties and judicial efficiency.

The pilot exists and has been working. It's for basic cases with a limited number of issues and requires appropriate financial disclosure. Although its availability has just been expanded, the take-up is still small even though a huge number, perhaps the majority, of family law cases fit into this category. Especially if the parties understand that by dropping some of the issues and focusing on what still needs a judge, they can avoid the traditional adversarial process, saving them and the system time and money and avoiding unnecessary hostility.

This isn't appropriate for every case. But thinking every case needs the rules that complex cases need isn't appropriate for non-complex cases, either. This judge-centric process uses existing facilities but requires less court time and cost for the parties and the system. And it focuses on the needs and values of the parties over those of the professionals serving them.

This series previously quoted writer Upton Sinclair, who wrote that "It is difficult to get a man to understand something, when his salary depends upon his not understanding it." The problem is that some will feel it's not in a lawyer's financial interests to promote Binding JDR, other than to get a few low-fee cases off their hands. But if the purpose of the family justice system is to resolve issues for parties, to optimize outcomes for divorcing people rather than to provide jobs for lawyers, Binding JDR as part of the system is obvious.

We need to vigorously promote this to lawyers and enthusiastically inform the public about the benefits of this option. Reminders about this need to be part of every family law conference. The Law Society of Ontario should endorse this as an equal partner to the adversarial court process and show that the profession encourages people to use it. Binding JDR should be seen and encouraged at every stage of the family law process as a best-choice option, if at all possible.

The traditional adversarial system will always be with us. There will always be complex cases, parties with resources unwilling to resolve matters easily if they can outspend the other party, and parties determined to fight to the end instead of being reasonable. But why should our system give those people the right to force the other into costly and time-consuming litigation in a divisive and debilitating system as a strategy? The "which track" motion will help balance the field by presenting appropriate cases with a more sensible option. That may impact some lawyers' fees, but whose interests should be our main priority?

When we see the system that's damaging to the long-term interests of parties and know that there is a judge-centric alternative, not bringing that to the centre of client considerations is either wilful blindness or deliberate insistence on preserving a system because it benefits the practitioners without regard to whether it benefits the parties.

The family justice system isn't there to serve us. Limiting client options to what gives us the biggest payment isn't what lawyering is supposed to be about. There'll still be plenty of clients and matters for the traditional system to handle through the adversarial track. If for no other reason, offering the Binding JDR track option should be seen as a consumer protection issue.

Neither of these proposals "burn down the barn to replace it" or involve inventing anything new. Both are already inside the tent of things we do but need to be moved to the centre of our system and not marginalized, so we can optimize the outcome for our family litigants.

This is the final part of a five-part series. Part one: Family law shouldn't be a game — but it is; part two: How coercive and divisive is family court? Let us count the ways; part three: 'Tricks' the family law system lures parties into using once in court; part four: More 'tricks' foisted on family law litigants.

Joel Miller is a retired former partner with ***Ricketts, Harris****, chair of their family law group, and founder of The Family Law Coach. He was an instructor at Ontario's Bar Admission course and a speaker at various legal conferences. He is currently writing a book to help self-reps succeed in family court.*

The opinions expressed are those of the author and do not reflect the views of the author's firm, its clients, Law360 Canada, LexisNexis Canada, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

OBA LAUNCHES PEER SUPPORT NETWORK FOR LAWYERS WITH DISABILITIES

By Terry Davidson, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The Ontario Bar Association has launched a "first-of-its-kind" peer-support initiative for lawyers with disabilities.

The Peer Support Network for Lawyers Living with Disabilities sits high on the mandate of OBA president Kelly McDermott, who has multiple sclerosis. Given that, the new network is also a personal accomplishment for McDermott, who received calls from lawyers across the province after she began sharing stories about her struggles with MS.

This is what planted the seed that eventually grew into the new network.

On Sept. 26, McDermott was joined by federal Minister of Sport and Physical Activity Carla Qualtrough, who is also a lawyer, to officially launch the network.

As of 2021, just over five per cent of lawyers in Ontario self-identified as having some kind of disability, according to the OBA.

The network will provide "constructive resources, tools and engagement opportunities" for participants, who will be able to "candidly and confidentially share lived experiences and offer each other understanding in a safe, judgment-free space," states a **news release**.

Inside the OBA's downtown Toronto headquarters, McDermott took to the podium to talk about how the support of her peers helped her cope with challenges.

Later, she spoke with Law360 Canada, explaining that the network is unique in that it will form a community of lawyers who help each other cope with the "day-to-day" challenges of living and working with a disability.

> “It’s not about crisis, it’s about dealing with the day-to-day challenges, victories. …”

“This is a bit different because we are really focused on bringing peer to peer community of interests. It’s not about crisis, it’s about dealing with the day-to-day challenges, victories. … We’re there just to be open and share experiences. I don’t think I’ve seen anything of a similar nature, but I think we’ve set out the foundation that it could be replicated, and I think it would be fantastic if it was.”

McDermott went on to say that while the network is strictly there to provide support (rather than advice), there are resources via its webpage that connects visitors to things such as occupational therapists and mental health specialists.

McDermott’s desire to create the network came from her own feelings of isolation following her diagnosis. To cope, she leaned on the support from her OBA colleagues.

“I was very scared to share the diagnosis because I was worried about the stigmas associated with that. That people would think I was less reliable, because it is an episodic type of disability. … I really leaned on a lot of the OBA counsel members and members that I’d met, and it dawned on me that this is what we need. There’s an organic peer support that exists here already, and [I thought], boy, would I like to make this accessible for the rest of our membership — or just lawyers across Ontario.”

Her MS can put McDermott through periods of paralysis, slurred speech and “cognitive fuzziness.”

She went on to explain that when she finally “got brave” enough to begin sharing the details of her condition, she began receiving “cold calls from lawyers right across the province, who had their own disabilities, and wanted to share and wanted to talk.”

During the launch presentation, Qualtrough, legally blind since birth, spoke of living with only five per cent vision capability.

Qualtrough, who was an award-winning Paralympic swimmer and a human rights lawyer before entering politics, talked about the importance of communication, of sharing stories.

“It’s very important to me that I share my journey with anyone who will listen, because I think my journey is not uncommon as someone with … a disability who went through a number of different phases in her life in terms of trying really hard to fit in, trying really hard to hide the fact that I had a disability.”

Communicating, she said, is a way of combating stigma and assumptions that are made about those with a disability.

“Most of us who were born with disabilities learn very quickly that the world was not built with our needs in mind, that people were always going to make assumptions about what we can and cannot do based on the fact that they’ve discovered that we can’t see very well, can’t hear very well, use a wheelchair, have mobility challenges — very quickly you come to understand … that people are going to make these judgments about you.”

RULE OF LAW REPORT
is published four times per year by:
LexisNexis Canada Inc.,
111 Gordon Baker Road, Suite 900,
Toronto ON M2H 3R1

ISBN 978-0-433-49876-6