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Adapting and Using the Law in the Recovery from a Natural Disaster

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Law on the Edge panel discussion commented on:

“Law at the Limits: A Canterbury Tale: Adapting and Using the Law in the Recovery from a Natural Disaster”

The Canadian Law & Society Association and the Law & Society Association of Australia & New Zealand held their first joint conference, “[Law on the Edge](#),” from July 1 – 4 in Vancouver in [Allard Hall](#), UBC Law’s spectacular home. There were over 100 plenary and other panels and roughly 400 participants, mainly from Canada, Australia and New Zealand. One of the most interesting panel discussions that I attended was the “Law at the Limits: A Canterbury Tale: Adapting and Using the Law in the Recovery from a Natural Disaster” panel on July 2, with presentations by five professors from the School of Law at the University of Canterbury in Christchurch, New Zealand. Until this panel, I had not released the breadth of legal issues involved in recovering from natural disasters. The type of legal issues dealt with by panel members emphasized the systemic effects of natural disasters and recoveries, rather than the impact on individuals, such as the landlord/tenant, insurance, employment, credit/debt, mortgage, condo, and family issues being fielded by the volunteers with [Calgary Legal Guidance](#), [Pro Bono Law Alberta](#), Legal Aid Alberta, Pro Bono Students Canada and Student Legal Assistance in their [Southern Alberta Flood Legal Help](#) information and advice sessions. Nevertheless, the “Canterbury Tales” about price gouging, construction cartels, expropriation of condemned properties, unmediated discretion, volunteers’ liability, and other topics should be of broad interest to southern Albertans.

As readers might recall, in September 2010 a magnitude 7.1 earthquake caused significant property damage in Christchurch, New Zealand’s second largest city, and in the central Canterbury region. That earthquake was followed by a magnitude 6.3 earthquake in February 2011. Although of a lesser magnitude, the second quake was shallow and centred only 10 kilometres south-east of the centre of Christchurch. It caused 185 fatalities and widespread damage, including significant liquefaction. See the web site of [CERA](#), the Canterbury Earthquake Recovery Authority for more information.

“Administrative Law on the Edge: Structuring Discretion in a Time of Crisis”

The first panel presentation was made by Associate Professor [John Hopkins](#), a public law professor with a particular interest in the non-judicial aspects of administrative law. His paper was entitled “Administrative Law on the Edge: Structuring Discretion in a Time of Crisis.” He talked about how one of the first victims of disasters seems to be the requirements of administrative law and how the aftermath of the Canterbury earthquakes illustrated this phenomenon. A normal response to disasters is to suspend what are seen as mere “legal

niceties”; law is perceived to be “red tape” getting in the way of a speedy recovery. Hopkins argued that law is not the enemy of good administration, but rather should be its ally. As K.C. Davis famously stated in *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 34, “where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.” Recovery is a series of choices and administrative law exists to structure the discretion given executive bodies and ensure the decisions taken are of the highest quality.

The provisions of Alberta’s *Emergency Management Act*, [RSA 2000, c E-6.8](#), prevail over every other piece of provincial legislation except the *Alberta Bill of Rights* and the *Alberta Human Rights Act* if a state of emergency is declared (s. 18). The Minister of Municipal Affairs (under the *Designation and Transfer of Responsibility Regulation*, [Alta Reg 80/2012](#), section 14(1)(e)) or the local authority (as defined in section 1(g) of the *Emergency Management Act*) have a wide range of powers under section 19(1) once a state of emergency is declared, including the power to:

- (a) put into operation an emergency plan or program;
- (b) authorize or require a local authority to put into effect an emergency plan or program for the municipality;
- (c) acquire or utilize any real or personal property considered necessary to prevent, combat or alleviate the effects of an emergency or disaster;
- (d) authorize or require any qualified person to render aid of a type the person is qualified to provide;
- (e) control or prohibit travel to or from any area of Alberta;
- (f) provide for the restoration of essential facilities and the distribution of essential supplies and provide, maintain and co-ordinate emergency medical, welfare and other essential services in any part of Alberta;
- (g) cause the evacuation of persons and the removal of livestock and personal property from any area of Alberta that is or may be affected by a disaster and make arrangements for the adequate care and protection of those persons or livestock and of the personal property;
- (h) authorize the entry into any building or on any land, without warrant, by any person in the course of implementing an emergency plan or program;
- (i) cause the demolition or removal of any trees, structures or crops if the demolition or removal is necessary or appropriate in order to reach the scene of a disaster, or to attempt to forestall its occurrence or to combat its progress;
- (j) procure or fix prices for food, clothing, fuel, equipment, medical supplies, or other essential supplies and the use of any property, services, resources or equipment within any part of Alberta for the duration of the state of emergency;
- (k) authorize the conscription of persons needed to meet an emergency.

In southern Alberta, the controversies related to the firearms searches and seizures in High River — most likely made under s. 19(1)(c), (g) and (h) — might be a local and concrete illustration of Hopkins’ concerns. See e.g. “[RCMP seizure of High River guns sparks probe.](#)”

“New Zealand’s Disaster Policy Framework”

A second panelist, PhD candidate Robert Kipp, discussed New Zealand’s highly-regarded disaster policy legal framework and how and why it had to be amended as a result of the

2010/2011 earthquakes. Prior to September 2010, New Zealand has been widely recognized for having a disaster policy framework which included many of the features of contemporary disaster management theory: risk reduction, building resilience, and multi-level/multi-stakeholder cooperation and coordination. Recovery in the Canterbury region is the first real test of that framework and Kipp's PhD thesis will look at how the recovery process was carried out under the Canterbury Earthquake Recovery Act. In his presentation on the panel in Vancouver, Kipp emphasized the demand for strong central authority that arose after the earthquakes and the importance of clear lines of authority in the relevant legislation.

“Compulsory land acquisition to rebuild an earthquake-ravaged city”

Professor [Elizabeth Toomey](#), a property law professor, has presented and published extensively on property issues related to recovering from natural disasters. As just one example, her paper on “This Land is My Land, That Land is Your Land. A Challenge to Private Ownership: the Canterbury Earthquake Recovery Act 2011” is published in (2012) 2:2 Property Law Review 84. In Vancouver, she presented her initial findings on the government's acquisition of Christchurch properties that were not going to be remediated for a very long time — if at all. The Canterbury Earthquake Recovery Act 2011 gives both the Minister for Earthquake Recovery and the Canterbury Earthquake Recovery Authority extensive powers relating to real property. Toomey focused on CERA's power “to purchase or otherwise acquire, hold, exchange, mortgage, lease, and dispose of real property” (s 53(1)) and the ability of the Minister to acquire land compulsorily (ss 54 and 55). She is investigating the extent to which these powers have been exercised by CERA and the Minister and the effect on the Canterbury community. For example, in the worst hit (“red zone”) residential areas, owners of insured homes have received purchase offers from the government and have two options: sell both their land and buildings to the government, or sell only the land to the government and negotiate with their own insurance companies and the Earthquake Commission for the price of their homes and other buildings. Apparently the majority who chose the second option and who are still negotiating with hard-nosed or bankrupt insurance companies are regretting their choices. Among other factors, Toomey is looking at the difference socio-economic class makes to homeowner's decisions.

Under section 19(1) (c) of Alberta's *Emergency Management Act*, the Minister of Municipal Affairs or the relevant local authority may, for the duration of a declared state of emergency, “acquire or utilize any real or personal property considered necessary to prevent, combat or alleviate the effects of an emergency or disaster.” Thereafter, under the Act's *Disaster Recovery Regulation*, [Alta Reg 51/1994](#), section 2, the Minister has a great deal of discretion with respect to compensation:

2. The Minister may establish guidelines that
 - (a) govern the assessment of damage or loss caused by a disaster,
 - (b) govern what damage or loss caused by a disaster or costs incurred in emergency operations may be compensated, and
 - (c) establish limits on the amount of compensation that may be provided to an applicant.

Toomey has also made a number of other paper presentations with her colleague, Professor Jeremy Finn, also present at “Law on the Edge.” For example, Finn and Toomey recently teamed up to present a paper on the legal profession in this context, an oral presentation on “A first glimpse as to how the legal profession responded to the earthquakes” at the University of Canterbury at a conference on “Legal Issues Arising from the Earthquakes” in August 2012.

“Price gouging, construction cartels, or repair monopolies? Competition law issues following a natural disaster: The Canterbury Experience”

The research interests of Senior Lecturer, Dr. [Debra Wilson](#), include competition law and primarily cartel conduct. In her presentation on “Price gouging, construction cartels, or repair monopolies? Competition law issues following a natural disaster: the Canterbury Experience,” she noted that increases in the prices for goods or services following natural disasters has a long history, citing examples after the Great Plague of London in 1665 and the Great Fire in 1666. However, price gouging is of no concern to competition law. Perhaps counter-intuitively, competition law sees increases in the prices for goods or services following natural disasters as not a bad thing because artificially deflating prices encourages hoarding. Nevertheless, many jurisdictions have enacted laws prohibiting this type of supply-and-demand behaviour.

This aspect of the paper that Wilson presented brought to mind the allegations of price gouging that followed the Calgary flooding: see e.g., “[Calgary flood victims angered by alleged price-gouging.](#)” Sections 19(1)(j) and 24(1)(b) of Alberta’s *Emergency Management Act*, [RSA 2000, c E-6.8](#), provide that the Minister or local authority may “procure or fix prices for food, clothing, fuel, equipment, medical supplies, or other essential supplies and the use of any property, services, resources or equipment within any part of Alberta for the duration of the state of emergency.” Whether they exercised this power is not clear.

Of far greater concern following the Canterbury earthquakes was the anticipation of construction cartels. It was assumed that building companies would enter into agreements with each other to fix prices. However, Wilson indicated this assumption turned out to be unfounded as construction companies acted as good citizens. Unfortunately, the perception overwhelmed the reality and the relevant government authority appointed one construction company to act as presumptive project manager for the majority of home repairs in Canterbury. Initially homeowners wishing to use a different company could opt out. However, changes made to the opt-out policy as a result of an increasing numbers of dissatisfied homeowners made opting-out so disadvantageous that the one construction company effectively now has a monopoly. Other construction companies have complained that they are going out of business due to lack of work, while tens of thousands of homes remain in desperate need of repair over two years after the initial earthquake. These consequences of the government-created monopoly show why monopolies are of such concern in competition law. Christchurch’s experience also illustrates that price is not the only relevant factor; timeliness and quality are of equal if not greater concern to the home-owning survivors of the earthquakes.

“Will the law assist a volunteer? Legal issues arising from volunteer responses to natural disasters”

Professor [Jeremy Finn](#) considered the law relating to volunteers who respond to natural disasters. He distinguished between “previously organized volunteers” — those who work within structures provided by governmental and civic organizations, such as the [Canadian Red Cross](#) or the [City of Vancouver's Heavy Urban Search and Rescue team](#) — and “spontaneous volunteers” — those who act, individually or collectively, independently of those organizations. He noted that the legislation and policy that protects volunteers tends to have a very narrow understanding of who volunteers are, focusing solely on previously organized volunteers who are trained, skilled and accountable. There is little law or policy concerning spontaneous volunteers, who have hugely variable amounts of training and skills and who are generally unaccountable.

Nevertheless, everyone seems to agree that spontaneous volunteers are absolutely necessary following a natural disaster of any scale.

Finn noted that volunteers who solicit donations of money or goods will incur legal and/or equitable obligations for those donations, which may pose difficulties where the volunteers do not, or cannot, act entirely consistently with the purposes for which those donations were sought. Volunteers who provide labour or services may encounter a variety of legal issues, including potential criminal or tortious liability if their actions cause harm to people or property. The law in these cases is reasonably well-settled, but the results may be unsatisfactory. In some jurisdictions, protective legislation has been passed to limit or exclude some forms of liability.

Finn's points about volunteers' liability appear to be relevant to Alberta. A focus on previously organized volunteers can be seen in Part 3 of Alberta's *Emergency Management Act*, [RSA 2000, c E-6.8](#), which offers liability protection for a narrow group of emergency service providers:

27 No action lies against the Minister or a person acting under the Minister's direction or authorization for anything done or omitted to be done in good faith while carrying out a power or duty under this Act or the regulations.

28 No action lies against a local authority or a person acting under the local authority's direction or authorization for anything done or omitted to be done in good faith while carrying out a power or duty under this Act or the regulations during a state of local emergency.

29 No action in negligence lies against a search and rescue organization, the directors of that organization or a person acting under the direction or authorization of that organization for anything done or omitted to be done in good faith while acting under an agreement between that organization and the Minister.

These provisions raise the question of what does it mean to be "under the local authority's direction or authorization"? For example, the City offers advice on "[How to Organize Your Own Grassroots Clean-up Team](#)" and links to a number of volunteer efforts to organize and deploy volunteers. Are volunteers who follow this advice or these links "acting under the local authority's direction or authorization" and protected from liability under section 28?

Because the natural disaster in Christchurch was an earthquake, Finn did not examine the law with respect to harm to spontaneous volunteers themselves, something more likely to be a consequence of flooding. See e.g., the City of Calgary's "[Health risks of flooding](#)" and Alberta Health Services' "[Flood Updates and Resources](#)." Spontaneous volunteers at the site of a disaster are exposed to the same hazards as traditional emergency responders, but might have less training and less equipment to protect them. Are adverse health impacts to spontaneous volunteers covered by law or policy? All of the compensation provisions in Alberta's disaster legislation and regulations seem to be about harm to property.

Thinking about possible adverse health effects to spontaneous volunteers recalls an ABlawg post I recently wrote, titled "[A Rather Quick Response to a Rather Typical Vexatious Litigant](#)," commenting on *Onischuk v Alberta*, 2013 ABQB 89. Onischuk's initial claim arose from his allegation that he was harmed after being exposed to toxic chemicals as a result of voluntarily

participating in a cleanup of chemicals that spilled into Lake Wabamun when a Canadian National Railway (CNR) train derailed in 2005. The subsequent series of actions that Onischuk commenced and that eventually resulted in him being declared a vexatious litigant could all be traced back to that one instigating event. There was no question that harm was caused by the derailment; in 2009 CNR pled guilty to a number of environmental offences and was fined a total of \$1.4 million for the consequences of the derailment. But Onischuk's cause of action against CNR and various government departments was found to be "hopeless." His action against CNR and some of its employees was struck in 2009 on the basis that his claim did not disclose a reasonable cause of action. Negligence, as a cause of action, requires that the defendant owe the plaintiff a duty of care, a breach of that duty of care by the defendant, a causal connection between the negligent conduct of the defendant and the resulting injury to the plaintiff, and resulting damage to the plaintiff. Although the decision commented upon did not indicate in what way Onischuk's initial claim failed to disclose a reasonable cause of action, I would guess that it failed because the law does not recognize that a duty of care is owed by someone in CNR's position to someone in Onischuk's position.

If that is the law's position when a corporate entity can be identified as at least a cause of the harm complained of, what is the law when the disaster is a "natural disaster" and consequent damage to volunteers' and others' health is caused by what might be characterized as an "act of God"? Is a person a "volunteer" if they have been given a day with pay off work in order to contribute to clean-up efforts? See e.g. "[Volunteer for a day \(with pay\) to help the flood relief effort](#)" by the University of Calgary. Or is any harm caused by or to them done in their capacity as an employee and governed by the normal rules of employment law? I don't know the answer to these types of questions. Do you?

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