

The Wild West: Drone Laws and Privacy in Canada

September 2016

‘Drones’ were first known by the military as unmanned aerial vehicles, and later by the International Civil Aviation Organization as remotely piloted aircraft systems. Drones come in various shapes and sizes and can be piloted remotely by civilians or the military through complex systems which operate at high altitudes and long distances. Established commercial uses for drones include surveillance, construction, agriculture, resource exploration, meteorology, mapping, and photography.

Today, drones are being increasingly used in creative ways, including for real estate, movie production, racing sports, hunting and personal use. Nearly all consumer drones (e.g. “quadcopters”) have video and photographic capabilities. The smallest drone currently available on the Canadian market weighs 55 grams, is equipped with photographic technology, and syncs with iPhones. Alternatively, the United States Navy has created a drone the size of a Boeing 747. As drone use becomes more widespread, individuals and businesses should be aware of legal ramifications and who has rights associated with drones.

Broadly speaking, current Canadian law and corresponding rights surrounding drones can be divided into physical (trespass and safety) and photographic (privacy and voyeurism) concerns. These concerns are present at the government and civilian levels and can affect both businesses using drones for commercial purposes and individuals using drones for pleasure.

Commercial Use

In recent years, businesses in both the United States and Canada have pushed for further definition of the legal boundaries regarding drone use to reflect changing technologies. In 2013, Amazon first announced its proposed drone delivery program. Three years later, the company claims that the technology is ready and that they plan to use ‘Amazon Prime Air’ drones to deliver packages to consumers in 30 minutes or less once the legislature catches up. Further, the Canadian military is now allegedly purchasing drones with combat capacity.

Drone regulation begins at the federal government through Transport Canada.¹ Federal legislation governing civilian aviation in Canada includes the *Aeronautics Act* and the *Canadian Aviation Regulations* (CARs).² Transport Canada’s website reveals that drones used for work **or** research or that weigh more than 35 kg must be registered with a Special Flight Operations Certificate (SFOC).

There are a number of SFOC application processes depending on the nature and use of the drone and the level of complexity of the operation. Drone operators must have adequate knowledge and training for operation (which can be self-taught), and fixed or rotary wing pilot licenses are not required. Although some provisions in the CARs apply to drone operation, the majority of guidance on the subject stems from two Transport Canada Advisory Circulars (Circulars) which require SFOC certified drones to have a human operator to ensure that the drone is in direct sight at all times, amongst further requirements.³

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If an operator flies a drone without an SFOC and should have one, Transport Canada can issue fines up to \$5,000 for an individual and up to \$25,000 for a corporation. Moreover, if an operator does not follow the requirements of their SFOC, Transport Canada can issue fines of up to \$3,000 for an individual and up to \$15,000 for a corporation. However, Transport Canada can only enforce these regulations if report of an incident is received, or if local police are involved due to a contravention of the legislation.

The rapid growth and innovation in drone technology has left Canadian laws surrounding drone use in a complicated state of disarray. News stories of affected individuals who have attempted to navigate the complex web of advisories, guidelines, municipal and city bylaws, criminal laws, and potential lawsuits for trespass or property damage are plentiful.

In late 2014, Transport Canada introduced exemptions to the SFOC requirements as part of its ongoing review and development of the Canadian drone regulations. The stated purpose of the exemptions is to aid Canadian businesses in the proper use of small drones. Drones weighing less than 2 kg that are used for commercial purposes are now exempt from commercial SFOC conditions. Drones used for commercial purposes that weigh between 2 – 25 kg are exempt as long as proper notice of the proposed operation is provided to Transport Canada.

Personal Use

The lesson for commercial drone use seems to be, play it safe, comply with the requirements for an SFOC on Transport Canada's website and you won't have to worry about fines. However, what about the everyday drone user? As technology improves, quadcopters and other small drones are purchased in increasing numbers. For example, a beginner's model drone can cost less than \$100, with camera drones starting at a few hundred dollars. More complex drones, starting at less than \$1,000, offer customizable and programmable features, and are autonomous devices that can make their own decisions. For drone operators, it is important to be aware that any drone weighing less than 35 kg that is not being used for commercial, industrial, training, inspection or educational purposes must also comply with the *Aviation Act* and the CARs.

Compliance with the above legislation can be assured through following Transport Canada's general safety practices for drones in the Circulars. Transport Canada warns that if an individual places aircraft at risk, flies in restricted areas, or endangers anyone's safety, the operator could face serious consequences, including up to \$25,000 in fines and/or jail time. Despite these penalties, there have been a handful of recent reports of drones flying too close to aircraft. This may be because most online retailers do not warn of the potential safety concerns and legal ramifications of using a drone.

Drones and Privacy

So what happens when you fly a drone over your neighbour's property? Does this constitute trespass to their airspace? In Alberta, entry above the land has been found to be trespass in a case where the boom of a crane swings over the property,⁴ and where a newly installed air conditioner and eaves trough encroaches on the landowner's air space.⁵ However, the mere act of flying low over another's airspace may not constitute a trespass, if it does not infringe upon an individual's ability to possess or occupy his or her land for its use and enjoyment above the property line.⁶ The act of flying a drone over a neighbour's property lacks the element of permanency that appears in the case law where claims of trespass to air space are granted.

Although the guidelines in the Circulars address trespass and safety and the law on air space trespass presents some guidance, there are numerous privacy concerns surrounding the use of cameras on drones by both the government and civilians. While cameras already survey our daily lives, whether through cell phones, GoPros, dash cams, security cameras and satellite imagery, drones present a unique challenge as onboard cameras can easily fly undetected.

For individuals in Alberta, absent a complaint of voyeurism, or reporting that a drone operator has contravened the guidelines posted online by Transport Canada, individuals who fear being photographed or recorded by their neighbour's quadcopter whether at home or in public apparently have no legal recourse. Expectations of privacy depend on location and circumstances. There is a fundamental difference between a person's reasonable expectation of privacy in his or her dealings with the state and his or her dealings with ordinary citizens. The concept of privacy has a different scope in private law, as *Charter* rights do not apply to disputes between citizens.

In Alberta, the courts are hesitant to recognize an action for breach of a reasonable expectation of privacy. According to the courts, it is not appropriate to try and adapt the Charter to a private dispute even if only to draw some Charter-based wisdom into analysis of what an individual's reasonable expectation of privacy might look like.⁷ In Alberta, courts have been reluctant to allow claims for invasion of privacy between individual citizens. This leaves open the question of whether persons photographed by means of a drone have a legitimate complaint about publication of a photograph in the media.

Even in a situation where an individual discovers that their photo has been taken without their consent for a sexual purpose, the drone operator may not be found guilty of the criminal charge of voyeurism if the individual had no reasonable expectation of privacy to begin with. For example, one case dealt with a criminal charge of voyeurism against a photographer who took photos of a woman at a nude beach without her consent. The photographer claimed that he did not use the pictures for a sexual purpose. The court decided that the charge of voyeurism was not made out since, in this case, there was no reasonable expectation of privacy on a public beach.⁸ The conclusion could be much different if a drone operator took photos of a person who had a reasonable expectation of privacy.

In another case, a high school teacher was charged with voyeurism when he surreptitiously recorded female students with a pen camera. In this situation, the students were fully clothed in the recorded images. The accused argued that there was no expectation of privacy within the school since the school was already subject to security video camera surveillance. The court disagreed, pointing out that privacy is a relative concept, and that in assessing expectations of privacy “technology has the potential to dramatically change the reality of all such considerations and expectations.”⁹

In this case, the teacher was ultimately acquitted of the criminal charge of voyeurism, however it is clear that Canadian courts will assess each claim of privacy within its context, and individuals may have a reasonable expectation of privacy in a range of situations. Perhaps a creative solution to the issues above can be found in a proposed new technology: the Drone NoFlyZone. This proposed technology allows homeowners to establish a geofenced perimeter over their property. Currently, this technology may not be approved by the Federal Government, which has jurisdiction over radiocommunications. The *Radiocommunication Act* requires anyone wishing to manufacture, import, distribute, lease, sell or use radio equipment in Canada must ensure that devices are tested and certified to meet applicable technical standards. This requirement also applies to licence-exempt radiocommunication devices, whether locally manufactured or imported for use in Canada. Thus, this technology may require permits and it is unclear as to whether the requisite permits would be granted at this time.

Recent Government Initiatives

Transport Canada is developing new regulations that will attempt to integrate drones safely into Canadian airspace. The department published a Notice of Proposed Amendment in May 2015 that highlighted proposed changes, including new flight rules, aircraft marking and registration requirements, knowledge testing, minimum age limits, and pilot permits for certain drone operations. Transport Canada intends to publish draft regulations in 2016. Finally, on June 13, 2016, the Canadian Minister of Transport Marc Garneau, launched a national safety campaign in partnership with various organizations to educate drone operators and unveiled a ‘No Drone Zone’ sign. According to Transport Canada, the ‘No Drone Zone’ signs will be distributed to a number of airports and other organizations to promote the safe use of drones and to deter operators from flying in areas that put aviation safety at risk. It is clear that the government has recognized the need for further regulation and organization of the confusing web of regulations surrounding both commercial and personal drone use. As there is potential for litigation based on the interests affected above, we strongly recommend that clients ensure they update themselves accordingly on drone regulations via the Transport Canada website www.canada.ca/dronesafety.

New US Rules

On June 21, 2016 the Federal Aviation Administration of the United States (FAA) announced a new Small UAS Rule (Part 107), which came into effect in August 2016. Part 107 proposes that commercial flights must be performed by an operator who is at least 16 years old; who have passed an initial aeronautical knowledge test at an FAA-approved knowledge testing center, and are vetted by the Transportation Safety Administration (TSA). Individuals who already hold a pilot certificate issued under the rules and have successfully completed a flight review within the previous 24 months can complete a part 107 online training course at <https://www.faa.gov/> to satisfy this requirement.

The new rules will apply to drones that weigh less than 55lb (25kg), and will require that pilots complete an aeronautics safety test once every 24 months. Nighttime flying is not allowed and drones must operate below the maximum groundspeed of 100 mph (87 knots). As for altitude restrictions, drones may only be flown below a maximum altitude of 400 feet above ground level or, if higher than 400 feet above ground level, remain within 400 feet of a structure; however, drones cannot fly directly over an individual without their consent. Drone operators must also ensure a minimum weather visibility of 3 miles from control station, and must not fly from a moving vehicle.

The FAA also reports that it hopes to provide all drone owners with "privacy guidelines" for drone use, and that drone use for delivery by companies such as Amazon and Walmart remains off-limits for the time being.

Some rules under part 107 will be subject to waiver if the proposed use is deemed appropriate and safe by the FAA, in which case operators will be able to fly in ways that are not initially permitted.

Finally, the FAA provides an app that is available for free download in the App Store for iOS and Google Play store for Android. The App, B4UFLY, is an easy-to-use smartphone app that helps unmanned aircraft operators determine whether there are any restrictions or requirements in effect at the location where they want to fly. Key features of the B4UFLY app include: a clear "status" indicator that immediately informs the operator about the current or planned location, a "Planner Mode" for future flights, interactive maps with filtering options and links to other FAA UAS resources and regulatory information.

For questions regarding drone laws and privacy in Canada, contact Richard in Field Law's **Intellectual Property Group**.

¹ On the basis that drones fall within the scope of the federal government's constitutional power over aeronautics: *Constitution Act*, 1867, ss. 91; Canada *Transportation Act*, SC 1996, c. 10.

² RSC, 1985, c. A2; SOR/96433

³ Model Aircraft and Unmanned Air Vehicle Systems Advisory Circular (AC) No. 600002 and the Guidance Material for Operating Unmanned Air Vehicle Systems Advisory Circular (AC) No. 600004.

⁴ *Didow v. Alberta Power Ltd.*, (1988) CarswellAlta 109 (Alta. C.A.)

⁵ *Carriere v. Bourre*, 2009 CarswellOnt 4268 (Ont. S.C.J.)

⁶ *Harcourt v. Lewmar Air Toronto Ltd.* (1973), 1973 CarswellNat 93 (Fed. T.D.); also see *Didow v. Alberta Power Ltd.*, (1988) CarswellAlta 109 (Alta. C.A.) at para 27, 3641

⁷ *Denman v. Jamieson*, 2006 ABQB CarswellAlta 354, at para 75

⁸ *R v. Lebenfish*, 2014 ONCJ 130

⁹ *R. v. Jarvis*, 2015 ONSC 6813 (CanLII)