LawNow
relating law to life in Canada

Workplace Health & Safety

PLUS
Practical Tips for Self-Represented Litigants & Family Law Update

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Your Top 4 Questions About WCB Answered

September 7, 2022 by Carolyn Krahn

The Workers' Resource Centre provides practical tips for getting help with WCB claims, what to do if you disagree with a decision, and returns to work in Alberta.

The **Workers' Resource Centre (WRC)** is a FREE agency that assists Albertans with filing claims, complaints and certain appeals for:

- Employment Insurance (EI)
- Employment Standards
- Assured Income for the Severely Handicapped (AISH)
- Workers' Compensation Board benefits (WCB)
- Canada Pension Plan disability benefits (CPP-D)
- *Canada Labour Code*
- Human rights (Alberta Human Rights Commission and Canadian Human Rights Commission)

Have questions? Need support? Contact our Intake Coordinator at 403-264-8100 or info@helpwrc.org. We offer in-person and virtual appointments.

One area we support workers in is applying for WCB benefits after being injured or becoming ill at work. Below are answers to the most common questions workers ask us about the WCB process.

Where can I find someone to represent me with my WCB case?

The WRC assists Alberta workers with work-related illnesses or injuries in filing **initial** WCB claims. We do not file WCB appeals.

The reason for this is that there is an Appeals Commission that assists if you are not successful in your "request for review". The Appeals Commission and the WCB are separate organizations that are independent from each other:

- Appeals Commission staff are Government of Alberta employees. They are not WCB staff.
- The Commissioners at the Appeals Commission who hear appeals and make decisions are appointed by the Lieutenant Governor of Alberta.

For this reason, the WRC does not want to duplicate existing services, so we focus on offering support in claims that do not have other avenues for assistance.

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What can I do if I do not agree with WCB's decision on my claim?

Under the WCB legislation, a WCB case manager will review your claim. If they accept it, they will determine what types of supports you require. Sometimes, an ill or injured worker may disagree with the WCB's ruling. If you disagree with the WCB's response, you have options:

- If you are unable to resolve your concerns with your adjudicator or case manager, you

can request a formal review of the decision within one year of the decision date. After you submit the request, a supervisor will work with you towards a possible resolution.

- You can complete the request for review form online or request a paper version by calling the WCB contact centre.

Time limit for review

- You have **one year** from the date of your decision letter to submit a request for review. In some situations, the WCB may extend the time limit if it has been more than a year since the decision was made.
- The WCB Dispute Resolution and Decision Review Body (DRDRB) will make a decision regarding your request for review. If you disagree with that decision, you may file a claim with the Appeals Commission.

What can I do if my case manager is threatening to cut off my WCB payments if I do not participate in their "return to work" program (even though I am not ready to go back yet)?

If WCB has determined you need to return to work (with modified duties or otherwise) as recommended by their medical team, you must try to perform the duties they are asking. Otherwise, you risk getting your payments or treatment cut off or suspended. If you go to work and cannot perform the job duties asked of you, you need to contact your WCB case manager and inform them of this. In certain circumstances, the ill or injured worker may request what is called an Independent Medical Exam (IME) if they feel the WCB physician is not being realistic about the job duties the worker is able to perform. A non-WCB physician conducts the IME. Their job is to assess your current functioning capacity regarding your ability to return to work.

Why is it so difficult to "fight" WCB?

WCB is a challenge because it is guided by provincial legislation but is also a private insurance company. Often, people feel the WCB is trying to cheat them out of benefits by not approving medical and financial requests for assistance. People are also suspicious of the appeals process as they feel the Appeals Commission is still tied to the WCB.

The WRC recognizes these concerns and has a few suggestions when dealing with the Appeals process:

- Keep in touch with your WCB case manager and follow their instructions.
- Keep documents and make notes of everything related to your WCB claim.
- Remain active in your recovery process by attending appointments and treatment as required.

There are some organizations that can assist ill or injured workers with WCB appeals, and they typically come with a cost. The WCB process is often long and frustrating. If you are frustrated with your experience, contact your MLA's office to relay concerns and request changes to the program.

More Resources

Want more information? Chance to participate in a PAID research study? The WRC has partnered with the University of Calgary to offer a series of **free** seminars on supporting ill or injured workers.

For Ill or Injured Workers:
Wednesday, September 28, 2022
7:00 – 9:00pm (via Zoom)
Register online

For Community Agency Workers:
Thursday, September 29, 2022
1:00pm – 2:30pm (via Zoom)
Register online

Carolyn Krahn

Carolyn Krahn is the Executive Director of an employment rights agency that assists workers in navigating employment legislation and providing free public legal education.

The Death of Her Majesty the Queen: What does it mean for us?

September 12, 2022 by Nathalie Tremblay

The passing of Queen Elizabeth II and ascension of King Charles III impacts Canadians in interesting ways.

A lot of people will remember exactly where they were and what they were doing on September 8, 2022 when they learned of Queen Elizabeth II's passing.

Her Majesty's death does not hold the same meaning for everyone of course. Some people will be profoundly touched while some will be mostly interested in the historical significance of the longest reign of a Monarch in Commonwealth history. Others' feelings and interest will largely remain unaffected.

No matter our opinions and reactions, this important event will affect every Canadian's daily life as we experience a period of transition when it comes to naming titles, laws and institutions. Familiar nomenclatures may become somewhat awkward and perhaps even strange for some time. So, how do things change now that King Charles III has ascended the throne? Let's look at what will and will not change.

What about buildings, institutions and infrastructures?

This part is simple. Buildings and offices displaying an official photograph of the Queen will have to replace it with an official photo of the new King. Watch for the photo to be available soon to download from the Government of Canada's website. In the meantime, photos of the Queen can be draped in black. Commissioned artwork featuring Her Majesty does not have to be replaced.

You will not be driving down the KCIII highway! Infrastructures like schools and highways named in honour of Queen Elizabeth II will keep their names. And institutions holding Royal designation in the name of the Queen, such as the Royal Alberta Museum, will also keep that designation.

Photo from Pexels/Pixabay

What about things in my everyday life?

Your stamps with the Queen's image will still take your correspondence to its destination! And do not worry about your money – it will still be good! Of course, new currency honouring the King will be printed and with time the currency bearing Queen Elizabeth II's image will move out of circulation. (Collectors beware!)

If you are planning to travel soon, your passport will still be valid even if it is issued in the name of Her Majesty the Queen. The

wording will change when you renew your passport. But in the meantime: Bon voyage!

What about oaths and honours?

No changes are expected on that front. New Canadians swear an oath to the Crown so their citizenship status does not change nor do they have to swear a new oath. People who swear an oath as part of their employment will not have to swear another one either. Medals and national honours presented to individuals obviously retain their validity!

What happens with the justice system and political appointments?

You may have already noticed on their website that the Court of Queen's Bench (QB) has changed to the Court of King's Bench (KB). Section 2.1 of the *Court of Queen's Bench Act* was added in 2019 to clarify that the court is named the Court of Queen's Bench during the reign of a Queen and the Court of King's Bench during the reign of a King.

If you have an application or matter before the QB, do not fret. You do not need to re-file your documents. We are in a transition period where the Court will still accept forms referencing the Court of Queen's Bench. The Court has not yet announced a deadline to complete the transition.

Judges, police officers, Members of the Legislative Assembly, mayors, and more will not have to re-take their oaths to swear allegiance to the new King. Section 56 of the *Judicature Act* allows these functions to continue as if the Queen had not passed so that the running of important institutions is not interrupted.

Alberta's Lieutenant Governor remains in place because their oath is sworn in reference to the sovereign's heirs and successors as well.

Finally, all documents issued by the Queen's Printer remain valid. Though the name has now changed to Alberta King's Printer.

A Point in Time

A lot of us may be glued to our screens watching history in the making – and perhaps binge watching "The Crown" once more. And our lives will move forward with some adjustments and a list of new vocabulary.

Nathalie Tremblay

Nathalie Tremblay, MEd, is the Education Design and Evaluation Specialist at the Centre for Public Legal Education Alberta.

What happens when someone does not comply with Alberta's OHS laws?

September 19, 2022 by Jessica Steingard

Jail? Fines? Nothing? What are the real consequences of not following occupational health and safety (OHS) laws in Alberta?

Alberta's ***Occupational Health and Safety Act*** is the primary legislation governing OHS in Alberta. It also includes several regulations, each with its own role in regulating OHS:

- Occupational Health and Safety Regulation
- Farming and Ranching Exemption Regulation
- Occupational Health and Safety Code
- Administrative Penalty Regulation

In this article, we are going to focus on what happens when someone does not comply with any of these laws in Alberta. Who takes the heat, so to speak? What are the consequences?

Who is responsible for an unsafe work site?

Any work site party can be held responsible for an unsafe work site. As a reminder, work site parties named in the Act are:

1. Employers
2. Supervisors
3. Workers
4. Suppliers

Photo by Skitterphoto from Pexels

5. Service providers
6. Owners
7. Contracting employers
8. Prime contractors
9. Temporary staffing agencies

Alberta OHS office can act against any person, which can be an individual or a company.

How does Alberta OHS enforce the Act?

Directors and officers with Alberta's OHS office have wide powers to enforce the Act. These powers include inspections, investigations, inquiries, carrying out tests, issuing stop work or stop use orders, issuing administrative penalties, or charging a person with an offence. Let's look at a few of these enforcement tools.

What are stop work and stop use orders?

An officer can issue a **stop work order** if they believe a worker's health and safety are in

danger. They can order that work be stopped or that a worker or other person leave the work site immediately. They can also issue a written order listing steps that other work site parties must take to protect people from or remove the danger.

If the danger exists across a company's different work sites, the officer can order the company to stop all activities and everyone to leave the work sites. The company cannot resume work until the order is cancelled, which happens after they take steps to protect people from and remove the danger.

A **stop use order** is similar to a stop work order except it applies to the use of personal protective equipment, other equipment, harmful substances or explosives. An officer can order someone to stop using it and a supplier to stop supplying it.

If someone is not following a stop work or stop use order, the Director can apply to the Court of King's Bench to turn the order into a court order. This gives the Director a greater ability to enforce the order. A person not following the order can also be fined up to $1,000,000, jailed for up to 12 months, or both.

What are administrative penalties?

Administrative penalties are tickets for bad behaviour! An officer can issue one if they believe a person has:

- not followed a part of the Act, regulations or OHS Code
- not followed an order made under the Act, regulations or OHS Code
- not followed an acceptance, allowance, approval or interjurisdictional recognition issued under the Act
- made a false statement or given false or misleading information to an officer

Administrative penalties can be up to $10,000 per incident. If the non-complying behavior continues for more than one day, the penalty can increase to up to $10,000 for each day the behaviour continues. When deciding how much the penalty should be, an officer should think about the seriousness of the issue and the resulting risk of harm.

An officer must issue an administrative penalty within two years of the alleged contravention or failure to comply. A person who pays an administrative penalty cannot be charged with an offence for the same issue. Failing to pay the penalty means the Minister can file the notice of administrative penalty with the court and enforce it as a judgment of the Court of King's Bench.

What are the OHS offences?

A person is guilty of an offence if they participate in the following activities (set out in section 47 of the Act):

- not complying with an order or decision made under the Act, regulations or OHS Code
- intentionally blocking a Director or officer from carrying out their powers or duties
- not reasonably cooperating with a Director or officer in carrying out their powers or duties
- knowingly making a false statement or giving false information to an officer or the police carrying out an inspection or investigation
- making or causing another to make a record or destroying a record that is required under the Act, regulations or OHS Code
- not reporting an injury, illness, incident or worker exposure to radiation (see the requirements in section 33 of the Act)
- not complying with any provision of the Act, regulations or OHS Code

After an investigation, OHS may send the incident file to Alberta Justice and Solicitor

General to review to see if the person responsible should be charged. Remember, a person can be an individual or an organization. Alberta Justice and Solicitor General will lay charges if there is a reasonable likelihood of conviction and the prosecution is in the public interest. They must lay charges within two years of the incident. Being charged means going through the justice system, the same way someone charged with a crime does. There are special prosecutors with Alberta Justice and Solicitor General who prosecute OHS offences.

If the court finds the person guilty of the offence, the person can be fined or jailed or both. For a first offence, the person can be fined up to $500,000. If the offence continues for several days, they can be fined up to $30,000 for each subsequent day. The person can also be jailed for up to 6 months.

For a second or subsequent offence, the person can be fined up to $1,000,000. If the offence continues for more than one day, they can be fined up to $60,000 for each subsequent day. The person can also be jailed for up to 12 months.

The court also has wide powers to make other orders against a person found guilty. For example, the court may order the person to pay money for training or education programs for the health and safety of workers, or any other purpose that furthers the goal of achieving healthy and safe work sites. Failing to pay these amounts (or installments) by the deadline in the court order means the amount owing becomes a fine, which the government can enforce in different ways.

The government of Alberta posts lists of charges and convictions under Alberta's OHS laws on its website.

The takeaway?

Work site health and safety is everyone's responsibility. Take responsibility for yourself and others, no matter your position. If you have questions about OHS laws or unsafe work sites, contact Alberta OHS.

Jessica Steingard

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

OHS: A Safety Coordinator's Perspective

September 28, 2022 by Centre For Public Legal Education Alberta

Eight things workers should (and hopefully already) know about occupational health and safety laws in Alberta.

It's one thing to read the laws in Alberta about occupational health and safety (OHS). But how does it actually work day-to-day? Say you work in construction or IT or a school. The reality is that OHS laws are all around us. But does everyone know what the laws say?

We recently sat down with a safety coordinator in the Edmonton area, who shall remain nameless. They gave us their take on eight things workers should know (but might not!) about OHS laws in Alberta.

1. There are OHS laws.

This sounds silly but it's true. Some workers do not know that there are multiple laws governing OHS practices in Alberta, and across Canada.

Alberta's *Occupational Health and Safety Act* applies to most workers in Alberta. It also includes the OHS Regulation and OHS Code. We say it applies to 'most' workers because there are exceptions. The OHS Act applies to people meeting the definition of 'worker' (see below). But it does **not** apply to workers governed by federal safety laws. Workers in federally regulated industries are covered by Part II of the *Canada Labour Code*. Learn more about federally regulated workers at CPLEA's Law FAQs website.

This article discusses Alberta's OHS legislation.

2. Workers have the right to know, participate and refuse unsafe work.

These three rights are enshrined in section 2 of Alberta's OHS Act. The **right to know** means the "right to be informed of work site hazards and the means to eliminate or control those hazards". This includes being informed if another worker has exercised their right to refuse unsafe work for the same work you are being asked to do.

The **right to participate** means the "right to meaningful participation in health and safety activities pertaining to their work and work site, including the ability to express health and safety concerns." This includes being part of joint health and safety committees or acting as the health and safety representative.

Photo by Yury Kim from Pexels

The **right to refuse unsafe or dangerous work** is mentioned in section 2 and described further in section 17 of the OHS Act. A worker may refuse to do work if they reasonably believe there is an undue hazard at the work site or that the work may jeopardize their health and safety or that of another worker or

person. The employer can assign the worker to other work while they investigate and remove the hazard. If the employer considers the hazard to be gone but the worker still disagrees, the worker can report their concerns to an OHS officer to investigate further.

3. Work site parties have legislated rights and responsibilities.

Alberta's OHS Act defines nine work site parties:

1. **Employer**: includes self-employed persons, employers who hire workers through a temporary staffing agency, someone designated as the employer's representative, a director or officer of a corporation, or an employee overseeing the company's occupational health and safety program
2. **Supervisor**: a person who has charge of a work site or authority over a worker
3. **Worker**: a person engaged in an occupation, including who performs or supplies services for free. A worker does not include a student doing unpaid work as part of a school program, and family members and volunteers on a farm.
4. **Supplier**: a person who sells, rents, leases, erects, installs or provides any tools, appliances, personal protective equipment, equipment, harmful substances or explosives for use at a work site
5. **Service provider**: a person who provides training, consultation, testing, program development, or other services for an occupation or work site
6. **Contracting employer**: a person, partnership or group that directs the activities of one or more employers at a work site according to a contract, agreement or ownership
7. **Owner**: the person who owns the land of the work site or a person who agrees to be responsible for the owner's responsibilities under the Act. It does not include a person who owns a private residence unless a business, trade or profession is carried on in that place.
8. **Prime contractor**: the prime contractor overseeing two or more employers working at a construction or oil and gas work site (or other work sites OHS says must have a prime contractor)
9. **Temporary staffing agency**: an agency that brings on workers and places them with other employers

The Act lists specific responsibilities for each of these parties (see sections 3 to 12). Because these responsibilities are set out in legislation, a person in one of these positions can face consequences under the law if they do not abide by their responsibilities.

4. OHS can ticket or charge work site parties for unsafe behaviours.

A company may discipline someone who does not follow safety protocols. However, the person or company can also face consequences from Alberta OHS. Work site parties can be ticketed, jailed or both. Learn more in a recent LawNow article: What happens when someone does not comply with Alberta's OHS laws?

5. Personal protective equipment (PPE) is the law.

It's not just something your boss keeps bugging you about. Failing to wear PPE might mean being disciplined by your company. But it can also lead to consequences for you or your company from Alberta OHS. The required PPE depends on the industry in which you work and the specific site conditions. PPE can range from a hard hat, safety vest and steel-toed boots (the basics) to respirators, chemical suits and fall protection.

6. Safety audits matter.

Safety audits allow a company and its workers to see how effective a safety program is and the company's commitment to following its policies and procedures.

Organizations with COR must complete external safety audits every three years and internal maintenance audits the other two years. Failing to do an audit may mean losing COR. And one benefit of COR is that it may reduce a company's WCB premiums, presumably because the company is a safer place to work and so injuries leading to WCB benefits being paid out are less common.

7. Use your daily logbooks, FLHA's, etc.

These daily hazard assessments are vital to identifying any hazards on a job site and informing all work site parties about those hazards. Again, it's not just paperwork. The conditions outlined in the FLHA allow a worker to exercise their rights to know, participate and refuse unsafe work.

8. Safety is everyone's responsibility.

Safety is not just a policy or the safety coordinator's role. Everyone on a work site has a responsibility to conduct themselves in a way that creates a safe work environment for themselves and everyone else.

Centre for Public Legal Education Alberta

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

Do you need legal information? Start at Alberta Law Libraries

October 5, 2022 by Ana San Miguel

Alberta Law Libraries offer guidance and free access to legal materials and forms.

If you are dealing with a legal problem, or if you need to appear in court and do not have a lawyer, you are welcome to visit **Alberta Law Libraries** for assistance and free access to legal materials. Understanding the law is a useful first step even if you do have a lawyer.

Photo by Vojtech Okenka from Pexels

There are plenty of sites online that offer legal information and advice. However, many may not apply to Alberta or may offer wrong or outdated advice. Finding the right information can be challenging and time consuming. That is where we can help!

Alberta Law Libraries (ALL) is a provincial network of libraries that provide support and information services to all Albertans. The libraries are located in ten Alberta courthouses. Library staff at each location can help individuals locate the materials they need to understand their legal issues.

The library collection includes books, quick reference materials, legislative resources and case law materials. You may access the information in paper, on the public computers at each of our branches, or remotely from your home computer. You may also use photocopiers and scanners at our bigger locations (there may be a fee).

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Visit the ALL webpage for resources and information on how to conduct your research:

- Our Research Guides will point you to the most useful legal resources on different areas of the law.
- Navigating Legal Information explains the different types of resources, including how to find other legal help.

NEW to Alberta Law Libraries, you can now research the law from the comfort of your home computer. Members of the public can register with the libraries to access remotely and for free some of the most comprehensive legal databases and collections of legal books. Call the library if you need help navigating the materials. These are some of the resources available to Alberta residents:

- Westlaw Canada (14-day limited access) – Canadian legal texts, case law and legislation
- vLex Justis – collection of books on family, criminal and civil law
- Emond's Criminal Law Series – collection of books on criminal law
- Rangefindr.ca – range of sentences for criminal offences in Canada

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Ana San Miguel

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Ayn Rand and the United States Court of Elitism: A strange symbiosis (Part 1)

October 11, 2022 by Rob Normey

Part one of this two-part series reviews Ayn Rand's views and novels, to help us understand her influence on the United States Supreme Court.

Photos from Pexels/Pixabay

OPINION | The views expressed in this article are those of the author.

Part One: Who are Howard Roark and Judge Narragansett?

At the end of August 2022, Senator Bernie Sanders gave a rousing speech to British workers who are attempting to defend their rights (watch the video on YouTube). Sanders paraphrased the abolitionist and human rights advocate Frederick Douglass on the importance of struggle in the fight for equality of all citizens. In his West Indian Emancipation Speech of 1857, Douglass stated: "If there is no struggle, there is no progress. … Power concedes nothing without a demand. It never did and never will."

As Sanders points out, workers and ordinary Americans wishing to see their votes count in upcoming elections face a growing oligarchical structure of wealth and power and political influence. The top three multi-billionaire families own more wealth than the bottom half of American society – that is, of 165 million ordinary citizens. In the last few decades – an age of "extreme capitalism" in the U.S. – the wide spread of wealth and political power has grown to its current dangerous state.

Ayn Rand's Individualism

There are few American writers and proponents of extreme capitalism from a radical right perspective besides novelist and philosopher Ayn Rand. She was born in Russia in 1905, immigrated to the United States in 1928 and passed away in 1982. Rand eventually became a screenwriter and noted enemy of left-wing writers, who were prominent for a brief time in Hollywood before the "Red Scare" and McCarthyism took their toll. Her hatred of Soviet Communism extended to all writers and thinkers, including political and legal thinkers who opposed her vehement views on the sanctity of unregulated markets and the "persecution" of the real makers of wealth (big businessmen and their corporations).

Rand adapted some of the German philosopher Nietzsche's views to her concept of the Ubermensch (Superman or Overman). She believed in freeing the hands of the major producers – businessmen – from the "second raters" and "looters" (to use terms of abuse she regularly employed in her novels). She

promoted a form of individualism in a country known for such trait. However, when reading her novels, one quickly learns she is dead serious about super-sizing the concept of individualism.

It is clear from 2005's *Ayn Rand Answers* that all who oppose her positions on individualism, her hatred of altruism, and her belief that any restraint on "free markets" and the ability of powerful individuals to produce what they wish, without governmental controls, are "collectivists". In the Randian universe, collectivists' views should be given the contempt they deserve. In *Ayn Rand Answers*, we also learn that while property rights are sacrosanct, Indigenous peoples could have no property rights whatsoever because of the nature of their society (at pages 102 to 104). For good measure, she also claims the indigenous people of historic Palestine (Palestinians) lack property rights and indeed should be viewed as having no rights whatsoever, including "to human intercourse" (at page 97). With these views, she likely would have loathed the United Nations Declaration of the Rights of Indigenous Peoples. In fact, her entire philosophy is deeply committed to a hierarchical order of great businessmen (and a few businesswomen) that has troubling implications for a modern democracy.

Given Rand's extreme commitment to property rights and aversion to virtually all government regulation, many politicians and justices widely admire her. Donald Trump has declared himself to be a latter-day Howard Roark, protagonist of Rand's 1943 blockbuster novel *The Fountainhead*. Rand Paul, prominent Republican Senator, gives friends and staff gifts of Rand novels every Christmas.

In this two-part series, we will look at the connection between Rand's novels and U.S. Supreme Court justices. This first part will set the stage for part two by looking at the main characters of two of Rand's most famous novels. In part two, we will look at the strange yet strong connection between the novels and philosophy and the judicial approach of the "Midas Mulligans", as I dub the five radical right members of the Supreme Court led by Justice Thomas.

The Fountainhead

There are two trials in *The Fountainhead*, her breakthrough novel of 1943. The second forms a climax to the fiercely controversial plot. Rand tells us she designed the novel to offer a projection of her ideal man, a "moral" force in the world. The novel's hero is Howard Roark, a brash, nonconformist architect. Although the novel is apparently set in the late 1930s, primarily in New York, we are a long way from realism. The characterization is wooden. There are totally evil villains, including architectural and dramatic critic Ellsworth Toohey, who writes for a leading newspaper, the Banner.

One episode in particular represents the atmosphere of this strange novel. A group of playwrights discuss a truly mediocre and even embarrassing play that should not see the light of day. Despite this, Toohey and the Banner's drama critic join forces to promote the play, praising it to the skies. They watch audiences flock to it on Broadway. This sequence perfectly captures the narrator's inexhaustible contempt for "the masses", the ordinary citizens. Throughout the novel, we see citizens blindly following opinion makers who have underhanded, nefarious motives. Only the exceptional individuals like Roark (or his eventual partner, Dominique Francon) are capable of resisting conformist thinking in favour of collectivism. Rand postures that it is these giants who create works of value and provide leadership.

A minor but still telling incident occurs late in the novel as Roark finally establishes his architectural firm with a growing staff. As an employer, Rand portrays Roark as completely dedicated and interested only in his employees' productivity, not any aspect of their lives. The stern employer lets a young

man go after only two weeks because he dared "to introduce the human in preference to the intellectual in the office." The Randian worldview is a harsh "survival of the fittest" one, in which only a few ruthless geniuses will emerge victorious.

Late in the novel, Roark is on trial for dynamiting a housing project for needy orphans. Roark secretly worked on the project plans while he claims they were prepared by his "second rater" acquaintance, Peter Keating. A change to the project between Roark and Cortlandt Homes – to add a gymnasium – breaches the pact between the two men. The plan enrages our unyielding protagonist, and he proceeds to destroy the large structure, endangering any pedestrians in the process. The trial concludes with a stirring presentation to the jury by Roark of his life's philosophy – selfish individualism that tolerates no compromise. Roark has naturally determined he is best defending himself. I note for what it is worth that normal rules of procedure seem to fly out the courtroom window at this point. Further, the prosecutor is stumped by the strategy and seems to weakly accept the verbal onslaught, without objection or response.

The judge is apparently so impressed, or overwhelmed, by Roark's change of subject that he fails to sum up and guide the jury through the facts. A man has taken it upon himself to blow up a large partially constructed building, endangering others who might be in the vicinity. With the aid of the stupefied judge and prosecutor, naturally in this black and white tale, the jury acquits. Roark goes on to build not just a skyscraper in this journey between valleys and peaks, but the "greatest, tallest" building in the city, courtesy of a commission by a wealthy newspaper tycoon.

Atlas Shrugged

In 1957, Rand was back with the triple decker epic, *Atlas Shrugged*. This capitalist romance novel milks the self-pity of "poor little rich boys", the major business tycoons of the time. Our heroine, Dagny Taggart, is an heiress and part of owner of a railway company. She idolizes a virile and handsome businessman who has climbed to the top of the world of epic producers. In this dystopian world of government overreach and needless regulation, the major business oligarchs have staged a strike. (This is a cunning reversal no doubt, of the typical 1930s proletarian novel, empathizing with the vulnerable working class that Rand so despised.)

There is no doubt in *Atlas Shrugged* that the President, his Cabinet and various government officials wear black hats and have a compulsion to overregulate. Still, readers not seduced by Randian philosophy will likely raise their eyebrows at the thought of big business being the truly oppressed class in American society. The government enacts anti-trust laws following a democratic process. And no doubt, mega-firms do not like the idea of having to break into smaller companies. Yet are they entitled to perpetrate dangerous and anti-democratic behaviour? You be the judge, assuming you are willing to trudge through this 1,168-page novel.

We learn of the powerful entrepreneur and oilman Ellis Wyatt's response to regulations on rail shipments in a truly vicious manner. He actually blows up his oil wells, which of course would cause major pollution and environmental disaster for local residents. He (and the narrator) is unapologetic. Dagny's lover, Hank Reardon, is forced to stand trial for flagrantly ignoring a law in his business operations. We see a deep contempt for the legal process, as Reardon refuses to recognize the legitimacy of the tribunal (of three judges). And despite courteous requests, he obstinately refuses to plead to the charge. As one of the Nietzschean heroes of the melodrama, you can surely guess the result.

Towards the end of the novel, Dagny and Hank meet up with the other protesting tycoons. We

learn of the work of the astute banker, Midas Mulligan, and a wise old judge of distinctly conservative convictions, Judge Narragansett. The judge completely sympathizes with the strikers, who have now forced the federal government to resign, recognizing at last the necessity of a business takeover.

Here in the hideaway of the reverse Robin Hoods at Galt's Gulch, we learn, along with the judge, of the often violent and predatory behaviour of the plutocrat's ancestors. Raw capitalism under the Randian world-view entails acts of violence, even murder, in the pursuit of maximum profit-taking. Laws in the public interest are made to be broken by these Randian Supermen.

As part of the new order, which I interpret as a coup, Judge Narragansett is hard at work drafting amendments to the Constitution including the Bill of Rights. He proposes removing various provisions that he views as contradictions. The centrepiece of this elitist Constitution will be a new clause: "Congress shall make no law abridging the freedom of production and trade…" God help us from all zealots who would overturn the U.S. Constitution to enshrine the wealthy and powerful, including big business and its property interests, as the final arbiters of all issues!

A Massive Influence

Rand's books, particularly these two novels, have sold more than 37 million copies, with sales picking up over the past dozen years. Collectively, they are the equivalent of the anti-slavery novel *Uncle Tom's Cabin* but endorse "liberty" as proclaimed by the radical right. In addition to the massive influence they have had on Republican politicians and conservative-minded justices, a survey by the Library of the U.S. Congress ranked *Atlas Shrugged* right below the *Bible* in its list of the most influential books ever written.

Rob Normey

Rob Normey has been a member of the Alberta Bar for 41 years and has been keenly interested in human rights issues throughout that time. He has been a member of Amnesty Intenational for 40 years and has worked for various human rights groups. He is a supporter of B"Tselem, Israel's largest human rights group.

How PLEI Resources Can (and Cannot) Help Self-Represented People

October 14, 2022 by Jeff Surtees

Reliable and current public legal education and information (PLEI) resources can help self-represented people prevent and resolve legal problems in many situations.

Photo Credit: Centre for Public Legal Education Alberta

What is PLEI?

PLEI stands for public legal education and information. While it may seem self-explanatory, one description of what is does is as follows:

> *PLE provides people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognize when they may need support, what sort of advice is available, and how to go about getting it." (See "**Effectiveness of Public Legal Education initiatives: A literature review" by Dr. Lisa Wintersteiger et al**)*

The first sentence above describes *how* PLEI is meant to help. The second sentence is a caution, hinting that there might be a line in some legal disputes where *information* will not be enough and *advice* from an expert (usually a lawyer) is needed. It might not always be easy to see where that line is, especially for a participant trying to solve a legal problem. It will depend on the unique facts of the case and the unique abilities of the person dealing with the problem.

Only lawyers can give legal advice

In Alberta, and in most provinces across the country, only active, insured lawyers can practice law, or give legal advice. "Active" means the lawyer is a member of the Law Society of Alberta and must follow a strict Code of Conduct. "Insured" means the lawyer carries insurance to cover situations where they make a mistake. And to "practice law" means to look at the facts of an issue and advise the client on what they should do in their specific situation.

There are a few exceptions to this rule, including for self-represented parties. However, non-lawyers can still provide legal education and information.

See CPLEA's Legal Information vs. Legal Advice: What is the difference? info sheet for a deeper look at the distinction between legal advice and legal information.

How PLEI can help

Getting legal advice from a lawyer is not the only solution to a legal problem. Good legal information and education can also help.

Not everyone has a burning interest in legal topics. As a result, most people will likely only start looking for legal information about a topic when they have a problem. This can create pressure for the person if they must learn things quickly.

Using a methodical approach to legal information is important. See CPLEA's Seven Steps to Solving a Problem booklet for some tips.

So, what *can* PLEI do? It can:

- help you clearly define what your problem is. This can prevent you from wasting time and effort solving problems that you do not actually have.
- help you decide what to do next. PLEI will not usually tell you what to do (that would be advice), but it will tell you about the law that applies to your situation and what it requires of everyone in a similar situation.
- help you understand procedure (for example, see CPLEA's Tips for Going to Court info sheet)
- help you understand the laws that apply to your situation (for example, see CPLEA's extensive resources about the laws that apply to families and relationships in Alberta, including several booklets and accompanying videos)
- reduce anxiety and build your confidence
- show you where to go to learn more
- help you understand advice your lawyer or other professionals are giving you
- help you decide when you need professional help

PLEI organizations like the Centre for Public Legal Education Alberta (CPLEA) also have grander goals. Our 'big picture' view is that PLEI is a prevention tool. It is usually easier and less expensive to avoid problems in the first place than it is to deal with them after they happen. By broadening people's knowledge about legal topics in general (increasing their legal capability), we hope to reduce the number and severity of legal problems that occur. We want to assist individuals by helping them prevent legal problems, by raising their awareness of their rights, and by raising awareness of services and supports available to them.

At the community level, PLEI organizations aim to help people become better citizens. We also try to improve the systems and laws that people must work within. A core belief we hold is that PLEI can improve both access to justice and the quality of justice available to people.

Where to get PLEI and how to tell if it is good

Many organizations in Alberta provide PLEI and most have websites. You can find lots of information at www.cplea.ca as well as on the websites of other specialized non-profits and agencies, local legal clinics, the courts, government departments and agencies, Legal Aid Alberta, and the universities.

Most people start with an online search. Use search terms that make sense for your situation. It is important to narrow your results down and to think about the quality of the information you are looking at. The internet will give you useful information mixed in with lots of information that is wrong, out of date, or applies somewhere else but not in Alberta. Check out CPLEA's Is it Reliable – 6 Clues to Good Legal Information Online info sheet for more tips.

When PLEI might not be the complete answer

PLEI cannot solve all legal problems. It will not be a complete solution if:

- Your case involves a company that you own, as only lawyers can represent companies.
- Your case is legally complex, especially if it involves arguments based on conflicting case law. Again, some people will be more capable of dealing with complexity than others.
- Your case requires appearing in court or before a tribunal, and you do not have the confidence or skills to represent yourself. People are often capable of much more than they think, as you can always gain knowledge and skills (including from PLEI). Whether you can increase your capabilities in the time you have is a judgment call only you can make.
- It is too traumatic or worse, not safe. In cases where there has been intimidation or violence, it is helpful to have someone between you and the other party.
- Things are happening too quickly for you to deal with. The civil court system is not fast, but in some situations, there may be multiple court applications and processes going on at the same time. Whether this is your opponent's tactic or just a necessary part of the case, a lawyer can make this easier to deal with.
- There is little or no PLEI available about the problem you have. PLEI does not exist for every conceivable problem. Generally, PLEI resources are available for 'everyday legal problems', the kinds of problems that most people are likely to encounter during their lifetimes, especially those problems commonly faced by people in disadvantaged groups. If your legal problem is one-of-a-kind, you likely will not find PLEI that deals with it.
- When you have bad facts. PLEI cannot solve this problem and neither can a lawyer. But a lawyer can share openly and honestly about your chances of success in your case. That advice can help you pick the least harmful course of action.

If your case falls into one of these categories (and there are others), you would benefit from help and advice from a lawyer. And where to get legal advice is a topic for another article – stay tuned!

Jeff Surtees

Jeff Surtees, BComm, JD, LLM, is the Executive Director of the Centre for Public Legal Education Alberta.

How legal coaching can help if you are representing yourself in court

October 21, 2022 by Marcus M. Sixta

Gaining in popularity, legal coaching is an unbundled legal service that allows you to hire a legal helper to do a specific job for you.

With Legal Aid services chronically underfunded and the average cost for a lawyer steadily increasing, it is no wonder more and more people are representing themselves in court. An average 2-day trial in Canada can cost over $30,000, and that is just for the trial. If there are steps to take before trial, like court applications, this will increase the costs. Most people cannot afford this.

In fact, in some Canadian jurisdictions, over 60% of court cases involve at least one person who is self-representing. Many in the legal community have recognized this shocking statistic as an access to justice crisis. Fortunately, legal coaching services are now available to help those representing themselves in court.

What is legal coaching?

Legal coaching is a form of legal assistance that provides support in the background for someone who is representing themselves in court. Coaching is a type of "unbundled" legal service. This means you are hiring a legal helper to do a specific job for you, rather than to take on every part of your legal matter.

With legal coaching you can hire a lawyer to help you draft a letter or affidavit, to help you prepare for a trial or mediation, or even to explain the basics of filing and serving court documents. What a legal coach will **not** do is attend court for you. With legal coaching you are representing yourself in court or at mediation.

Photo by Sora Shimazaki from Pexels

Legal coaching has been gaining in popularity over the last 10 years. Now, there are many lawyers and even paralegals who provide legal coaching in Canada. Legal coaching is available for many different areas of law including family law, estate Law, employment law, small claims court, debtor creditor issues, residential tenancy, and many more.

Why should I consider legal coaching?

Representing yourself in court is tough. The forms are confusing and hard to find, and filing processes are often strange and outdated. You may not know how to find the law you need to support your case. You may not know how to present your case to the judge. Without any legal help, your chances of getting a successful outcome are much lower,

especially if the other side of the case has a lawyer.

With a legal coach, you are able to get help in the background when you need it. You decide what help you need, and you decide what help you get. If you only have funds for one meeting, you can meet with a legal coach for advice in one meeting. If you have funds to hire a legal coach to draft your court documents, you can hire a legal coach to do this as well. With legal coaching you control your spending as you decide what assistance you get.

Legal coaching is client centered. This means the client retains control over their case and how it proceeds. With legal coaching you drive the bus and the lawyer acts as the navigation system. You can follow the path set by the navigation system or you can choose a new path. Ultimately, the path you take is up to you, and the lawyer will advise you on the consequences of this.

Who should use legal coaching?

Legal coaching is for people representing themselves in court. Some people choose legal coaching because they cannot qualify for Legal Aid. Some people choose legal coaching because they cannot afford to pay a lawyer a big retainer. Some people choose legal coaching because they believe they can successfully represent themselves with some help in the background.

Court clerks and judges often will assist people who are self-represented in court by providing them with direction on legal processes. However, they cannot provide legal advice. Often, they are under pressure to be efficient and will not have time to explain much. A legal coach can provide advice and direction. They can help draft and edit documents. Most people recognize that everyone is better off with some legal assistance than none at all.

However, self-represented individuals must have the capacity to represent themselves in court. Unfortunately, this is not always the case. If you have an extreme fear of public speaking or are suffering from mental health difficulties, legal coaching may not be for you.

Can I be successful with legal coaching?

Many people have achieved successful results with legal coaching. However, the outcome in any court case is never guaranteed. A judge ultimately has to choose between two sides and only one side is successful. That being said, you are more likely to have a successful outcome if you have some legal assistance.

With legal coaching, you are provided with the tools for success. But, as you are representing yourself in court, it is up to you to use those tools for a successful outcome.

Marcus M. Sixta

Marcus M. Sixta, BSW, JD, is a family lawyer, mediator and legal coach practicing in Alberta and British Columbia. He is the founder of Coach My Case, a legal coaching company, and Crossroads Law, a family law firm. He has presented on legal coaching topics to lawyers, businesses, nonprofits and media organizations. He is the proud father of two kids who coach him on how to be a better dad.

Canada's legal responsibilities on international human rights

October 25, 2022 by John Cooper

If passed, Bill C-262 will hold Canadian companies accountable for adverse impacts on human rights in their business activities abroad.

Human rights are embedded in the *Canadian Charter of Rights and Freedoms*. They are also an essential component of Canada's approach to both domestic and international relations.

But how enforceable are these rights on the global stage, especially when considered against the backdrop of international business? Around the world, people are victims of political oppression, social restrictions, forced labour, environmental damage, torture, and activities often driven by western business interests, from oil and mining to agriculture and manufacturing.

These activities are driving a call for "due diligence mandates" demanding that companies adopt transparent and accountable reporting on their international activities with respect to human rights. So how effective is Canada (and by extension, Canadian business) in standing up for the rights of the world's citizens?

The Uyghurs in China

Consider the Uyghurs (also spelled Uighers), a mainly Muslim ethnic group with a 1,700-year history in Northwestern China's Xinjiang region. Xinjiang is China's largest province at 1,665 million square kilometres. Uyghurs there have been the target of genocide for decades. The media have widely reported that since 2017, the Chinese government imprisoned more than a million Uyghurs in Xinjiang "re-education" camps, with a "shoot-to-kill" policy for potential escapees. The remaining 11 million-plus Uyghurs are the subject of coerced labour, constant surveillance, religious restriction and forced sterilization.

In 2021, Canada joined the U.S. in recognizing this treatment as a form of crimes- against-humanity and genocide (from the Greek *genos* meaning tribe and Latin *cide* meaning killing). In 1946, the United Nations General Assembly defined genocide as:

> ***Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:***
>
> ***a. Killing members of the group;***
>
> ***b. Causing serious bodily or mental harm to members of the group;***
>
> ***c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;***
>
> ***d. Imposing measures intended to prevent births within the group;***
>
> ***e. Forcibly transferring children of the group to another group.***

The challenge for lawmakers and business? Canada is an endpoint for products made with forced Uyghur labour. The International Labour Organization defines forced labour as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily."

Photo from Pixabay/Pexels

Canada's complicated involvement

According to advocacy group Save Uigher, Uyghur-produced forced-labour items include personal protective equipment, technology such as laptop components, agricultural products such as tomato paste, and cotton for clothing. Twenty percent of the world's cotton supply is from Xinjiang, and the region is responsible for 85% of China's cotton production.

"Uyghurs for Sale", a 2020 report by the Australian Strategic Policy Institute, identified 12 Canadian companies with links to Uyghur-produced cotton. A 2021 Canadian parliamentary report asked the federal government to boost measures to ensure that products made with forced labour do not enter Canadian markets.

Uyghur Canadian activist Mehmet Tohti is a former science teacher who left China at age 26 and the executive director of Ottawa-based Uyghur Rights Advocacy Project. He said his group works to push the federal government to create remedy-centric legislation that puts the onus on importers to show that goods arriving in Canada are not the product of Uyghur forced labour.

In a July 2022 Zoom interview, Tohti said there is a misconception that by engaging with China, western governments can develop a political openness with China and "China will become 'more like us.'" This is far from the truth, said Tohti, who added that governments doing business with China have a responsibility to respond to human rights issues. "They created that monster of oppression" by supporting and promoting China's economic development through investment, technology transfer and nurturing an open market for consumer products.

In January 2021, the federal government announced a new initiative to address the issue of possible complicity in Xinjiang-based human rights abuse: the creation of a third-party analysis of supply chain risks related to forced labour in Xinjiang. Undertaken by Canadian research and media firm Corporate Knights, the fact-finding study focuses on giving Canadian companies a starting point to undertake further due diligence on the risks of doing business in the region.

In an e-mail interview, Aidan Gilchrist-Blackwood, of policy and law reform advocacy group Canadian Network on Corporate Accountability (CNCA), said the following:

> ***We've seen the federal government increasingly acknowledge that human rights and environmental abuses by Canadian corporations and in Canadian supply chains is a serious problem that must be addressed.***

Bill C-262: Corporate Responsibility to Protect Human Rights Act

Members of Parliament have brought forward several human rights-focused Bills, including Bill C-262 by New Westminster-Burnaby MP Peter Julian. Bill C-26: *An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad* is also known as the

Corporate Responsibility to Protect Human Rights Act.

Introduced in March 2022, it would hold Canadian companies accountable, make it mandatory that business find and reduce risks to people, and offer remedy to those harmed. According to the Canadian Parliamentary website, the focus of the *Act* is:

> ***to prevent, address and remedy the adverse impacts on human rights that occur in relation to business activities conducted by entities abroad … every entity has a duty to avoid causing any adverse impacts on human rights from occurring outside Canada as a result of its acts or omissions or those of its affiliates.***

In a news release, MP Julian said:

> ***Bill C-262 would require companies to identify, prevent and mitigate human rights abuses and provides for liability when companies cause harm in their global operations. The federal government must make abusive actions by Canadians and Canadian corporations illegal here and abroad.***

Gilchrist-Blackwood said CNCA believes:

> ***This legislation must be strong and comprehensive – and introduced immediately. Experience in other jurisdictions demonstrates that a mandatory Human Rights and Environmental Due Diligence (mHREDD) law is a realistic and effective way forward. Bill C-262 … would be such a law. Similar legislation has already been adopted by France, Germany, and Norway. It's long past time for Canada to catch up to its global peers (and) experience shows that voluntary measures do not work.***
>
> ***Canadian companies continue to be linked to egregious human rights violations, including killings, sexual violence, water contamination, land grabs, poverty wages and forced labour. … The United Nations Working Group on Business and Human Rights has repeatedly highlighted the Canadian government's inaction and called on Canada to introduce binding human rights legislation.***

Problems with Bill C-262

For Linda Reif, Professor of International Trade and Associate Dean (Graduate Studies) at the University of Alberta's Faculty of Law, Bill C-262 may be problematic. In a telephone interview, Reif said that Canada already has in place the government body CORE (Canadian Ombudsperson for Responsible Enterprise). According to its website, CORE reviews "complaints about possible human rights abuses by Canadian companies when those companies work outside Canada in the garment, mining, and oil and gas sectors."

Organizations like CORE represent a "soft law" approach often found in international legal circles. (Soft law focusses on non-legally binding treaties, as opposed to legally enforceable "hard law.") CORE's recommendations (which may result in punitive actions like withdrawing trade commission support) *may* be considered in a court of law, said Reif. The question is how Bill C-262, if passed into law, may affect CORE's role.

According to Reif, European countries have moved toward a due diligence model for international business for years, in line with the United Nations *Guiding Principles on Business and Human Rights*. These principles centre on the following obligations:

- to respect, protect and fulfil human rights and fundamental freedoms;
- the requirement of business enterprises to comply with all applicable laws and to respect human rights;
- the need for rights and obligations to be matched to appropriate and effective remedies when breached.

While Canada has been slow in developing a human rights plan, there is a heightened awareness of the need for accountability. Reif added that a "carrot approach rather than a stick approach" to legislation – one that is less coercive and punitive and focused on getting businesses to accept their responsibility to duly report their activities – is an approach that has worked in Europe.

At the federal level, Bill C-262 might raise more questions than it immediately answers. Given that the legislation is rooted in the soft law of treaties rather than enforceable hard laws, "it will force courts to look at human rights treaties, and courts will be asked to apply those obligations to private business," said Reif. She added there is little precedent on how to apply such treaties to private business and it will take years until there is a body of precedents. And it may also add to the logjam of cases already clogging Canadian courts.

"The federal government might say 'why do we want to support this?' or it could say 'is this going to scare off Canadian business?'" said Reif.

An ongoing battle

For Mehmet Tohti, pushing for changes to laws governing Canadian companies doing business in Xinjiang is ongoing. While the federal government has talked about "cleaning up the international market, there has been little action," said Tohti. "There's no action from private sector corporations or government, so Canada is becoming a dumping ground for products made by Uyghur forced labour." Uyghur Rights Advocacy Project will continue to research and document human rights abuses to "bring attention to the crimes and atrocities being committed right now."

John Cooper

John Cooper, EdD, is an educator and researcher who has taught journalism and corporate communications at Durham College and Centennial College.

Childcare Obligations and Self-Accommodation in Alberta

November 4, 2022 by Myrna El Fakhry Tuttle

Under Alberta human rights laws, what do employees have to show in a case of family status discrimination relating to childcare obligations?

Provincial, territorial and federal human rights legislation in Canada prohibits discrimination against employees based on family status. This protection includes an employee's childcare obligations. However, the family status discrimination test has developed in different ways across Canada. And employers often do not know their duty to accommodate an employee's childcare needs is triggered.

Alberta Human Rights Act

Section 4 of the *Alberta Human Rights Act* (the *Act*) protects individuals from discrimination based on different protected grounds including family status. The *Act* defines family status as the "status of being related to another person by blood, marriage or adoption" (section 44(1)(f)).

Family status protections allow employees who are parents to ask for an appropriate accommodation to be able to look after their children. It also requires employers to accommodate their employees' family status needs up to the point of undue hardship.

Employees must try to find suitable childcare to adjust childcare obligations with work obligations. However, if no reasonable options for childcare are available, employers must modify work requirements to allow employees to manage childcare obligations. Modifications must not constitute undue hardship for the employers.

Photo by Kindel Media from Pexels

The big question is: to prove discrimination, do employees have to demonstrate they made reasonable efforts to meet their childcare obligations before requesting accommodation? We call this the "obligation of self-accommodation".

The Test for Discrimination

In the 2012 case of *Moore v British Columbia (Education)*, the Supreme Court of Canada (SCC) established a test for prima facie discrimination in human rights cases (at para 33). The complainant must prove the following:

1. the complainant has a characteristic protected from discrimination,
2. the complainant experienced an adverse impact, and

3. the protected characteristic was a factor in the adverse impact.

The SCC stated:

> *Once a* prima facie *case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. (At para 33)*

In the 2014 case of *Canada (Attorney General) v Johnstone*, the Federal Court of Appeal (FCA) extended the general test for discrimination to include self-accommodation in family status cases. The FCA said the complainant must show they have made reasonable efforts to solve the issue on their own.

The FCA asserted:

> *... in order to make out a* prima facie *case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation. (At para 93)*

The decision introduces the obligation of self-accommodation in the third step of this test. The FCA explained further:

> *A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a* bona fide *childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances. (At para 96)*

This test differs from the three-part test laid out by the SCC in *Moore*. Unlike *Johnstone*, *Moore* does not require the complainant to prove self-accommodation to satisfy the test for *prima facie* discrimination. These two approaches have led to inconsistencies in court decisions on whether or not a demonstration of self-accommodation is required to make out a *prima facie* case for discrimination in family status cases.

What is the situation in Alberta?

In the 2021 case of *United Nurses of Alberta v Alberta Health Services*, the Alberta Court of Appeal (ABCA) decided that the proper test for establishing a case of *prima facie* family status discrimination in Alberta is the three-part test described in *Moore*.

The ABCA ruled:

> *While the Supreme Court of Canada has not yet specifically applied the Moore test to the protected ground of family status, the test has nevertheless been adopted in Canada as the leading framework for establishing prima facie discrimination. Until the Supreme Court expressly alters the test for prima facie discrimination in family status cases, the Moore test governs in such matters. (At para 65)*

> *Johnstone and like cases importing a fourth requirement of self-accommodation into the Moore test for prima facie discrimination are wrong, and inappropriately hold family status claimants to a higher standard than other kinds of discrimination. (At para 99)*

The ABCA followed the Alberta Court of Queen's Bench in *SMS Equipment Inc v Communications, Energy and Paperworks Union*. It decided the applicable test for establishing a *prima facie* case of family status discrimination in Alberta is the three-part test set out in *Moore*. Therefore, a complainant in Alberta is **not** required to prove self-accommodation.

Conclusion

In 2022, the SCC dismissed an application for leave to appeal the ABCA's decision in *United Nurses of Alberta v Alberta Health Services*. As a result of this dismissal, there continues to be no consistent test for determining *prima facie* discrimination in all cases. Each jurisdiction – provincial, territorial, and federal – in Canada can decide their own appropriate tests for *prima facie* discrimination in family status cases. Therefore, employers that have operations in different jurisdictions will have to apply different tests for assessing family status discrimination.

Myrna El Fakhry Tuttle

Myrna El Fakhry Tuttle, JD, MA, LLM, is the Research Associate at the Alberta Civil Liberties Research Centre in Calgary, Alberta.

The Tort of Family Violence: New relief available for victims of family violence

November 10, 2022 by Mathieu Maillet

In 2022, the Ontario Supreme Court applied a new tort of family violence that recognizes the complex dynamic of violence within a relationship.

The new tort of family violence represents another step forward in Canadian courts' ever-changing views of how to address violence in family matters. To understand this tort and its importance, we must first appreciate how Canadian family law once refused victims of family violence the opportunity to claim damages through tort law as part of their family matter. Now, this completely new tort allows victims to pursue damages directly in response to violence experienced during a relationship.

What is tort law?

Before diving into this new tort, let's review what is tort law. It is a civil law claim that allows victims "of a wrong to seek a remedy from the person who injured" them. The remedy is normally money, called damages.

A timeline of torts in family law

In their 1987 decision of *Frame v Smith*, the Supreme Court of Canada was hesitant to extend remedies in tort to victims who sought relief after experiencing family violence. They feared that doing so would "fashion an ideal weapon for spouses whose initial… objective, is to injure one another".

Despite the Court's hesitance to allow relief through tort law, it did consider family violence when resolving family law disputes. For example, the Supreme Court of Canada in their 1996 decision of *Gordon v Goertz* stated that the "threat or fear of violence to the custodial parent or the child" could be reason for moving a child's residence without first providing notice to the non-custodial parent.

In time, courts began allowing family members to claim traditional violent torts such as assault and battery within family matters. Courts started with small damage awards and increased them over time. Now the damages reflect those granted under the general principles of tort law. In the 2017 decision of *Montgomery v Kenwell*, counsel argued for higher damages and the Ontario Supreme Court agreed. The Court granted a damage award of $75,000 for assault that occurred during a marriage.

In 2019, the Canadian Parliament announced amendments to the *Divorce Act*, which came into effect in 2021. For the first time, the *Act* explicitly defines "family violence" as:

> ***any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and***

in the case of a child, the direct or indirect exposure to such conduct

(a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;

(b) sexual abuse;

(c) threats to kill or cause bodily harm to any person;

(d) harassment, including stalking;

(e) the failure to provide the necessaries of life;

(f) psychological abuse;

(g) financial abuse;

(h) threats to kill or harm an animal or damage property; and

(i) the killing or harming of an animal or the damaging of property.

In step with Parliament and the new *Divorce Act*, courts have become more willing to recognize and apply tort law and its remedies in response to family violence. This leads us to the most recent development from the Ontario Supreme Court in 2022. In the decision of *Ahluwalia v Ahluwalia*, the Court defined and applied a new tort of family violence.

At paragraph 52, the Court lays out the test for finding family violence and liability on a civil standard. The plaintiff must establish:

Conduct by a family member towards the plaintiff, within the context of a family relationship, that:

1. is violent or threatening, or

2. constitutes a pattern of coercive and controlling behaviour, or

3. causes the plaintiff to fear for their own safety or that of another person.

The Court found the defendant father liable for breaching this tort and awarded damages of $150,000 in favour of the plaintiff mother.

In coming to this decision, the Court recognized that the new *Divorce Act*, while statutorily recognizing family violence, fails to "…create a complete statutory scheme to address all the legal issues that arise in a situation of alleged family violence". The Court relies on the general principles of tort law to allow them to create new foundations for liability when there are interests worthy of protection and the development is necessary to stay abreast of social change (at para 50).

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The Court comes to its conclusion for the new tort by considering "case law related to spousal battery, explicit recognition of the harms associated with 'family violence' in the *Divorce Act*, recent provincial legislation that removes other legal barriers facing survivors leaving violent relationships, developments in American caselaw, and Canada's international law obligation related to women's equality" (at para 58).

The Court justifies the need for the tort of family violence by considering the complex dynamic of violence within a relationship:

In terms of liability and damages, a narrow focus on the intentional torts of battery or assault committed on specific days or at specific times will obscure the lived reality of family violence. In family relationships, the conditions of terror, fear, coercion, and control are often created through

years of psychological abuse punctuated with relatively few acts of serious physical violence. In practice, a perpetrator need only administer one hard beating at the beginning of a marriage to create an imminent threat of daily violence. Focusing too narrowly on specific incidents risks minimizing the tortious conduct, which is the overall pattern of violent and coercive behavior combined with a breach of trust. It follows then that a surgical focus on the mechanical elements of the physical assaults, for example, will not be adequate to understand and appreciate the true nature of the harmful conduct. (at para 59)

Towards clarity and protection

Family violence and remedies in tort are not new issues for family law. However, they have now grown to become more clearly defined, acknowledged, and applied so to protect and compensate individuals who have experienced a relationship defined by violence.

Mathieu Maillet

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Dealing Effectively with Self-Represented Litigants: A view from the bench

November 16, 2022 by The Honourable Justice Robert A. Graesser

Nine tips for anyone involved with self-represented litigants (SRLs), including a look at the responsibilities of lawyers and the court.

I can only speculate on the reasons for the surge over the last 20 years in people representing themselves in all forms of litigation. One may be the high cost of litigation. Another may be the availability of and ease of access to legal information on the internet. I sometimes wonder if television shows oversimplifying the law encourage people to go it alone, without considering the complexity of the legal system, the rules of evidence, and the convoluted process to court. Or maybe people are more aware of their legal rights.

In nearly 16 years of dealing with **self-represented litigants (SRLs)**, I have concluded most are sincere, sane and simply trying to protect what they believe to be their rights. A minority of SRLs are personality disordered, vexatious and malevolent. They have no genuine interest in resolving their dispute unless and until they have won. They are unable to see anything but their own interests and positions and are oblivious to anyone else's feelings or rights. They may well have ample funds with which to hire a lawyer, but they think they're smarter than everyone else, or they haven't been able to find a lawyer who agrees with their position and who is willing to be their mouthpiece.

Whatever the case, SRLs will continue to be part of our legal system. Below are my nine tips for anyone working with SRLs.

Photo by Sora Shimazaki from Pexels

1. Resources for lawyers

A starting point, because I do not want to reinvent the wheel, is the Law Society of Alberta's module on Self-Represented Parties. It is a good mix of ethical rules and standards and common sense.

Shortly after I was appointed to the bench, I was introduced to books by Bill Eddy, a California lawyer, therapist and family mediator. Bill's first book in 2008, *Managing High Conflict People in Court*, was a great read. His basic thesis is that a significant portion of the difficult litigants in court (particularly in family law) have borderline personality disorders or exhibit these traits. In my view, this book is a "must read" for lawyers dealing with high conflict opponents, whether they be SRLs or difficult lawyers.

After reading this book, I spent time analyzing the various personalities appearing in front of me. But that was little help in finding ways of dealing with these individuals. Bill's 2014 book, *BIFF* (brief, informative, firm and fair), provides a pathway for dealing with anyone who is a high conflict person, regardless of their traits or disorders. The book emphasizes there is little point arguing with difficult people. They hear what they want to hear and may have no interest in actually resolving a dispute. Their interest is in prolonging and provoking the dispute, for whatever reason.

I encourage everyone to visit Bill's High Conflict Institute website and subscribe to his newsletters. In case you are worried, I do not get commissions and have no connection with the Institute other than being a huge fan of their work.

2. Resources for SRLs

Many of the challenges SRLs face stem from their lack of procedural knowledge. There are good self-help websites and resources available online. While not applicable in Alberta, the B.C. Government has many resources about court processes, document requirements and even running a trial. Another great resource is the National Self-Represented Litigants Project website and their catalogue of resources across Canada.

3. Communication skills

Communication skills can help a person get information without being aggressive or threatening. Listening skills are also very important and are usually triggered by asking open-ended questions (who, what, where, when and why) rather than closed questions (where the answer is yes or no). Another useful skill is 'reframing'. For example, saying "you want to have a say in what the kids do on weekends" instead of "you feel he's ignoring your wishes".

The goal is to diffuse anger as there is no useful purpose in trying to reason with an angry person. Their amygdala telling them to fight or flee diminishes their ability to reason. In the same vein, the worst thing you can do is lose your own cool. Some people try to set traps to make their opponent lose focus by making them angry. Don't fall for it! Take a deep breath, take a break, but stay focused on what is important.

And read and reread *BIFF* and use its strategies.

4. Put it in writing

Despite my Pollyanna-like faith in humanity and wanting to be able to trust everyone, I have learned the hard way that the most credible evidence is in documents. Eye-witness testimony is increasingly being discredited. You are better off sending a confirming email or text to your opponent after each communication.

If you believe your opponent is untrustworthy, it is perfectly acceptable to refuse to speak to them by phone or in-person, and to insist all communications be in writing, such as by snail mail, email or text. In family law, programs like "Our Family Wizard" are very useful and effective. The program saves communications and even has a feature that discourages unhelpful communications (rude, abusive, profane, etc.).

I am not keen on one person unilaterally recording a conversation, as I find it unreliable. The recording party knows to be well behaved and may use passive aggressive techniques to provoke the other party. When both parties know there is a recording, the playing field is level. Meetings with difficult people could be recorded if everyone agrees upfront.

5. SRL's duties

The Canadian Judicial Council (governing body for the Canadian superior and appellate courts) published guidelines on what the Court could expect from SRLs. The bar is relatively low, as an SRL's main duty is to "familiarize

themselves with the relevant legal practices and procedures regarding their case." The guidelines go on to say the SRL is responsible for preparing their own case and being respectful of the legal process and the officials involved in it. Vexatious litigants are not allowed to abuse the process.

Pintea v Johns, 2017 SCC 23 is the Supreme Court of Canada's most recent pronouncement on SRLs and is a must read for everyone involved with SRLs.

6. Court's responsibilities

Judicial obligations include providing SRLs with information to help them understand and assert their rights or raise arguments before the court.

Paragraph 2.D.1 of our new *Ethical Principles for Judges* speaks of judges having to "be aware of the different ways in which disputes can be resolved fairly and efficiently." Paragraph 2.D.2 emphasizes that "passive neutrality and treating everyone in the same manner may not always be appropriate". Judges can provide help "while being alert to not compromise judicial impartiality and the fairness of the proceedings." Judges must ensure procedural and evidentiary rules are not used to "unjustly hinder the legal interests of self-represented litigants".

7. Case management and Rule 4.10

There was a time when case management dealt with personality conflicts, obstructionist conduct and difficult litigants. For many reasons, case management has been significantly curtailed and internal policies discourage judges from conducting or recommending it, except in very clear circumstances if ordered by an ACJ.

An underused process is a case conference under Rule 4.10 of the *Alberta Rules of Court*. An ACJ must also order its use, but they are more likely to do so over case management. A case conference can be extremely helpful in putting together a litigation plan and organizing out-of-control litigation.

8. Opposing lawyer's responsibilities

I understand that a sizable portion of complaints about lawyers in litigation matters come from SRLs. (The same can be said about complaints about judges to the Canadian Judicial Council.) Therefore, it is important to understand what our professional bodies say about lawyers' responsibilities towards SRLs.

The Law Society of Alberta's Code of Conduct discusses the conduct and duties of lawyers, including:

- being courteous and acting in good faith with all persons with whom a lawyer has dealings with, not lying or misleading another lawyer, avoiding sharp practice, and not recording conversations without consent
- when dealing with an SRL on behalf of their client, advising the unrepresented person to get legal representation, making sure the unrepresented person knows the lawyer is not protecting their interests, and making it clear to the unrepresented person they are acting exclusively in the interests of the client

See Rules 7.2-1 to 7.2-12. Without speaking for the Law Society, the gist of these rules is that lawyers owe the same professional duties to an SRL as they do to other lawyers.

9. Costs in favour of SRLs

Rule 10.29 of the *Alberta Rules of Court* entitles a successful party to a costs award against the unsuccessful party for out-of-pocket legal costs (fees and disbursements charged by their lawyer). The *Rules* or case law do not say an SRL should not have to pay costs if they are unsuccessful.

It is a different story when a successful SRL seeks costs from the unsuccessful party, whether represented or not. Rule 10.31(5)

says the Court may, where appropriate, order payment to an SRL "of an amount or part of an amount equivalent to the fees specified in Schedule C".

Alberta courts have been slow to order costs in favour of a successful SRL. A majority of cases deny costs to an SRL, though sometimes the court has awarded the SRL their disbursements and an allowance for lost earnings if they had to take unpaid time away from work. The 2013 Alberta Court of Appeal case of *Hogarth v Rocky Mountain Slate Inc* recognizes an SRL may be awarded costs, but the purpose is not to indemnify. The court referenced the 2001 Alberta Court of Appeal decision in *Dechant v Law Society of Alberta*, where the Court worried that awarding costs to SRLs may encourage SRLs to litigate and not settle. The Court recently approved *Dechant* and *Hogarth* in *Terrigno v Butzner*, 2021 ABCA 125.

Judges have very broad discretion on costs. I am usually friendly to reimbursement for lost wages if the SRL is the successful respondent or if the other side does not show up or is behaving badly. I do keep in mind the Alberta Court of Appeal's unfriendly warning about not wanting to turn being self-represented into a paid occupation. I am also generally sympathetic to awarding reasonable disbursements.

My take-away when it comes to costs? Litigating with SRLs is not risk-free when it comes to the possibility of paying costs to an SRL if you and your client are not successful.

Conclusion

The prevalence of SRLs has increased exponentially since I was appointed to the bench in 2006. I predict that growth will continue. I also don't think Canada is alone in experiencing this phenomenon. It may appear to lawyers and their clients that the system is bending over backwards to provide forums for and assist SRLs. That may well be true. But I doubt we will ever see a system reinstated that mainly caters to lawyers.

One thing is for sure: legal system participants must develop skills to effectively deal with SRLs and make sure the playing field in court is level.

Robert Graesser

The Honourable Justice Robert A. Graesser is a justice of the Alberta Court of King's Bench. The opinions and views expressed in this article are those of the writer and do not purport to represent the views of other judges or of the Court of King's Bench of Alberta.

Gambling in the Online Age

November 30, 2022 by Lillian Howard

While gambling facilities must have a provincial license to operate, only government-operated websites offer legal gambling online.

You have probably seen ads for online gambling websites all over the place – commercials, social media, even at the Superbowl. But did you know these websites are not always legal for Canadians to use, even if they're advertised to you?

Online gambling does not just mean digital slot machines or virtual blackjack. Although these are common, it can also include betting sites or lotteries, among others. These different types of gambling are mostly managed by provincial governments. For example, the Alberta Gaming, Liquor and Cannabis Commission (AGLC) oversees gambling in Alberta. If you visit a large casino in your area, there's usually no doubt about whether it's operating legally. But how does that work when you're gambling online?

Is it legal?

Gambling is only legal in Canada if the institution hosting the gambling has a licence. Each province has its own regulatory body that issues and oversees licences in that province. In Alberta, the Alberta Gaming, Liquor, and Cannabis Commission oversees gambling. It does so under the authority of the *Gaming, Liquor, and Cannabis Act*.

It is tricky to guarantee whether a venue is licenced if you're playing online. Websites may not be clear on their country of origin or may not show proof of licencing. Sometimes, they may not take proper steps to make sure minors are not using their services. Many websites rely on an honour system for a user to mark their age when they sign up. Some websites do take more steps to verify a user's identity. But even an adult user may be uncomfortable giving their personal information to a site they are not sure is legal.

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British Columbia was the first province to create its own official online gambling website, PlayNow. The British Columbia Lottery Corporation designed and owns PlayNow. They've also made PlayNow available in other provinces like Saskatchewan and Manitoba. Those provinces have adopted it as their own official gambling website rather than start from scratch. Alberta's official online gambling venue is PlayAlberta, which is the only regulated website in our province.

It is legal only for provincial governments to have online gambling websites in Canada. In other words, other organizations cannot get licences to offer gaming online. However, it is very popular for Canadians to use unregulated websites from other countries. The law is not clear on how Canada can crack down on or prosecute offshore gaming sites for trying to conduct business in Canada.

See CPLEA's Gambling FAQs to learn more.

Gambling as Entertainment

Online gambling isn't just an attraction for people to play. It's become popular to watch on streaming platforms like Twitch and sometimes in video games through loot boxes.

Twitch is a platform often used to stream people playing videogames, but you can use it to stream anything. There is usually a live chat box for viewers to comment and the streamer to respond if they choose. It's not illegal to stream yourself gambling on Twitch, and neither is it illegal for minors to watch. But Twitch does hold some reservations in its terms of service. For example, Twitch doesn't let streamers give to viewers links or referrals to gambling websites. But this does not wholly address concerns about gambling on the platform. Videogames or commentary are the most popular streaming categories. But there are over a million users following gambling categories like slots. This can be mere entertainment, but streaming is particularly popular with younger audiences, who may not be as cautious or aware of the financial risks involved. There have been cases of unregulated gambling websites paying streamers to use their website while live to advertise it. In October 2022, Twitch banned the streaming of unlicensed gambling. This followed backlash against streamers who allegedly frauded others to fund gambling addictions. However, concerns about gambling on Twitch had been circulating since before these events.

In some countries, like the United States, loot boxes in videogames are being scrutinized. A loot box is an item you can buy or find in a videogame with surprise "loot" inside. This can be items or outfits, some of which give big advantages for the player. Currently, they are still legal in the United States. But loot box contents are randomised, can provide advantages over other players, and you can pay for them with real world money. This has raised concerns about whether games with this feature should be regulated like other gambling. Players can access these videogames on consoles like XBox, PlayStation, or Nintendo Switch. But many players just use home computers or laptops to take part.

The Bottom Line

So, how do you know if the gambling website you're using is regulated or legal? Here are a few tips:

- Looking around the website to see if it has a licence number can help make you feel more secure.
- See if you can find a governmental affiliation listed on the gaming website.
- If you want to gamble online when travelling in another province, check the government website of that province for more information on gambling there.

Always remember that big wins are unlikely! For some types of gambling, like cards, there is some skill involved that can tip the balance. Even so, there will always be a "house advantage." That means the casino or the gambling website will keep the odds in their favour. And if you enjoy watching streamers gamble, keep in mind that the gambling website they are using may have given them money to spend. It's rare to win big, even if some of them make it seem achievable.

Lillian Howard

Lillian Howard, BA, is a law student at the University of Alberta who will complete her degree in 2024. She enjoys legal research in a variety of areas including consumer, criminal, employment, and property law among others.

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