LawNow

relating law to life in Canada

Home Buyer Edition

PLUS

Women and the Law

The Canadian Legal System

Volume 47-3 *March – May 2023*

Cover photo by David McBee from Pexels.

We would like to thank the **Alberta Law Foundation** and the **Department of Justice Canada** for providing operational funding, which makes publications like this possible.

The Legal Resource Centre of Alberta Ltd., operating as the Centre for Public Legal Education Alberta, is a non-profit organization whose mission is to help people understand the law as it affects their everyday lives. We develop plain language booklets, presentations, and other learning materials to help people recognize and respond to their legal rights and responsibilities. We have a variety of programs, and provide legal information and referrals on many topics. For more information, please visit: **www.cplea.ca**

About LawNow

The contents of this publication are intended as general legal information only. **It is not legal advice.**

Opinions and views expressed are those of the writers and do not necessarily reflect the opinion of the Legal Resource Centre of Alberta Ltd. and/or the Centre for Public Legal Education Alberta.

More information is available on our website at:
www.lawnow.org

Publisher Jeff Surtees

Editor/Legal Writer Jessica Steingard

Designer Jessica Nobert

March

April

May

A Look Back at Women's Rights

March 8, 2023 by Jessica Steingard

International Women's Day celebrates the achievements of women and provides an opportunity to look back at the evolution of women's rights, including about voting, holding political office and owning property.

Today is International Women's Day, celebrated around the world each year on March 8th.

The United Nations writes this is "a day when women are recognized for their achievements without regard to divisions, whether national, ethnic, linguistic, cultural, economic or political." The day has been celebrated in some form and by some countries since 1909 though the United Nations began celebrating March 8th in 1975.

In Canada today, equality among genders is protected by the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and other provincial and territorial human rights laws. But it wasn't always so. Let's look back at how women's rights have evolved in Canada when it comes to voting, holding political office and owning property.

Voting

In the 1700s and 1800s, some women in Canada could vote if they met certain criteria, including owning property of a certain value. However, provincial and federal legislation in the 1800s took away many of these rights, including the *British North America Act* which only allowed British male subjects 21 years and older to vote.

Starting in January of 1916, Manitoba was the first province granting women the right to vote in provincial elections. Saskatchewan and Alberta followed that same year while British Columbia and Ontario followed in 1917. The rest of the provinces followed over the next several years, or as they came into existence. Quebec did not grant women the right to vote until 1940.

Photo by Jill Wellington from Pexels

The right to vote in federal elections took a few more years and complications. On September 20, 1917, during the First World War, *The Wartime Elections Act* granted certain women the right to vote in federal elections. Women had to be the wife, widow, mother, sister or daughter of a person in the naval or miliary forces serving with Canada or Great Britain. Women also had to be a British subject and qualify as to age, race and residence.

On that same day, the *Military Voters Act* granted the right to vote to female British subjects who were on active service for Canada (including non-residents and "Indians") or for Great Britain or an ally (only if they were resident in Canada, including "Indians"). These war-time voting rules applied only until demobilization of the relevant military personnel (i.e. the male relative or female on active service).

Women's broader right to vote federally didn't happen until January 1, 1919, when

An Act to confer the Electoral Franchise upon Women took effect. At this time, 21-year-old British females who also met the qualifications required of male voters could vote in federal elections.

Indigenous women (and men) under Canada's *Indian Act* did not get the right to vote without having to give up their status until July 1, 1960, when changes to the *Canada Elections Act* and the *Indian Act* took effect. From 1876 until that time, those with Indian status could vote if they gave up their status. "Voluntary enfranchisement" required an "Indian" to apply for the right to vote, though the process favored those with university educations and included a 3-year "probationary Indian" phase for others.

Holding political office

The right to vote and the right to hold political office are separate. Women received the right to run as a member of the House of Commons in 1919. However, women could participate in provincial, municipal, and other political offices before that. Women did not get the right to become a senator until 1929 following the Persons Case.

The Persons Case, as it is commonly referred to, was a challenge by the Famous Five female activists to the Canadian government to decide whether "persons" in the *British North America Act* included women. The Supreme Court of Canada said it did not. The Judicial Committee of the Privy Council in Britain – the court of last appeal in Canada until 1949 when the Supreme Court of Canada became the top court – overturned that decision.

Fun facts: In 1894, Maria Grant was the first woman to hold a public office in Canada when she ran for a school board. In 1921, Agnes Macphail was the first woman voted in as a Member of Parliament. On February 15, 1930, Cairine Wilson was the first woman to become a senator in Canada.

Owning property

In 1884, Ontario was the first province to give *married* women the same legal rights as men to enter into agreements and buy property. Prior to this, unmarried women needed permission from their fathers and married women needed permission from their husbands. The rest of the provinces followed, including Manitoba in 1900, Alberta in 1922 and Quebec in 1964.

Fun fact: Alberta did not repeal its *Married Women's Act* until late in 2018. The Act was short – only seven sections. The first section recognized a married women as having rights in property, debts, contracts, etc. as if she were an unmarried woman.

Rights versus experiences

While equality rights in Canada ensure all genders have the same legal rights, there are still differences in how women experience those rights.

For example, while women have equal opportunities to participate at work, they are more likely to need time away from work due to pregnancy or to deal with children or domestic responsibilities. This can leave them open to more discrimination in the workplace. In fact, the Alberta Human Rights Commission reports that 12% of human rights complaints received from April 2021 to March 2022 were related to gender, which includes pregnancy and sexual harassment.

Jessica Steingard

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

Sexual Assault is on the Rise in Canada

March 16, 2023 by Myrna El Fakhry Tuttle

Though sexual assault is the only violent crime in Canada not declining, many incidents are not reported to police for reasons including victim blaming and low confidence in the justice system.

Photo by Polina Tankilevitch from Pexels

In August 2022, Statistics Canada reported that sexual assault is the only violent crime in Canada not declining. According to the report, the sexual assault rate in 2021 was the highest since 1996. There were more than 34,200 reports of sexual assault in Canada in 2021, an 18 per cent increase from 2020.

Despite the increase in reporting, the number of sexual assaults reported to police is still very low. In 2019, only six per cent of sexual assault incidents that took place the previous year had been reported to police.

Sexual Violence and Sexual Assault

According to the World Health Organization (WHO), **sexual violence** is "any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting."

Sexual violence is a form of gender-based violence. Anyone can experience sexual violence and sexual assault, but women and girls are at higher risk. It can take place between people in romantic relationships, in families, at work, and between friends and strangers. It usually happens in private places between people who know each other.

Sexual violence includes sexual assault and sexual harassment.

Sexual assault is "any unwanted act of touching or threat of touching, directly or indirectly that violates the sexual integrity of any person. It is sexual assault regardless of the relationship of the victim/survivor to the perpetrator."

Sexual harassment can be "comments, behaviour, and unwanted sexual contact. It can take the form of jokes, threats, and discriminatory remarks about someone's gender or sexuality. It can happen in person or online."

In *R v Ewanchuk*, the Supreme Court of Canada said that "violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights." The Court cited *R v Osolin* where Justice Peter Cory asserted that sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women" (at para 69).

It is important to note that the police can respond to all forms of sexual assault but only some forms of sexual harassment. A person who experiences non-physical forms of sexual harassment for example at work, by a landlord or by a service provider can also make a complaint to the appropriate human rights commission.

The Impact of Sexual Assault on Victims

The impact of sexual assault varies among victims. According to the Government of Canada:

> *In the aftermath of trauma, victims may make statements that appear to be incomplete or inconsistent. They may also seek to hide or minimize behaviors they used to survive, such as appeasement, or flattery, out of fear that they will not be believed or that they will be blamed for their assault. ...*
>
> *Shame, blame, and the attendant experience of social isolation that sexual assault victims feel create a significant barrier to receiving much needed social support. In some cases, that isolation and the negative emotional responses a victim receives increase the feeling of threat and lack of safety. A social context of victim blaming, therefore, has a neurophysiological consequence for the victim of sexual assault, by keeping her in a protracted state of anxiety and fear.*

Victims may feel blame or shame from their perpetrator or family and friends. This leads to many women hesitating to report or disclose the assault.

Victim blaming usually stems from rape myths. These include wrong beliefs that only young and sexually desirable women get raped, that women who work in the sex industry do not get raped, and that women usually lie about sexual assault to get attention or revenge. The impact of rape myths can influence police investigations, arrests, and convictions of sexual assault, which can further lead to under-reporting.

In an Ontario case (*Jane Doe v Metropolitan Toronto Commissioners of Police*), the court found the Toronto Police Service was biased in their investigation of sexual assault. Justice MacFarland said:

> *... the police can and do act as a filtering system for sexual assault cases. If, for example, an investigating officer determines that a particular complaint is "unfounded", it likely will not proceed further in the justice system. Studies exist which show that, generally, the "unfounded" rate for crimes of assault is lower than for crimes of sexual assault.*
>
> *One of the reasons suggested for the higher "unfounded" rate in relation to sexual assaults is the widespread adherence among investigating police officers to rape mythology, that is, the belief in certain false assumptions, usually based in sexist stereotyping, about women who report being raped. The fact that these stereotypical beliefs are widely held in society is a factor to be considered in relation to the larger social and political context in which this aspect of the plaintiff's claim must be analyzed.*

In addition, women victims of sexual assault, who usually experience lower levels of social support, have a higher number of Post-Traumatic Stress Disorder (PTSD) symptoms than men who have been sexually assaulted. These women also report "emotional numbing, less range of feeling, avoidance responses, and experience higher levels of psychological reactivity to traumatic stimuli."

An Under-Reported Crime

Sexual assault incidents are significantly under-reported to police. Many times, they are reported long after the incident took place. According to Government of Canada statistics, a person who experiences sexual assault has many reasons for not reporting, including:

- dealing with the issue another way (61%)
- deeming the incident not important enough to report (50%)
- considering the incident to be a personal matter (50%)

- not wanting the police involved (47%)
- feeling the police could not do anything about it (33%)
- believing the police would not help them (18%)
- fearing revenge by the offender (19%)
- wanting to avoid publicity over the incident (14%)

According to one victim:

> *The personal cost for nothing to happen was [...] too unbalanced for me, and that was why I didn't report. And this is the thing, it's like there's no guarantee that I am going to be heard and listened to and believed, and the skepticism that policing seems to have with sexual assault and all forms of unwanted sexual contact is a huge barrier to me. (Interview 4) I didn't feel like the police would be able to do anything useful, so I thought that [reporting] might cause a lot of strife and conflict but not really have any [...] benefits. [...] I knew that the process of reporting could potentially be traumatic in itself, that I might not be believed, that there might be a lack of physical evidence.*

Moreover, some women do not report sexual assault for "fear of stigma and general distrust of the efficacy and neutrality of the Canadian judicial system."

A Framework for Police Response

Police services from Ontario collaborated to develop a framework for police response on sexual violence. The framework says police should inform victims of sexual violence about the criminal justice process and conduct in-depth impartial investigations. Police officers should gather, evaluate, and process evidence when someone reports an assault to them.

The framework asserts that victims of sexual assault should be informed when the police decide not to go ahead with charges and the reason why, such as not enough evidence. Not laying charges does not mean police do not believe the victims.

Police officers should protect the privacy of victims by interviewing victims in private and by ensuring victims do not have to keep retelling the incident to different investigative officers. Once the investigation is over, victims should receive an explanation of the outcome of the investigation and contact information of investigating officers.

Finally, the framework talks about prevention and public education of sexual violence, including prioritizing addressing rape myths.

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.

Ayn Rand and the United States Court of Elitism: A strange symbiosis (Part 2)

March 22, 2023 by Rob Normey

Part two of this two-part series looks at 'Randian approaches to law and justice' by the United States Supreme Court, including when it comes to voting rights and environmental protection laws and policies.

Photos from Pexels/Pixabay

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

Part Two: Contemporary Erosion of "The Public Good"

Looking at the current workings of the U.S. Supreme Court, we can see remarkable support for pro-business laws and fierce opposition to laws protecting workers' rights, including rights of association and the creation of unions. Some have described the current Court as the most pro-business court since the 1920s, when laissez faire economics were in their heyday.

During his term, President Donald Trump appointed two justices to the Supreme Court, the result of a questionably unfair process. This means six of the nine justices are hard right in their political orientation. Of these six, five are likely to approach justice in the same way as two senior associate justices on the Court: Clarence Thomas (age 74) and Samuel Alito (age 72).

Justice Thomas has spoken openly of his admiration for Ayn Rand's work. While Alito has not spoken of literary influences on his judicial philosophy, he clearly shares many of Thomas' views on key issues that have come before the Court. The two justices might be likened to Midas Mulligan – the resolute pro-business, anti-government regulation banker and belligerent right-winger in Rand's novel *Atlas Shrugged*.

In part one of this series, I set the stage by looking at the main characters of two of Rand's most famous novels – *The Fountainhead* and *Atlas Shrugged*. In this second part, I will look at what I call 'Randian approaches to law and justice' in today's legal landscape. I will examine two key issues before the Court this year or next and offer commentary on what a Randian approach might look like. The two issues that illustrate the elitist views of Rand in their purest form are voting rights and environmental protection laws and policies.

Tilting the electoral process further towards the wealthy

In *Atlas Shrugged*, the narrator ridicules a passenger on a train hurtling toward a major crash by pouring cold water on the notion that

a right to vote is vital. The narrator displays an icy contempt for ordinary folk who lack the creative spark of the tycoons and makes it clear that the deceased in the fiery crash have serious defects in their character. In the Randian worldview, these passengers are representative of a Nietzschean slave class and are less-than-human. The narrator scoffs at the notion that we should legally or morally endorse the vote of the poor housewife who has the audacity to believe she is capable of choosing wisely in the voting booth.

In modified form, the Court has essentially applied Rand's philosophy of great business men (and the occasional business woman) being the engineers of growth. They are so much more important than ordinary citizens, who become moochers and leeches if they support policies that regulate and tax the rich. The Court has already done much to remove the right to vote of ordinary citizens in a wide variety of ways. However, it has the capacity in upcoming cases to go even further.

In a 2022 interview in The New Yorker about the lurch to the right and elitist perspective of the Supreme Court, long-time scholar and constitutional law commentator Lawrence Tribe comments:

> ***In the vacuum that is created when the rule of law collapses, tyranny and fascism are likely to arise. That possibility, unfortunately, looms over us anyway, with a Court that is undermining voting rights, is doing nothing to correct partisan gerrymandering, turning back the clock on minority rights and human rights and the rights of bodily autonomy.***

In the 2010 decision of *Citizens United*, the Supreme Court said that laws preventing corporations and unions from expressing their preference for candidates go against the First Amendment's freedom of speech. In a position opposite that of the Supreme Court of Canada in the 2004 case of *Harper v Canada*, the majority for the U.S. Supreme Court struck down spending limits on third parties. This will ensure greater inequality in what was already an unequal electoral process. The Court also struck down later cases attempting to promote transparency and instead allowed the use of dark money.

In *Supreme Inequality: The Supreme Court's 50 Year Battle for a More Unjust America*, Adam Cohen writes that "the Court's new hardline conservative majority (with Alito joining Thomas, among others) made it's big move" to open the field for big business and pro-business conservative organizations to spend massively in support of their favored candidates. The decision dismantled the campaign finance regime – a goal explicitly set by prominent Republican election lawyers. The captains of industry in *Atlas Shrugged* would have rubbed their hands with glee at such a result, unlikely as it would have seemed in 1957.

The dissenting judgement of the liberal-minded justices, written by Justice Stevens, notes that corporations "have no consciences, no beliefs, no feelings…" Corporations also pay lower taxes than most citizens, issue stock for capital, and "live forever." While corporations can create a more robust economy (furthering public good), these court decisions ensure they instead become powerful players in the political process. Adam Cohen notes that in a system where large contributions become a vital part of any campaign, the large and wealthy corporations disproportionately affect government policy. He cites an important study by Martin Gilens of Princeton that confirms this bleak reality.

Coming up, the Court is expected to hear cases about various kinds of state manipulation and gerrymandering of districts. The conservative super-majority will likely favour arguments supporting efforts to suppress the voting rights of ordinary citizens. We can almost certainly expect the current lineup on the Court to further skew the voting process in favour of the wealthy and powerful. The result is a diminished American democracy.

Environmental protection and "frightening" prospects

In *Atlas Shrugged*, Hank Rearden and his fellow plutocrats believe that nature is available for capitalist exploitation without limits, and that a pristine wilderness is uninteresting and unworthy of preservation. One of the "John Galt strikers", oil baron Ellis Wyatt, considers it perfectly acceptable to blow up his oil fields to protest Congress' new regulations. In the world of Rand, his actions are heroic and praiseworthy even though this shocking act of vandalism would have heavily polluted the surrounding landscape.

In the post-Trump era, the U.S. Supreme Court has shut down any attempt by Congress to legislate and assert control over environmental protection matters. An early example of the super-conservative majority in action is the June 2022 decision of *West Virginia v EPA*. The ruling is a blow to the powers of the Environmental Protection Agency. For example, the agency will now have a much more difficult time enforcing the *Clean Air Act* without a detailed regulation enacted by Congress. It curtails the EPA's options for regulating greenhouse gas emissions.

The Court creatively employed a new tool, the "major questions" doctrine, to realign governmental powers and restrict the workings of the administrative state. In simple terms, the Court held that the EPA has no power to make administrative decisions, such as regulating electricity production, that involve a question of extraordinary economic and political significance. The test has been criticized as highly imprecise and subjective.

Justice Kagan noted in her dissent that, before this decision, the Court had not successfully applied the major questions doctrine. Commentators exclaim the decision may fundamentally change what the federal government does. It could very well mean that important technical decisions will be left solely to a political body that may not understand them. Justice Kagan ends her dissent with a stirring appeal saying that "the Court appoints itself – instead of Congress and the expert agency – the decision maker on climate policy. I cannot think of many things more frightening."

It is impossible to read the majority ruling and not recognize a highly conservative policy preference at work. One that favors business interests over the needs of ordinary citizens and the nation for a clean, sustainable environment. The public good clearly suffers.

2023 promises to see more significant environmental matters reach the Supreme Court. One worth mentioning is *Held v State of Montana*, in which a group of young people claim that Montana's policies worsen the climate crisis by promoting fossil fuel industries such as coal. They claim a violation of their rights under the state's *Constitution* to a clean and healthful environment. The track record of the current members of the Court are not encouraging for the plaintiffs.

Fiction meets the real-world

For the longer term, the question is what it will take to establish a Supreme Court that breaks out of the Randian world view. It is surely time for the Court to display a willingness to consider the public interest when environmental issues are raised.

Ayn Rand's didactic fictions – with their fantastic depiction of extreme individualism and a blind commitment to a rugged, no-holds barred form of capitalism – now run parallel to the real-world decision-making of the conservative-dominated U.S. Supreme Court.

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.

The Law is All Around Us: A Case for Public Legal Education and Information

March 30, 2023 by Nathalie Tremblay

Greater legal capability – the ability to understand and use legal information – helps people to learn the right vocabulary, formulate questions, decide on next steps, decide who to talk to, etc.

Learning about the law is not just something you do when confronted with a serious legal issue. Personal legal capability is about awareness, citizenship, human rights, social engagement and having the confidence to advocate for yourself when you have to. This article will introduce the readers to the work of the Centre for Public Legal Education Alberta (CPLEA) and its efforts to increase Albertans' access to justice by developing free accessible resources about the laws that are all around us – from everyday legal issues to more significant matters.

About CPLEA: the importance of a name

CPLEA is a non-profit organization that has been active in Alberta for almost 50 years! First introduced as the Legal Resource Centre, a decision was made by its board in 2012 to start operating as the "Centre for Public Legal Education Alberta". The new name was deemed to better reflect the identity and purpose of the organization. It also obviously signals that its main goal is to serve the general public. It is very important for an organization devoted to increasing Albertan's "legal literacy" with plain language information to present itself clearly.

Photo from Pexels/Pixabay

What do we mean by legal literacy?

In the Public Legal Education (PLE) field, the concept of legal literacy is mostly referred to as legal "capability". This is a fairly new addition to the PLE vocabulary describing the basic legal competencies and awareness that everyone should have. Meaning, the ability to understand and use legal information. We can all imagine how one can feel when involved in a legal matter full of unknowns. Having timely access to reliable, plain language information can make a difference in the anxiety level an individual experiences by providing some sense of control over a given situation. Greater legal capability helps people to learn the right vocabulary, formulate questions, decide on next steps, decide who to talk to, etc. More clarity and better awareness provide more decision-making opportunities.

People who cannot afford to access the services of a lawyer (unrepresented litigants) or people who make the decision to represent themselves (self-represented litigants) have a variety of needs when it comes to legal

information. Organizations such as CPLEA become an important link in the legal assistance chain.

Ultimately if people decide to use the services of a professional like a lawyer or a mediator, having some of the necessary knowledge, vocabulary and concepts allows them to ask targeted questions and access the right services in a timelier fashion. There can also be a financial benefit to the consumer, as the professional can spend less time with basic explanations and instead dedicate more time to strategies and solutions. The good news is that in Alberta, there is an increasing availability of limited scope legal services and coaching, a concept well described in this LawNow article.

Legal topics and their importance

CPLEA develops a large variety of information on legal topics based on identified needs. We make use of web analytics and survey data to make decisions about specific resources and delivery. It is essentially using public input to generate the right output!

Some of our resources are also the result of close collaboration with social and community agencies who are able to identify areas of need directly from their interactions with the public.

This work is continuous and ongoing because of the nature of legislation which changes regularly and greatly affects people depending on circumstances and context, for example:

- Sizable and complex areas of law such as *Family Law* calls for a large array of resources spanning from divorce and parenting to contact orders and financial support and everything in between. There are many ways of approaching Family Law in Alberta, many points of entry into the court system and many ways to resolve disputes out of court. CPLEA's resources play an important part in providing clarity.
- Dramatic events such as a global pandemic sadly draw attention to areas of law where people are most affected like Landlord and Tenant and Employment.
- New laws such as Canada's Ban on Conversion Therapy requires plain language information to be disseminated to the population in a clear and sensitive manner.

Everything is in the delivery!

Developing reliable public legal information in plain language to increase access to justice and expand people's legal capability is of course a major part of the work at CPLEA. However, great resources must reach their audience to be effective! Facilitating access to our resources is of the utmost importance to affect people's lives. CPLEA delivers its information in a variety of ways to boost accessibility by accommodating individual preferences, modes of access, interests, and settings:

- **Digital resources and specialized websites**: Info sheets, booklets, and posters are available to download online. Several separate specialized websites addressing specific areas of law and targeted audiences are also part of CPLEA offerings.
- **Hard copy resources**: For people needing hard copy materials for personal use or to distribute to clients, resources can be ordered and will be delivered for free anywhere in Alberta.
- **Videos**: Our YouTube channel "CPLEA-TV" presents a collection of short videos and recorded webinars to watch on-demand.
- **Presentations and webinars**: These offerings are in direct response to requests or emerging needs.
- **Self-directed learning modules**: Learning opportunities for people to explore areas

of the law on their own! This type of learning is a growing aspect of CPLEA's component of resources.

- **Social media**: Posts and short quizzes to direct people's attention to useful and timely resources.

Learning about the law is not usually top of mind because people don't always realize that legal aspects permeate many things in their daily life. From mobile phone contracts to wills and estates, knowing about a place to go for knowledge and awareness is key.

To access all CPLEA offerings, visit **www.cplea.ca**

You can also subscribe to our monthly newsletter **What's New @ CPLEA** to keep in touch with our work!

This article was originally published by The Edmonton Social Planning Council in their Community Matters March 2023 newsletter. It is reprinted with permission.

Nathalie Tremblay

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

What To Know When Buying your First Home

April 5, 2023 by Sherry Simons

Eight things to know when buying your first home, including the professionals who will support you, real property reports and title insurance, property insurance, adjustments, holdbacks and more.

Buying your first home can be an overwhelming and stressful process. Here are my top 8 things to consider when preparing to buy a home.

Note that each province has different real estate rules and processes. While this article is about Alberta processes, the information generally applies across Canada.

Photo by Jessica Bryant from Pexels

1. Get your support team in place

There are four key people who assist with a home purchase: realtor, mortgage broker or specialist, home inspector, and real estate lawyer.

Your **realtor** sends you tailored house listings and attends house viewings with you. They give you advice on purchase price offers, help you with negotiations, and prepare your contract documents. Using a realtor as a buyer is typically free! Your realtor is paid out of the sales commission paid by the seller.

A **mortgage broker** helps you find a mortgage that suits your needs and assists you with the lender's paperwork. Mortgage brokers often have access to special rates and products, and they help you consider options from a variety of different lenders. If you don't want to work with a mortgage broker, you can contact your bank (or any other bank) directly and speak with a mortgage specialist about their mortgage products.

Your **home inspector** checks the condition of the house and identifies any problems. They take a thorough look through the home, inspect areas that are not easily accessible (such as the attic), and check to see if the appliances work properly. They will provide you with a final inspection report that will note any areas of concern.

Last but not least, your **lawyer** will meet with you to review the transaction and sign your mortgage paperwork. They will send your purchase funds to the seller and will register your title and mortgage with the Land Titles Office.

Start looking early for qualified professionals. You can do internet searches, attend free seminars, or go to open houses to meet with professionals. Family and friends can also be a good resource for recommendations.

2. Title insurance v. RPR & compliance: What's the difference?

A **Real Property Report (RPR)** is a land survey drawing prepared by a qualified land surveyor. This drawing shows the physical features of the property, including the house, garage and any other structures. A seller typically sends a copy of the RPR to the local municipality for review. If the house and other structures shown on the RPR comply with local bylaws, the municipality will give the RPR a stamp of approval.

Because this process takes time and money, some sellers offer to pay for a title insurance policy for the buyer instead. A **title insurance policy** protects a buyer from any unknown defects relating to the title of the property, such as improperly located structures, non-compliance with bylaws, or fraud issues.

3. Insurance is a must!

If you are financing, your lender will require you to have home insurance to protect the property. Take steps in advance to familiarize yourself with insurance companies that you want to use. For a condo, the condo board will already have insurance in place for the building and common areas, however it's recommended to get your own insurance to protect the contents of your unit.

4. Be aware of adjustments and other costs

Be prepared for other costs and make sure you have extra room in your budget. Adjustment costs are the costs a homeowner pays for their property in any given year, such as property taxes, condo fees, and homeowner association fees. The lawyers will calculate the amount of each adjustment to make sure the buyer and seller pay for their fair share of these costs based on the closing date.

Home inspectors and lawyers will charge fees for their services. Typically, you will need to pay these costs before your closing date.

5. All about holdbacks

A holdback is a part of the purchase price that one of the lawyers will hold back if there is an outstanding problem the seller needs to fix after the closing date. Your lawyer will negotiate a fair holdback amount based on the estimated cost to fix the problem. Examples of situations when a holdback is needed are to repair a broken appliance or if a permit is missing for a structure built on the property (such as a deck or gazebo).

6. Closing delays

Closing delays happen on occasion and may result in extra costs and delays. If your lender is late sending mortgage funds to your lawyer (the deadline is typically noon on closing date), then you are responsible for paying late interest on a daily rate until you are able to pay the full purchase price.

Further, if your payment is delayed, the seller may not allow you to take possession of your home until the full price has been paid. Save yourself some stress and do not plan to move into your house right on closing day. Allow for a few days of buffer time just in case.

7. After purchase considerations

Hooray! You have jumped the hurdles and bought your home. Smooth sailing, right? Hopefully so! However, you must keep on top of your three main responsibilities after your purchase:

1. Pay your mortgage on time,
2. Pay your property taxes and don't fall behind, and
3. Keep your insurance up to date.

If you do not keep up with your three main responsibilities, your lender could take legal steps against you.

8. Final considerations

As a homeowner, you want to take care of your home, including regular maintenance. Make sure you are familiar with your local bylaws and respect the rules of your neighborhood.

It's also a good idea to make sure your Enduring Power of Attorney and Will are up to date. These documents will specify what will happen to your property if you are incapacitated or if you pass away.

Sherry Simons

Sherry Simons has been practising law in Edmonton since 2014. She has a successful practice focused on real estate, wills and estates, corporate matters, and policy drafting. In her spare time, Sherry likes to hike with her dog, bake, and travel.

Canada's First-Time Home Buyer Incentive Explained

April 11, 2023 by Ben Throndson

Answers to your questions about Canada's First-Time Home Buyer Incentive, including who is eligible, how it works, repaying it, and other associated costs.

In September 2019, the Government of Canada introduced the **First-Time Home Buyer Incentive**. The purpose of the Incentive is to make home ownership more accessible for qualifying first-time buyers.

Photo by RODNAE Productions from Pexels

Recent updates to the program in June 2022 limited the shared equity amount payable to the Government upon repayment. The Government has also recently announced an extension of the Incentive program to 2025.

Who is eligible for the Incentive?

A buyer must meet the following conditions to qualify for the Incentive:

- The buyer's total annual qualifying income cannot exceed $120,000 ($150,000 if the home being purchased is in the Toronto, Vancouver, or Victoria Census Metropolitan Areas). If there is more than one buyer, the combined qualifying annual income cannot exceed these amounts.
- The buyer's total borrowing cannot be more than four times the buyer's qualifying income (or 4.5 times if the home is in Toronto, Vancouver, or Victoria).
- The buyer or their partner must be a first-time homebuyer. A first-time homebuyer is someone:
  - who has never purchased a home before
  - who, in the last four years, did not occupy a home that they or their current spouse or common-law partner owned, or
  - who is experiencing a breakdown of a marriage or common-law partnership.
- The buyer must be a Canadian citizen, permanent resident, or non-permanent resident who is allowed to work in Canada.
- The buyer must be buying a home located in Canada that will be their primary place of residence.

It is important to be aware that a person may only obtain the Incentive once.

How does the Incentive work?

The Incentive involves the Canada Mortgage and Housing Corporation (CMHC) lending part of the home's purchase price to the buyer at the time of the purchase. The buyer uses this amount to increase their down payment.

The buyer must still provide a minimum down payment of at least 5% of the purchase price from traditional sources (such as savings or withdrawal from an RRSP).

The exact percentage CMHC will provide as part of the Incentive (5% or 10%) depends on the type of home being purchased.

- For a re-sale home, the Incentive will be 5% of the original home value.
- For a new build, the Incentive can be 5% or 10% of the original home value, as requested by the buyer and approved by CMHC.
- For a mobile/manufactured home, whether new construction or resale, the Incentive will be 5% of the original home value.

The advantage of the Incentive is that the buyer can increase their down payment and lower their carrying costs for the main mortgage on the home. In exchange for receiving the Incentive, the buyer gives CMHC a second "shared equity mortgage". This second mortgage is registered on the title of the home at the same time as the main mortgage when the buyer completes the purchase.

A shared equity mortgage is unlike a typical mortgage as it does not require regular payments and there is no interest. Instead, under the Incentive's shared equity mortgage, the buyer/borrower agrees that CMHC will share in the upside or the downside of the property value at the time of repayment (usually when the home is sold).

Let's look at an example: Imagine a person buying a home for $300,000. They put down 5% ($15,000) from savings and also receive an Incentive of 5% ($15,000), meaning their total down payment is $30,000. The buyer takes out a traditional mortgage for the balance of the purchase price, and makes monthly principal and interest payments on the mortgage. When they sell the home, its value has increased to $400,000. The repayment amount for the Incentive would be 5% of the current value ($20,000). The same principle applies if the value of the home goes down. If the value is now $250,000, the repayment amount for the Incentive would be 5% of the current value ($12,500).

Effective June 2022, the Government of Canada changed the Incentive so that its share in the appreciation or depreciation of the home is limited to a maximum gain or loss of 8% per annum (not compounded). This means the Government's gains (if the home's value has increased drastically) are capped, but also that the Government's losses are limited (if the home's value has decreased drastically).

When does the Incentive need to be repaid?

The buyer must pay the Incentive in full when they sell the home or after 25 years, whichever comes first. Certain types of refinancing can also trigger a requirement to repay the Incentive in full.

A buyer can also choose to repay the Incentive early, subject to CMHC's approval. This may be a sound option if the value of the home is increasing rapidly, or if the buyer is planning on carrying out major renovations or an expansion to the home.

What other costs are associated with the Incentive?

While there is no fee to apply for the Incentive, prospective buyers may be responsible for paying for certain expenses in connection with the Incentive, such as closing services, funding advances, and legal costs associated with the second mortgage. There may also be administration costs relating to valuating the home at the time of repayment, default management costs, and legal fees associated with discharging the Incentive.

Ben Throndson

Ben Throndson is a Student-at-Law with Reynolds Mirth Richards & Farmer LLP. He graduated from the University of Alberta Faculty of Law in 2020 and clerked at the Alberta Court of Appeal before beginning his articles with the firm.

If you or your municipality have questions or require legal advice, please reach out to RMRF's Municipal Team. You can find us at www.rmrf.com.

Planning for things no one wants to talk about

April 14, 2023 by Benjamin Freeland

Advance care planning and the need for frank conversations about death

Photo from unsplash

If you were too sick or injured to make healthcare decisions for yourself, who would make them for you? Advance care planning (ACP) gives you a chance to decide who. April 16 is National Advance Care Planning Day, a day where Canadians are encouraged to engage in conversation with a trusted individual about their end-of-life preferences and to plan for future care by completing a personal directive, a will, and a power of attorney.

Even a single conversation can make the difference between a protracted end of life full of unwanted, potentially uncomfortable medical interventions and a peaceful death surrounded by friends and family.

A story of open conversations

From a very young age, Vic Mitchell has been able to talk about loss. Born in Belfast, Northern Ireland in 1948, Vic lost his father in 1953 in the MV Princess Victoria ferry disaster, in which 135 people died in the so-called "Storm of the Century." While he grew up in what he describes as a "happy home" with his mother and stepfather, he was always struck by his mother's silence when asked about his birth father.

"My mother never wanted to talk about him," he said. "I think that was just how people coped."

Vic's openness to discussing death, a topic that for many remains unmentionable, has carried through to the present. The St. Albert native emigrated to Canada in 1976, worked a long career in construction and today remains active as a patient advisor for Alberta Health Services.

Vic's passionate involvement in the healthcare sector is influenced by his own health challenges (managing celiac disease and surviving stomach cancer in 2008) and by the experience of his late wife Lori who died from leukemia in 2014.

"It was completely out of the blue," Vic explains.

"We were out to celebrate my 65th birthday as well as my five-year anniversary of being cancer-free, and then three weeks later she was diagnosed. Part of the treatment was a trip down to Calgary so that she could have a bone marrow transplant, and tragically the transplant worked except for one cell. She recognized that in order to continue living she would have to continue undergoing chemotherapy for the rest of her life, so quality of life became the issue."

For Lori, there was no question of what to do. She made the decision to forego further treatment.

"She decided to stop treatments on Saturday, and she died Wednesday night," says Vic. "It was that fast."

In the years since his wife's death, Vic has immersed himself in the world of patient consultation. In that time, he has helped numerous people begin their cancer journey and has encouraged them to communicate with their families and to draft personal directives, wills and other instructions for loved ones. This experience had led him to be extremely proactive in his own end-of-life planning.

"I've seen it be an absolute gong-show, where nobody knows what's going on," he explains. "That's why I always keep my Green Sleeve with instructions on top of the fridge. That's why I recently had a Zoom meeting with my children, where we went over my will page by page and discussed the details openly. Six months later while talking to my daughter, she said to me 'I thought you'd had bad news or something.' It's important to talk about these things when you're healthy, because things can go south in an instant."

A story of chance conversation

Vic's wife was fortunate enough to be able to communicate her end-of-life wishes herself. In the case of David Schneider, a retired former communications manager with the Edmonton Police Service, it was a chance conversation many years prior with his mother that made the difference.

Several years ago, David and his sister arrived at their mother's home to find her collapsed and unconscious on the floor. Upon arrival in hospital, an exam revealed she had suffered a severe internal brain injury from which she would likely never recover. David's sister then asked him and his other siblings if they knew anything about their mother's wishes regarding medical efforts to prolong her life.

"I was able to recall one casual conversation that I had had with her many years previous, when she made it very clear that she did not want any kind of extraordinary care in the hospital," David explains.

"It was a half-joking conversation, but it made all the difference to her quality of life at the end. I shared that conversation with my sister, and the hospital transferred her to the palliative care unit, where she died peacefully one week later. Had we not had that conversation, she might still be on life support today."

For David, this experience was a wake-up call to the importance of palliative care awareness and advance care planning.

"Prior to this, I had no knowledge of palliative care. Even as they took my mother to the unit, I really had no idea what palliative care entailed, and it was only after being there for several days that I came to understand what it was," he says.

"Had I known more, I would have been able to have further discussions with my mother to make sure we were all clear on what her final wishes were. Instead, we were reliant on me and my memory of a conversation that had been had many years prior."

Advocating for cultural change

More than half of Canadians now report having had someone receive palliative care within the last 10 years. Despite this fact, a 2016 Ipsos poll revealed that 42 per cent of Canadians were unfamiliar with palliative care. Less than half of Canadian adults (43 per cent) reported having had conversations regarding their end-of-life care preferences.

Vic, ever the passionate patient advocate, feels strongly that a cultural change is needed around how we discuss – or rather *don't* discuss – death and dying.

"When my dad died nobody wanted to talk about it," he explains. "Nowadays still nobody wants to talk about death. We're not educated to do it. We don't talk about death until serious illness strikes and it becomes front and centre, and then we're overwhelmed by it. Grief has a way of coming at you in

unexpected ways, and when it does, you're in no state to make important decisions. You have to have these discussions ahead of time."

For more information on completing advance care planning and to learn more about palliative care, visit the Covenant Health Palliative Institute's Compassionate Alberta website. There you will find extensive advance care planning resources as well as advice and tools to start conversations with the people who matter most about death and dying.

Benjamin Freeland

Benjamin Freeland, MA is a writer, communications specialist and educator currently serving as communications advisor at the Covenant Health Palliative Institute and webmaster for the Compassionate Alberta website.

The Right To Die and the Debate Surrounding Mental Illness

April 19, 2023 by Isaac Belland

Medical assistance in dying, or MAID, has been legal in Canada since 2016 and has continued to evolve. The current debate is around expanding MAID eligibility to patients experiencing mental health conditions.

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

Medical assistance in dying (MAID) is a process where a medical professional assists an individual, at their request, in intentionally ending their life. In Canada, MAID is a painless process that uses drugs.

The origins of medical assistance in dying

In February 2015, the Supreme Court of Canada in *Carter v Canada* directed Parliament to change parts of Canada's *Criminal Code* to align with section 7 of the *Charter*. Section 7 protects every Canadian's right to life, liberty, and security of the person.

The Court decided that laws prohibiting physician-assisted dying interfere with the right to life, liberty and security of an individual. Those with "grievous and irremediable" medical conditions did not have the **liberty** (freedom) to make decisions about their bodily integrity and medical care. This legislative framework also meant many patients endured intolerable suffering, which violates the individual's **security** of person. Further, the Court found the prohibitions deprived some people of **life** by forcing them to decide to take their own lives prematurely or risk not being able to once their condition worsened.

Photo from Pexels/Pixabay

Depriving the life, liberty, and security of the person does not accord with the principles of fundamental justice. The purpose of the law prohibiting physician-assisted dying was to protect individuals in particularly vulnerable positions. However, the prohibition was overbroad to the extent it applied to individuals who were not vulnerable. In other words, the prohibition denied the rights of some not related to the law's original purpose.

Finally, the Court decided section 1 of the *Charter* could not save the prohibition. Despite furthering a pressing and substantial objective, a MAID regime with properly designed and administered safeguards could protect vulnerable individuals without infringing on the rights of non-vulnerable people.

And so, in June 2016, Parliament passed *Bill C-14* to amend the *Criminal Code*. These amendments exempt medical professionals from criminal liability if they provide MAID.

The legislative evolution

Since 2016, MAID has continued to develop.

In 2019, the Superior Court of Québec held that the "reasonable foreseeability of natural death" eligibility requirement was unconstitutional.

One of the applicants, Jean Truchon, had lived with spastic cerebral palsy since birth. He was completely paralyzed except for his left arm. Mr. Truchon's physical condition did not stop him from living a full and independent life. He graduated from Université Laval in 1992, he swam and played wheelchair ball hockey, and he had an active social life with close friends and family.

Although he had always seen his life as a battle for autonomy, he was satisfied. He described his life as more or less normal.

In 2011, Mr. Truchon began losing the use of his left arm. Doctors diagnosed him with severe spinal stenosis and myelomalacia, a degenerative condition with no treatment. By 2012, Mr. Truchon was fully paralyzed and had no hope of improving. He experienced intense burning sensations and painful spasms. Mr. Truchon could no longer go to the pool or play ball hockey, and he rarely went out. Moving around in his wheelchair, which he had to control with his chin, was difficult and painful.

Mr. Truchon said he died in 2012.

In 2017, he requested MAID. Mr. Truchon's physician refused his request because his condition did not impact his life expectancy and would not lead to his death in the foreseeable future.

Mr. Truchon successfully challenged the constitutionality of the "reasonable foreseeability of natural death" requirement.

The Court found the requirement violated section 7 of the *Charter* for all the same reasons as in the *Carter* case. The Court also said the requirement violated section 15's guarantee of equality because it distinguished between people based on their disability. Disabilities where death was reasonably foreseeable were treated differently than disabilities where it was not.

In response, Parliament passed *Bill C-7* in 2021, which removed the requirement for death to be reasonably foreseeable. Instead, the condition had to be **grievous and irremediable**. The Bill also added safeguards for those whose death was not reasonably foreseeable, such as a minimum 90-day assessment period and requiring one of the two assessments be carried out by a medical professional who is an expert on the particular condition causing the person's suffering. Further, the assessment professional must agree the patient had seriously considered reasonable and available means of easing their suffering.

The current debate

All this context brings us to the current debate surrounding the expansion of MAID.

Bill C-7 temporarily excluded eligibility for two years for those suffering solely from mental illness. During that time, the Ministers of Justice and Health were to conduct an expert review of recommendations, protocols, guidelines, and safeguards for performing MAID on individuals with mental health conditions.

The expert review produced the *Final Report of the Expert Panel on MAiD and Mental Illness*, tabled to Parliament on May 13, 2022. The report noted that no system of safeguards, protocols and guidance would satisfy everyone because of the severe diverging values at the heart of MAID.

One significant challenge is the requirement that the mental illness in question be "grievous

and irremediable." While the *Criminal Code* defines this requirement as "incurable, with an advanced state of irreversible decline in capability", applying the definition has led to much debate.

In his brief to the Senate, Dr. Sonu Gaind argued there is currently no evidence or standards for reliably predicting whether a particular mental health diagnosis is reversible. Dr. Gaind was the president of the Canadian Psychiatric Association in 2016 and the chair of the Canadian Psychological Association task force on MAID in 2016. As he understood Bill C-7, Canada would be the first and only country to rely on the patient's assessment of whether their condition is irremediable, even if they had not tried reasonable options that are likely to help.

On the other hand, Dr. Mona Gupta argued that in practice, the only patients recommended for MAID are those who have been ill for many years and have tried many interventions and treatments. She argues that a bright line requirement to try treatments would require state-of-the-art interventions for persons with difficult-to-treat psychiatric conditions. There are no corresponding mechanisms to make sure people have access to those treatments. In effect, this would make MAID inaccessible for some. Additionally, Dr. Gupta argued the prohibition on MAID for mental illness does not prevent the difficult cases it was intended to avoid:

> ***[T]he psychiatric and physical conditions of the person's condition are intertwined such that they are best thought of as a mixed condition rather than two co-existing conditions and it is this intertwined condition that motivates the request [for MAID].***

The BC Civil Liberties Association also made submissions to the Senate. In support of MAID for mental illness, it suggested the prohibition is arbitrary since "mental illness" does not have a clinical, medical or legal definition. There are many mental disorders, such as Alzheimer's disease and Huntington's disease, which could be deemed mental illnesses. Yet, in practice, a wide variety of medical professionals offer MAID for these diseases.

Still, others like Inclusion Canada, argued for a "duty to assist" that would require governments to make resources available to address causes of suffering like a lack of adequate housing or needed healthcare aids. A mental health MAID regime without a corresponding "duty to assist" would undermine equal respect and dignity of people with disabilities and may infringe equality rights protected by section 15 of the *Charter*.

What's next?

Despite these concerns, the expert review report concluded the existing MAID eligibility criteria and safeguards – strengthened by existing laws, standards, and practices in related areas of healthcare – could provide an adequate structure for mental illness-related MAID.

Currently, MAID is set to expand on March 17, 2024. However, the federal government still needs to clarify the legislative details. They have not commented further.

My view on expanding MAID

The debate has largely moved on from whether Canadians have the right to die. As Justice Cory put it in his *Rodriguez* dissent, "the right to die with dignity should be as well protected as is any other aspect of the right to life."

The question to be answered is whether proper safeguards can adequately protect the vulnerabilities of those with mental illness from the finality and irreversibility of MAID. Requiring informed consent means the patient must have decision-making capacity. Although assessing capacity can be difficult at times, the same is true for many other serious medical decisions. In those cases, the answer is not refusing intervention for everyone.

Further, there may not be a standardized test for assessing whether a mental disorder is incurable. However, a case by case approach involving several attempts at treatment is a middle ground that protects vulnerabilities while respecting the individual's right to die. Lastly, to ensure the best possible chance of receiving true informed consent, requesters of MAID should receive access to an wide range of social supports that might reduce their suffering. Where appropriate, these services should include housing and income supports.

Isaac Belland

Isaac Belland is a law student at the University of Alberta, graduating in 2024.

Double take on mortgages

April 28, 2023 by Judy Feng

Getting a mortgage to buy a home is a significant decision. Five things you should know about mortgages include lending terms, security for the mortgage, open vs. closed mortgages, and defaulting on the mortgage.

AUTHOR'S NOTE Some of the following content is adapted from **CPLEA's Nested course**. Nested is CPLEA's free on-line course on the basics of homebuying and ownership in Alberta. Nested was created to help you decide if buying a home is the right choice, and to empower you to think about the possibility of owning your own home. You can access Nested at learn.cplea.ca.

Photo by Andrea Piacquadio from Pexels

Buying a home, especially for the first time, can be exciting. It is one of the most significant purchases people make in their lifetimes and most people will need to finance that purchase through a mortgage. If you are taking on a mortgage, here is what you need to know:

1. Mortgages are a loan and contract

The word mortgage itself comes from an old French term meaning "death contract". But do not let that scare you off! A mortgage is a home loan secured by real property (known as real estate). A mortgage is a special loan that allows you to buy a property. It is also a contract between the lender (also known as mortgagee, the financial institution or person providing the loan) and borrower (also known as the mortgagor).

2. A mortgage's contractual terms covers the loan and more

Lenders usually have standard form mortgages. A typical standard form mortgage from an institutional lender can easily exceed 20 pages, containing many contractual terms including:

- loan amount and term
- interest rate (could be fixed or variable)
- when you have to make payments
- how much you have to pay
- prepayment privileges and fees
- what happens when you do not make payments (default)
- other responsibilities such as insurance, property taxes, and property repair and replacement
- further terms for condominiums and rental properties

That is why it is important to review mortgage documents with the help of a real estate lawyer. They can help you understand your rights and obligations when executing (signing) the mortgage.

3. Mortgages are secured by property

All mortgages are secured, or guaranteed, by the property you are buying. Depending on the terms of your mortgage, this security

extends to even fixtures or things within the property such as:

- windows or door screens, including blinds, shutters and awnings
- lighting equipment
- floor coverings
- built-in appliances

4. Open and closed mortgages are not the same

When shopping around for a mortgage, you may focus on getting the best interest rate deal possible. But one thing to seriously consider is whether the mortgage is open or closed rate and how that may affect your flexibility in making payments. Whether a mortgage is open or closed affects your rights when it comes to prepayment privileges and charges.

An **open mortgage** gives you freedom to pay off the remaining balance whenever you want. There are no restrictions preventing you from making lump sum payments at any time, to help reduce the principal amount. Most lenders charge higher interest rates for these privileges.

Closed mortgages limit how much you can pay towards the principal before the lender charges you extra penalties. Usually, there is a cap on lump sum payments that you cannot go over. This cap is typically a percentage of the original loan amount in a calendar year. Interest rates are usually lower with closed mortgages.

5. If you do not make mortgage payments when they are due, the mortgage goes into default

If something goes wrong and you cannot make payments, then the mortgage goes into default. It does not matter if not being able to make payments is outside your control. You are responsible for making mortgage payments when they are due.

Not paying taxes, condominium contributions and homeowner association fees, or meeting any other obligations to the lender, can also be acts of default under a mortgage. Upon default, the lender can start the **foreclosure process**. Learn more about mortgage defaults and foreclosure in CPLEA's foreclosure booklet.

Judy Feng

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

Canadian Legal System: The role of libraries in access to justice

May 4, 2023 by Alberta Law Libraries

There are many different kinds of libraries that support and provide access to our Canadian legal system, including courthouse libraries, legislative libraries, public libraries and more.

Libraries are essential to sustaining democracy and accessing justice. They retain and preserve official documents, provide access to information and endorse transparency. Some libraries offer public access while others only allow access to certain users. But they all offer information online to Canadians.

Our legal system is composed of three branches of power:

- judicial power – the system of courts and tribunals
- legislative power – the federal Parliament and provincial and territorial Legislatures
- executive power – the Prime Minister, Premiers, and cabinets

This division of powers is the basis of our Canadian legal system. Did you know there are also libraries for these branches?

Judicial and courthouse libraries: Alberta Law Libraries and Supreme Court of Canada Library

Alberta Law Libraries serves all three courts in Alberta: Alberta Court of Justice, Court of King's Bench of Alberta, and Court of Appeal of Alberta.

The first law libraries in Alberta came to be before the province existed. The Law Society of the Northwest Territories – which covered the land that is now Alberta, Saskatchewan, and much of Manitoba – passed a *Legal Profession Ordinance* in 1889. Among other things, this law empowered lawyers to spend money to create law libraries. Housed in the courthouses of the early judicial districts, these libraries supported the judicial process. The new Law Society of Alberta took control of the law libraries when Alberta became a province in 1905.

Photo by Element5Digital from Pexels

At first, only members of the legal profession could access the law libraries in Alberta. An important step in democracy came in 1973 when the public was granted access to services in person or remotely. Since then, Alberta Law Libraries has served the legal community (judges, lawyers and Crown prosecutors), as well as the public.

Alberta Law Libraries offers public access to print materials in ten locations. Our collection includes federal and provincial legislation, as well as historic and current case law (judicial decisions) from all provinces and many tribunals. In addition, we have many books that explore and explain the legal system and its many parts.

We also offer free remote access to a collection of eResources, which include online databases and books. Offering access to these expensive resources to all Albertans creates an equal opportunity for both the legal community and the public. Research support and instructional sessions are available to Alberta residents to make sure they find the right legal resources for their needs. Check our Services to the Public to see how Alberta Law Libraries can help you understand and access the Canadian legal system.

The **Supreme Court of Canada Library** serves the Supreme Court of Canada, which hears appeals from appeal courts across the country. The Supreme Court Library opened officially when space was available after the Court first expanded in 1892. The library assists the Supreme Court of Canada in deciding questions of national importance by providing information and research. It is open to those appearing before the Supreme Court of Canada and the Federal Court of Appeal, to the Canadian judiciary, to members of law societies across Canada, and to others by permission. Public access to the collection, including some electronic resources, is available through the Library catalogue.

Legislative and executive libraries: Legislature Library of Alberta and Library of Parliament

The legislative branch of government makes the laws in Canada. Our elected representatives (Members of Parliament or Members of the Legislative Assembly) present, discuss, amend, pass or discard new laws (called bills). Both the Parliament in Ottawa as well as the Legislature in Alberta have their own libraries.

The Legislature Library of Alberta was established in 1906 as a repository of the Legislative Assembly of Alberta. To this day, it continues to provide Members of the Legislative Assembly with access to legal information and research services. Staff also provide some help to the public. Visit the Assembly Dashboard to find more information about the Assembly and bills in Alberta.

The **Library of Parliament** traces its roots to Upper and Lower Canada's Legislative libraries, which were created in 1791 and 1792 and unified in 1841. The current library opened in Ottawa in 1876. The library houses historical and current parliamentary materials and provides research help to parliamentarians. It also responds to general queries from the public about the role, history, and work of Parliament, provides access to documents such as sessional papers, and directs Canadians to parliamentary offices and resources. The Library of Parliament, working with the Senate and the House of Commons, provides access to all Canadians to federal bills through LEGISinfo.

Other libraries

Other libraries also provide access to information and materials about Canada's legal system.

University law libraries are usually open to the public and offer in-depth legal information on their websites. Examples are the University of Alberta Law Library Page and the University of Calgary Beginning your Canadian Legal Research.

Public libraries collect materials on the most common legal issues. Unlike most of the law libraries described above, public libraries loan print materials to all users.

Importance of libraries

Courthouse, legislative, academic, and public libraries support and democratize our Canadian legal system. Libraries strive to facilitate education, understanding, dissemination and access to legal materials. In doing so, they fulfill a crucial role in our path toward fair and universal access to justice.

Alberta Law Libraries

Alberta Law Libraries (ALL) is a network of law libraries across the province existing to provide research support and information services to the legal community, self represented litigants and all Albertans.

Houseless Encampments: A political or legal issue?

May 9, 2023 by Isaac Belland

Provincial and municipal laws apply to houseless encampments, but adequately addressing the root of the issue involves policy changes and political will.

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

On November 23, 2022, an Encampment Response Team (ERT) composed of members from the City of Edmonton, Boyle Street Community Services, Bissell Centre, and the Edmonton Police Service (EPS) dismantled and displaced a houseless encampment near Edmonton's Bissel Centre.

The removal involved connecting camp inhabitants with resources for housing and health support. However, we cannot forget that this process means the forceful destruction and removal of some of our community's most vulnerable from the place they call home.

Pushback from Edmontonians led City Council to decrease ERT funding by $11.5 million over four years. A local business owner described the displacement as cruel, stating:

> *You guys need a more dignifying way to address this challenge… they are not being treated like human beings."*

Still, $1.17 million will still be allocated to the ERT annually. Presumably, EPS will continue to displace unhoused populations living in encampments.

Photo by Brett Sayles from Pexels

Was the law behind them?

Generally, yes.

The *Crown Property Regulation* prohibits occupying, residing, camping, or sleeping on Crown (public) property between sunset of one day and sunrise of the next. Camps on private land are no safer, as landowners can remove houseless encampments from their property via section 2 of the *Petty Trespass Act*.

Further, a variety of municipal bylaws criminalize behaviour that tends to be overrepresented in houseless encampments. For example, littering can be more common without garbage pick-up, and public urination or defecation can be more common because of a lack of facilities. Local authorities can justify ticketing encampment inhabitants or beginning the process of their removal where there are bylaw violations.

Even if a landowner gives permission, houseless encampments may violate zoning bylaws. The Chinatown and Area Business Association, the Chinese Benevolent Association of Edmonton and others appealed a proposed drop-in shelter offering social

support for the houseless. The Edmonton Subdivision and Development Appeal Board prevented the development since the site was a general business zone, and Community Recreation Services and/or Supportive Housing were not permitted nor discretionary uses. Presumably, the same logic would apply to encampments.

Why do unhoused people live in encampments?

Firstly, during surges in demand for shelter beds, commonly seen in the winter, demand can quickly outstrip availability.

Secondly, seeking shelter elsewhere puts the unhoused at risk for violence and inhumane treatment. In 2021, EPS officers issued a public apology for evicting unhoused people from a city-centre LRT station into -33 degree Celsius wind chills. The city has buses to transport people to shelter in these situations, but they were never provided. Since then, there have not been any high-profile evictions without offering transport to a shelter.

However, staying in a shelter is not a feasible option for everyone. There are many valid reasons why an individual may prefer an encampment to a shelter: being able to come and go as one pleases, the sense of community an encampment offers, no prohibitions on drug use, and being able to stay together as a group or family (for example, some shelters accept only women).

Is there a better way?

In 2008, the B.C. Supreme Court made the novel move of striking down a municipal bylaw preventing a group of unhoused people from building an encampment for temporary shelter in an urban park. The bylaw prohibited the overnight "erection or construction" of temporary shelter on public land. In *Victoria (City) v Adams*, the Court found a shortage of available shelter beds forced the unhoused to seek public shelter (i.e. encampments) in a way that exposed them to significant health risks. As a result, this violated their section 7 *Charter* right to life, liberty, and the security of the person. In other words, when there is a lack of formal shelter beds, the unhoused have the right to construct shelter on public property. A nearly identical challenge was recently successful in Ontario.

Similar conditions arguably exist in Edmonton. Municipal bylaws, in effect, prevent unhoused people from setting up temporary shelter such as encampments even when there is a shortage of available shelter beds. The unhoused in Edmonton currently seek public shelter in a way that exposes them to health risks. This raises the question of whether a similar *Charter* challenge could strike down Edmonton bylaws that prohibit unhoused encampments.

Practically speaking, a similarly successful court challenge in Alberta would likely protect encampments in the short term while there is a shortage of shelter beds. In the long term, the municipalities and Provincial government could fund more shelter beds, making such a finding effectively moot. A shelter is not a viable alternative for some living in encampments. Nevertheless, pressure to increase shelter funding can only be a good thing.

Another alternative may lie in Victoria's new bylaw, which allows a houseless person to construct a shelter in public parks between 7 p.m. and 7 a.m. The unhoused have a place to sleep, and those critical of encampments are placated during the day. Of course, changing legislation requires some political will, which seems unlikely for the time being. The UCP government abolished "squatter rights" (i.e. adverse possession claims) in December 2022. The attitude of the government seems to be squarely in favour of property rights. Further, it is probably unrealistic to expect people to pack up their homes and leave every morning. Such a regime begs for police confrontation.

So, what's left? Obviously, targeting the problem at its roots: more funding for mental illness prevention and treatment, more funding for addiction treatment, stronger unions, a higher minimum wage, and stronger tenancy protections, to name a few. In other words, a retreat from Neo-Liberalism towards policy that leads with compassion rather than assigning fault.

The law is a powerful tool, but it is no substitute for political change.

Isaac Belland

Isaac Belland is a law student at the University of Alberta, graduating in 2024.

Compensation for Travel Delays

May 18, 2023 by Gina Burke

Canada's *Airline Passenger Protection Regulations* set out rules that airlines must follow, including compensation for travel delays and how to make a claim.

You will likely recall the extreme winter weather conditions across Canada in December 2022 and January 2023. Winter storms affected the entire country, including major airports in British Columbia, Ontario and Quebec. Because of this, airlines struggled with flight delays and cancellations that left travelers stranded during the peak holiday travel season.

The aviation sector is also still reeling from the effects of the pandemic, including staffing issues. A dramatic resurgence in the demand for air travel has made it challenging for airlines to deliver.

As we approach the summer, another busy travel season, let's look closer at what happened over the holiday season as well as the rules in place for compensating travelers for delays and cancellations.

The perfect storm

Despite a travel advisory to refrain from travelling due to the impending weather in December 2022, Canadians faced unprecedent travel problems during the last holiday travel season. The air travel disruption forced people to book additional stays at hotels and incur expenses for which they had not budgeted. Airlines faced pressure to compensate passengers for their financial losses and inconvenience.

News stories and media coverage were abundant. For example, we heard of Sunwing passengers stranded abroad in Cancun, Mexico. The winter storms did not allow the airline to move crew and planes to different airports. As Sunwing repeatedly delayed and pushed ahead flights, passengers grew desperate. The number of flight delays eventually caused a fundamental breakdown in the airline's communication of rescheduled flights. The chaos resulted in many people sleeping in airports and mistrust in the airline. The Canadian Transportation Agency (CTA) fined Sunwing $126,000 for 36 violations that took place in December 2022.

Photo from Pexels/Pixabay

WestJet cancelled approximately 1600 between December 2022 and mid-January 2023. The airline worked to lessen the travel disruption by cancelling flights proactively. WestJet informed passengers of cancellations before their trip began, which prevented chaos at airports.

Air Canada also experienced flight disruptions and cancellations. They allowed travelers to voluntarily change their flight free of charge up to one hour prior to departure (with some exceptions).

The House of Commons transport committee is looking into what happened to prevent

similar situations from arising again. At a hearing, WestJet shared it would like third parties to share the costs of compensating passengers, including airports, navigation, security, border control, ground handlers, and more. Transport Minister Omar Alghabra acknowledged the unacceptable treatment of passengers and called for a review of protocols.

Passenger regulations

In September 2022, the federal government changed the *Air Passenger Protection Regulations*. These changes show the government is moving toward a more passenger-friendly position, which places more pressure on the airlines to deliver the best service possible. The CTA is now encouraging all Canadians to "know your rights".

An example of passenger rights is alternate arrangements. Airlines must provide a refund or rebooking, at the passenger's choice, when there is a flight cancellation or a lengthy delay due to something outside the airline's control. This applies to all flights to, from and within Canada. These regulations also identify the costs to be refunded and the method for a refund.

Another right is compensation for delay or cancellation. When a flight is delayed, large carriers must pay the passenger for inconvenience as follows:

- **$400** if a passenger's flight arrives at the destination three or more hours, but less than six hours, later than originally scheduled
- **$700** if a passenger's flight arrives at the destination six or more hours, but less than nine hours, later than originally scheduled
- **$1,000** if a passenger's flight arrives at the destination nine or more hours later than originally scheduled
- **$400** if a passenger chooses a refund instead of rebooking

The CTA's website provides a complete overview of these regulations.

How to make a claim for compensation

Passengers can file a claim online through the airline's website compensation claims form. Travelers have one year after an incident (flight delay or cancellation) to make a claim.

The airline must respond within 30 days of receiving the claim. The airline's response to the claim will be either payment or an explanation as to why they do not have to compensate the passenger.

Passengers can also file a complaint online directly with the airline if they receive no response or are not satisfied with the response.

Flying forward

The *Air Passenger Protection Regulations* require airlines to compensate travelers for delays and disruptions. Recent changes seek to better support travelers moving forward.

Gina Burke

Gina Burke is a second year law student at the University of Leicester.

Working Interviews in Alberta: What employers and job seekers need to know

May 31, 2023 by Evan Oikawa

Sometimes employers ask job applicants to perform tasks without payment as part of the hiring process. But are these working interviews legal in Alberta?

There's a growing trend in Canada for employers to conduct "working interviews" as part of their hiring process. This involves an employer asking an applicant to perform actual work tasks without receiving payment, as part of the interview.

Some people argue this practice allows employers to better assess an applicant's skills and fit with the company. But others have raised concerns about the legality of working interviews and their potential for exploiting workers.

So, are unpaid working interviews legal? Let's take a closer look.

Employment standards

In Canada, laws and regulations called employment standards protect workers' rights and ensure fair working conditions. These standards establish *minimum* requirements employers must follow, including providing employees with at least the minimum wage for the work they perform. Each province or territory has its own standards, and Canada-wide standards apply only to federally regulated workers.

This raises a few questions: Who is an "employee"? What is "work?" If an applicant performs work during the interview process, is the applicant entitled to (owed) payment?

In Alberta, the ***Employment Standards Code*** says an "employee" is anyone employed to do work who receives or is entitled to wages. The *Code* defines "work" as providing a service to the employer. These definitions provide the starting point for assessing whether working interviews are legal, but they unfortunately do not provide an easy answer.

Photo by Christina Morillo from Pexels

Are working interviews similar to volunteering?

We can find guidance on this issue by looking at the similar question of whether an individual is an employee or a volunteer. Let's look at *World Immigration Group (Wig) Corp. v Allado*, a recent Alberta Labour Relations decision.

In *Allado*, three individuals filed complaints with the Alberta Ministry of Labour for unpaid wages and other employment earnings under the *Code*. They had worked for Immigration World Group, an immigration consulting firm. The company paid them $10 per hour for their work, which is less than the minimum

wage in Alberta. None of the complainants were eligible to work in Canada at the relevant times. They were also living with the company's president at times and did some work at his home. As a defense, the president argued the complainants were volunteers, not employees. Therefore, they were not entitled to the minimum wage.

For the work at the president's home, the Labour Relations Board found the complainants had no expectation of payment. In the Board's view, this work consisted of that done by houseguests staying at a house without paying rent. So, the Board concluded the complainants were not employees of the company while performing these tasks.

But overall, the Board had no trouble concluding the complainants were employees when working at the office for the purposes of applying the *Code*. In deciding the case, the Board noted the following:

> ***[123] The uncontradicted evidence before the Board is that the Complainants did work in the offices that was part of the core, for-profit, business functions of the Employer. The Employer was an immigration consultant. The evidence clearly shows Mr. Allado and Mr. Romero took immigration forms and input information from paper copies onto a computer. Ms. Tambach clearly performed office management functions in Calgary – one of the Employer's own witnesses described Ms. Tambach performing payroll and time recording duties for that office. The Employer acknowledged there would be clients of the Employer who were assisted by Ms. Tambach on behalf of the Employer.***

My take on working interviews

Back to the original question: are working interviews legal?

As *Allado* suggests, the answer depends on whether the work done by the individual is actual employment. In my view, this will be the case where the work lasts more than several hours and is part of the employer's regular, for-profit operations. In these cases, employers must pay the applicant at least the *minimum* wage for all hours worked. Employers must also pay a minimum of three hours at the minimum wage, even if the work for that day lasts less than three hours. These rules apply unless an exception in legislation says otherwise.

However, we must distinguish the above scenario from situations where the tasks done during the working interview are **not** actual, for-profit duties. For example, an employer at a publishing house may ask a candidate to edit an article to see how well they perform the task. If the employer is not benefiting from the candidate's labour, and the task is strictly for assessment purposes, this may not be "employment" under the *Code*.

What about when an applicant expressly agrees to not receive payment for the working interview? The *Code* clearly says an employee and employer cannot agree to avoid minimum standards. Section 4 reads:

> ***4 An agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee, is against public policy and void.***

So, if the work done during the working interview primarily consists of employment duties, any agreement not to receive payment will be null and void (invalid). In *Allado*, the employer's president tried to defend the action by claiming the complainants were "happy" to be volunteers. The Board not only rejected this argument but found it offensive, including because the employer deliberately preyed on the complainants' vulnerability as foreign workers.

Case law supports greater worker protection

Support for broad protections under employment standards legislation comes from the Supreme Court of Canada case of

Machtinger v. HOI Industries. This is still one of the most influential employment law decisions in the country despite being more than three decades old.

The Court ruled employees cannot waive their rights under employment standards legislation. In reaching this conclusion, the Court commented that we must robustly and broadly interpret employment standards in favour of worker protection:

> ***… an interpretation of the [Employment Standards] Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance.***

Where there is a choice between applying the *Code*'s protections or not, courts will apply the *Code*'s provisions to as many workers as possible (unless reasons exist not to).

Danger of exploitation

A key concern in working interviews is exploitation. Some employers may deliberately use working interviews to get free labour, without intending to actually hire the applicant. As we saw in *Allado*, the law seeks to protect the victims of exploitation. But because of the power imbalance between employees and job applicants, it can be difficult for workers to assert their rights.

Where an employer is engaging in unfair labour practices, workers can make a complaint or anonymous tip to the Ministry of Labour. The Ministry in turn can investigate and levy administrative penalties against non-compliant employers.

Where does that leave us?

The law requires employers to pay employees at least the minimum wage for the work they perform. Generally, this means an employer should pay an applicant at least the minimum wage for any work done during a working interview.

Employers may argue this work is part of the interview process and not deserving of payment. But job seekers can challenge this argument can be challenged, and in many cases, the courts will reject it. As outlined above, the law seeks to apply the minimum standards to as many individuals as possible. However, in some cases, an employer may not have to pay the applicant – for example, if the employer can show the tasks are not part of actual work duties and are purely for assessing the applicant's ability to do the job. Whether an employer's actions are legal may depend on the specific facts of each case, including whether the employer is exploiting the worker.

If you are an employer conducting working interviews or unpaid internships, talk to an employment law expert to ensure you are complying with all relevant employment laws. Failing to comply could expose your business to liability.

If you are a job applicant asked to participate in a working interview, know your rights. If you believe an employer is engaged in unfair labour practices, contact the Ministry of Labour.

The question of whether working interviews are legal is not necessarily straightforward. But by understanding the legal issues at play, employers and applicants can more effectively navigate this process.

Evan Oikawa

Evan Oikawa is an Employment and Human Rights lawyer practicing at Osuji and Smith Lawyers, a fast-growing law firm in Calgary with a strong reputation in employment law matters. His practice focuses on employee-side cases, and helping individuals advocate for their rights. Connect on LinkedIn to continue the conversation.

Thank You

Thank you to all of our volunteer contributors for their continued support.

We would also like to thank the **Alberta Law Foundation** and the **Department of Justice Canada** for providing operational funding, which makes publications like this possible.