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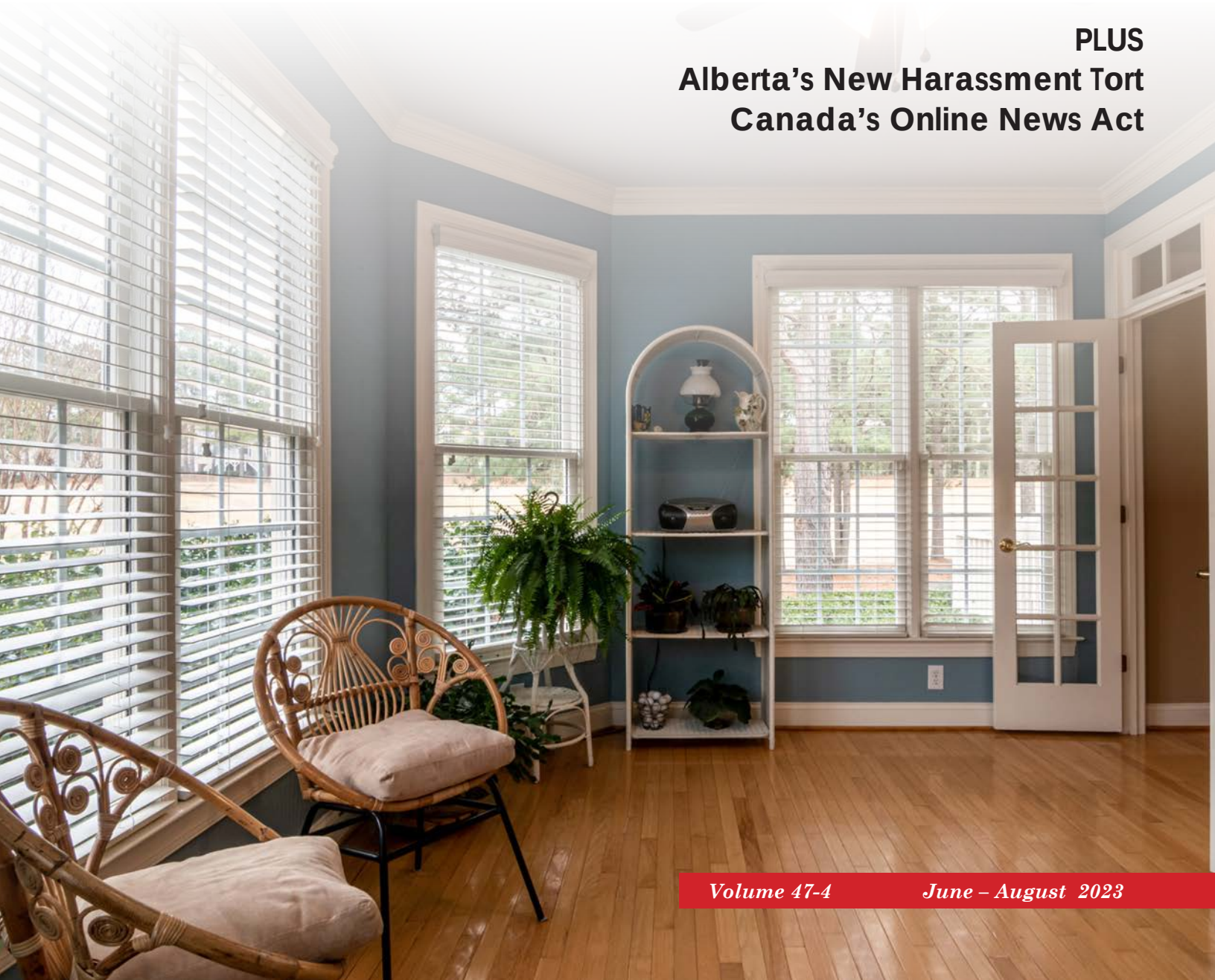

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LAW & LITERATURE

Alberta's New Harassment Tort

June 15, 2023 by Jessica Steingard

In June 2023, the Court of King's Bench of Alberta recognized a new harassment tort that allows those experiencing harassment to sue for damages in civil court.

When I say "torts", you probably think of a delicious dessert. In law though, the word has a slightly different meaning!

Tort law

A tort is a civil wrong that causes a person to suffer loss or harm, including to property. The person who suffers loss or harm (the plaintiff) can sue the person who caused the harm (the defendant) in civil court for damages. Usually, damages are a sum of money the defendant pays the plaintiff as compensation.

Torts are different from criminal law. Torts are between people and businesses while criminal offences are crimes against society.

You may be familiar with several torts:

- Assault – threat of imminent physical harm (different from the criminal offence of assault, which is unwanted physical contact)
- Battery – physical harm
- Negligence – someone not taking proper care to avoid a foreseeable risk

Where do torts come from? Well, some torts are in legislation. For example, Alberta's *Protecting Survivors of Human Trafficking Act* creates the tort of human trafficking. Other torts only exist at common law, or judge-made law. Judges can recognize new torts where the law does not properly protect a right.

Just a few weeks ago, the Court of King's Bench of Alberta recognized a new tort of harassment in *Alberta Health Services v Johnston*.

The tort of harassment

A defendant has committed the tort of harassment where:

1. they engaged in repeated communications, threats, insults, stalking or other harassing behaviour in person or in other ways
2. they knew or should have known their behaviour was unwelcome
3. their behavior questions the plaintiff's dignity, causes the plaintiff to fear for their safety or the safety of their loved ones, or could cause emotional distress, and
4. they caused harm.

A plaintiff must prove all these elements for a judge to decide whether a defendant committed the tort of harassment. This tort may also come into play in many situations, including at work, while renting, or in relationships.

In his decision, Justice Feasby noted how the law already protects against harassment in other ways. Canada's *Criminal Code* says it is a crime to harass another by engaging in conduct that makes them fear for their safety or the safety of someone they know. However, our criminal justice system provides limited remedies to the victim of a crime. Restraining orders can protect a person from their harasser by ordering the harasser to stay away from them, but not compensate them for suffering from harassment.

Do you see what I see? Neither of these existing laws fully compensate a person for their losses or suffering from harassment. The tort of harassment now allows a person to sue their harasser for damages. In fact, several crimes have a matching tort that allows the victim to seek compensation.

Alberta Health Services v Johnston

Let's look at the case that started it all.

Kevin Johnston ran for mayor of Calgary in 2021. During his campaign, he made vile comments about Alberta Health Services (AHS) and Sarah Nunn, an AHS public health inspector. The comments related to AHS policies during COVID-19 and Ms. Nunn's role in enforcing those policies.

Following a lengthy analysis of the court's authority to recognize a new tort of harassment, Justice Feasby easily decided Mr. Johnston had committed the tort of harassment against Ms. Nunn. As the plaintiff, Ms. Nunn successfully proved the tort's four elements:

1. Mr. Johnston repeatedly engaged in communications, threats, insults and other harassing behaviour through his talk show, media and more. We can reasonably interpret his statements as encouraging his followers to be violent towards Ms. Nunn and her family.
2. Mr. Johnston knew or should have known Ms. Nunn did not welcome this behaviour.
3. Mr. Johnston's behavior would cause a reasonable person to fear for their safety and the safety of their loved ones.
4. Ms. Nunn suffered harm and losses. She was afraid to leave her home, the police told her children not to take the bus, and she installed a home security system. This caused emotional distress and seriously impacted her quality of life.

Justice Feasby awarded Ms. Nunn $100,000 in general damages for harassment and $250,000 in aggravated damages. Ms. Nunn also sued Mr. Johnston for defamation, and the court awarded $300,000 in general damages to compensate her for injury to her reputation.

Mr. Johnston owes Ms. Nunn a total of $650,000. While this may seem like a win for Ms. Nunn, Justice Feasby also noted Mr. Johnston is unlikely to pay up as he has not yet paid an earlier multi-million-dollar defamation damages award in Ontario.

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My final thoughts

The law can often feel like a distant, emotionless beast muddled in process. Sometimes, people who use our legal system do not feel like it is a *just* system.

In a case like this, where the facts are quite disturbing, it is comforting to see the courts recognize a wrong and provide a remedy in law. But, as we also saw, even when "justice is served", it can mean very little if the defendant cannot pay the damages awarded to the plaintiff. After all, you cannot get water from a rock.

To end on a more positive note … a plaintiff can sue a defendant who caused them harm, including harassment. And remember that there are many ways to enforce a court order, even years later.

Jessica Steingard

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

Key Differences In Personal Injury Law: Ontario vs. Quebec

June 22, 2023 by Ted Bergeron

Claimants should know about key differences between Ontario and Quebec law that change how they deal with a personal injury in each province.

Location, location, location.

Location is vitally important. It determines your residential property value and the success or failure of your business. It's also a key factor in how to deal with your personal injury claim, whether as the result of a car crash, medical malpractice, or slip and fall. Whereas criminal law is governed by federal laws, injury law is governed by provincial laws. Clear differences exist between Ontario law and Quebec law. Knowing these differences allows the injured claimant to maximize recovery and compensation.

Common Law vs. Civil Law

Ontario operates under the common law system, which is a legal framework heavily steeped in case law or judicial precedent (*stare decisis*). The common law system is not based on a definitive, comprehensive collection of legal rules and statutes. Instead, in Ontario, principles evolve through judicial decisions, which judges then interpret for each case before them. It's a dynamic and adaptable system that reflects societal changes over time. Some people refer to the common law as 'judge-made' law.

On the other side of the border, Quebec follows the Quebec Civil Code, which falls under the civil law tradition. Unlike common law, civil law is codified, meaning the legal rules and principles are all written in legal codes. In this system, the laws are not based on judicial decisions but rather on detailed, written legislation. While judicial processes are important, they are not binding precedents the way they are in common law jurisdictions. The civil code sets the binding precedent, and the role of judges is to apply the codes to the unique case.

Photo by Oliver King from Pexels

These differences between the two legal systems are essential to understand any legal case, especially about personal injury. In Ontario's common law system, judicial decisions on personal injury cases create precedents that inform future cases. This case-based approach allows for flexibility as courts can adapt to evolving societal values and new types of personal injuries. However, it can also lead to unpredictability, as courts may interpret similar facts differently. In contrast, Quebec's civil law system provides clear guidance on personal injury matters such as fault assessment, damages calculation, and victims' rights. But while this codified system brings a degree of certainty, it lacks the

adaptability of common law, making it difficult for those used to the Ontario system and vice versa.

SABS vs. SAAQ

In Canada, motor vehicle accidents are the most common form of personal injury leading to a court case. While this is true for both Ontario and Quebec, what is different is how each province deals with motor vehicle collisions.

In Ontario, an injured person has the right to sue for compensation through the courts based on common law principles and has the right to claim no-fault accident benefits. The **Statutory Accident Benefits Schedule** (**SABS**) applies, giving individuals specific benefits following a motor vehicle accident. The SABS system is more complicated when it comes to catastrophic impairment assessments, making it challenging for those with severe injuries, such as spinal injuries or significant brain damage, to be considered catastrophically impaired.

Quebec uses a no-fault system administered by the **Société de l'Assurance Automobile du Québec** (**SAAQ**). Whereas the Ontario system allows for compensation claims through the courts under the common law, the Quebec system strips the individual's right to sue the at-fault driver but provides automatic benefits to accident victims through the SAAQ.

The unique structures of these motor vehicle accident regulations often lead to confusion, with many Ontarians unfamiliar with the workings of SAAQ and vice versa. This lack of knowledge can pose a problem when Ontarians are injured in Quebec and the other way around.

Tort vs. No-Fault

Legal fees are another key distinguishing factor between the provinces. In the context of injury law, Quebec's no-fault system does not pay legal fees. As a result, there is less uptake of personal injury law in Quebec and a greater emphasis on administrative tribunals. In fairness, the Ontario SABS system does not provide a way for an injured claimant to recover legal fees either. The difference is that in Ontario, an innocent accident victim can also sue the at-fault driver and collect not only damages (compensation) but some legal fees as well.

Ontario follows a tort system where the 'loser pays,' meaning the successful party can recuperate legal fees. Many travellers assume that if they are injured while they are away, they can sue in their courts at home and their home province's legislation applies. But this is not true. The tort system does not apply to Ontario residents that are injured in Quebec. However, Quebecers injured while in Ontario may be eligible for a tort claim. As with everything in law, there is a Latin maxim that applies. The Supreme Court of Canada ruled that the principle of *lex loci delicti commissi* (meaning "the substantive law of the place where the wrongful act occurred applies") says what law will govern an injury case. Thus, if a crash occurs in Ontario, then Ontario law applies. If a crash occurs in Quebec, then Quebec law applies.

Advice for Quebec & Ontario Residents

Thousands of motorists who have property or commitments in the other province use the Ontario-Quebec border daily. Many live in one province but work in the other, or own cottages in one of the provinces but primarily reside in the other. Whatever the reason for crossing that border, it's important to know the legal differences between your home and visiting provinces.

It is most often Quebeckers who find themselves misinformed about their injury rights. If a crash occurs in Ontario, the Quebec resident may return to Gatineau, Montreal or beyond and collect SAAQ benefits. But they also have the right to make a common law claim for compensation under Ontario law.

This fortunate turn of events for the Quebecker works in reverse for the Ontario resident. If injured in Quebec, the Ontarian has the right to collect SAAQ benefits and possibly SABS benefits as well. However, they have no right to sue the at-fault driver for compensation in neither the Quebec nor Ontario courts.

Seek a Qualified Personal Injury Lawyer

Only some individuals know the full extent of personal injury law. That's why working with a qualified personal injury lawyer is absolutely essential in cross-province injury cases. Navigating the complexities of personal injury can be much simpler with the help of an experienced professional. Regardless of the province of injury, personal injury lawyers are the best-equipped professionals to help you receive the fairest compensation possible for your unique situation. Not calling your lawyer after an injury means you may not receive compensation for your losses.

Seek Out Location-Specific Experts

When it comes to cross-border injury litigation, no matter where you live, everything needs to go through local service providers. Ideally your lawyer will be local to where you live and will ensure you receive the best and most appropriate rehabilitation care for your specific injury or impairment. It's essential for your lawyer to consult with local experts to ensure the best healthcare outcome and return to function, work and healthy living. Often your injury lawyer will collaborate with a qualified lawyer in the region where your injury occurred. Your Ontario injury lawyer will need the advice and guidance of a Quebec lawyer, and vice versa, to properly litigate an out-of-province case.

The differences between Ontario's and Quebec's personal injury laws are distinct and can feel overwhelming to those trying to navigate the legal system. Being aware of these differences helps you know how to manage any situation you may find yourself in. Working with a lawyer well-versed in the relevant jurisdiction can help you stay informed and feel more prepared and confident to tackle the case ahead, regardless of where you live.

Ted Bergeron

Ted Bergeron is a Founding Partner at Bergeron Clifford, a personal injury law firm with over 20 years of proven track record experience. They operate across Ontario and have offices in Kingston, Ottawa, Perth, and Carleton Place. They have been ranked in The Top 10 Injury law firms by Canadian Lawyer Magazine from 2017-2022. Ted is a Queen's University grad, a featured leading lawyer listed by Lexpert and Best Lawyers, and a Fellow of the Litigation Council of America.

All About Rental Fees (Part 1): Refundable vs non-refundable

June 28, 2023 by Judy Feng

Landlords try to charge fees, both refundable and non-refundable, for lots of things, but are these rental fees legal?

CPLEA has been hearing lately about confusion over fees that landlords are charging tenants. There also seems to be confusion about whether increasing fees triggers rent increase notice rules under the *Residential Tenancies Act (RTA)* in Alberta. While we may not have answers as to why there is such confusion, we hope to at least clarify the general law about fees through our two-part article series. The first part of this series will cover the law as it relates to refundable fees and non-refundable fees. Part two of this series will cover parking fees as well as fees for late payment of rent and breaking a lease.

To understand this area of the law, let's go back to basics. Forget about the different types of possible fees such as pet fees, key fees, re-rental fees, lake fees (yes, we saw this one in the caselaw) or fill-in the-blank of whatever fee you can think of. The very first question to consider is whether a fee is refundable or non-refundable.

Refundable fees: subject to security deposit restrictions

If a fee is refundable, then it forms part of the security deposit. The security deposit restrictions under the *RTA* apply – meaning that the total security deposit including refundable fees cannot be more than one month's rent. Key fees and pet fees are sometimes refundable fees or charges. For example, if a landlord charges $1800 a month for rent, then the total security deposit including any refundable fees cannot exceed that amount.

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Since we are talking about pet fees, what about pet rent? Sometimes we hear rumors about landlords charging pet rent. The *RTA* is not clear about whether it allows pet rent, and a judge has not clarified the issue. Depending on what the lease says though, it may be possible that a tenant renting with a pet will pay more rent than one renting without a pet.

Non-refundable fees: likely enforceable if agreed to but must be reasonable

Unlike refundable fees, the security deposit restrictions under the *RTA* do not apply to non-refundable fees. The caselaw suggests that if parties agree to a non-refundable fee (such as a re-rental fee) in a rental agreement and it does not go against the *RTA*, then it is likely enforceable.

For example, in a case before Alberta's Residential Tenancies Dispute Resolution

Service (RTDRS), one of the issues was whether the landlord was entitled to an unpaid non-refundable pet fee. The dispute resolution officer recognized that the *RTA* is silent when it comes to non-refundable fees. The officer decided that if the parties agree to pay a non-refundable fee for bringing another pet into the premises, then the agreement does not go against the *RTA* and is therefore enforceable.

Does this mean landlords can be a little creative and charge non-refundable fees at will? Not necessarily. Just because a landlord can charge a non-refundable fee does not protect them from a court or RTDRS reviewing the fee for reasonability. Any fees should reasonably reflect an actual cost recovery. The courts or RTDRS may not enforce a fee if it does not reflect actual cost recovery or if it exceeds cost recovery.

Practical tips for refundable and non-refundable fees

What are some best practices for refundable and non-refundable fees? As mentioned in the RTA handbook, if a tenant feels a fee or charge is unreasonable, they can apply to the court or RTDRS for a remedy. As such, during the tenant application process and taking of the security deposit, landlords should clearly state:

- any additional fees or charges
- circumstances that will give rise to fees/charges, and
- whether the fees/charges are refundable or non-refundable.

Judy Feng

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

Public Trust Doctrine and Climate Litigation in Canada

July 17, 2023 by Myrna El Fakhry Tuttle

The right to a healthy environment is making headway thanks to case law against governments arguing the public trust doctrine and with changes under Bill S-5 to the *Canadian Environmental Protection Act*.

Today, climate change is one of the biggest challenges facing us globally. Climate change affects countries, including Canada, where temperatures are rising above the global average.

Climate change can be addressed through litigation, which has been used to challenge governments' actions in this field. Particularly, we see young people expressing their concerns by bringing cases against governments around the world under the **public trust doctrine**.

What is the Public Trust Doctrine?

According to the University of Victoria, the public trust doctrine is:

> *a common law legal principle declaring that there are certain public rights that are so important that the government holds them in trust for the public at large. It is, in essence, a legal mechanism that members of the public can use to require governments to hold and protect vital natural resources (such as navigable waters, drinking water, and fisheries) for the benefit of present and future generations.*

Legal Aid Manitoba states the origins of the public trust doctrine go back to Roman law. The Code of Justinian asserts that "air, flowing water, the sea and, consequently, the shores of the sea are common to all."

The basis of this doctrine is that "some things are considered too important to society to be owned by one person" and that "everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks."

Professor Mary Wood stated:

> *[The] government is the trustee of our natural assets, including the waters, wildlife, and air. A trust is a fundamental type of ownership whereby one manages property for the benefit of another – similar to someone managing a college account for their niece. We, along with the future generations, are the beneficiaries of this natural endowment. We all hold a common property interest in Nature's Trust, and we need that trust to be productive in order to sustain human survival and promote human welfare. Our imperiled atmosphere is one of the most crucial assets in our trust.*

She added:

> *With every trust, there is a core duty of protection. The trustee must defend the trust against injury. When we call upon government to safeguard our atmosphere, we are invoking principles that are engrained in sovereignty itself. These*

> ***principles have been said to 'exist from the inception of humankind.' Our government trustees do not have discretion to allow irrevocable damage to the trust.***

Joseph Regalia noted:

> ***A key feature of the doctrine is that the public often has a right to sue to enforce it. States can use their*** parens patriate ***powers to enforce their trust rights. But the public can use the trust to force their government to respect their own governmental obligations under the doctrine. And that is what makes the doctrine a potential weapon to preserve the climate and the environment.***

Taken together, this doctrine allows individuals and public interest organizations to challenge governments about the way they manage public resources. It can be used to protect the environment and tackle climate change.

Rocky Mountains in Alberta | Photo credit: Jessica Steingard

Public Trust Doctrine in Canada

While courts have not established the public trust doctrine in Canada as the sole cause of action in combatting climate change, it has been discussed in different cases. Below are a few of them.

British Columbia v Canadian Forest Products Ltd (*Canfor*)

In *Canfor*, the Supreme Court of Canada (SCC) agreed that mid-13th century English law recognized that "by natural law these are common to all: running water, air, the sea and the shores of the sea …" (at para 75).

The SCC also declared that "[b]y legal convention, ownership of such public rights was vested in the Crown, as too did authority to enforce public rights of use." The SCC added that since the 13th century, "public rights and jurisdiction over these cannot be separated from the Crown" (at para 76).

The SCC further noted:

> ***[O]ur common future, that of every Canadian community, depends on a healthy environment. … This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment … environmental protection [has] emerged as a fundamental value in Canadian society" (at para 7, citing* 114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*).***

The *Charter* does not explicitly provide for a right to a healthy environment, and the SCC did not say we have that right. In addition, while the SCC discussed the public trust doctrine, it did not rule on whether it applied in Canada. However, this case made it possible for the public trust doctrine to be established in Canada.

La Rose et al v Her Majesty the Queen

In 2019, fifteen children and youths sued the Crown and Attorney General of Canada in the Federal Court. They claimed Canada "continues to cause, contributes to and allows GHG [Green House Gas] emissions that are incompatible with a stable climate" (at para 3). The plaintiffs argued that Canada's actions have violated their rights under sections 7 and 15 of the *Charter of Rights and Freedoms* (at para 6), as well as the rights of present and future Canadian children under the public trust doctrine (at para 7). They asked the Court for an order requiring the government to develop and implement a Climate Recovery Plan (at para 9).

The plaintiffs stated:

> ***Some resources are, by their very nature, common or inherently public resources. Where these resources play a fundamental role in the lives of the public, the defendants are under an affirmative trust-like,*** parens patriae***, or fiduciary obligation to preserve and protect their integrity so that the public is not deprived of the benefits they provide to all. This is both a common law obligation and an unwritten constitutional principle (at para 238).***
>
> ***…***
>
> ***The defendants have an obligation to protect the following Public Trust Resources within federal jurisdiction for the benefit of all present and future generations:***
>
> ***a. navigable waters, the foreshores and the territorial sea, including the lands submerged thereunder and the resources located therein;***
>
> ***b. the air, including the atmosphere; and***
>
> ***c. the permafrost (at para 240).***

In their reply to the statement of defence, the plaintiffs noted:

> ***The plaintiffs acknowledge, and indeed underscore, that determining whether and to what extent the public trust doctrine has a place in Canadian law raises 'important,' 'novel' and 'difficult' questions (at para 65).***
>
> ***While Canadian courts have yet to recognize the public trust doctrine, the notion that there are public rights in the environment, particularly to assets or property held in common for the public good, is one that has 'deep roots in the common law' (at para 66).***

The plaintiffs argued *Canfor* opened the door for Canadian courts to consider the public trust doctrine (at para 67).

In 2020, a Federal Court judge dismissed the lawsuit. They ruled that the *Charter* claims, under section 7 and section 15, are not justiciable (subject to being determined by a court of law) and disclose no reasonable cause of action (legal claim recognized as entitling one to bring a claim) (at para 102). The judge also ruled that the public trust doctrine, while justiciable, does not disclose a reasonable cause of action (at para 102).

The plaintiffs appealed the decision to the Federal Court of Appeal. The Court has not yet released its decision.

Lho'imggin et al. v Canada

Similar to *La Rose*, the Indigenous plaintiffs in this case argued the public trust doctrine. They alleged Canada declined to enact legislation addressing the climate change crisis. The Federal Court decided the claim was not justiciable and did not discuss the public trust doctrine (at para 72).

Bill S-5: *Strengthening Environmental Protection for a Healthier Canada Act*

Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act*, originated in the Canadian Senate and received royal assent in June 2023. This Bill amends the *Canadian Environmental Protection Act* (*CEPA*), whose preamble now recognizes the "right to a healthy environment."

According to David R Boyd, "the right to a healthy environment is intended to ensure that everyone has access to clean air, safe water, fertile soil, and nutritious food."

Highlights of the Bill S-5 changes to CEPA include:

- the Government of Canada now must "protect the right of every individual in Canada to a healthy environment as provided under this Act, subject to any reasonable limits" (see subsection 2(1)(a.2))

- the Government of Canada must exercise its powers in a manner that "protects the environment and human health, including the health of vulnerable populations" (see subsection 2(1)(a)(i))
- the Ministers must "develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act" (see new subsection 5.1(1))
- the government must take specific actions when managing *CEPA* (see sections 3(2) and 5.1(2))

Commentary

Unlike in Canada, the public trust doctrine is firmly established in the United Sates. Sixteen young people are the plaintiffs in *Held v State* (2020). They argue the state of Montana's fossil fuel-based State Energy Policy and the Climate Change Exception in the Montana *Environmental Policy Act* violate a clause in the Montana constitution that guarantees the right to a clean environment. The plaintiffs also allege the State Energy Policy and the Climate Change Exception violate the public trust doctrine. This lawsuit went to trial in June, 2023. The court has not yet released its decision.

While not legally binding on Canadian courts, Canadian proponents can try to rely on cases like this one to argue that the public trust doctrine should apply in Canada. Such an argument will also be easier given the recent changes to *CEPA*, which explicitly obliges the government to protect the right of Canadians to a healthy environment.

Myrna El Fakhry Tuttle

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All About Rental Fees (Part 2): Parking fees, late payment of rent fees, and lease break fees

July 21, 2023 by Judy Feng

Part 2 of this 2-part article looks at whether rental fees like parking fees, late payment of rent fees, and lease break fees are legal under Alberta's *Residential Tenancies Act*.

Over the past year, CPLEA has been hearing about confusion over fees that landlords are charging tenants. The first part of this article series, All About Rental Fees: Refundable vs non-refundable, already covered the law as it relates to refundable fees and non-refundable fees.

So, what about the other fees we promised to cover in part two? Like parking fees? Or fees for late payment of rent or breaking a lease?

Parking fees: probably allowed if agreed on

The *RTA* is silent on parking fees and there is no relevant caselaw about them. However, the updated RTA handbook (at page 41) notes the following:

> *There is no requirement for a rent increase notice when a landlord and tenant agree to add a parking stall to a residential tenancy agreement.*
>
> *If a residential tenancy agreement states that parking fees are included in the rent, then an increase for parking charges or the introduction of a new parking fee is subject to the rent increase notice provisions.*

So, parking fees are probably allowed if both landlords and tenants agree to them in the lease. But, any increase in parking charges or the introduction of new parking fees must follow rent increase notice rules under the RTA.

Photo by Ivan Samkov from Pexels

Fees for late payment of rent: unenforceable if they are punitive

The courts and RTDRS have made it clear that fees for paying rent late must be reasonable. Late fees are not enforceable if they are punitive in nature. The threshold for what may be punitive and therefore unenforceable is lower than one would think. For example, in one case, the Alberta Court of Justice (previously the Provincial Court) found a $5 late charge on rent of $325 to be punitive. In

other cases, the Court found that a $25 daily late fee to be punitive and a $40 late fee for being 15 days late on mobile home rent to be punitive.

Lease break fees: unenforceable because they are punitive

There is authority in both the Alberta Court of Justice and the Court of King's Bench, as well as the Residential Tenancy Dispute Resolution Service (RTDRS) that says that a lease break fee is purely a penalty clause. They are windfalls for the landlord and are not a genuine pre-estimate of damages. As such, the RTDRS and courts will not enforce contractual lease break fees.

Summary

The law around rental fees is like a maze to navigate – the *RTA* is not the only source of law to refer to. Sometimes, it takes a good deep dive into caselaw and even the RTA handbook to get additional information on the topic. So, as a quick recap from the All About Rental Fees article series:

- Refundable fees must follow the *Residential Tenancies Act*'s (*RTA*) security deposit restrictions as they form part of the security deposit. So, the total security deposit including refundable fees cannot be more than one month's rent
- Non-refundable fees are likely enforceable if the landlord and tenant agrees to them –but they must be reasonable.
- Any non-refundable fees that a landlord charges should reasonably reflect an actual cost recovery.
- The courts or RTDRS may not enforce a fee if it does not reflect actual cost recovery or if it exceeds cost recovery.
- Parking fees are probably allowed if agreed on, but there are rules to follow when increasing them or introducing new parking fees.
- Fees for late payment of rent are unenforceable if they are punitive.
- Lease break fees are purely punitive and therefore, unenforceable.

Judy Feng

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Bill C-18: Canada's Online News Act

July 31, 2023 by Jessica Steingard

Canada's Online News Act received royal assent but is not yet law, though it is already stirring up controversy with Google and Meta saying news will no longer be available to Canadians on their platforms.

Meta and Google have been in the news lately in response to Canada's *Online News Act* receiving royal assent on June 22, 2023. The *Act* is not yet in force, but it is stirring up a lot of controversy. Perhaps you've seen the notice on Facebook from Facebook Public Affairs saying users will no longer be able to share news online?

The *Online News Act* will come into force as law by an Order in Council. The *Act* gives a 180-day period for this to happen. It says any section not yet in force at the end of the 180 days will automatically come into force at the end of this period.

So, what exactly is the *Online News Act* and why the big fuss?

What is the Online News Act?

Section 4 of the *Act* articulates its purpose:

> ***The purpose of this Act is to regulate digital news intermediaries with a view to enhancing fairness in the Canadian digital news marketplace and contributing to its sustainability, including the sustainability of news businesses in Canada, in both the non-profit and for-profits sectors, including independent local ones.***

In short, the goal is to sustain the news business in Canada by regulating digital news intermediaries. Operators of digital news intermediaries will pay news businesses for making news content available to online users.

Before we dig deeper, let's look at a few definitions in the *Act*:

- **Digital news intermediaries** are online communications platforms, including search engines or social media services. For example, Google and Facebook. They make the news content produced by news outlets available to people in Canada. Online communications platforms that allow people to communicate privately with each other, such as Messenger, are not digital news intermediaries.
- **Operators** are individuals or organizations that operate a digital news intermediary. For example, Meta, which operates Facebook, Instagram, Threads, etc.
- **News outlets** are undertakings or distinct parts of an undertaking whose primary purpose is to produce news content. For example, CBC Edmonton or a local newspaper is a news outlet. They also include Indigenous news outlets and official language minority community news outlets.
- **News businesses** are individuals or organizations that operate news outlets. For example, Corus Entertainment, which operates Global News and more.

The *Act* does not apply to broadcasting activities or telecommunications service providers.

How does the Online News Act work?

The Canadian Radio-television and Telecommunications Commission (the CRTC) will administer the *Act*. It will regulate the relationships between operators and news businesses.

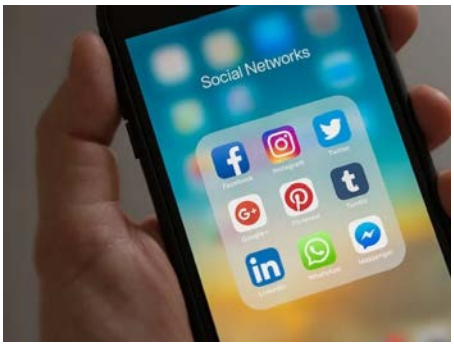

Photo by Tracy Le Blanc from Pexels

If the *Act* applies to its digital news intermediaries, operators must notify the CRTC. The CRTC in turn will keep a list of digital news intermediaries that fall under the *Act*. This list will be publicly available on the CRTC's website.

The *Act* allows a news business to initiate a bargaining process with an operator. The goal of this process is for the two parties to reach an agreement whereby the operator will pay the news business for news content shared on its platform. The *Act* creates a **duty to bargain** for operators. It also describes a general bargaining process, though any regulations under the *Act* will presumably set out a more detailed process. The CRTC will also create a **Code of Conduct** for the bargaining process.

Rather than going through the bargaining process, an operator and news business can make an agreement between themselves. The operator can then apply to the CRTC for an **exemption order**. This order exempts the operator from the bargaining process and is good for 5 years.

When deciding whether to grant an exemption order, the CRTC will review the agreement to make sure it complies with factors set out in section 11 of the *Act*. Among other things, the CRTC is looking to make sure that the agreement provides for fair compensation to the news business, and that the new business will use an "appropriate portion" of the compensation to support the production of local, regional and national news content.

What's the big fuss?

Right now, digital news intermediaries share news content on their platforms without compensating news outlets. For example, CTV Edmonton may have a Facebook page where they post current articles. Facebook users can also freely share those articles on their accounts.

Meta published the opening statement that its President of Global Affairs, Nick Clegg, planned to make at a hearing of Canada's Heritage Committee. According to the statement, Meta's position is that the *Act* is "based on a fundamentally flawed premise":

> ***Meta does not benefit unfairly from people sharing links to news content on our platform. The reverse is true. Publishers choose to share their content because it benefits them to do so, whereas it isn't particularly valuable to us at all.***

Meta further asserts that news publishers in Canada received an estimated 1.9 billion clicks from April 2021 to April 2022. They argue this is free advertising estimated to be "worth more than $230 million". Meta has been clear that it will "end the availability of news content in Canada" if the legislation comes into force.

Google has also published several blog posts on its website about Bill C-18.

A similar scheme exists in Australia. Its news media bargaining code "is a mandatory code of conduct which governs commercial relationships between Australian news businesses and 'designated' digital platforms who benefit from a significant bargaining power imbalance." It came into force in 2021. However, Meta argues Canada's *Act* goes

further in that it makes Canada "the first democracy to put a price on free links to web pages, which flies in the face of global norms on copyright principles and puts at risk the free flow of information online."

The Government of Canada published a backgrounder to the legislation on its website on July 10, 2023. Next steps involve drafting regulations and public consultation on those draft regulations. With less than 180 days to go before the *Act* becomes law and so much controversy already, the question is … what will happen in the meantime?

Jessica Steingard

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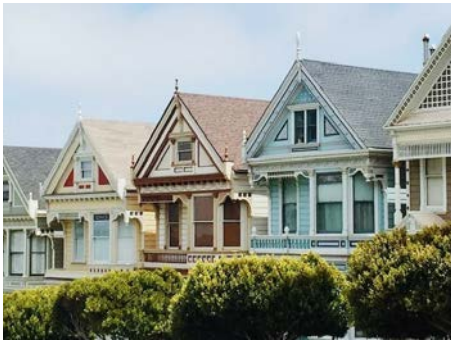
High Ratio vs. Conventional Mortgages

August 29, 2023 by Ebun Agharese and Anna Lund

How the Court deals with a home foreclosure depends on whether the mortgage is a high ratio, insured mortgage or a conventional mortgage where the borrower's down payment was at least 20% of the value of the home.



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If you are facing foreclosure in Alberta, it is important to know what type of mortgage you have. Knowing whether you have a **high ratio, insured mortgage** or a **conventional mortgage** affects two important things in the foreclosure process:

1. the **redemption period**, being the period of time you have to try to stop the foreclosure, and
2. whether the Court can grant a **deficiency judgment** against you if your property is worth less than the amount owing on the mortgage.

This article describes these two types of mortgages in Alberta and explains how the foreclosure process differs between them.

Before diving in, a few things to note:

- The laws governing mortgages differ from province to province. This article deals with the laws that apply in Alberta only.
- The insurance discussed in this article is mortgage insurance, not property insurance. Regardless of the type of mortgage, all borrowers must carry property insurance on their property.

High Ratio, Insured Mortgages

In Canada, a mortgage must be insured if the borrower is financing more than 80% of the property's value. For example, you will require mortgage insurance if you have a mortgage of $400,000 or more on a house worth $500,000. Mortgage insurance protects a bank against the possibility that the amount owing on the mortgage is greater than the value of the home. The bank's potential loss is called a **deficiency**.

Borrowers pay the premium for mortgage insurance either as an initial lump sum or as part of their mortgage payments. They are often surprised to learn the mortgage insurance protects *the bank* and not *the borrower*. In Alberta, mortgage insurance is provided by Canada Mortgage and Housing Corporation (CMHC), Canada Guaranty, and Sagen (formerly Genworth).

If a borrower defaults on the mortgage, and the lender sells the property, the insurer will reimburse the lender for the deficiency. By lowering the bank's risk, mortgage insurance

allows borrowers to own a home if they have a down payment of less than 20% of the value of the home.

Having an insured mortgage affects the foreclosure process in two ways:

1. The bank can get a judgment against the borrower for the deficiency. The Court calls this a **deficiency judgment**.
2. The Court may give the borrower a short or no **redemption period**.

Deficiency Judgment

With an insured mortgage, the bank can get a judgment against a borrower for a deficiency if it sells a home and recovers less from the sale of the home than the amount owing on the mortgage. For example, imagine a borrower owes $500,000 to a bank, and the bank sells the home and recovers $450,000. The bank will get a deficiency judgment for the remaining $50,000. The judgment is a court order directing the borrower to pay the amount to the bank.

Once the bank has a deficiency judgment against the borrower, it will transfer the judgment to the insurer. The insurer will decide whether to try to collect the judgment amount from the borrower.

The insurer can try to collect the judgment by garnishing the borrower's employment income (i.e., collecting a portion of their wages), by seizing personal property (e.g., a vehicle), or by using other legal tools.

Redemption Period

The law gives borrowers a default redemption period of six months (12 months for farm properties) to take steps to stop the foreclosure process. The Court can lengthen or shorten this period. The default redemption period does not apply to high ratio, insured mortgages. When there is a high ratio, insured mortgage, the Court can decide whether it will give the owner any time to try to stop the foreclosure.

If the lender is facing a deficiency, the Court will usually refuse to give the borrower a six-month redemption period, regardless of what type of mortgage is involved. Instead, the Court will give the borrower a much shorter time to try to end the foreclosure.

During the redemption period, borrowers may be able to stop the foreclosure by:

- repaying the arrears (the payments they have missed) along with the costs the lender incurred in the foreclosure proceedings,
- refinancing with a different lender, or
- choosing to sell the property themselves (some borrowers believe they can get a better price for their house if they sell it themselves rather than waiting for the bank to sell it).

Some borrowers choose to do nothing during the redemption period and let the bank sell the house after the period is over.

Conventional Mortgages

A conventional mortgage does not require mortgage insurance because the borrower provided a down payment of at least 20% of the property's value.

When a borrower defaults on a conventional mortgage, the lender has no right to a deficiency judgment against the borrower, even if the property is worth less than the mortgage amount still owing. If there is a deficiency, the lender's options are to take the property or to take a loss on the sale. The default redemption period of 6 months applies when a property is subject to a conventional mortgage, but the Court can shorten or lengthen this period.

Summary

A borrower holding a **high ratio, insured mortgage** will be liable to the lender if their property is worth less than the mortgage amount still owing. As well, the Court may

not give them any time to try to stop the foreclosure process.

A borrower holding a **conventional mortgage** is not liable to the lender if the property is worth less than the mortgage amount still owing. The borrower is also entitled to a default six-month period to pay the arrears and the lender's foreclosure costs, though the Court can change the length of this period.

There are other types of mortgages that a residential borrower may hold which can affect the foreclosure process. For example, the process for a mortgage granted under the *National Housing Act* is usually the same as a high ratio, insured mortgage. This same process also applies to an individual who has been assigned a mortgage where the original borrower was a corporation **unless** the individual is using the property as a residence or farmland.

How to Determine What Type of Mortgage You Have

To determine the type of mortgage you have, follow these steps:

1. **Review your mortgage documents.** Review your mortgage agreement and any other documents from your lender. These documents typically outline the terms and conditions of your mortgage, including the type. You likely have a document called a "disclosure statement". If it shows the payment of an insurance premium (usually in the thousands of dollars), it is likely you have a high ratio, insured mortgage.
2. **Contact your lender.** They can tell you the type of mortgage you have.
3. **Talk to a mortgage professional.** Mortgage brokers or financial advisors who specialize in mortgages have expertise in the mortgage industry. They can assist you in determining the type of mortgage you have based on your specific circumstances.

A word of caution! If the bank starts foreclosure proceedings, do not rely on their Statement of Claim to decide what kind of mortgage you have. A Statement of Claim is a legal document filed in court that outlines the lender's claims against the borrower. Sometimes lawyers use "boiler plate" documents that do not set out the correct facts. The Statement of Claim may wrongly state that the mortgage is a high ratio, insured mortgage. It is wise to check for yourself what kind of mortgage you have.

Get help

For accurate information on foreclosure laws and protections in Alberta, consult professionals. Reach out to your financial institute, your mortgage broker or legal professionals to confirm what foreclosure process applies to your mortgage.

If you cannot afford to pay for professional help, contact the Consumer Debt Negotiation Project at the Edmonton Community Legal Centre or one of the other legal clinics serving low-income individuals in Alberta. If you have an upcoming court date in Edmonton or Calgary, ask the lender's lawyer if they can schedule it for a day when a volunteer lawyer will be available from Pro Bono Law Alberta's King's Bench Assistance Program.

You can also read more about the defences available to homeowners in Alberta during foreclosure proceedings in the summer 2023 issue of the Alberta Law Review.

AUTHORS' NOTE Thank you to Judith Hanebury, KC for providing excellent editorial assistance in preparing this article.

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The Iraq War 20 Years Later: Those who spoke out and those who didn't

August 31, 2023 by Rob Normey

With 20 years having passed since the start of the Iraq War, it is fascinating to look back at who spoke out against the war and who didn't, including most surprisingly, left-wing journalist Christopher Hitchens.

Photo from Pexels/Pixabay

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

This year marks 20 years since the start of the Iraq War. Reading some thoughtful journalistic articles on the debacle led me to reflect on those fraught times.

Launched by President George W. Bush, there is much discussion among legal scholars that the war was not solidly based in law. Countries should govern themselves according to the UN Charter and protocols. This includes the United States, despite its claim to be an exceptional nation with superior knowledge of international dynamics.

Instead, the war was likely conceived over a lengthy period by neoconservatives, based on a belief in American exceptionalism and the imperative to dominate various parts of the world, including the volatile Middle East. These hardcore believers had little or no regard for international law or the niceties of fundamental rights. The war was almost certainly an illegal act of aggression and led to an ongoing "War on Terror." Such a war would undoubtedly be never-ending and would involve the U.S. in untold offensive wars, were one to take the concept seriously.

Looking back at the alarming drumbeat for war in the U.S. in 2003, I note there were a few – but only a few – dissenting and courageous voices.

The confusing position of Christopher Hitchens

As an avid reader of left-wing and human rights-affirming publications, I could hardly avoid thinking of Hitchens this year. While a fascinating left-liberal thinker, Hitchens seems to have lost his way when it came to the disastrous Iraq War.

Two recent books by left-wing writers examine Hitchens' legacy and offer something of an intellectual biography. These add to a posse of earlier books on Hitchens, including a detailed critique of his championing of the war (see Simon Cottee and Thomas Cushman's *Christopher Hitchens and His Critics: Terror, Iraq and the Left*).

The brilliant and occasionally controversial novelist Martin Amis, who passed away in May of this year, was a staunch friend of Hitchens. One main theme in Amis' last book, a lightly fictionalized memoir titled *Inside Story*, is his combative but ultimately simpatico literary partnership and friendship with "Hitch".

Particularly poignant is a late chapter where Amis meets with Hitchens. By that point, Hitchens' cancer had progressed to a very late stage. Amis writes of Hitchens confronting the many political failures he had witnessed in his action-packed, nomadic existence as a journalist, accomplished writer and pundit. Hitchens resolutely faced his coming mortal end with courage and humour.

Amis' novel does a fine job of vividly portraying his close friend and political maverick. The two engage in several stimulating discussions, during which we get some sense of Hitchens' internationalism as a confusing mix of ideas. In their last meeting, Amis writes about their talk of Israel/Palestine and how the oppression of Palestinians was a great political sadness for Hitchens. "Like his sloughing of hope in socialism, like his sloughing of hope in the outcome of the war in Iraq…"

Like many liberals, Hitchens became a leading supporter of the Iraq War. One can understand his obvious frustration at the failure of the U.S. and the West to do more to bring about self-determination for the Kurds. His lengthy career of advocating for vulnerable, stateless populations such as the Kurds, the Palestinians and Tibetans, was admirable.

However, it should have been clear from scrutinizing the Bush Administration's key players that there had been a long-held desire to reshape the Middle East and to ensure greater control of oil and other strategic assets, particularly in Iraq. It is implausible that humanitarian considerations and a deep respect for human rights motivated President George W. Bush, Vice President Dick Cheney and Defence Secretary Donald Rumsfeld. The situation of the Kurds was far down their list of priorities.

Instead, the Iraq War led to hundreds of thousands, indeed millions, of deaths if we count indirect deaths caused by the brutal and destructive American campaign, both in Iraq and in nearby Syria. There are also reports of U.S. troops committing a series of shocking human rights violations. For example, the inhumane treatment of prisoners at Abu Ghraib Prison in Iraq and Guantanamo in Cuba, which the U.S. seems to think is a legal "black hole".

Examining Hitchens through the lens of critical works and the more personal account offered by Amis, I think we see that Hitchens changed. Initially, Hitchens valued the political left – the movement that has most consistently spoken up in favour of civil liberties and a commitment to legal equality. When Amis first describes him as an Oxford University student in the 1960s, Hitchens comes across as a thoroughbred racing confidently with long strides. He was guided by his progressive political beliefs, especially his anti-colonial and anti-imperial views.

Over time, Hitchens' priorities shifted. He ultimately came to support the interventionist stance of the Bush Administration. There was of course no guarantee that Bush would uphold the universal values and commitment to meaningful freedom for all that Hitchens claimed to believe in. While the Kurds in Iraq did benefit from the overthrow of Saddam Hussein, the resulting sectarian strife and mounting political and legal instability in the country almost certainly made the region and the world a more dangerous place. Extremist Islamic groups such as ISIS proliferated in the wake of the breakdown of Iraq.

Instead of challenging the dominant narrative and the course of the war, however, Hitchens chose to remain a fervent, lead-footed supporter of the ongoing debacle. He had

changed from the sleek racehorse of his Oxford days to a black rhinoceros, an animal known to attack first and ask questions later. While thinking of himself as a contrarian, in reality Hitchens risked becoming that cliché – a left-wing thinker who moved sharply to the right as his wealth and influence increased and his overreaction to a single attack led to a reversal of previous political (and legal) positions.

Those who spoke out

During the war, I think there were prominent writers who did maintain their commitment to the left and to an intelligent appraisal of the dangers of the impending war. Some liberal players, like Canadian academic and short-lived Liberal leader Michael Ignatieff, initially supported the war but then acknowledged their mistakes in doing so.

I recall reading articles by Canada's Linda McQuaig when the war started. Through her writing, Linda alerted progressive-minded citizens to the inherent dangers of such an offensive war. McQuaig followed her writings in the Toronto Star with two bestselling accounts of the era: *War, Big Oil and the Fight for the Planet* and *Holding the Bully's Coat*.

Another such writer is Gillian Slovo, who has an impeccable record of challenging apartheid in her native South Africa and other systems of apartheid or domination elsewhere around the world. She wrote a play I saw in London with Victoria Brittain called *Guantanamo: Honor Bound to Defend Freedom*. It dramatizes the profound loss of respect for human rights displayed by individuals such as Defense Secretary Rumsfeld and President George W. Bush, among others in his administration.

Best of all, the play conveys the absurdity of imprisoning individuals at Guantanamo for no valid reason and then denying any opportunity to challenge the ongoing detentions. By throwing out basic rules and procedures of fundamental fairness, serious human rights violations were bound to occur. Surely, we all remember the Torture memo, prepared by a group of high-ranking lawyers in the Bush Administration, including John Yoo. This was a stain on the legal profession itself.

However, it was almost impossible to offer a reasoned critique of the war in U.S. media or in the wider public sphere without severe backlash. Several high-profile figures were targeted. Some, like film producer Ed Gerson, were fired. Others, like Susan Sarandon and Sean Penn, saw cancellation of events at which they were to appear. The Dixie Chicks received obscene levels of vitriolic attack. Dissent was made exceedingly difficult just when a meaningful debate was surely needed.

The cause of the suffering

I firmly believe that Hitchens and most political commentators supporting a war that led to so many human rights violations meant the questionable justification for the war was not properly scrutinized.

The committees formed years later to examine the origins and conduct of the Iraq War remind me of Bertold Brecht, the great German playwright and poet (*In the Jungle of the Cities, Mother Courage*). Brecht recounted a story of a king who was distraught to learn of the suffering in the world. He convened his wise men to seek out the cause of all this suffering and report back to him. They proceeded to do so and returned with a clear answer: the cause of the suffering was the king.

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 International for 40 years and has worked for various human rights groups.

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