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On The Farm

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Barriers to Accessing Justice
Not In My Backyard

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The *Charter of Rights and Freedoms* and Migrant Farm Workers

March 7, 2022 by John Cooper

Each year, between 50K and 60K migrant farm workers come to Canada. But are their working conditions in violation of the *Charter*?

Photo Credit: Jeff Surtees

> **"The fight is never about grapes or lettuce. It is always about people."**
>
> ***– Cesar Chavez, civil rights and farm labour activist***

Chavez uttered those words in 1970 in the U.S. For Canada's migrant farm workers, they may ring as true today as they did half a century ago. It's not about crops, it's about fairness. The fight for improved working conditions and better pay, safety from illness, and the right to unionize.

Between 50,000 and 60,000 people a year arrive in Canada from Mexico, the Caribbean, Thailand, Guatemala and the Philippines. It is an annual, granular exercise of sweat, toil, illness and sometimes death. They perform backbreaking work for up to nine months to get food from field to supermarket to consumers' tables. And then they return home. According to Katherine Lay of the University of Victoria's Faculty of Law, workers too often have very little job security, no access to health care, and no human rights protections.

Programs that bring migrant workers to Canada include the Seasonal Agricultural Worker Program (SAWP) – initiated in 1966 for workers from Mexico and the Caribbean – and several initiatives under the Temporary Foreign Workers Program. Migrant farm workers often live in crowded bunk houses with little access to amenities like showers. And the COVID pandemic made a difficult situation worse for many. While the federal government provided $150 million to employers to help manage illness due to COVID, the situation for workers did not greatly approve, according to Lay. The rights of migrant workers in Canada are limited. They contract with a specific employer and can only switch employment if their employer and home government approve. They can be fired for non-compliance and work refusals, with little avenue for appeal.

Yet according to the Government of Canada, "any person in Canada – whether they are a Canadian citizen, a permanent resident or a newcomer – has the rights and freedoms contained in the *Charter*." Section 15 of the *Charter* guarantees that "every individual in Canada – regardless of race, religion, national or ethnic origin, colour, sex, age or physical or mental disability – is to be treated with the same respect, dignity and consideration."

"In most jurisdictions … farm workers are at the bottom of the market in terms of skills and union organization," says Michael Lynk, a professor in Western University's law school.

Along with the construction industry, farm work ranks as the most dangerous work in Canada.

Employment Insurance and Unions

Two areas that have proven especially challenging are:

1. employment insurance – migrant farm workers must pay premiums but often cannot collect benefits, and
2. being denied the chance to form unions.

According to the United Food and Commercial Workers (UFCW), agricultural workers pay premiums under the *Employment Insurance Act* but cannot claim them. The UFCW says this violates their *Charter* rights. Most work from February to November each year, must leave when their contract is over, and are unable to claim benefits when they are out of work. According to the UFCW Canada website, "requiring these low wage workers to pay premiums for benefits they cannot receive violates section 15(1) of the *Charter of Rights and Freedoms* which guarantees every individual's right to equality under the law and equal protection and benefit of the law without discrimination."

With respect to unionizing, workers have taken their case to the Supreme Court of Canada. A 2011 decision found that section 2 of the *Charter* allows for collective bargaining under the guarantee of "freedom of association." But the Court also allowed the exclusion of farm workers under the *Labour Relations Act* from forming a union. "In the opinion of many labour relations law academics (it was) one of the most shallow decisions by the Supreme Court," says Lynk. The decision mirrored a pattern of behaviour that favoured the economic and social clout of farm owners over their often racialized (Latinx and Black) farm workers.

Many consider Ontario's 2002 *Agricultural Employees Protection Act* to be a watered-down version of a farm employees' protection bill. It allowed farm workers to present a petition to an employer, but the employer still had veto rights. Clearly, "your ability to agitate is much more enhanced if you have a union," says Lynk.

COVID Pandemic

Also according to Lynk, "if ever there was a time when our farm worker rights were shown to be weak," it was during the height of the COVID pandemic. The health crisis cast light on the "inability of employers to ensure adequate housing and living conditions for farm workers."

In Ontario, more than 1,000 workers became ill from COVID in 2020 and three died. The province's deputy coroner made 25 recommendations in a sweeping report that called for increased federal inspection of agricultural operations and a requirement that employers pay workers who were COVID-isolated and unable to work. Other issues identified ranged from dangerous working conditions (by the halfway point in 2021, up to 10 workers died from various causes) to death from cancer (due to pesticide exposure), COVID, or farm machinery mishaps.

Families may receive some compensation following a farm worker's death. But groups like Justice for Migrant Workers have called for more accountability on the part of employers, including prosecution under the law. In September 2021, a farm operation in southern Ontario's Norfolk County was charged with 27 counts of breaking the *Occupational Health and Safety Act* and the *Reopening of Ontario Act*. Two hundred migrant workers were found to be COVID-positive and one worker died because of the virus. It was the first prosecution of an employer in relation to COVID under Ontario's occupational health and safety laws.

Understanding Rights & Accessing Supports

The University of British Columbia's Bethany Hastie says there is a difference between

migrant workers and workers who live year-round in Canada. In Canada, "access to courts and tribunals remains a key mechanism for enforcing legal rights … and can serve as a platform for wider reform." By contrast, migrant workers are hampered by "a lack of knowledge of legal rights and resources and inability to access workplace justice." And employer-specific, bonded work permits prevent workers from accessing their rights. This hampers their ability to speak out against dangerous working conditions. It also creates a power imbalance between employer and worker that thwarts migrant farm personnel from "converting legal rights into just conditions of work," says Hastie.

Lynk agrees. "They are here for six to nine months a year. They gain no status for permanent residency. Because they are not allowed a stake in Canada, the provinces and federal government get away with ensuring that their working conditions are modest and that their vulnerability can be taken advantage of."

The program essentially is a subsidized means for "Canada to try to pursue a low-cost food strategy that means it is borne by these workers who have formal rights" that are never realized," adds Lynk. Previous governments have had opportunities to pass legislation allowing for unionization of farm workers but shied away because of pressure from homegrown voters – the farmers who employ the workers.

Cobourg, Ontario-based community service group Horizons of Friendship sees the challenges firsthand. It often joins with other organizations to provide services to migrant workers. Its Migrant Worker Outreach Program supports migrant workers' health, legal, and social matters in the southern Ontario county of Northumberland. The program offers help to the up to 300 workers who toil on the area's apple, chicken, dairy and vegetable farms.

According to Horizons' community outreach officer Daniel Quesada-Rebolledo, the biggest barriers are in language differences, access to basic services like health and legal assistance, and social isolation. "One of the key things that I have noticed is the question of freedom of association … some workers want to associate with an organization like us or they want to do outreach with unions but workers will get reprimanded for talking to the wrong people. They don't have the same freedom of association rights as you or I," Quesada-Rebolledo says. If there is a dispute, "by the time you file a complaint and get a court date the workers might have been sent back to Mexico."

Improvements Coming?

In March 2021, the federal government announced measures to protect migrant workers, according to an Employment and Social Development Canada news release. These measures included strengthened workplace inspections, and a "tip line" with multilingual workers "who can help workers better communicate situations of mistreatment or abuse, and [can provide] additional education for workers on their rights." But activists have said these measures are not enough.

Often, "the attitude (among workers) is 'keep your head down, get your work done and go home.'" Quesada-Rebolledo adds that groups like Horizons fill the gap when governments fail to provide necessary services to migrant farm workers.

John Cooper

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Canada Follows Other Countries and Bans Conversion Therapy

March 15, 2022 by Myrna El Fakhry Tuttle

After two failed attempts, Canada passed legislation on December 8, 2021, banning conversion therapy and safeguarding the rights of LGBTQ2 individuals.

After two failed attempts, Canada passed legislation, on December 8, 2021, banning conversion therapy. By doing so, Canada joins many countries around the world that have already banned this practice.

Photo by Anete Lusina from Pexels

The new legislation amended the *Criminal Code* and makes it illegal as of January 7, 2022 to:

- cause another person to undergo conversion therapy
- remove a minor from Canada to subject them to conversion therapy abroad
- profit from providing conversion therapy
- advertise or promote conversion therapy

The legislation also allows "courts to order that advertisements for conversion therapy be disposed of or deleted."

Practices of Conversion Therapy

The new legislation defines conversion therapy as any practice, treatment or service designed to change or repress a person's sexual orientation, gender identity or gender expression to conform to the sex they were assigned at birth (see section 320.101).

In a report submitted to the United Nations Human Rights Council, an Independent Expert gave the following definition:

> ***Conversion therapy is used as an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person's sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender.***

Conversion therapy varies from talk and behavioral therapy to medical treatments. Examples of conversion practices include "acts of physical, psychological and sexual abuse, electrocution and forced medication, isolation and confinement, verbal abuse and humiliation".

The Independent Forensic Expert Group stated:

> ***Conversion therapy appears to be performed widely by health professionals,***

including medical doctors, psychiatrists, psychologists, sexologists, and therapists. It is also conducted by spiritual leaders, religious practitioners, traditional healers, and community or family members.

In 2012, the Pan American Health Organization stated that "services that purport to 'cure' people with non-heterosexual sexual orientation lack medical justification and represent a serious threat to the health and well-being of affected people." The Pan American Health Organization added that conversion therapies "have to be considered threats to the right to personal autonomy and to personal integrity."

In 2013, the American Psychiatric Association declared that "no credible evidence exists that any mental health intervention can reliably and safely change sexual orientation; nor, from a mental health perspective does sexual orientation needs to be changed." In 2016, the World Psychiatric Association found that "there is no sound scientific evidence that innate sexual orientation can be changed." And in 2020, the Independent Forensic Expert Group said that "offering conversion therapy is a form of deception, false advertising and fraud."

The 2019-2020 findings of the Sex Now Survey conclude:

As many as one in five sexual minority men (gay, bisexual, trans, Two-Spirit and queer or 'GBT2Q') report having ever experienced sexual orientation, gender identity or gender expression change efforts (SOGIECE) – and of them, nearly 40 per cent (or as many as 47,000 GBT2Q men in Canada) have experienced conversion therapy.

Impacts on Victims

Conversion therapies have been denounced by the United Nations, the World Health Organization, Amnesty International, the Canadian Psychological Association, the Canadian Psychiatric Association and the Canadian Paediatric Society. They all clearly state this practice is harmful to LGBTQ2 individuals.

The Independent Forensic Expert Group (mentioned above) declared:

All practices attempting conversion are inherently humiliating, demeaning and discriminatory. The combined effects of feeling powerless and extreme humiliation generate profound feelings of shame, guilt, self-disgust, and worthlessness, which can result in a damaged self-concept and enduring personality changes. The injury caused by practices of 'conversion therapy' begins with the notion that an individual is sick, diseased, and abnormal due to their sexual orientation or gender identity and must therefore be treated. This starts a process of victimization through conversion therapy.

In addition, these practices can violate the prohibition of torture and ill-treatment. The underlying assumption is that gender or sexually diverse people are inferior to heterosexual and cisgender individuals, and they must change their identity or orientation to cure that inferiority. That can be degrading and can lead to torture depending on the severity of the situation.

The Independent Expert also stated:

The deep impact on individuals includes significant loss of self-esteem, anxiety, depressive syndrome, social isolation, intimacy difficulty, self-hatred, shame and guilt, sexual dysfunction, suicidal ideation and suicide attempts and symptoms of post-traumatic stress disorder, as well as often significant physical pain and suffering. …

These practices are inherently discriminatory, that they are cruel, inhuman and degrading treatment, and that depending on the severity or physical or mental pain and suffering inflicted to the victim, they may amount to torture.

Commentary

The new legislation is an important step in safeguarding the rights of LGBTQ2 individuals and outlawing the practice of conversion therapy.

If someone were to challenge these new provisions as violating our freedoms of religion or expression under the *Charter*, I believe the legislation would be upheld by the courts under section 1. Our rights under the *Charter* are not absolute. Section 1 of the *Charter* can limit our rights and freedoms when justified in a free and democratic society.

I also believe this legislation would be upheld under *Charter* sections 7 (life, liberty, and security of person) and 15(1) (equal treatment under the law) given the fact that these practices are discriminatory, dangerous, and harmful to patients.

Myrna El Fakhry Tuttle

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What happens when farmers divorce?

March 18, 2022 by Ken Proudman

The inter-generational nature of farms, and the need to keep enough farmland to make the farm viable, pose several unique challenges when families decide to separate.

Photo Credit: Jeff Surtees

Farm families often experience the law in unique ways, and divorce is no exception. The inter-generational nature of farms, and the need to keep enough farmland to make the farm viable, pose several unique challenges when families decide to separate.

Last month, I wrote a two-part article about what happens when business owners divorce. Part 1 focused on the different ways in which a spouse is bought out and whether a spouse has a claim against a corporation's assets. Part 2 talked about ways to protect a business, and how child and spousal support are calculated when a parent is self-employed. That general information also applies to farms, which are a type of business. However, there are many other aspects and potential solutions to think about when it comes to farms.

How are spouses bought out of farms?

The usual options to buy out a spouse discussed in What happens when a business owner divorces? Part 1 are a useful starting point. That said, while it is easy to divide money in the bank, it is not so simple when we are talking about a family farm. You may have planned for your children to inherit the farm. The farm might have been in a family for generations. Because farming is only workable when you have enough land, selling land can make it impractical to continue farming. Many farmers tend to be asset-rich but cash-poor. That lack of cash can make it difficult to pay or qualify for a large enough loan to buy the other spouse out. For many traditional families, if the farm does not survive, that might mean the only significant income stream dies. Fortunately, there are a few potential solutions.

One thing to keep in mind is that the law does not always require divorcing spouses to divide assets equally. The spouses also need to consider farm debts, as well as capital gains tax and other adjustments. Often the most impactful adjustment for farms is exemptions. In Alberta, exemptions are credits a divorcing spouse receives for inheritances, gifts, property owned prior to the relationship, personal injury proceeds, or insurance proceeds. Farmland is often inherited, gifted by a spouse's parents, or owned prior to the relationship. The divorcing spouses typically share the increase in equity during the relationship, although not necessarily equally. That means that for a short relationship, there might not be any payout as exemptions would apply. But, for decades-long relationships, exemptions might not have as much impact. The credit is typically also halved if the couple transfers the property into both their names. The law of exemptions is a lot more complicated than I make it sound here, but you can see how it can have a big impact.

If the family had planned to leave the farm to the children, sometimes spouses will simply

agree that should still happen. Through proper succession planning involving trained professionals, the spouses can gift the farmland to children on a tax-free basis, called an "inter-generational rollover". Another option is to implement an "estate freeze", where the parents get paid out by the children over time for the current value of the farm, but the increase in value of the farm goes to the children on a tax-free basis. Often one spouse pays spousal support to the other to divide the income from the land in the meantime.

Because the home quarter is often worth significantly more than other quarters of land, sometimes the spouse who is being bought out (who I will call the non-farming spouse) will receive the home quarter. Or we might subdivide it and sell the home to generate proceeds to buy out the non-farming spouse. While it is not ideal for the farming spouse to live farther away from the farm, at least leaving the farmland intact keeps the farming operation viable.

Sometimes both spouses continue to own the farm and divide farming income through child and spousal support, postponing dividing the equity in the farm until they retire. This is not ideal because it is usually simpler to pay out a spouse upfront. It also means former spouses must continue to interact. If land continues to go up in value, the farming spouse will have to pay out more to the non-farming spouse. The non-farming spouse usually prefers to receive their share early so that they can put it towards something like their own house.

Sometimes an early buy-out just is not practical. While the non-farming spouse usually wants cash up front, sometimes they must decide whether that is worth killing the farm, and potentially receiving less child and spousal support. The farming spouse would often receive some benefit for the effort they put into the farm as spousal support does not necessarily divide income equally. However, the non-farming spouse is unlikely to agree to this if the farming spouse claims their income is minimal and they should pay little or no spousal support. From the non-farming spouse's perspective, why keep money tied up in an unprofitable farm if they would make more money through an investment like mutual funds?

How are child and spousal support calculated for farm families?

How someone's income is calculated when they're self-employed is discussed in What happens when a business owner divorces? Part 2, which still applies to farmers. There are a few differences though.

For farmers, business and personal expenses tend to be very intertwined. Most farmers tend to live on the home quarter, which can mean that their vehicle, utilities, property tax, phone, as well as many debts and other payments usually benefit the farm and their personal life. For example, they may have bought a quad for rock-picking, but the family also uses it for recreation. While accountants usually do not deduct the full amount as a business expense, the amount claimed often makes the farmer's income look very low compared to their lifestyle. Family courts do not have to recognize deductions just because tax rules allow them. Instead, family courts typically aim to calculate a farmer's income as if they were a normal employee working somewhere else, paying all their own personal expenses. That means trying to figure out what portion of each expense should be personal and which portion is a pure farming expense.

Many farm families only work at the farm which can make finding work elsewhere especially difficult. Once farm families separate, one of them is often left unemployed and has difficulty finding work elsewhere because of their lack of experience in other industries. That is what spousal support can address.

However, when deciding spousal support, courts, within limits, must encourage the spouse asking for support to contribute

to their own expenses. That usually means the non-farming spouse will have to go through the difficult journey of re-entering the workforce. Even when they find work though, their income may not be much higher than minimum wage. Spousal support paid by the farming spouse can help, although it depends on the circumstances. Sometimes we try to find a way to finance the non-farming spouse to enroll in training and increase their employment prospects, although that might not be possible closer to retirement.

As I previously noted, one of our top priorities in dealing with divorcing farm couples is making sure the farm stays profitable. Otherwise, a major income source can disappear if the farm does not survive. Paying for two households is more expensive than one. When a farm couple separates, we need to consider all these issues to come up with financial arrangements that let each spouse survive, while recognizing the history and individual efforts.

Thinking outside the box

As with businesses, when farm couples separate, there are better alternatives than the courts. Farm divorces are often too complex for most types of court hearings to address. Your judge is unlikely to have any farming experience. Mediation, arbitration, and their hybrid med-arb are excellent alternatives. Through these processes, you can select a family law mediator/arbitrator with experience addressing farms who can help facilitate a resolution that can be fairer, more attentive, less costly, and faster than through the courts.

Ken Proudman

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The (Sometimes Complicated) Rules that Apply to Farm Workers in Alberta

March 30, 2022 by Jessica Steingard

In January 2020, the rules changed to exempt farm and ranch employees on small farms from employment standards laws.

Alberta's *Employment Standards Code* (and the *Employment Standards Regulation*) applies to most workers in Alberta. But it creates all kinds of exceptions for farm workers, including whether the rules even apply at all.

Photo Credit: Jeff Surtees

In November 2019, the UCP government introduced Bill 26: Farm Freedom and Safety Act. The Bill amended the *Agricultural Operation Practices Act*, the *Employment Standards Code*, and the *Labour Relations Code*. It included some of the rules described above, which came into effect on January 30, 2020.

Bill 26 meant to undo some of the changes to the agricultural industry first introduced by the NDP in 2015 through Bill 6: Enhanced Protection for Farm and Ranch Workers Act, which was met with mixed reviews at the time. According to discussion in the legislature, the changes included in Bill 26 were made after "extensive consultations over months with agricultural stakeholders." Changes to the *Employment Standards Code* carved out exceptions for small farms and recognized greenhouses and nurseries as farms.

Let's start with a definition of farm and ranch employees. Then we'll look at which farm and ranch employees the *Code* does and does not apply to.

Who is a farm and ranch employee?

It is an individual employed by a farm primarily producing eggs, milk, grain, seeds, fruit, vegetables, mushrooms, sod, trees, shrubs, plants, honey, livestock, diversified livestock animals, poultry, or bees. Production can be in a greenhouse or nursery. An operation that produces cultured fish is included but cannabis production is not.

Which farm and ranch employees does the *Employment Standards Code* NOT apply to?

The *Employment Standards Code* does **not** apply at all to family members, volunteers, and workers on small farms. Let's call these *exempted workers*.

Family members include spouses, adult interdependent partners, children, parents, grandparents, siblings, aunts, uncles, nieces, nephews, or first cousins. These family members can be shareholders, partners, or sole proprietors.

Volunteers include any unpaid workers, such as family, friends or neighbours helping out.

A small farm is one that employs five or less paid workers for more than six months. This limit of five workers does not include seasonal workers or family members. For example, a farm is a small farm if it pays five employees for six or more months of work. The farm may have several seasonal workers (who work less than six consecutive months) and family members involved, but it is still a small farm. As soon as the farm starts paying its sixth long-term employee, it is no longer a small farm and the usual rules under the *Code* apply.

Which farm and ranch employees does the *Employment Standards Code* STILL apply to?

The *Code* applies to all farm and ranch employees except for the exempted workers described above. Farms employing more than five farm and ranch employees must follow rules in the *Code* about minimum wage, job-protected leaves, vacation pay, termination pay, and more. The *Code* also sets out a few exceptions for these farm and ranch employees when it comes to hours of work and rest, overtime, and general holiday pay.

Hours of Work & Rest Exceptions

Farm and ranch employees are not protected by some of the hours of work laws in the *Code*. Employees can work more than 12 hours in a workday and do not have to get 20-minute breaks after every 5 hours of work.

A farm employer must give each employee at least four days of rest in each period of 28 consecutive workdays.

Overtime Exceptions

The rules about overtime and overtime pay do **not** apply to farm and ranch employees at all.

General Holiday Pay Exceptions

If a farm and ranch employee **does not** work on a general holiday, the employer must pay general holiday pay. In this case, general holiday pay is calculated as at least 4.2% of the employee's wages, vacation pay and general holiday pay earned in the four weeks before the holiday.

If an employee **does** work on a general holiday, the employer must pay the employee their usual wage rate multiplied by the number of hours worked. The employer must also pay general holiday pay (as calculated above). The employer can also choose to give the employee a working day off within 30 days of the general holiday or on a later date if agreed to in writing. The day off is optional but paying general holiday pay is not.

More Legislative Changes

If you thought the above was complicated, there's more! Other changes in Bill 26 included removing the requirement for farms to enroll in Alberta's Workers' Compensation Benefits (WCB) scheme. Instead farms with more than five long-term employees must either enroll in WCB or buy private insurance. Small farms do not have to have any insurance. Farm and ranch employees (with exceptions for greenhouses, mushroom farms, nurseries and sod farms) are also no longer afforded protection under the *Labour Relations Code*, including not be able to join trade unions and collectively bargain with their employers.

Jessica Steingard

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Access to Justice During COVID-19 and the *Jordan* Case

April 4, 2022 by Myrna El Fakhry Tuttle

How are delays in court processes due to COVID-19 considered when assessing the *Jordan* time limits for the right to be tried within a reasonable time?

In March 2020, the World Health Organization (WHO) declared COVID-19 a pandemic. Since then, the pandemic has affected the functioning of many institutions, including the courts given the lockdown on court staff, judges, prosecutors, and lawyers.

Across Canada, courts adjourned their activities and provided minimum service where trials and proceedings were cancelled or postponed. Consequently, a broad range of human rights were impacted, including the right to access justice in a timely, fair, and effective way.

Edmonton Law Courts | Photo Credit: Jessica Nobert

Access to Justice

Access to justice is a basic principle of the rule of law. In simple terms, access to justice means the ability to appear in court. But it can also include the broader social context of the court system and the obstacles that some members of the community might face.

The Chief Justice of Canada, the Right Honourable Richard Wagner stated:

> *Access to justice means informing individuals of tools and services that are available. Access to justice allows individuals to get legal assistance when needed, it informs them of their right to counsel, and having courts that can settle their issues in a timely and efficient manner. Access to justice means getting justice for everyone not only a few.*

Fair Trial and Reasonable Time

Section 11(b) of the *Charter of Rights and Freedoms* (the *Charter*) protects against excessive delays by saying the accused has the right to a trial in a reasonable time.

Section 11(d) of the *Charter* provides that "any person charged with an offence has the right to a fair and public hearing by an independent and impartial tribunal."

Long delays can have serious consequences. When a judge finds that an accused has been denied their constitutional right to be tried within a reasonable time under section 11(b) of the *Charter*, that judge can order a stay of proceedings and dismiss the charges instead.

The *Jordan* Case

In 2016, the Supreme Court of Canada established a new framework in *R v Jordan* regarding court delays.

In December 2008, Barrett Richard Jordan and nine others were charged with criminal offences relating to drug possession and

trafficking in the lower mainland area of British Columbia. For different reasons, Jordan's trial did not begin until September 2012 and did not end until early 2013. He waited over four years after being charged to learn his fate.

At the beginning of the trial, Mr. Jordan sought a stay of proceedings. He argued that his right to be tried within a reasonable time under section 11(b) of the *Charter* had been violated. The trial judge dismissed his application, and the Court of Appeal of British Columbia dismissed his appeal. Mr. Jordan appealed to the Supreme Court of Canada. The Supreme Court agreed to set aside Mr. Jordan's conviction and granted the stay of proceedings.

The Supreme Court ruled:

> ***The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).***
>
> ***If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow. (at paras 46-47)***

As a result of the *Jordan* case, there is a time limit for how long a case is allowed to continue before it is dismissed for delay under the *Charter*.

COVID-19 Delays

Court closures required by COVID-19 have led to serious trial delays, impacting the right to be tried within a reasonable time under section 11(b) of the *Charter*.

Measures that were taken to reduce the spread of the virus, including the lockdown, delayed decisions on many cases. But is the COVID-19 crisis an "exceptional circumstance" under the *Jordan* framework?

In the *Jordan* case, the Supreme Court stated:

> ***Exceptional circumstances lie*** **outside the Crown's control** ***in the sense that (1) they are reasonably unforeseen*** **or** ***reasonably unavoidable,*** **and** ***(2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. (at para 69)***

The delay created by the pandemic has caused many cases to go beyond the time limits of 18 or 30 months set by the Supreme Court of Canada. However, courts must determine the reasons for the delay before dismissing charges.

Court Decisions During the Pandemic

In *Kalashnikoff v Her Majesty the Queen*, the three accused – Alexander Dimitri Kalashnikoff, Tara Lee Cartwright and Matthew James Roberti – faced charges of drug trafficking. They applied for a stay of proceedings under section 11(b) of the *Charter* because their trial was delayed from May 2020 to May 18, 2021.

They argued that only the period of time that the court was not conducting any in-person trials should be deducted from the total delay. That means that only the time between May 5, 2020 either to the end of June 2020 or September 2020 – when the court was able to hear in-person trials – should be deducted as delay attributable to the pandemic.

The Alberta Court of Queen's Bench concluded that:

> ***… the entire delay occasioned by the COVID 19 pandemic from May 5, 2020 to the anticipated completion of trial on May 21, 2021 is properly considered an exceptional circumstance and should be deducted from the total delay.***

> *The delay in this matter from the date of the first Information to the conclusion of trial is 40 months (Jan 22, 2018 to May 21, 2021).*
>
> *The total delay attributable to the pandemic runs from May 8, 2020 to May 21, 2021. That amounts to 12 months, 13 days. When that amount is deducted from the total delay, the remaining delay is below the 30-month presumptive ceiling in* Jordan*. (at paras 35-37)*

In *R v Walker*, Richard Walker applied for a stay of his sentencing, staying the execution of his sentence or reducing the severity of his sentence, in line with section 24(1) of the *Charter*. He argued his right to be sentenced within a reasonable time under section 11(b) of the *Charter* was violated.

The application was dismissed by the Ontario Superior Court of Justice:

> *The delay caused by the suspension of court operations and the resulting backlog due to the pandemic has already been found to be reasonable because of the presence of exceptional circumstances. The pandemic was not reasonably foreseeable, and the Crown could not have reasonably remedied the delays that emanated from it. (at para 43)*

Commentary

The International Commission of Jurists' (ICJ) general guidance on the courts and COVID-19 mentions the important role the courts play in protecting human rights and the rule of law even when there is an emergency. According to the ICJ, courts need to always function effectively to have "the right to fair trial by an independent and impartial court; the right to judicial control of deprivation of liberty; the right to an effective remedy; and to ensuring that all branches of government act lawfully."

The impact on the right to a fair trial and within a reasonable time should not be disregarded, even in these exceptional circumstances. During this public health crisis and when practical, courts should continue to operate to prevent any unusual backlog of cases that may result in further disruption of their activities in the future.

Myrna El Fakhry Tuttle

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Sorrowful Soliloquies: *I Am Ariel Sharon* (Part 1)

April 11, 2022 by Rob Normey

***I Am Ariel Sharon* by Yara El-Ghadban is a timely novel that sheds light on the ongoing tragedy of the Palestinian people.**

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

Part 1 of this article describes how Canadian politics, institutions and media have responded to the Israel-Palestine conflict, providing context for my review of *I Am Ariel* Sharon in Part 2.

The Impact of One-sided Reporting

I read *I Am Ariel Sharon* hard on the heels of reading Amnesty International's landmark report on the State of Israel's system of domination, which Amnesty says amounts to a system of apartheid. (Some human rights activists refer to this system as Apartheid 2.0, to distinguish it from the South African form of domination and settler colonial rule.)

The Amnesty Report is the latest of a series of human rights reports by most of the major rights organizations around the globe, including various Palestinian and Jewish Israeli human rights groups. The latter have issued outstanding reports on the system of domination and discrimination against Palestinians – one authored by B'Tselem about a year ago and one by Yesh Din in 2020.

Harvard Law School's International Human Rights Clinic issued a report in February 2022 that finds Israel's treatment of Palestinians in the West Bank amounts to the crime of apartheid. Further, Michael Lynk, Special Rapporteur on the situation of human rights in the Palestinian Territories since 1967, submitted a report to the United Nations Human Rights Council on March 21, 2022. His report also concludes that the treatment of Palestinians by Israel amounts to apartheid. One recommendation in the report is for Israel to quickly and unconditionally end their occupation of Palestinian territory.

Photo by Xach Hill from Pexels

The sparse and unhelpful reporting on Amnesty's report – a major human rights and international law document – has been sparse and unhelpful. This highlights the difficulty I see in allowing either a Palestinian perspective or a human rights perspective (extending to stateless individuals such as the Palestinians and the Kurds) to receive anything like a proper hearing in Canadian political and legal discourse. The marginalization of Palestinian voices has a sad history. The brilliant cultural critic, literary scholar and humanist Edward Said penned a preface to a reissue of *Orientalism*. In it he said, in terms that surely apply in Canada as well as his home turf in the U.S.A.:

> ***The life of an Arab Palestinian in the West, particularly in America, is disheartening. There exists an almost unanimous consensus that politically he does not exist, and when it is allowed that he does, it is either as a nuisance or as an Oriental. The web of racism, cultural stereotypes,***

> ***political imperialism, dehumanizing ideology holding in the Arab or the Muslim is very strong indeed, and it is this web which every Palestinian has come to feel as his uniquely punishing destiny.***

In *Blaming the Victims: Spurious Scholarship and the Palestinian Question*, Said notes the many ways in which one-sided accounts by news outlets and scholars have affected readers and viewers. It has left them critically unaware of the dispossession of Palestinians and the assault on their rights due to harsh military occupation after the 1967 War.

Canada's Response to the Israel-Palestine Conflict

I was struck by the similarity of all Palestinians – both those adrift in refugee camps in various countries or those who have somehow made their way to Canada as refugees or migrants – to the impressive Syrian activist Wafa Mustafa, recently profiled in the Globe and Mail. She was denied a visitor's visa to Canada and considers herself something more than a mere refugee. Speaking of the Canadian government's treatment, she laments that "to them obviously I'm not an activist, I'm not a daughter of a detainee … I'm nothing but a refugee." I wish to acknowledge that Mustafa's frustrations at her status make clear that she, like so many others, has suffered greatly at the hands of the Syrian dictator Assad. And other refugees have likewise suffered from the human rights atrocities of other dictators in the region.

Palestinians are likewise denied their full humanity by the Canadian government, major institutions and the mainstream media. Many of them are refugees in or from war-ravaged Syria and have been forced to flee Israel/Palestine. Canada's voting record at the UN over the past two decades shows a consistent pattern of not voting in favour of resolutions condemning the human rights violations of Palestinians. Individuals and human rights organizations pointed to the anti-Palestinian stance of the Trudeau government as a significant reason why Canada should not be granted a seat at the UN Security Council.

The "punishing destiny" Said refers to is surely at work in the marginalization of Palestinian voices in Canadian mainstream or legacy media. This treatment extends to human rights advocates who support stateless Palestinian citizens. We might consider the debacle when CBC management forced a host to apologize for uttering the word "Palestine" on air. The absurdity and unfairness of the CBC's position was heightened by the fact that the guest on Cross Country Checkup, the popular radio program, was the brilliant graphic novelist and nonfiction writer Joe Sacco. The book that triggered this lapse on the part of the host was titled *Palestine*! The lesson is clear – if one wants to be invited onto the CBC, one must refer to Sacco's masterful nonfiction novel as *blank*, a graphic novel. Meanwhile, the hard right governments of Israel increasingly name the West Bank – Occupied Palestine – as Judea and Samaria, that is, a territory intended to be permanently incorporated into Israel.

Interested Canadians will have read of the trials and tribulations of human rights educators trying to assemble materials offering a fair and balanced account of the state of human rights for Palestinians in Occupied Palestine and in Israel. While I don't have space to detail the limits on academic freedom in Canada, I will briefly mention one egregious episode. An astonishing sequence of events known as the "Azarova Affair" played out in 2020-2021 at the University of Toronto Law School. It is a perfect illustration of the various obstacles at work in the ability to study and become aware of the serious, systemic violations of Palestinian rights. It is my understanding that Law School administration first offered a position as Director of a vital Human Rights program to the highly capable lawyer Valentina Azarova. After an intervention by a sitting Federal Court tax judge, the school rescinded the offer.

Articles I have read refer to Azarova as a 'superb human rights scholar.' A factor in the reversal of position was surely her willingness to engage in serious study of Israel's human rights violations with respect to the Palestinian population, particularly those living in Occupied Palestine (only one of several state's whose conduct she has studied). The shameful handling of the matter was so serious as to provoke the Canadian Association of University Teachers (CAUT) to "censure" the university for a period of many months. The latest in this sorry saga involves a judicial review of the decision of the Canadian Judicial Council respecting the judge who interfered in the appointment process. That decision is still pending as of the writing of this article.

Digging Deeper for Information

Despite the truncated opportunities for scholarship about the Israel-Palestine conflict and the relative failure of Canada's legacy media to cover the violations of Palestinian rights, it is possible for the diligent reader in this country to read books from abroad that provide powerful accounts. One such history is the remarkable work by the late Israeli historian and sociologist Baruch Kimmerling. *Politicide* is a scathing critique of the leadership of Ariel Sharon, Defence Minister turned Prime Minister of Israel and a co-founder of the hard right Likud Party. The Party was led for many years by Prime Minister Benjamin Netanyahu until late last year. Kimmerling sees Sharon as having engaged in a process with an ultimate goal of dissolving the Palestinian people's existence as a legitimate social, political and economic entity. To Kimmerling, this politicide is a consequence of the 1967 War, which Israel won against Egypt and various other Arab states, as well as of the orientation of various political parties in Israel. Sharon's process involved many violations of international law and subverting the rule of law within Israel.

Kimmerling's detailed account of Ariel Sharon, as well as Ronen Bergman's *Rise and Kill First: The Secret History of Israel's Targeted Assassinations*, provide helpful context for the reader of *I Am Ariel Sharon*.

Read Part 2 for my review.

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.

Sorrowful Soliloquies: *I Am Ariel Sharon* (Part 2)

April 11, 2022 by Rob Normey

***I Am Ariel Sharon* by Yara El-Ghadban, is a timely novel that sheds light on the ongoing tragedy of the Palestinian people.**

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

Part 1 of this article described how Canadian politics, institutions and media have responded to the Israel-Palestine conflict, providing context for my review below of *I Am Ariel Sharon*.

As I read the novel, I visualized the various women at the bedside of an unconscious Sharon, felled by a stroke and in a coma in a Tel Aviv hospital in 2006. (He remained in a coma for the last eight years of his life.) The first woman is an earth-bound angel who introduces a vital motif, the injustice that hovers over death. In recounting Sharon's life through the personal recollections of the women who knew him best, we keep coming back to the deaths on the battlefield and those connected to Israel's occupation of Palestine after the 1967 War.

A Single-minded Goal

After the mysterious woman of the opening chapter, we are introduced to Ariel's mother, Vera. She addresses the gap between a parent with strong recollections of a different life in Russia with its more sophisticated cultural milieu (but wracked at the end of the 19th century by antisemitism, including pogroms) and the world of Mandate Palestine, in the years leading to the establishment of Israel and the 1948 War with various Arab states. Vera emphasizes that for Sharon, history starts with Israel which explains his single-minded (and many would say short-sighted) focus on creating and then expanding Israel's borders.

Photo by Xach Hill from Pexels

I think back to the many discussions of a two-state solution that I had with my late friend Boris, a Romanian Jew from Israel who emigrated to Canada. We discussed how military-minded leaders like Sharon seriously diminished the prospects for any such solution. Sharon directed the building of the long concrete wall in 2002 that is part of the "matrix of control" and human rights abuses of Palestinians. The wall does not spread out across the Green Line of the 1967 border. Instead, it illegally snakes deep into Occupied Palestinian territory. An advisory ruling by the International Court of Justice in 2004 determined it clearly violates international law and directed it be dismantled. Surely Boris would agree with the assessment of the Jewish American writer Michael Chabon on the need to end Israel's occupation. Chabon visited in 2016 and called it "the most grievous injustice I have seen in my life."

In later chapters of the novel, we are also introduced to Sharon's two wives and the story of the accidental shooting death of his young son, Gour. This and other stories certainly humanize the militant warrior. We are also given brief details of the massacres that Sharon and his troops carried out in Qibya and

elsewhere. No event was more horrifying than the massacre at the Sabra and Shatila refugee camps in Lebanon, conducted by Lebanese Phalangists forces as part of the invasion of Lebanon under Sharon's military command. It was clear that these forces, which killed as many as 1,400 civilian Palestinian refugees, falsely claimed to be "terrorists", had Sharon's full knowledge and logistical support. It is surprising there has not been a war crimes inquiry into the event.

Perhaps the most fascinating chapters in the novel are those in the concluding pages with the mysterious woman named Rita. She is clearly a Palestinian nurse but figure of reproach. She offers her stream of consciousness thoughts on the life and legacy of the man known for a time as "the King of Israel" for his military exploits. Rita's accusations are a nonviolent alternative to vengeance but are meant to suggest that Sharon must have been held to some form of account for the acts of domination and dispossession of the Palestinian people by him or his political orders. The concluding chapters introduce a kind of Arabic magic realism into the work. The politics and the legal (human rights) elements of the novel are subtle but devastating.

A Modern-day Greek Chorus

In a sense, the soliloquies of the women are presumably speaking to Arik (Ariel). However, I see the figures as appearing on a stage and addressing the words to the audience of readers. Another way of thinking about the women's voices is to hear them as a modern-day Greek chorus. They comment, retroactively, on the vigorous actions of the warrior-king that occur off-stage.

The women reminded me of the characters in Euripides great tragedy, the *Trojan Women*. These modern-day women, like the actual captives from the Trojan War, are in a sense tied to and captives of Sharon's vision for a Greater Israel, obtained at the expense of Palestinian self-determination and respect for Palestinian rights. I am putting the matter baldly, and *I Am Ariel Sharon* works in a more subtle manner! But the commentary on his life the writing affords is nonetheless a lament at the losses caused by relentless military domination.

Rob Normey

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Working with Clients Who Have Experienced Family Violence: Being client-centered and trauma-informed

Sheila Pahl

Calgary Legal Guidance's Domestic Violence Family Law program is constantly learning and growing to better hear, understand and serve its clients.

Calgary Legal Guidance (CLG) is a non-profit organization offering a range of legal services to those who cannot easily access Legal Aid or other paid legal services. The Domestic Violence Family Law program (DVFL) is one of many programs and services offered by CLG. Like our other programs, the DVFL is in a constant process of learning and growing. We are always pushing forward to fill gaps in the legal system in the most client-centered, trauma-informed, efficient, and effective ways possible.

The Need to be Heard and Understood

Everyone entering the legal system needs to be heard and understood by a responsive system. And therein lies the central challenge. Do we hear and understand people engaged in the legal system? What about a person who has experienced family violence and their need to address many challenges, both legal and non-legal?

Law students all learn the same formula for approaching legal matters: gather the facts,

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identify the issues, identify the law, apply the law, and form a conclusion. In practice, especially in the murky waters of family law, the speedy lawyer may entirely skip the part where we find out what the client wants to accomplish, what their reality is, their lived experience, their needs, their fears, and their strengths. We cut people off when they talk about their emotions or conflicts or relationship issues, and say things like "stick to the facts, please". Then we skip right to the part where sentences begin with "you should", "you'll have to", and "this is what I'll do for you". The danger in this process is when we become overconfident in our assessment of someone else's life and needs, or ignore the day-to-day reality of the family, and push them into predetermined outcomes. In other words, we are not listening, and we are not going to create good outcomes.

The good news is that adopting a client-centered and trauma-informed approach is

a great place to start. But what does it mean, and why does it matter?

"Client-centered" means different things in different settings. The term originates in the field of psychotherapy, with a man named Carl Rogers, who said:

> *In my early professional years I was asking the question: How can I treat, or cure, or change this person? Now I would phrase the question in this way: How can I provide a relationship which this person may use for his own personal growth?*

Being client-centered means approaching a client with a sincere belief in their strength and capacity, and recognizing their agency without judgment. With very few exceptions, everyone has capacity upon which we can build, and everyone can make decisions for themselves that we can positively support. Doing so can massively shift power and energize self-advocacy.

Being trauma-informed is not the same as being nice. Yes, is important to have an excellent set of people skills, and to know what to say or not say in response to various things our clients might tell us. It is important to be kind to a person who is distraught, or who has had painful experiences. Being trauma-informed IS understanding the neurobiology of trauma and being responsive to the many ways that trauma shows up in our clients. It also means recognizing someone's lived experience (which may include childhood or generational trauma) and being responsive to that.

How We Work

The DVFL is an interdisciplinary, collaborative program that uses a holistic approach to support people accessing our services. The reality of the survivor or victim of violence and abuse is far more complex than a narrow set of legal issues. Clients most often need support with safety, housing, immediate financial aid, as well as quality, thoughtful and direct referrals to services such as counselling. To that end, the program employs two full-time lawyers, one full-time registered social worker/advocate, and another full-time program coordinator who is also a registered social worker. The team works collectively and on an equal footing with one another, deferring to and relying on one another's expertise and insight.

Some best practices and things we do include:

- **A wheel of service with a human at the center:** Our program coordinator is the hub of everything. Having a social worker/program coordinator at the center of communication means the client is not responsible for putting all the pieces together themselves (which leads to referral fatigue). Clients can rely on a human with a phone number and a name they know who can connect them to program lawyers, the program advocate, other programs and services in CLG, and external programs and services ranging from emergency shelters to the Family Court Counsellors. Our program coordinator can also immediately support someone in distress, including suicide screening.
- **Debriefing:** While the ability to share a difficult client story or situation with a colleague is extremely beneficial to our well-being, debriefing is primarily an opportunity to learn. Having a non-lawyer colleague, especially someone like a social worker or health professional, to talk to (observing any confidentiality or privilege that applies in your situation) is an excellent way for us to grow as professionals. We can find new, different, more impactful and often more practical ways to support our clients.
- **Free-flowing communication:** The team works TOGETHER. We see clients as team clients, rather than belonging to one team member. We actively work together to

problem solve, discuss and debrief on client matters as necessary. This enables us to flexibly support our clients' needs and to support each other.

Helpful Resources

CPLEA's Domestic Violence and the Law series of print resources and WillowNet.ca are excellent resources for the basics on the law and how it applies.

Below are a few other resources that have helped me personally but are not commonly discussed or listed elsewhere:

- **SAFeR**: SAFeR is a four-step method to create safe, workable outcomes for parents and their children who are subjected to family violence. It was created by the Battered Women's Justice Project and is a particularly useful tool for lawyers.
- **Family Violence and Family Law webinar series at Western University** (free)
- **CCAW**: For those lawyers and professionals who have the resources, I encourage you to spend your conference budget on the Conference on Crimes Against Women (annually in Dallas, Texas) even just once. It has been extremely eye-opening for me.
- **The Trauma-Informed Lawyer Podcast**: Hosted by Myrna McCallum, the podcast is for lawyers as well as anyone who works with people generally.

Towards Creating a Responsive System

The challenges faced by those subjected to family violence when entering the legal system are rooted firstly in abuse and its effects: safety concerns for self and children, fear, lack of confidence, self-doubt, power imbalances, the effects of trauma on the brain and body, etc. These are further complicated by entering a legal system that lacks understanding about family violence and its effects, and the reality that it exists and is widespread.

The challenge remains to create a system that is not only educated, but responsive. We still have a ways to go, but the concepts and practices of being client-centered and trauma-informed, especially grounded in family violence education, are an excellent place to start.

Sheila Pahl

Sheila Pahl is the lead lawyer for Calgary Legal Guidance's Domestic Violence Family Law program.

Assisting the Client Living with the Effects of Serious Mental Illness

April 22, 2022 by Averie Mcnary

What are the challenges involved when working with clients living with psychotic illnesses, and what is some practical advice for their lawyers and advocates?

I was asked to write an article on the challenges that those experiencing mental illnesses face when engaging with the legal system. What follows are my observations on providing legal services to a person living with the effects of a serious mental illness, especially in the "simple" civil law realm. It is based on my experience as a lawyer, policy maker and manager for government, as well as private practice in high conflict estate matters and pro bono work at the Edmonton Community Legal Centre. I am also a supporter of a loved one living with the effects of schizophrenia. My goal is to describe the challenge involved, to acknowledge there are no easy solutions, and to offer some practical advice for navigating this rocky road.

The Challenge

Write an article on the mentally ill in the justice system. That is a task equivalent to eating not just a mere elephant, but an entire herd and the surrounding forest one spoonful at a time (as Desmond Tutu said). Civil or criminal matters? If criminal – police encounters? Arrest? Bail? Jail? Indictable? Provincial? Mental Health or Drug Courts? If civil – debtor or creditor issues? Immigration? Landlord or tenant? Trusteeship? Estates? Family? And what about those "neither fish nor foul" matters, such as a *Mental Health Act* arrest, confinement and compulsory care? Bylaw enforcement? Traffic tickets?

Photo by Riccardo from Pexels

And just what do we mean by mentally ill? Being so filled with fear and anxiety you cannot leave your home? Hearing voices? Stubbornly insisting on your innocence or guilt? Depression so intense that one lacks all volition? Believing your neighbour is whispering about you? Unable to comprehend the justice system? (Take a moment to consider which of these are "real" and which are not.) Diagnostic and Statistical Manual of Mental Disorders 5th edition anyone? (The American and Canadian gold standard for classification and diagnosis of psychiatric disorders.)

Let's narrow the field to representation of a subset of clients: individuals living with psychotic illness, such as schizophrenia spectrum or bipolar disorder. The life of a person living with one of these chronic and

serious mental illnesses is one of managing delusions and other forms of break with reality. The client is also dealing with "negative" symptoms. This includes impaired executive function (the ability to plan and make decisions), avolition (loss of motivation) and, for some, anosognosia (the inability to recognize there is a pathology). For these clients, there are also the external forces of shame, stigma and stereotype. About two in 100 people worldwide experience psychotic illness. About one-third manage it well, one-third live independently with support, and one-third are not well managed. They come from all walks of life – there is no socioeconomic predictor of these illnesses. The cognitive effects of the illness can be so disabling as to impede employment or full social interaction, resulting in many living in financially low/modest and socially-isolated circumstances.

Their access to justice is sub par. These clients encounter the same legal issues as the general population, but a far higher percentage encounter the criminal justice system. And many are excluded from the civil justice system because of the challenges of their illness and the challenge they present as clients.

The client will have difficulty sorting reality from delusion. Their ability to plan and follow directions are limited. They often shift perspective and have trouble following commitments. In the face of this, the lawyer's task is seeking just resolution, starting with framing the client's issues within a tidy lawyerly framework that can be slotted neatly into the justice machine for outcome. This can be a messy, crazy business.

To keep the discussion manageable, I have limited my thinking to clients with delusional illness encountering "simple" civil matters – such as small claims, landlord tenant disputes, social assistance and AISH appeals. The adjective "simple" is fraught: while these may be matters that are simple processes for lawyers, they are never simple or unimportant to the client. The outcome can lead to dignity or shame, security or dependence, shelter or homelessness. The suggestions below apply to complex matters as well but are easier to conceptualize if you imagine using them in a simple situation.

~~Fixes~~ Patches

The specific challenges faced by the client is longer than the word count allows. The practical "fixes" are limited and patchwork. That said, let's dive in.

Mental capacity and the ability to instruct counsel is a first challenge for the lawyer or other advocate. A client must have the ability to understand their legal situation and give instructions. Their ability to understand and instruct is likely fluid – changing from day to day. Bizarre reality may be mistaken for delusion by the hearer. Another challenge may be the client's limited ability to take steps on their own, due to avolition or cognitive issues.

A further challenge is the client's ability to provide evidence in affidavit or testimony. Memory may be severely compromised. The ability to understand questions and to answer in a straightforward fashion is compromised. This is especially true where the client is under stress. Clients may not be able to prove their case because of their limited ability to convey the facts.

So, what is a lawyer or advocate to do?

Have patience.

Trite but true, it takes careful listening and thoughtful teaching. You may be encountering a person who seeks results that are impossible or relies on a reality that does not exist. It is hard for a listener to pry truth from delusion and fact from opinion. Remember the whole person: not only is there a brain disorder but likely also a unique range of experience with hospital admissions and social, economic and other turmoil.

Probe for your client's best and most comfortable interview times and circumstances.

I have found it is best to work with the clients when they are at their best. This may be at certain times of day due to medication or sleep needs, or necessarily avoiding crowded places and so on.

Enlist a trusted family member or friend to assist and attend in support.

This person can be a great help, provided the client consents to their participation and the person is reasonably trustworthy. Yes, the supporter may influence the client. However, provided the influence is not "undue", it is better than the alternative. The trusted family or friend is there for the long run. You, the lawyer, are only a blip in the story.

The Law Society of Alberta's *Code of Conduct* sets out a framework for dealing with clients with limited capacity but relies on a trustee or substitute decision maker as an option for clients who cannot instruct (see Rule 3.2-15). Appointing a substitute decision maker such as a trustee may be overkill for a person with fluid capacity. The application may trigger anger and mistrust. Not to mention finding a trustee or litigation representative or attorney may be impossible or impractical. (And the Public Trustee will not step in except in rare circumstances.) Nonetheless, one may be a possibility in the right circumstances.

Obtaining a capacity assessment is often suggested as a means to ascertain capacity. Such assessments are useful security, but they are expensive and not particularly useful for situations where, like here, capacity may change over time. Plus, it is hard to find clinicians to do them.

Learn how to speak with the potentially delusional client.

If the client presents with what appears to be a delusion, do not argue with their account of reality when sorting out the facts. Test it gently for an air of reality. Remember, the neighbours might really be listening in. Do not deny or argue but acknowledge the client's experience: "That must have been terrifying to know assassins may be behind any tree. Let's put that on the back burner and see if it figures into your case… " Acknowledgement does not equal agreement. But to the client, a delusional experience *is* real.

In moving forward with case strategy, seek areas of agreement. In conveying difficult information, ask permission to convey it. Provide it with humility and in a way that respects the client's truth: "You are here to ask for my help, can I give you my thoughts now? I hear that you would like to get $100,000 in damages, but I am sorry to say that's just not what the law allows …" As much as possible, keep affidavits to essential facts and simple statements that, when read back to the client, can be answered "yes" or "no". Prepare your client for cross examination as best you can to keep answers similarly simple.

The client may not be capable of participating in mediation or negotiation. Be realistic about their ability to understand interests-based mediation or other processes that require comprehension of other's perspectives.

The court can be your friend.

The court system is full of frustration and foibles. It seems impenetrable to most people, let alone one who must manage delusions or other symptoms. That said, the clerks, counsellors and judges who people the system do aspire to be alert to the challenges parties face, and to ease their way through their case. Remain courteous and (cautiously) optimistic toward the court and advise your client to do the same.

Make the experience feel fair to the client.

Dispute resolution research has shown that the experience of being respectfully heard is more important for effective resolution than

the outcome itself. Procedural fairness is as important as substantive fairness. Particularly when a client has weak or no cause (or gets a negative judicial result), being treated fairly may be an end in itself. Demand fair treatment and do what you can to provide it.

Know when to fold 'em.

There will be times when you can do no more for a client. There are a million reasons why that may happen. The decision to stop should be based on ethical principles – a reasonable balance of personal and professional resources, respect for client autonomy, and safeguarding the client's interests. Ideally the client should be left with a path or option they can follow.

Conclusion

This seems like one small spoonful in a very, very big meal. But there is much to be optimistic about: one is the willingness of lawyers and others who undertake personal advocacy of the mentally ill to continue their work.

AUTHOR'S NOTE | Special thanks to Sarah Eadey at Edmonton Community Legal Centre for her help with this article.

Averie McNary

Averie McNary, QC is, among other things, former director of family law and legislative reform for Alberta Justice, volunteer at ECLC and CMHA, and co-founder of FAMIA - Families Supporting Adults living with Mental Illness in Alberta.

Defending Your Workplace Rights in Alberta Can Be More Difficult Than It Should Be

April 27, 2022 by Taylor Mcmullen

The Workers' Resource Centre sees common scenarios where workers do not understand their rights and options, leaving them vulnerable to exploitation.

For someone experiencing legal issues in the workplace for the first time, navigating the system for information and help can be a dauting task. Legal firms may charge several hundred dollars for a consultation, legal aid clinics usually have narrow financial thresholds to meet to access their services, and the internet is full of vague and inaccurate information. Understanding your basic rights in the workplace can be even more tricky if you are new to the country, have language barriers, or do not have access to the internet.

Photo by Yury Kim from Pexels

At the **Workers' Resource Centre (WRC)**, many new clients come to us every week with little more than a feeling that their workplace rights are being infringed upon. But they usually have no idea what their options are. The purpose of this article is to draw attention to the difficulties that everyday people can face in understanding their workplace rights and finding reliable help to explain potential options available for resolution or recourse.

When Employers Exploit Temporary Foreign Workers

One of the more unfortunate situations we see regularly at the WRC is employers exploiting their non-citizen employees, or temporary foreign workers, who are working on a closed work permit. These employees often do not ask too many questions about their workplace rights.

A typical scenario is an employer forcing these vulnerable employees to provide kickbacks to the employer from every pay cheque the employee receives. The employer may also require the employees to work overtime and general holidays without paying them properly. The employer then threatens to revoke the employees' work permits if they refuse or try to seek help.

Due to the nature of a closed work permit (meaning the employee can only work for the employer who is sponsoring them), these employees are often unwilling to stand up

to their employers or to get legal help. They believe it is not worth risking their work permits as they are often desperate to earn money to support their families. Many of these workers do not receive adequate information and education on their workplace rights before starting their new jobs, which in turn leaves them highly susceptible to exploitation.

Contracting Out of Minimum Obligations

Another situation that makes it difficult for people to know about their workplace rights is employers including terms in employment agreements that do not comply with Alberta's *Employment Standards Code*. Employers cannot contract out of their minimum obligations under the Code. But not every employee knows this or what minimum standards they are entitled to.

Some common examples we see at the WRC of employees "agreeing" to things which are not legal include:

- deducting pay for staff uniforms
- providing mandatory two weeks' notice when resigning or else risking a deduction from their final pay cheque
- deducting pay for loss of or damage to the employer's product, such as broken merchandise
- overtime or general holiday pay structures that do not meet the minimum requirements

It's not always obvious in these situations that the worker's rights are being infringed upon because they are "agreeing" to these terms of employment. This is particularly true for people who are new to the country or have little experience with these issues.

Human Rights Issues that Employment Standards Deems to be Non-issues

One of the more confusing issues for employees that we regularly see at the WRC is where both the Alberta Human Rights Commission and Alberta Employment Standards seem to have jurisdiction over (the right to hear) an issue. But one of the agencies views the issue as a violation, while the other does not.

The most common example we see are situations involving job-protected leaves for medical reasons. The *Employment Standards Code* says that if you need a medical leave from work that is supported by your health professionals, then your employer must hold your job until you are able to return so long as you are not off work for longer than 16 weeks. This is typically cited on termination letters given to people who reach out to us for help after they lost their job because they needed more than 16 weeks off. However, the Alberta Human Rights Commission mandates that employees cannot be terminated because of a mental or physical disability (with very few exceptions). This is discrimination. If there is a human rights issue, the *Alberta Human Rights Act* takes priority over other legislation.

So, in these cases of medical leaves, the termination appears to be legitimate from an Employment Standards perspective, but may be illegitimate from a human rights perspective. This makes it very difficult for people to realize their workplace rights have been violated when the legislation cited in a termination letter appears to support the legitimacy of the termination.

A similar issue can occur for people who are ordered off work by WCB Alberta (Workers' Compensation Board) following a workplace injury. It used to be that employers were obligated to return the employee's position to them once they were physically able to return to work. But WCB's legislation recently changed. Now, according to WCB, employers no longer have to offer back an employee their position following a leave of absence due to a workplace injury. That being said, the Alberta Human Rights Commission may view this as discrimination based on a disability and find

merit in cases where an employer does not return an employee's job to them following a medical leave.

Help is Available

These are only a few examples of the difficulties people face in both understanding their rights in the workplace and knowing how to access or navigate the legal system when their rights have been violated. The legal system is largely reactive to violations, not preventative. Therefore, people often do not understand their options to resolve workplace issues until it is too late.

The WRC offers free consultations to all Alberta workers who have questions about issues they are having with their employers, no matter how big or small. Give us a call if you suspect your workplace rights are not being honoured, or if you have general questions about the different agencies that deal with employment issues and their processes.

Taylor McMullen

Taylor McMullen is a case worker for the Workers' Resource Centre in Alberta.

Drinking in City Parks: Changes to Alberta's liquor laws

May 5, 2022 by Anisa Hussain and Stephen Raitz

In 2021, pilot programs in Edmonton and Calgary allowed public drinking in certain parks. What did we learn and how has drinking culture changed?

To help Albertans endure the pandemic, the Government of Alberta passed the *Gaming, Liquor and Cannabis Amendment Act 2020*, which allowed Albertans to drink in certain parks. In this article, we summarize the amendment's effects on the law and Albertans.

View of the North Saskatchewan River in Edmonton, AB | Photo Credit: Jessica Steingard

Provincial Legislation

This new law amended the *Gaming, Liquor and Cannabis Act*. Most notably, the amendments reduced restrictions on public alcohol consumption in parks. Doing so changes the experiences Albertans may have in public spaces like parks, greenspaces, and plazas.

In effect, the amendments allow municipalities or other owners of park spaces to decide whether to permit alcohol consumption in their spaces. The province also now allows public consumption of alcohol in some day use picnic areas within provincial parks and recreational areas.

Edmonton and Calgary are the two Alberta cities that have explored the opportunity the furthest, with both running full pilot programs in the summer of 2021. Several other municipalities have explored the idea, including St. Albert, Leduc, Strathcona County, and Lacombe.

Edmonton Rules

The City of Edmonton ran their pilot program from May 28 to October 11, 2021, in seven river valley parks. Alcohol consumption was allowed at 47 picnic sites, which could be booked ahead of time or accessed on a first-come, first-serve basis.

When deciding which parks to use for the pilot, the City considered principles of safety, accessibility and minimizing costs. In particular, the City chose sites which aligned with existing peace officer patrols to ensure compliance and address behavioral concerns. The pilot was coupled with communication and education programs that brought awareness to the rules and encouraged responsible consumption. These programs included signs that informed patrons which parks were *excluded* from the pilot.

In line with the provincial law, drinking was allowed from 11am to 9pm daily. Additionally, City of Edmonton Bylaws 2202 (Parkland), 13145 (Animal Licensing and Control) and 14614 (Public Places) applied. These bylaws stated that patrons could not litter, fight or harass others. Nor could they disturb the enjoyment of other patrons or interfere with a peace officer carrying out their duties. Anyone who contravened these rules could be asked to leave.

In a survey sent out last November, most respondents said the pilot was a positive experience. The vast majority said they did not encounter disorderly conduct, noise, or litter issues. By contrast, a public engagement survey conducted *prior* to the pilot revealed safety concerns and disorderly behavior were respondents' main reasons for opposing the pilot.

The City will reinstate and expand the program this summer, from May 1 through to October 10, 2022. Alcohol consumption will be allowed in parks outside the river valley but will be restricted to picnic sites. Check the City of Edmonton's website for more information on where alcohol consumption is permitted.

Calgary Rules

Calgary ran a pilot program from June 1 to September 7, 2021 with 58 tables across the city. In tight alignment with the provincial legislation, the City restricted consumption to picnic sites, providing both first-come, first-serve options and free reservations for priority use. Information found online and accompanying reservations clarified additional rules regarding consumption and public safety.

In reviewing the pilot program, the City said that over 1500 bookings were made plus non-booked visits (which were not tracked). Almost no complaints were raised based on noise or designated sites. And when complaints did arise, they were addressed by changing the permitted public consumption locations.

The City of Calgary recommended that the program continue with changes for improvement and expansion. The largest adjustment in this recommendation was focusing the program in higher-uptake locations around the downtown core. In addition to the existing tables, the City will provide more tables in five to ten parks in higher density areas. This aligns better with the program's intent to provide opportunities to use greenspace for those without a yard or who live in apartments. Another recommended adjustment was to include some larger bookable picnic sites in the program as well as extend the program into winter by allowing consumption at winter firepits.

Commentary on Broader Impacts

Edmonton and Calgary's experiences indicate that allowing alcohol consumption in public parks amounts to a fairly minor change in how community members engage in public spaces. A survey of Calgarians showed that 80% were neutral about the program's impact and only 4% had used the program. None of the respondents mentioned the pilot as a reason for decreased park visitation frequency during the summer.

Drinking culture in large Canadian cities may be slowly evolving. Up to this point, the consumption of alcohol has been a highly regulated matter occurring mostly in private spaces. Now, with Edmonton and Calgary continuing these programs, alcohol consumption is becoming a more normalized social activity in fully public spaces.

The feedback received in Edmonton and Calgary on the 2021 pilot projects highlights that many are prepared for this evolution. Although there were vocal minorities of community members who opposed these changes, most of these perspectives reflected a N.I.M.B.Y. sentiment. Community members voiced concern about potential negative impacts in their neighbourhoods. But the reports indicate there were few recorded noise complaints or other issues. Based on feedback, both cities have adjusted their approach to mitigate concerns raised by nearby residents and other community members.

Altogether, communities choosing to allow drinking in public spaces should expect that change is possible. But some opposition from residents is expected. As more communities change municipal bylaws and policies to permit drinking in public spaces, there will

be more and more information available about the impact of permitted public alcohol consumption.

Commentary on the Impacts on Those Experiencing Homelessness

As vulnerable populations often experience the law differently, the impacts of these changes on the homeless population deserves special attention. Will those experiencing homelessness benefit from this law the same as those not experiencing homelessness? For example, how will a marginalized person openly drinking in a park in the middle of the afternoon be perceived compared to someone who appears to be housed, employed, etc.? Will police respond differently to these individuals as well?

While the rules do not (and cannot) discriminate based on housing status, Sindi Addorisio, former manager of the Winter Emergency Program at Boyle Street Community Services, says that marginalized populations do not drink in parks because they are too open and not usual drinking spots. Ms. Addorisio already observes differential police treatment towards this population, especially as these individuals may not always be aware of their rights. She notes that sometimes they search their belongings without the required level of suspicion. Sometimes police use excessive force when arresting them. Additionally, even though police lack the required level of suspicion, police will act in a way that makes a reasonable person in their situation feel detained. This violates the following *Charter* rights: the right against unreasonable search and seizure (section 8), the right to life, liberty and justice except in accordance with the principles of fundamental justice (section 7), and the right not be arbitrary detained (section 9). Furthermore, Ms. Addorisio also raises the possibility that intoxicated non-marginalized folks may get confrontational towards individuals experiencing homelessness taking advantage of the same opportunity to drink openly.

The question becomes what can municipalities do to ensure that every adult benefits from this law should they choose to take advantage of it? A city's failure to do so may violate a person's rights under section 15 of the *Canadian Charter of Rights and Freedoms*. Section 15 is the right to be free from discrimination on certain grounds. Courts have considered homelessness as a form of socially constructed exclusion though there has been mixed lower court recognition of homelessness as an analogous protected ground against discrimination.

The bottom line is that municipalities must ensure this benefit is accessible to those experiencing homelessness just the same as it is to any other park-goer.

Watch our short summary video on YouTube!

Review, Understand and Evolve

The cultural expectations around consuming alcohol in public places appears to be slowly evolving. Municipalities are on the front lines of responding to and enacting these changes. It will be key for administrators and political decision-makers to review changes made in other cities to understand the impacts these amendments are having or may have on the community at large as well as on vulnerable populations within communities.

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Rights Within Your Property: Did you know?

May 11, 2022 by Judy Feng

Your property rights when it comes to property boundaries, fences, airspace, peaceful enjoyment, and encroachments.

Ever wonder whether your fence defines property boundaries and whether there are laws about fences? Do you know what you own and control on your property? How about neighborhood noises … are there laws that deal with disturbances such as barking dogs, parties and loud people? Do you know what your rights are when there are things encroaching or intruding onto your property? Here's a brief introduction to some of your rights with respect to your own property that you may or may not know about.

Photo by Michael Morse from Pexels

Did you know #1: There is more to property boundaries than just the fence

One might think that property boundaries are established by a fence, and one owns and can use all that is within it. Fences are often a physical marker for property boundaries. But there is more to property boundaries than just fences.

As a starting point, a Certificate of Title describes the location of legal property boundaries. There may be encumbrances, liens and interests registered on title affecting the property. For example, your municipality may have a utility right of way registered on title, which is an agreement that allows them to use your land in some way. That's why it's important to know what's on your Certificate of Title and all registered documents on title.

Furthermore, disputes can happen where there is uncertainty over boundaries. For example, when physical boundaries established by fences don't match the legal boundaries described in the Certificate of Title. Whenever you are dealing with uncertainty or disputes about property boundaries, you should get legal advice.

Did you know #2: Speaking of fences, there's laws about those too

Speaking of fences, there are laws in each province about building them and who is responsible for paying for them. In Alberta, the *Line Fence Act* has limited application as it only applies to fences designed to keep livestock out of adjoining land. The *Act* says that when two owners or occupiers of an adjoining property want to build a fence for the common advantage of both of them, they are to equally share the costs of construction, maintenance and repairs. Let's say the *Act* applies to your situation and you have a dispute with your neighbour about a fence's quality, property location, or the money to maintain or repair it. Under the *Act*, such fence disputes can be referred to arbitration.

Other than checking your provincial laws about fences, you should also check your local municipal bylaws about fences – which specify

height, location and whether development permits are required. As a tip, you should also check architectural guidelines for your neighborhood or community association when it comes to fences. There may be construction and colour guidelines to follow, sometimes even down to the exact paint colour.

Did you know #3: You are entitled to airspace above the surface of your property

Let's say you are standing on the land surface of your property. Do you own anything above that surface? When you own a piece of land, the common law (judge-made law) recognizes a right to airspace up to a certain height. This has also been interpreted to mean that you own as much airspace as you can potentially and reasonably enjoy or use. Airspace entitlement is a little different for condo owners and tenants who live in buildings. In such situations, condo owners and tenants have a right to a piece of the stratosphere. Fun fact, this also helps explain why condominium law is often referred to as "strata law" in British Columbia.

What about what's under the surface of your property? If you strike oil or gold, can you keep it? Read the LawNow article Property Laws You've Maybe Never Heard Of to learn more.

Did you know #4: You have a right to peaceful enjoyment of your property

Common law also recognizes a right to peaceful enjoyment on private property. Essentially, the law protects against unwanted intrusions or disturbances on your property. Municipal bylaws regulate conduct and activities on private property (and adjacent property) to make sure that you have enjoyable use of property. For example, municipal bylaws cover nuisances such as noise and enforcement.

The right to peaceful enjoyment also extends to tenants living in rented properties. This means landlords have a responsibility to deal with problems that infringe on a tenant's right to peaceful enjoyment – such as excessive noise, aggressive behavior and disturbances caused by others allowed on the premises.

To learn more about what to do with noisy neighbours and more, refer to the LawNow article Common Neighbourhood Disputes and Solutions.

Did you know #5: It gets complicated when there are encroachments and intrusions onto your property

There is a range of caselaw when it comes to encroachments and intrusions onto your property. When it comes to trees, hedges, shrubs and the like, you may be able to remove branches from a tree planted on your neighbor's lot if they encroach onto your property – as they are considered natural encroachments.

But it can get complicated when the encroaching tree is a straddle tree where the roots are growing in neigbouring or adjacent properties. Some cases say these types of trees are common property while some cases say root intrusion is a type of nuisance. So, there is uncertainty about what you can do with encroaching trees depending on how it's growing and whether your actions will harm the health of the tree.

Intrusions into airspace above your property can also get complicated. The courts have viewed direct and permanent structural intrusions (such as the case of low hanging powerlines) as a trespass to be remedied. On the other hand, courts have viewed transient intrusions such as aircraft as not likely to interfere with enjoyment of your property.

To learn more about resolving disputes about encroachments onto property, refer to the LawNow article Neighbour Disputes: Encroaching people, trees, and smoke.

Judy Feng

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Neighbour Disputes: Encroaching people, trees, and smoke

May 11, 2022 by Jessica Steingard

Sharing a property line with someone else can lead to disputes. Here's a few common neighbour disputes and what you can do about them.

Neighbours are an inevitable part of life. Unless you've managed to escape somewhere far off the grid! Sometimes, neighbours become great friends. Other times, the relationship ends in neighbour disputes.

A previous LawNow article covered common neighbour disputes and solutions, including issues about clearing snow, noise, and messy yards and garbage. In this article, we'll tackle a few more common neighbour disputes – trespassing, overhanging trees, and smoking or vaping – and what you can do about them.

Coming Onto Property Without Permission

Your kid's ball flies over the fence. Your cattle stray onto your neighbour's fields. You build a structure that encroaches on your neighbour's property. Regardless of your intentions, trespass occurs when you or something you control crosses onto someone else's property without permission and causes harm. Another previous LawNow article discusses trespass in more detail.

So, what to do? For both the trespasser and trespassed, talking to each other is always an easy, practical first step, if safe to do so. If your kid's ball goes over the fence, ask your neighbour if they can pass it back rather than just wandering into their yard. If your neighbour's cattle crossed into your fields and caused damage, talk to your neighbour about your concerns. If your neighbour built a structure that comes onto your property, you can ask them to remove it.

Photo from Pexels/Pixabay

If talking is not safe or effective, you can call the police about the trespasser. If there are disputes about where the property line is – aka questions about whether someone or something is actually trespassing – you may need to hire a land surveyor or get advice from a lawyer.

Going to court may also be an option. An injunction is a temporary court order stopping someone from doing what they are doing. For example, if your neighbour is in the process of cutting down trees on your property, you may be able to go to court quickly to get an injunction ordering them to stop. To get an injunction against someone, you must prove three things to the court:

1. There is a serious issue to be tried, such as a trespass.
2. You will suffer irreparable harm if the injunction is not granted, such as loss of your trees.

3. The balance of convenience weighs in favour of granting the injunction. In other words, the court considers who would suffer the greater harm from granting or refusing the injunction.

The court can also order someone to remove a structure that is encroaching on someone's property or to pay for damages to someone else's property due to the trespass.

Overhanging Trees or Shrubs

A person's trees or shrubs crossing onto their neighbour's property is one form of trespass. Going onto that property to cut down the trees is also trespass!

Last year, a West Vancouver homeowner was in hot water for sneaking onto his neighbour's property and cutting off the tops of his neighbour's cedar trees while the neighbours were on vacation. Why did he do it? Because his neighbour's trees were blocking the ocean view from his multi-million-dollar property. The consequences? The court ordered the homeowner to pay his neighbour $18,175 in general and special damages, and $30,000 in punitive damages (meant to punish the payor for their actions), plus interest. The court also ordered the homeowner not to enter his neighbours' property or contact them.

In another case, a homeowner had someone not trained in tree pruning cut the overhanging branches up to the property line. While the homeowner did not enter onto their neighbour's property, the trimming jeopardized the health of the tree and ruined it's aesthetic. The court recognized there are limits to which a trespasser is required to restore land to its previous condition. The court must consider what is reasonable, practical and fair in each situation. In that case, the court awarded the neighbour $2000 for their loss.

So, what to do? If your neighbour's trees are overhanging, talk to them. Maybe you can figure out a solution, such as having a professional arborist come in to trim the tree in a way that will not harm the tree. If you take matters into your own hands, you may be setting yourself up for a lawsuit, depending on the damage you cause. Your neighbour may be able to sue you for special damages (money they spend to correct the issue) or general damages (for loss of amenities).

Smoking or Vaping

You are sitting in your backyard and smell someone smoking or vaping nearby. Can you do anything about it?

It depends where the person is smoking or vaping. There are provincial laws and local bylaws that govern where a person can smoke or vape in public places in Alberta. The *Tobacco, Smoking and Vaping Reduction Act* bans smoking or vaping in public places such as hospitals, childcare facilities, schools, workplaces, public transportation, vehicles with minors, playgrounds, etc. Smoking or vaping is also not allowed within five metres of doorways, windows, air intakes, etc.

The *Act* does not apply to private residences. However, landlords, property managers and condominium boards may have rules about smoking or vaping in units and common property.

So, what to do? If you have concerns about someone smoking or vaping, you can talk to that person directly. If that does not resolve the issue, you can make a complaint to your landlord, property manager, condo board or local bylaw enforcement office. For more information about the laws that apply where you live, contact your local government office.

To learn more about some of your rights within your own property, read the LawNow article Rights Within Your Property: Did you know?

Jessica Steingard

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DIY Home Improvements: What's the law?

May 19, 2022 by Jeff Surtees

Doing your own home renovations means understanding the legal requirements, such as permits, and the consequences of doing poor work.

You own your own home and decide to do some renovations. You get a couple of quotes from local contractors and are in shock over what it all adds up to. You think to yourself: "I'm not paying that. I've got some tools. It doesn't look too hard. I can do this myself. (That bird house I built back in school was perfect). Plus, there's a ton of stuff on YouTube to follow. What could possibly go wrong? I don't even think I'll bother with a permit. That sounds like a lot of hassle and is just a formality."

The Regulatory Framework

The Alberta government has the power to pass laws to make sure things are built safely. The Alberta *Safety Codes Act* is the starting point. This statute (written law) and its regulations:

- create a safety codes system that regulates the construction of buildings, elevators, amusement rides, ski lifts (and other rope systems), the installation of fire prevention, pressure and private sewage disposal systems, and how electrical, gas and plumbing work is to be done
- create a formal group of experts called the Safety Codes Counsel and give them duties, including figuring out what the standards should be in the areas of construction the Act applies to
- give owners, designers, manufacturers, contractors and sellers of property duties to make sure they comply with the Act
- create a system for inspection, enforcement and penalties to make sure the rules are followed, and allow the province to delegate much of this work to municipalities

Provincial statutes usually include a power to create regulations that will set out the details of how the work of the statute will get done. Those details often change, and the process for changing regulations is easier than the process for changing the statute. As of May 2022, there are over twenty regulations under the *Safety Codes Act*. Many of those regulations say that a set of standards developed by an expert group applies in Alberta. For example, section 1 of the *Building Codes Regulation* (one of the regulations under the *Safety Codes Act*) says "The National Building Code - 2019 Alberta Edition, published by the National Research Council of Canada as amended or replaced from time to time, is declared in force with respect to buildings." That National Building Code is over 1,400 pages long and contains many rules regarding how buildings are to be built. There are separate sets of regulations for each of the areas covered by the *Safety Codes Act*.

A homeowner doing renovations has a duty to make sure their work complies with the *Safety Codes Act*. The way to do that is to obtain the proper building permit, if one is required. Many municipalities can issue permits, and in other places there are designated agencies

that issue permits. As part of the permit process an official will inspect and approve the work done at various stages of construction. That approval is your confirmation that the work has been done in a way that meets the requirements of the Act.

Photo Credit: Jeff Surtees

But can a homeowner apply for a permit themselves and do their own work? Yes – for some types of renovations in some types of homes. For more dangerous work, for example anything dealing with gas lines, a permit can only be issued to licensed tradespeople. Also, some homeowner building permits can only be issued for freestanding homes, not apartment-style condominiums.

When is a building permit required? A permit is not usually required for cosmetic upgrades such as new paint or flooring. It is always best to check the local requirements. There are differences between municipalities. For example, in Calgary no permit is required for a deck less than 23-5/8 inches above grade. In Edmonton, the rule is 24 inches. A backyard fence in Calgary can be 6'-6" without a permit. In Edmonton, the rule is 6.1 feet (roughly 6'-2"). The safest practice is to always assume you need a permit until you verify you do not with City Hall. All major municipalities in Alberta have excellent websites providing information about when building permits are required and when they are not. Simply search the name of your municipality along with 'building permit'. If you are still unsure, call or visit your municipality's planning department and ask.

Homeowners should also be aware that for some types of renovations they may need a development permit in addition to a building permit. Building permits are meant to ensure construction safety. Development permits are meant to ensure compliance with the municipality's land use bylaw.

The consequences of not obtaining a permit can be severe. An inspector or the court might:

- order you to stop work in the middle of the project
- tell you to remove the work that has been done
- levy an administrative penalty (fine) against you

You also might get less for your house if you decide to sell it, or not be able to sell it at all.

Risk of Being Sued

In Alberta, people can sue others in court for negligence. For a negligence lawsuit to be successful, an injured person (the plaintiff) must prove:

- the defendant (that's you … the homeowner who did their own renovation) owed them what is legally called a 'duty of care'. Let's assume this is true.
- the defendant breached the 'standard of care' that applied (more about this in a minute)
- they suffered legally recognised damages. That is, the work you did hurt the plaintiff in some way, either physically or financially.
- their damages were caused by the defendant's breach of the duty of care. Again, we will assume this is true.

For example, let's say a homeowner does shoddy electrical work (with or without a permit). The house later burns down, injuring someone. To what standard will the court hold the homeowner? A standard of care is what a person is measured against when the court is asking the question 'Did the defendant do enough?'. Usually, the court will use what is

called the 'reasonable person' standard. What would a reasonable person with similar skills have done? But a court could impose a stricter standard on a defendant doing their own renovations in two ways. First, the court could say the defendant was holding themselves out (pretending to be) an electrician, so they should be held to the standard of what a reasonably competent electrician would have done. Second, the court could say, given that the work was obviously dangerous and beyond their skill level, the defendant had a duty to expand their own knowledge by consulting with an expert, someone who knows more than they did.

The best defence against a negligence claim is always … wait for it … don't be negligent. If you decide to do your own renovations, get the proper permits. The required successful inspections are evidence that you did the work properly. If permits are not required, only do work that you know how to do and do it competently. If you come across something that you do not know how to do, get advice or help from an expert. Or better yet, hire an expert to do that part of the job.

Jeff Surtees

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(Even More) Myths About Child Support

June 2, 2022 by Sarah Dargatz

Debunking the myths and legends that haunt family law, including those about supporting adult children and the obligations of stepparents.

We have already debunked some myths about the law of child support, but there are so many out there! Let's address a few more …

Myth: My child is now 18 so I can stop paying child support.

Myth: My child is now 22 so I can stop paying child support.

Child support obligations apply to any child under the age of majority (in Alberta, 18 years of age) if the child has not "withdrawn from their parents' charge". This means one of the child's parents still supports them. Parents may be obligated to continue to support their child 18 years or older if that child is unable to withdraw from their parents' charge or provide for themselves due to illness, disability, or some other reason such as attending post-secondary school. Sometimes this ongoing need is obvious, sometimes it is not. A judge considers the facts of each family's case to decide whether it is reasonable for a parent to continue to be obligated to pay support for an adult child. If a child is studying full-time, most judges would agree that child support should continue, at least for a first degree, diploma, or certificate.

Neither the *Divorce Act* nor provincial family legislation, like Alberta's *Family Law Act*, have an upper age limit. However, until 2018, the *Family Law Act* did cap the child support obligation at 22 years old. Some people still believe this is the case, but that is now a myth. Also, for administrative purposes, some government enforcement programs, like Alberta's Maintenance Enforcement Program, have policies to stop collecting child support when a child turns 22 years of age, unless a new court order specifies the support should continue.

Usually, the amount of child support a parent must pay is based strictly on that parent's income. A court has very little discretion to ignore the amounts set by the Tables in the *Federal Child Support Guidelines*. However, when a child is over the age of majority, a court has some discretion when deciding how much support should be paid. Section 3(2) of the *Federal Child Support Guidelines* gives the court discretion to order a different amount taking into consideration the conditions, means, needs and other circumstances of the child as well as the financial ability of the parents to continue supporting their adult child. So, a judge may consider whether the child has a job, whether they have savings for school, and what expectations the parents had when they were together about the level of support they would continue to provide to their child when they turned 18.

Myth: They are not my kid so I do not have to pay child support.

Myth: My ex already gets child support for that kid from the biological parent, so I do not have to pay.

Biology and adoption are not the only ways someone becomes a "parent" to a child for the purposes of child support obligations. The definition of a "child of the marriage" under the *Divorce Act* includes a child to whom one or both parents "stood in the place

of a parent". Provincial family legislation, like Alberta's *Family Law Act*, has a similar definition.

"Standing in the place of a parent", or being "*in loco parentis*", occurs when someone treats a child as their own. Not every stepparent will stand in the place of the parent though it is common for them to fall into this role. If the issue goes to court, the judge will look at the circumstances of the family, including:

- the age of the child
- how long the person was in the child's life
- whether the child perceived the person as a parental figure
- whether the person was involved in the child's care, discipline, education, etc.
- whether the person has an ongoing relationship with the child after a separation from the child's other parent
- whether there were discussions about adopting the child, changing the child's surname to their own, or applying to become the child's guardian
- whether the person provided direct or indirect financial support for the child, and
- *any other factor the court considers relevant.*

If the court finds someone is "standing in the place of a parent", that person becomes obligated to pay child support. Remember, it is the child's right to be supported by their parents. The child should not experience financial hardship just because their parents split up.

As mentioned earlier, the amount of child support payable is usually strictly based on that parent's income. A court has very little discretion to ignore the amounts set by the Tables in the *Federal Child Support Guidelines*. However, where someone stood in the place of a parent, a court has a lot of discretion when deciding how much support should be paid. Section 5 of the *Federal Child Support Guidelines* gives the court complete discretion to order an amount it considers "appropriate, having regard to the Guidelines and other parent's legal duty to support the child."

Photo by Steve Johnson from Pexels

It is possible that both a biological parent and stepparent will pay child support for the same child. The biological parent's support is based on a strict application of the *Tables* while the stepparent's support is based on what a court considers appropriate. The appropriate amount could be more or less than what the biological parent pays, depending on the circumstances of the biological parents, stepparent, and child.

Myth: My ex claims I stood in the place of a parent to their child so I must pay child support. Now I have a right to parenting time with that child.

Child support obligations and "rights" to parenting time are separate legal concepts with different legal tests. Decisions about who has what parenting time with a child are based on what is in a child's best interests. Just because a stepparent must pay child support does not mean it is in the child's bests interest to have time with that same stepparent. For example, if the stepparent committed family violence against the child, their parenting time might be limited, or even eliminated, while they still have an obligation to pay support.

However, it is common for the same facts that create an obligation to pay child support to also suggest parenting time is in the child's

best interest. For example, if the child and stepparent have a strong bond and good relationship, that fact will likely support a child support obligation and generous parenting time. Each family will be unique – with their own set of facts leading to their specific outcome.

Illustration by CPLEA

Sarah Dargatz

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Thank You

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