Human Rights and Alberta Municipalities

A research report prepared

by

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Executive Summary

This study is funded by a grant from the Human Rights Education and Multiculturalism Fund of the Alberta Human Rights Commission. Using a mixed methods approach, it evaluates the consistency of land use and land use–related bylaws of a select set of municipalities in Alberta through the *Alberta Human Rights Act* and the *Canadian Charter of Rights Freedom*. The study concludes that Alberta municipalities have made significant progress on the human rights front. However, they continue to face two sets of potential human rights challenges. One set is the perennial and outstanding issues of inclusion of user characteristics and minimum separation distances in the zoning bylaw, inadequate provision of various forms of affordable and supportive housing, and limits on freedom of expression on municipal properties. These concerns arise out of court challenges premised on human rights, along with several sections of the *Charter*: Sections 1 (reasonable limits on rights), 2 (right to expression, religion, and peaceful assembly), 7 (right to life, liberty, and security) and 15 (right to equality). The other set of challenges is created by recent changes to federal legislation, resulting in new issues, such as locating safe injection sites, methadone clinics, and cannabis dispensaries.

Introduction

Applying human rights legislation to government action—including challenges to municipal action—is a growing concern. Government action that is consistent with human rights legislation is a constitutional requirement and, above all, a moral issue. Within such a context, this study presents a systematic evaluation of the soundness of bylaws related to land use in Alberta municipalities in relation to the Alberta Human Rights Act[1] and the *Canadian Charter of Rights and Freedoms*[2]. We methodically analyzed municipal documents (municipal plans, municipal bylaws such as zoning and community standards, and other bylaws that have land use implications) and interviewed numerous key informants in five major cities and five rural municipalities across Alberta.

The report begins with background on the legislative context of human rights, including the Alberta Human Rights Act. It then describes how the study was conducted and details its findings. It concludes by sketching a broad set of patterns observed across Alberta.

Legislative Context of Human Rights

Human rights are the rights an individual has by virtue of being human—they represent dignity and are the equal, inalienable, and universal rights of all human beings. In Canada, some of them are entrenched in the constitution through the *Canadian Charter of Rights and Freedoms*. The *Charter* sets out the rights and freedoms of people *only* in relation to government activities, which distinguishes it from human rights legislation that encompasses both private and public acts. Specifically, Section 15 of the *Charter* guarantees equality before the law and the right to equal protection and benefit of the law without discrimination based on race, disability, and analogous grounds. Laws (including municipal government bylaws) that are inconsistent with the *Charter* may be declared invalid and may lead to the payment of damages or other remedies.

Constitutional guarantees are not, however, absolute. *Charter* Section 1 places "reasonable limits [on rights] prescribed by law as can be demonstrably justified in a free and democratic society." Section 32 of the *Charter* declares that it applies to the legislature and government of each province in all matters within the authority of the legislature of each province. The Supreme Court of Canada decision *Godbout v. Longueuil* (*City*)[3] clearly established that municipalities are also subject to the *Charter*.

Because the *Charter* does not apply to non-governmental activities, interactions *between individuals and organizations* (such as those between employers or landlords) are governed instead by human rights legislation, such as the Alberta Human Rights Act. Provincial and territorial

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[1] *Alberta Human Rights Act*, RSA 2000, c A-25.5.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

[3] *Godbout v Longueuil (City)*, [1997] 3 SCR 844, 152 DLR (4th) 577 [*Godbout*].

human rights agencies therefore deal with matters like equal treatment without discrimination based on race, religion, age, or sexual orientation, according to the particulars of their human rights code. A salient fact here is that the rights and freedoms in the *Charter* are not always included in other human rights laws; thus, when certain rights are violated the remedies may not be the same. However, regional human rights legislation and the *Charter* may overlap when an act of government occurs in an employment context or when services, facilities, or accommodations are provided by the federal, provincial, or municipal government.

The Alberta Human Rights Act

The Alberta Human Rights Act has evolved over the years. The birth of the Act goes back to 1966 when it was passed by the Alberta legislature as a part of the nation-wide effort to promote awareness of human rights. It was intended as a comprehensive system for dealing with discrimination, but was understaffed, with only a single administrator. Fortunately, in 1972 the Province strengthened the legislation by acting on several fronts:

- Renaming the Act the Individual Rights Protection Act (IRPA)
- Creating a Human Rights Commission
- Hiring staff to administer it

Finally, in 2000 the IRPA was renamed the Alberta Human Rights Act (henceforth, AHRA).

It is noteworthy that the Act was contested in the late 1990s for continuing to exclude sexual orientation as a ground of discrimination. The Supreme Court of Canada ruled in 1998 that the Act's omission of sexual orientation violated the *Charter* and ordered the Government of Alberta to interpret its human rights legislation as if it included sexual orientation. The Act was eventually amended in 2009 to include protection against sexual orientation—a full 10 years after the Supreme Court ruling. The Act was amended again in 2015 to include gender identity and expression as further prohibited grounds of discrimination. It went through yet another amendment recently, following a court ruling in 2017, to add age as a prohibited ground of discrimination.

The Alberta Bill of Rights

The Alberta Bill of rights enacted in 1972 is unique. The Bill still exists alongside the AHRA while carrying overlapping rights. Except for the Canadian Bill of Rights and the Alberta Bill of Rights, other provinces and territories like Ontario and Quebec have combined their Bill and Act provisions into one Human Rights Act (or Code).

The Alberta Bill of Rights contains only rights and freedoms extended or guaranteed by the Crown to individuals (and not corporations). It is a mere statute which imposes limits on the Alberta legislature only and can be overridden by the Legislature as per the notwithstanding clause

in Section 2 of the Bill[4]. Usually, many of the rights and freedoms in bill of rights[5] are guaranteed in the *Charter* and/or provincial and territorial acts. However, the Alberta Bill of Rights provides for the right to "enjoyment of property", which is not covered by the Charter, placing the Bill at odds with the constitutional provision to Canadians. Also, the Alberta Bill does not have a limitation clause similar to that of in section 1 of the Canadian *Charter*. So, in theory, it grants more rights than the *Charter* does.

The Alberta Bill of Rights' lack of status as an ordinary non-entrenched legislation has resulted in a conservative approach to interpreting it[6]. The repeal of Communal Property Act is the only significant example, which was to restrict the growth of Hutterite communities, was based on its alleged violation of Alberta Bill of Rights. The courts have generally avoided giving priority to bill of rights in order to respect legislative supremacy[7] and hence interpreted them in such a way that they do not take priority over other statutes[8]. Some interpretations[9] of the Alberta Bill by the courts underscore Section 1a that allows the legislature to override the right of the individual to liberty, security of the person and enjoyment of property by due process of law.

Important human rights cases in Alberta

Alberta has some interesting case law on human rights. The following two Supreme Court cases in particular have had significant implications on the human rights debate in Alberta:

1. *Alberta vs. Hutterian Brethren of Wilson Colony*[10]

This case drew attention to what may constitute a justifiable limit on rights. Alberta requires all persons who drive motor vehicles on highways to hold a driver's licence. In 2003, the Province adopted a new regulation that made the photo requirement in licences universal. The Wilson Colony of Hutterian Brethren—that maintains a rural, communal lifestyle—objected on religious grounds to having their photographs taken. The Province proposed measures to lessen the impact of the universal photo requirement, but the Hutterites rejected the proposal. Unable to reach

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[4] Section 2 of the Bill - *Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding the Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.*

[5] Including Canadian Bill of Rights 1960, Saskatchewan Bill of Rights, 1947 and Alberta Bill of Rights 1972.

[6] Bowal, P. and Thul, D. Bill of Rights in Canada. (January 1 2013). Online < http://www.lawnow.org/bills-of-rights-in-canada/>

[7] Greene, I. 2014. *The Charter of Rights* and Freedoms 2nd ed. (Toronto: Lorimer). Legislative supremacy provides judges with a guide for ranking legal rules. If a judge encounters a conflict between a statute and a cabinet order, or between a statute and the common law, the statute takes precedence in both cases because legislatures, which create statutes, are superior to cabinets and the judiciary. If there is a conflict between two statutes, the more recent one takes precedence because a current legislature is legally supreme at any given time.

[8] Regina v. Big M. Drug Mart Ltd. Et al, [1985] 1 S.C.R. 295

[9] *R. v. Such,* [1992] A.W.L.D. 706, 132 A.R. 323; *Churgin v. Calgary (City),* [1988] 41 Alta. L.R. (3d) 112, 33 M.P.L.R. (2d) 247; and *Trelenberg v. Alberta (Minister of Environment),* [1995] A.W.L.D. 815, 31 Alta. L.R. (3d) 353

[10] *Alberta v Huttertian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

agreement with the Province, the members of the Wilson Colony challenged the constitutionality of the regulation, alleging an unjustifiable breach of their religious freedom under the *Charter*.

The Supreme Court of Canada upheld the regulation in a 4–3 decision. The majority of the Court justified the decision under Section 1 of the *Charter*. It said that the impugned regulation maintains the integrity of the driver's licensing system in a way that minimizes the risk of identity theft, which is clearly a goal of pressing and substantial importance, capable of justifying limits on rights. The Court concluded that the Province was entitled to pass the regulation[11].

2. Vriend v Alberta, [1998] [12]

This case highlighted that a legislative omission—not including sexual orientation as ground of protection—may be found to be a *Charter* violation. The case involved the dismissal of the teacher Delvin Vriend from a private religious college in Edmonton, The King's University College, because of his sexual orientation. The IRPA did not offer him an avenue to register a complaint since it did not include sexual orientation as a prohibited ground of discrimination. Vriend thus sought a declaration from the Alberta Court of Queen's Bench that the omission breached Section 15 of his *Charter* rights. The Queen's Bench found that the exclusion of sexual orientation as a protected ground of discrimination in the IRPA did violate Section 15(1) of the *Charter* and the provincial government could not argue the exclusion based on Section 1. The Alberta Court of Appeal then overturned the Queen's Bench decision, but the Supreme Court of Canada finally ruled in favour of Vriend in 1998. It concluded that "sexual orientation" must be read into the impugned provision of the Act[13].

Municipal Land Use Planning and Human Rights Legislation

Canada currently has little jurisprudence on constitutional rights and how they apply to municipal planning and property rights. While several cases[14] have dealt with human rights-related issues in a municipal context, they are too narrow or specific to point to general principles or strategies. Some[15]especially those which were decided before the pronouncement of the *Charter* found roots in the administrative law and generally in common law principles[16]. However, the four cases below were important for addressing rights and land-use regulations more broadly, leading to some notable outcomes:

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[11] *Ibid* at para 109.

[12] *Vriend v Alberta*, [1998] 1 SCR 493, 212 AR 237 [*Vriend*].

[13] *Ibid* at paras 179-180.

[14] see *Smith v Tiny (Township),* 107 DLR (3d) 483, 12 MPLR 141 [*Smith*]*; Milton (Town) v Smith,* [1986] OJ No 2748, 32 MPLR 107*; Alcoholism Foundation of Manitoba v Winnipeg (City),* [1990] 6 WWR 232, 49 MPLR 1*; Haydon Youth Services v Keaney (Town),* 36 OMBR 124, 1997 CarswellOnt 5666*; Advocacy Centre for Tenants Ontario v Kitchener (City),* 64 OMBR 283, 69 MPLR (4th) 119 [*Advocacy Centre*]; *Deveau v Toronto (City),* 47 MPLR (3d) 107, 47 OMBR 168 [*Deveau*].

[15] Such as *Re Drummond Wren* [1945], Noble v. Alley [1951], Bell v. R. [1979]

[16] The basis of common law systems is that court cases will be ruled primarily based on precedent.

- ***Re Drummond Wren*** [1945] O.R. 778 (Ont. H.C.)[17] —a Supreme Court decision voiding a restrictive covenant that blocked the sale of land to a Jewish person.
- ***Noble v Alley*** [1951] S.C.R. 64[18]—a Supreme Court decision voiding a covenant that blocked the sale of land to a person of colour.
- ***Bell v.* R.,** [1979] 2 S.C.R. 212[19]—a Supreme Court case distinguishing between the restrictions on *the use* versus *the users* of land. This case has been cited in many subsequent cases,[20] although it does not have quite as strong an impact in recent decisions.
- ***Congrégation des témoins de Jéhovah de St-Jérôme- Lafontaine v. Lafontaine [Village]***, 2004 S.C.J. No. 45[21] - A Supreme Court decision allowing a place of worship in a commercial zone when the congregation could not locate a suitable land in the appropriate zone.

Many municipalities across Canada, irrespective of size, or urban or rural status, face serious human rights challenges. Some of the areas where human rights have influenced land-use regulations concern use restriction, limitations on numbers, parking standards, separations distances, and age restrictions. The Supreme Court ruling in *Bell*, which clarified that municipalities could regulate the use but not the users of lands, had a major impact.[22] In fact, many municipalities have responded to these issues with appropriate changes to their zoning bylaws. However, in several other jurisdictions the issues remain very much alive.

Toronto, Sarnia, Kitchener, and Smith Falls, for example, have all been challenged, based on the definition of group homes and associated separation distances.[23] In *Smith*, the issue concerned the reference to "family" in seasonal dwellings, but the zoning restriction was upheld.[24] On the other hand, Delta, BC had a bylaw that allowed secondary suites only when occupied by family members—this was quashed by the Supreme Court of BC.[25] Similarly, the Human Rights Tribunal found Kelowna, BC's mayor guilty of violating the BC Human Rights Code when he refused to proclaim gay pride week in the city.[26] The City of Outremont recently placed a ban on

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[17] *Re Drummond Wren*, [1945] 4 DLR 674, [1945] OR 778 [*Re Drummond Wren*].

[18] *Noble v Alley*, [1951] SCR 64, [1951] 1 DLR 321 [*Noble*].

[19] *Bell v R*, [1979] 2 SCR 212, 98 DLR (3d) 255 [*Bell*].

[20] Smith et al. v. Township of Tiny, 1980 27 OR 690 (Div. Ct.); leave to appeal refused (1980), 29 OR (2d) 661n (Ont. CA).

[21] *Congrégation des témoins de Jéhovah de St-Jérôme- Lafontaine v Lafontaine (Municipality),* 2004 SCC 48, 2 SCR 650 [*Lafontaine*].

[22] *Bell, supra* note 12.

[23] The author's report to the City of Toronto was instrumental in getting recognition of the group inhabiting the group home and having separation distances between them removed from the bylaw. It also helped in introducing human rights in *Ontario's Public Policy Statement*.

[24] *Smith, supra* note 9.

[25] See *Tenants' Rights Action Coalition v Delta*, 1997 [1997] BCJ No. 2070, 151 DLR (4th) 729.

[26] *Okanagan Rainbow Coalition v Kelowna* (City), 2000 BCHRT 21, 37 CHRR D/122.

the construction of a new synagogue for the ultra-orthodox Jewish community. Ironically, this is the same religious community that won the court challenge[27] in 2001 against Outremont, which had banned them from erecting an *eruv*[28] during Sabbath.

Closer to home, in Calgary, Edmonton, and Red Deer, issues of locating group homes and supportive housing[29] have surfaced. In Edmonton, this author[30] argued against the pause on funding for supportive and affordable housing[31] in certain inner-city neighbourhoods, asserting that this was a violation of human rights. Calgary's issues have focused on the prohibition on secondary suites and livestock within the city limits. As well, the Calgary Water Safety bylaw was unsuccessfully challenged in the court as *ultra vires*[32] because it required wearing a personal flotation device in waterways, which was over and above the federal requirement. [33] As well, other alleged planning and human rights violations have come to light in Alberta cities:

- Edmonton's bylaw pertaining to a livestock operation within the City limits[34]
- The City of St. Albert's sign bylaw as a possible violation of the *Charter* right of freedom of expression[35]
- *Calgary (City) v. Hughes*, [36] which concerns the *Charter* challenge of a City of Calgary bylaw that prohibits keeping chickens in backyards.
- *R v. Pawlowski* [37] is another *Charter* challenge of a City of Calgary bylaw that prohibits any person from intervening in a parade or a special roadway event without permission.

These issues will be discussed in greater detail in later sections of this report.

Research Method

[27] *Rosenberg v Outremont (City),* [2001] RJQ 1556, 84 CRR (2d) 331.

[28] An eruv is a symbolic demarcation of an area enclosed by a wire that extends the private domain of Jewish households into public areas, allowing activities within it that are normally forbidden in public on the Sabbath.

[29] Supportive housing is a combination of housing and social services meant for those who may have health issues, including addiction or alcoholism, mental health, HIV/AIDS, or diverse disabilities.

[30] The author made a deputation to the Edmonton City Council on April 12th, 2016

[31] Although housing itself is not included as a human right, it has a place within the human rights discussion, especially given that it often applies to groups who are protected under the *Charter* or human rights legislation and who have trouble accessing affordable and safe housing.

[32] Legal term for going beyond one's legal power or authority.

[33] *Alberta v Latouche*, 2010 ABPC 166, [2010] 10 WWR 282.

[34] Dave Lazzarino, "Edmonton bylaw officers tell local sheep farmer to get rid of his 50 sheep or face a $500 per animal fine", *The Edmonton Sun* (6 August, 2015), online: <www.edmontonsun.com> [Lazzarino].

[35] Min Dhariwal, "St. Albert resident says she feels 'bullied' by mayor over lawn sign", *CBC News* (5 July, 2016), online: <www.cbc.ca>.

[36] *Calgary (City) v Hughes,* 2012 ABPC 250, [2012] AWLD 4346.

[37] *R v Pawlowski*, 2011 ABQB 93, [2011] 6 WWR 83 [*Pawlowski ABQB*]; *R v Pawlowski,* 2014 ABCA 135, [2014] 7 WWR 241 [*Pawlowski ABCA*].

This study used a mixed-methods approach, which entailed the following steps to ensure a broad scope:

- **Collect literature** on human rights and planning jurisprudence
- **Analyze the case law and the decisions** made by planning bodies in Alberta and other provinces
- **Conduct a legal analysis** to look for potential human rights violations in municipal development plans and zoning bylaws
- **Conduct semi-structured interviews** with human rights advocates and city officials of five large cities (Edmonton, Calgary, Red Deer, Lethbridge, and Medicine Hat) and five municipal districts in Alberta (Red Deer County, Parkland County, Grande Prairie County, Lethbridge County, and Clearwater County).
- **Interview key informants** in large cities outside of Alberta—Vancouver, Toronto, and Montreal—to contextualize and compare our findings

To implement these broad methodological tasks, we also undertook a four-step process that allowed us to identify which parts of the municipal zoning bylaw and plans have been contentious or could potentially violate the human and *Charter* rights. Specifically, we did the following:

1. **Reviewed past court decisions** of and any ongoing litigation at Alberta Human Rights Commission.
2. **Interviewed municipal officials to identify any potential issues they see and ascertain their views, awareness, and knowledge of human rights requirements and the *Charter***. We are bound by the University of Alberta's ethical obligations to keep our interviewees anonymous. It is for this reason we are extraordinarily careful in even identifying municipalities unless the issue had already surfaced in public through local or national media accounts.
3. **We analyzed parts of the municipal plans and bylaws** identified as potentially inconsistent with human rights. We applied two tests from a previously developed instrument[38]: the Meiorin test for the human rights analysis[39] and the Andrews test for the *Charter* analysis[40].
4. **To guide and oversee our work, we assembled an advisory committee** comprising Shirish Chotalia, QC, a lawyer based in Edmonton with expertise in human rights; Renee Vaugeois, a human rights advocate and Executive Director of the John Humphrey Centre for Peace and Human Rights; Dr. Raffath Sayeed, a human rights advocate based in Lloydminster; and Nicholas Ameyaw, a former staff member of *the* Alberta Human Rights Commission.

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[38] Sandeep Agrawal, "Balancing Municipal Planning with Human Rights: A Case Study" (2014) 23:1 CJUR 1; Toronto, City Solicitor's Office of Toronto, *Opinion on the Provisions of Group Homes in the City-wide Zoning By-Law of the City of Toronto. Submitted to City Solicitor's office of Toronto.*, by Sandeep Agrawal (Toronto: City, 2013), online: <http://www.toronto.ca/legdocs/mmis/2013/pg/bgrd/backgroundfile-56473.pdf>.

[39] *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3, 1999 10 WWR 1.

[40] *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143, [1989] 2 WWR 289.

Research Findings

We noticed possible concerns with respect to the *Charter* and human rights legislation violations in several areas, which are reviewed below.

Housing

Secondary suites

Restriction on developing secondary suites in certain parts of Calgary has been a perennial issue and has been repeatedly raised as a human rights issue by Calgarians, human rights advocates, and the Calgary Mayor himself. The human rights aspect resides in the ban on secondary suites restricting access to affordable housing. However, during our research we learned that the new Calgary City Council took an extraordinary step in December 2017 to make secondary suites a discretionary use across the city. Previously, these units had been prohibited, especially in areas zoned for low density, single detached housing residential districts, such as R-1, R-C1, and R-C1L, which constitute large sections of the city. This change from prohibited to discretionary use means that secondary suites can be handled by a normal development review process, without homeowners going to the City Council for approval. Further, this revised process saves the applicants from a drawn out and onerous approval process.

Supportive housing

Supportive housing is a type of housing which provides permanent, affordable housing to at-risk populations under the supervision of on-site staff. Restrictive provisions in municipal bylaws affect where supportive and affordable housing may be located and who can live there, thereby turning the restrictions into a human rights issue. In several large and small municipalities across the country, the most contentious issue concerns the placement of co-owned housing,[41] communal dwellings or cohousing,[42] rooming and lodging houses,[43] and transitional housing.[44] Some possible concerns in Alberta are related to the following:

Direct control zones

Direct Control (DC) are areas in which a municipality wishes to exercise control over the use and development of land or buildings. The uses in Calgary, such as emergency and temporary shelters, fall under the DC zones—which require the city council's approval. This practice adds time, costs, and potential barriers to services intended to most likely shelter *Charter*-protected

[41] Co-ownership is ownership of the same housing, jointly and at the same time, by several persons each of whom is privately bought a share in the right of ownership.

[42] Cohousing is a collection of private homes with shared common facilities, such as kitchen.

[43] A rooming or lodging house is a private house in which rooms are rented to persons unrelated to each other, for living or staying temporarily, who share kitchen and bathroom facilities.

[44] Transitional housing refers to temporary accommodations for displaced individuals and families, which also provide some supportive services.

groups, such as people with disabilities, persons of colour, or those with ethnic backgrounds. Thus, in Calgary, issues pertinent to DC land-use zones are of interest to housing advocates.

No specific zones

One of the key problems the Edmonton-based housing providers and advocates mentioned is that very few sites in the city are zoned appropriately to allow for the building of permanent supportive housing across the city. Since most of Edmonton's neighbourhoods are zoned for single detached housing, every multi-unit high density supportive housing project requires a rezoning process—and a rezoning exercise for affordable housing is a hard and lengthy struggle. In Edmonton, getting a "buy-in" from the community regarding supportive housing projects has also been a major challenge. At times, the projects get embroiled in protracted legal battles with the community, resulting in further consternation and mistrust between the parties involved.

No clear land-use definition

Another supportive housing issue our informants identified is the absence of land use class definitions of supportive housing, especially in Edmonton's zoning bylaw. The supportive housing use does not fit into any existing residential or other use definitions because of the unique nature of this housing and the combination of uses involved. As well, the building usually has independent units with a common kitchen and community spaces. As a result, several uses can be combined in a congregate living setting. Some permanent supportive housing programs also offer meals, peer support programs, case management, and social activities, along with addiction, mental health, or health/medical services.

From the zoning perspective, because permanent supportive housing does not have its own classification, it straddles a number of already-defined classes of use, including the following:

- apartment housing (because of the presence of multiple dwelling units)
- congregate living (because occupants share access to facilities such as cooking, dining, laundry, or sanitary facilities)
- special residential facilities like group homes and lodging houses
- extended medical treatment services such as hospitals, sanitariums, isolation facilities, psychiatric hospitals, and detoxification centres.

For neighbourhood residents, all these uses—when linked together in supportive housing—raise red flags. Similarly, for the City's development authority, these uses are exceptions to the rules prescribed in the City's zoning bylaw and thus warrant extra scrutiny.

The closest definition in Edmonton's zoning to supportive housing is "supportive community provision," which applies to apartment housing or group homes. This provision adds special criteria the project must meet, such as indoor common space and amenities, and outside landscaping, while incentivizing the development by allowing extra density and reduced parking. This use should also provide further additional benefits to developers to spur their interest.

Lacks strong legal ground

The housing advocates in Edmonton shared that it is difficult for them to challenge a rejection of a permanent supportive housing project in the courts on human rights or *Charter* grounds. They argued that this is partly because either the project does not yet exist, or no units are built at the time of making an application to the court. Above all, no actual real-life clients exist who are being discriminated against.

We have not been able to fully verify whether this argument holds any merit from a legal perspective and hence it remains an open question. However, a large body of case law exists on legal challenges to the municipal approval (or rejection) of development projects based on a myriad of reasons: for instance, lack of due process, error in the application of relevant law, and/or jurisdictional overreach (*ultra vires*).

If we look at the issue raised by the housing advocates from the "standing[45]" point of view, two recent court decisions—*Abbotsford (City) vs. Shantz*[46] and *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*[47]—are important to cite. Both cases affirm a *liberal and purposive* approach to public interest standing. Public interest litigation allows a person or organization to bring a case, notwithstanding their lack of direct involvement in the matter, or any infringement of their personal rights.

In the *Abbotsford* case,[48], the British Columbia/Yukon Association of Drug War Survivors and the British Columbia Civil Liberties Association were granted the public interest standing to challenge the constitutionality of city bylaws that endangered lives of homeless people. In the Downtown Eastside Sex Workers case, the court granted the *Downtown Eastside Sex Workers* case,[49] the standing to challenge a broad range of laws against prostitution, on the basis that they infringed several of their members' *Charter* rights. The society is an advocacy group whose objective is to improve the working conditions of the female sex workers in British Columbia. Noteworthy here, is that these two judgements could help the housing advocates' standing in mounting a legal challenge on behalf of their future clients.

Calgary appears to have a slightly better approach to such situations. Its zoning includes definitions for multi-residential, apartment-style housing, and residential care that takes the form of on-site health and social support. It also allows up to 10 units, with one parking stall for three residents on the site in all residential zones. The residential care is, however, a discretionary use in

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[45] "Standing" is the legal term for one's ability to bring a case in court against the conduct of another person.

[46] *Abbotsford (City) v Shantz*, 2014 BCSC 2385, [2015] BCWLD 1393 [*Abbotsford*].

[47] *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45, [2012] 2 SCR 524 [*Downtown Eastside Sex Workers*].

[48] *Abbotsford, supra* note 38.

[49] *Downtown Eastside Sex Workers, supra* note 39.

the residential building; the City development officer is the individual with the authority to approve this use, based on the compatibility, character, and other factors involved.

The advantage of having a zoning class of its own is that no barriers exist in constructing supportive housing. With such a unique zoning class, relevant projects would just need a development permit without going before council re-zoning. In Calgary, while this permit may be appealed by the neighbours, the overall process is not as onerous as it is in Edmonton.

Group homes

Group homes[50] are another form of supportive housing, the location of which has raised issues across Canada. Alberta municipalities are no exception to this. The two specific issues we have documented are situated in Red Deer and Edmonton.

Red Deer has struggled over whether to allow a special form of group home in a residential area for people who have very severe mental health issues—so much so that the residents of the facility need to be physically restrained for their own safety and the facility needs to be fitted with bullet-proof windows. This is an especially interesting example because the zoning actually allows the group homes right in the residential areas, but the occupants might not be appropriate for living in such a residential setting.

The zoning in Red Deer is partially a product of its history of having Michener Centre in the city since 1923. Michener Centre is a government-run residential facility for people with developmental disabilities. Furthermore, many social agencies look to locate these homes in Red Deer because of facilities and related supports that are already available in the city. Because this long institutional presence and other similar facilities, the City of Red Deer has had extensive experience in accommodating very complex special needs cases.

The Edmonton zoning has undergone its own set of changes in dealing with issues of group homes. In 1983, the City added the "limited group homes" zoning use-class. In 2010, in response to a *Charter* challenge, the City removed user characteristics from this definition, as well as the minimum separation distance (MSD) of 150m. But in 2012, zoning was amended only to add new neighbourhood- and block-level thresholds to limit the number of group homes in a neighbourhood.

The current zoning allows group homes in almost all residential zones, as either permitted or discretionary use. Two categories are allowed:

- *Limited group homes*, where a maximum of six residents is permitted, excluding on-site staff. Limited group homes are a permitted use in all residential zones.

[50] Group homes are residential facilities in which a small number of unrelated people in need of care, support, or supervision live together. They include correctional group homes, juvenile group homes, residential care facilities, and group foster homes. The focus here is on residential care facilities.

- *Group homes,* which could be a discretionary or permitted use, depending on the number of occupants. For example, a group home is discretionary in Low Density Zones (RF1-RF6), but is permitted in High Density Zones (RA7-RA9). A group home must have more than six residents or one resident per 60 m2 of lot size.

The Edmonton zoning does not use a MSD between group homes to restrict the number of group homes, which is, or was, the case in many other municipalities across Canada. To avoid overconcentration, it limits their numbers in a neighbourhood by the following three criteria:

1. A maximum of three facilities per 1000 residents of a neighbourhood
2. Two facilities on a block in a residential zone
3. 12 residents (discretionary use) and 30 residents (permitted use) in opposing block faces in a residential zone

It is not clear whether this kind of restriction on the number of group homes in a neighbourhood contravenes the human and *Charter* rights. Case law[51] suggests that overconcentration of a use can be reason for a municipality to establish certain thresholds.

Homelessness and tent cities

The tent city phenomenon is not new to Canadian cities. By some accounts, the size of tent cities has increased over the years in places like Vancouver and Toronto. Edmonton and Calgary have long grappled with the emergence of such squatters, along with illegal camping in parks, river valleys, and under city bridges. Both cities have seen a rise in such squatters. Housing advocates attribute this to rising homelessness coupled with a limited capacity of city-run emergency shelters and the limited supply of new supportive housing. As recently as 2017, several tent city residents were evicted from Calgary's Shaganappi Point Golf Course, just southwest of the downtown core, and from Edmonton's North Saskatchewan river valley.

Such evictions may contravene *Charter* rights, just as what happened in the Abbotsford[52] and Victoria, BC[53] cases. In those tent city cases, the courts said that the homeless have a constitutionally protected right under Section 7 of the *Charter* to erect a temporary shelter and sleep overnight in parks. However, neither of the two decisions affirm that Section 7 grants the homeless with a constitutionally protected right to adequate food or shelter, or any other necessities of life. Further, the cases do not impose any obligation on a municipality to provide individuals with adequate shelter.

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[51] See *Deveau, supra* note 9*; Advocacy Centre, supra* note 9.

[52] *Abbotsford, supra* note 38.

[53] *Victoria (City) v Adams* 2008 BCSC 1363, [2008] BCWLD 7764 [*Victoria BCSC*]; *Victoria (City) v Adams,* 2009 BCCA 563, [2009] BCJ No 2451 [*Victoria BCCA*].

These two decisions aligned with the Ontario Court of Appeal's decision in *Tanudjaja v. Canada (Attorney General)*,[54] which upheld a Superior Court of Ontario decision to strike an application brought under Section 7 of the *Charter.* This application sought to require the federal government and the Ontario government to provide for "affordable, adequate, accessible housing." Malik and Van Huizen's analysis of the decisions implies that Section 7 is concerned with whether government action deprives someone of their liberty rights, not with the government's obligation to fix the problem.[55]

Balancing rights of Charter-protected and other groups

The issue is how to balance the rights of an average Canadian with that of a *Charter*-protected group, such as Indigenous peoples, in combatting a serious social problem such as homelessness. A study participant from a rural county raised this matter. How does a municipality prioritize one group's needs over another, when providing accommodation and services? Alternatively, how does a municipality tackle a need that is more severe within the general population—in other words, one that is not specific to the *Charter*-protected group? One solution may lie in First Nations reserves and municipal governments collaborating so that together they can provide housing for both groups, rather than providing shelter exclusively for either group.

Adults-only residential building

The issue of adults-only buildings in Alberta municipalities is not a concern that a municipality has direct control over. Condominium bylaws are regulated through the provincial legislation Condominium Property Act. However, it deserves attention as it goes straight to the heart of a larger problem—access to housing. An example here pertaining to condominium building and human rights issues is a seminal Supreme Court of Canada decision[56] that upheld the right of Orthodox Jews to construct *succahs*[57] on their condominium balconies to celebrate the autumn festival of Succot under sections 2 and 15 of the *Canadian Charter* and section 3 of the *Quebec Charter*.

Adults-only residential buildings, including age-restricted condominiums, co-operative housing units, and mobile home sites, were legal in Alberta until the beginning of 2017, but that changed with an amendment to the AHRA to add age as a protective category in relation to the provision of goods, services, accommodation or facilities customarily available to the public (section 4), or in relation to tenancies (section 5) (effective January 1, 2018). In early January 2017, a Court of Queen's Bench order stated that the government had one year to add age as a prohibited reason for discrimination into specific sections of the human rights code. This order

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[54] *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852, 123 OR (3d) 161 [*Tanudjaja*].

[55] Ola Malik & Megan Van Huizen, "Is there Space for the Homeless in our City's Parks? A Summary and Brief Commentary of *Abbotsford (City) v Shantz*" (17 November, 2015), *ABlawg* (blog), online: < https://ablawg.ca/2015/11/17/is-there-space-for-the-homeless-in-our-citys-parks-a-summary-and-brief-commentary-of-abbotsford-city-v-shantz/>.

[56] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551

[57] Succah (variant spelling Sukkah) is a temporary structure built near a house or synagogue used during the Jewish festival of Succot for having meals.

followed an earlier ruling in March 2016, when AHRA was challenged on the basis that seniors were discriminated against when renting or selling. Interestingly, this challenge was not related to the buildings that prohibited families with children. However, thanks to the changes to the AHRA, the Act as of January 2018 prohibits landlords from discriminating based on age when renting, with the exception of seniors-only building, where the minimum age is set at 55 or older. The Act, however, allows 15 years to existing adult-only condos to transition out.

Is housing a human right?

The right to housing, specifically "adequate housing," is not considered a human right in Canada and is not included in the *Charter*. The result is that "there is no direct manner of enforcing the right to adequate housing" within the Canadian domestic legal system. Canada has nonetheless recognized that adequate housing is a fundamental human right by ratifying the *International Covenant on Economic, Social and Cultural Rights*[58] and other international conventions, such as the *Convention on the Rights of Persons with Disability*.[59] However, judicial reluctance and legislative silence currently do not support housing as a right.

Recently, the Prime Minister of Canada, Justin Trudeau, announced "Housing rights are human rights and everyone deserves a safe and affordable place to call home"[60]. However, it is not clear how his announcement might be implemented: Would the government amend the constitution to include housing in the *Charter*? Will the government develop some kind of national housing policy?

In addition to the *Abbotsford*[61], *Victoria*[62], and *Tanudjaja*[63] cases described earlier, the following cases are also illuminating when looking at supportive housing in Alberta through the human rights lens:

- ***Alcoholism Foundation of Manitoba v. Winnipeg (City)***[64]**.** The court held that municipal zoning bylaws regulating the location of group homes and requiring a minimum geographic separation between them were held to contravene Section 15 of the Charter and to be of no force or effect.

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[58] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS 993 (entered into force 3 January 1976) [*ICESCR*].

[59] *Convention on the Rights of Persons with Disabilities*, UNGAOR, 61st Sess, GA Res 61/106 (2007) [*CRPD*].

[60] John Paul Tasker, "Trudeau says housing is a human right – what does that mean exactly?", *CBC News* (23 November, 2017), online: <www.cbc.ca>.

[61] *Abbotsford, supra* note 38.

[62] *Victoria BCSC, supra* note 45; *Victoria BCCA, supra* note 45.

[63] *Tanudjaja*, *supra* note 46.

[64] *Alcoholism Foundation of Manitoba v Winnipeg (City),* [1990] 6 WWR 232, [1990] MJ No 212 [*Alcoholism Foundation*].

- ***Children's Aid Society of the Region of Peel v. Brampton (City)***[65]. The Court found the City of Brampton's bylaw restricting the number and location of foster and group homes with four or more foster children contravened Ontario's Planning Act to be invalid because it distinguished between related and non-related persons.
- ***The Neighbourhoods of Windfields Limited Partnership and the City of Oshawa v. Ronald Death et al.***[66] In contrast to other court decisions, this case stands apart because the court here determined that zoning based on how occupants relate to each other in their use of a building *is* a permissible use of the zoning power. Specifically, the court found that a "single housekeeping establishment," in the context of a zoning bylaw, generally means a typical single-family arrangement or similar basic social unit. This understanding is fundamentally inconsistent with residential properties being rented to groups of individuals bound together only by their common need for economical short-term accommodation.

Keeping livestock within the city limits

The issue of keeping livestock within the city limits—such as bees, chicken, sheep, or other animals—has come up often in the last few years as a human rights issue. The rules surrounding backyard chickens vary across the country, with only a few major Canadian cities allowing them. Keeping chickens in the backyard is legal in cities such as Vancouver, Victoria, Kelowna, Surrey, and Montreal, but Toronto, Ottawa, Calgary, Halifax, Winnipeg, Regina, and Saskatoon prohibit the practice. A few Alberta cities, such as Grande Prairie, Airdrie, Peace River, and Fort Saskatchewan allow the keeping of chickens within their municipal limits, although Edmonton and Calgary do not allow this.[67] Municipalities argue that keeping livestock in urban settings can present public health or cleanliness concerns.

A human and *Charter* rights case[68] related to keeping livestock arose in Calgary a few years ago. A city resident kept chickens in the backyard of his residential property, in violation of the City's bylaw that prohibits this practice. He was fined by the City for illegal urban livestock operations, but he challenged the bylaw, arguing that it affected his right to make decisions about what he eats, and what he grows or produces—in breach of his rights under Sections 2 and 7 of the *Charter* and human rights legislation. The City, on the other hand, argued that having a livestock (such as the chickens) within the urban area was considered a nuisance in terms of noise, odours, or accumulation of waste. The provincial court found the defendant guilty and ruled that the bylaw did not infringe upon the defendant's *Charter* rights. The issue of raising hens in backyards came

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[65] *Children's Aid Society of Peel (Region) v Brampton (City),* [2002] OJ No 4502, 118 ACWS (3d) 449 [*Children's Aid Society*]; See also *Children's Aid Society of Peel (Region) v Brampton (City),* [2003] O.J. No. 2004, 122 A.C.W.S. (3d) 1149.

[66] *The Neighbourhoods of Windfields Ltd. Partnership v Death,* 2009 ONCA 277, [2009] O.J. No. 1324 [*Death*].

[67] Brian Mckechnie, "What you need to know about backyard chickens", *Global News* (16 June, 2015), online: <www.globalnews.ca>.

[68] *Calgary (City) v Hughes*, 2012 ABPC 250, [2012] AWLD 4346.

to the city council for a vote in 2015, the second time in five years. However, the council again rejected the idea.

Also in 2015, an urban farmer in Edmonton faced a fine of $500 per sheep (or $25,000 for 50 sheeps), after a bylaw officer found him in contravention of the City's Animal Licensing and Control bylaw that prohibits keeping any livestock—which is any large animal over 10 kilograms (in case of Edmonton) —on residential property.[69] As of 2015, while keeping sheep is against city regulations, Edmonton allows residents to keep other creatures, including bees. A pilot project is currently underway to study the potential issues and concerns that are associated with keeping urban hens (consisting of a few homes that are being allowed to raise these birds). Limits are still in place for the number of pigeons or dogs one can keep at a property.

Freedom of expression and municipal properties

Charter Sections 1 and 15 have often been used in case law regarding human rights. Complainants first ask for relief from a bylaw under Section 15; Municipalities then can use Section 1 to show that a bylaw serves the public interest and safety, and hence a reasonable limit on rights and freedoms is justifiable. Increasingly, allegations of violations of complainants' fundamental freedoms are based on Section 2 (right to religion and peaceful assembly) or Section 7 (right to life, liberty, and security). When human rights legislation is the basis of a court challenge, most complaints address discrimination regarding goods, services, accommodation, or facilities.

Several *Charter* challenges have also taken up concerns with the use of public space by politically or religiously oriented signage or behaviour. Here are a few examples:

- **Calgary:** An Alberta Provincial Court decision[70] upheld the City's Traffic bylaw, which prohibits joining or interfering with a parade or special roadway event. Its violation is punishable by a maximum fine of $10,000 and costs, and up to 60 days imprisonment in default of payment. This bylaw was the basis for a street preacher to be charged with causing extreme noise and trespassing on the City's Stampede parade. It was arguably the most highly visible challenge brought to a city bylaw, based on *Charter* Section 2(b), with an allegation that the *Charter* rights of freedom to religion and freedom of expression were infringed upon. The court decision stated that such limitation is reasonable and demonstrably justified in a free and democratic society.
- **Edmonton:** This Alberta Queen's Bench 2016[71] decision required removal of an American Freedom Defence Initiative advertising sign that made explicit references to the honour killings of Muslim girls. Under *Charter* Section 1, the courts concluded that the City's policy imposed a reasonable limit that is justified in a free and democratic society.

[69] Lazzarino, *supra* note 27.

[70] *R v Pawlowski* 2014, ABPC 126, [2014] AWLD 3054.

[71] *American Freedom Defence Initiative v Edmonton (City),* 2016 ABQB 555, [2016] AWLD 4633.

- **Grande Prairie:** An Alberta Queen's Bench decision[72] supported the City's refusal to advertise a pro-life advertisement on the city buses.
- **Red Deer, Leduc, and Mountain View Counties:** According to one of the study participants, Red Deer, Leduc and Mountain View counties have teamed up to assert their authority to regulate and enforce their respective municipal bylaws on the type and number of signs along provincial highways, at the sections that pass within their municipal boundaries. The signage companies have claimed that the enforcement of municipal signage bylaws along the highway, which should be a provincial matter, violates their freedom of expression. At the time of writing this report, the dispute is still in the courts.

Safe injection sites

In 2011, the Federal Minister of Health refused to exempt a safe (or supervised) injection site[73] and its clients from drug possession laws. This was challenged under *Charter* Section 7, with the allegation that this position violated the life, liberty, and security rights of both health care workers and their clients. The Supreme Court[74] found the benefits to the health of the drug addicts far outweighed any detriment to the community or to society generally, and therefore ordered the exemption.

Municipal authorities must heed this decision when dealing with land-use decisions related to safe injection sites. If the public is not consulted or involved in siting such facilities, municipalities may run into tough opposition from their residents. For instance, the recent proposal by Edmonton City Council to place three of the four Health Canada-approved safe injection sites in the inner-city neighbourhoods came under fire from the residents of the Chinatown in the area. They termed the City's decision as "systemic ghettoization" of their neighbourhood, which they felt was already overrun by shelter beds and social agencies.[75] Late last year, the residents filed an application in the Federal Court seeking a judicial review of the federal health minister's decision to grant approval of safe injection sites in Edmonton. The application also complained about the flawed public consultation process and the concentration of the proposed sites in a particular area of the city.

Methadone clinics

The location of methadone clinics[76] is a persistent issue in many municipalities across Canada. In the Ontario, the Human Right Code covers a broad range and degree of disabilities, including

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[72] *Canadian Centre for Bio-Ethics v Grande Prairie (City)*, 2016 ABQB 734, [2017] 4 WWR 182.

[73] Safe or supervised injection sites are legally-sanctioned, medically-supervised facilities designed to reduce overdose mortality and communicable diseases through the sharing of needles. These sites provide a hygienic and stress-free environment in which individuals are able to consume illicit recreational drugs intravenously.

[74] *Canada (Attorney General) v PHS Community Services Society*, [2011] SCC 44, [2011] 3 SCR 134.

[75] Claire Theobald, "Inner-city communities protest concentration of supervised injection sites", *Edmonton Journal* (18 June, 2017), online: <www.edmontonjournal.com>.

[76] A methadone clinic is a place where a person who is addicted to opioid-based drugs, such as heroin or prescription painkillers, can receive prescription-based methadone as a method of treatment.

addictions.[77] On this basis, the Ontario Human Rights Commission advises several Ontario municipalities not to discriminate against people with addictions through restrictive zoning regulations for the methadone clinics; instead, the commission suggests including them as "medical clinics."

Relocating methadone clinics in the downtown areas of several Alberta municipalities, such as Lethbridge and Calgary, has become an issue as well. In Lethbridge, businesses in the area were opposed to the siting of such clinics because existing issues with the homeless and street drug users and with panhandlers and vandalism would be compounded by the clinics, which they argued would attract more opioid addictive users. However, zoning in Lethbridge did allow such clinics as a right.

Marijuana for medical purposes

Between 2013 and 2016, the Federal Marihuana for Medical Purposes Regulations (MMPR) required that medical marijuana be grown at licenced commercial facilities, a sharp departure from previous regulations. Users used to grow their own plants or get them from a third party who grew them for up to three prescription-holders.

The new regulations since 2016 responded to two court decisions[78] that stated the MMPR did not allow reasonable access to marijuana, which infringed on the right to security of the person as set out in Section 7 of the *Charter*.

Today, Health Canada (HC) requires applicants to meet existing municipal regulations pertaining to medical marijuana facilities. But if no such regulations exist, HC can still approve a facility without prior site approval from municipalities. Future marijuana grow operations could be seriously affected by either the absence of land-use regulation or by overly rigid municipal restrictions—currently the case in many Ontario municipalities—which could lead to human rights challenges.

The Alberta Urban Municipalities Association (AUMA) asked municipalities in its 2014 report to develop a specific land-use class to regulate the siting and operation of medical marijuana production facilities.[79] This is something that should be in place before the possibility of a production facility arises. They also suggested municipalities use their Community Standards Bylaw, which is intended to regulate the conduct of production facilities based on noise, odour, and unsightly appearance.

The Alberta Association of Municipal Districts and Counties (AAMDC) issued a similar cautionary note (2015) to Alberta's rural communities, warning their membership to proactively

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[77] See also *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (Ont. C.A.)

[78] *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602; *Allard v Canada*, 2016 FC 236, 263 ACWS (3d) 358.

[79] Alberta Urban Municipalities Association. *Municipal Regulation of Federally Licensed Medical Marijuana Production Facilities* (Edmonton: AUMA, 2014) online: <www.auma.ca/sites/default/files/Advocacy/Document_library/municipal_tools_for_marijuana_regulation_oct_14.pdf>.

address the siting of the facilities through land-use bylaws.[80] If a municipality does not have a land-use bylaw in place that specifically addresses medical marijuana facilities prior to a development application being submitted, municipalities may miss their opportunity to have a say in the location of such facilities. AAMDC drew attention to potential negative externalities the marijuana grow-ops carry with them, just like any other industrial operation. For example, if municipalities prefer that these facilities be situated in industrial-zoned areas rather than agricultural areas, they must develop bylaws that establish this.

Marijuana for recreational purposes

A recent decision by the federal government to legalize marijuana for recreational purposes added further complication to municipal land-use regulations, since marijuana can be grown at home as of July 1st, 2018. The federal decision as well as corresponding provincial legislative changes to the sale, purchase, possession and consumption of cannabis affect municipalities in several ways, including land-use management, business licensing, bylaws, public health and education, law enforcement, and human resource policies.

Both AUMA and AAMDC call for sufficient fire and building codes to regulate the growing of marijuana, particularly in residential properties. This is so that current and prospective property owners are protected from the adverse effects that home-growing can create. The Federation of Canadian Municipalities further suggests that land-use planning bylaws, such as MSDs, need to be put in place to limit cannabis dispensaries' proximity to schools and playgrounds.[81] They can also define and classify cannabis retail and lounge facilities distinctly from other zoning categories like general retail, where alcohol sales are permitted.

Definition of uses

We identified three possible issues with the zoning bylaws of the cities in our study, each discussed below. We employed the Meirion[82] and Andrews[83] tests to analyze zoning bylaws of the

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[80] Alberta Association of Municipal District and Counties. *Marijuana Grow Op and Medical Marijuana Facilities report released* (Nisku: AAMDC, 2015) online: <http://www.aamdc.com/attachments/article/882/07%2029%2015%20Marijuana%20Grow%20Op%20and%20Medical%20Marijuana%20Facilities%20Report%20Released.pdf>.

[81] Federation of Canadian Municipalities. *Cannabis Legalization Primer* (Ottawa: FCM, 2017) online: <https://fcm.ca/Documents/issues/Cannabis_Legislation_Primer_EN.pdf>.

[82] **The *Meiorin* test– the human rights analysis:** In *British Columbia Public Service Employee Relations Commission v. BCGSEU* (known as *Meiorin*), the Supreme Court of Canada used a three-part test to determine if, on a balance of probabilities (that is, "more likely than not"), a particular standard, requirement, factor, or rule is a *bona fide occupational requirement* (BFOR). Was it :

- adopted for a **purpose** rationally connected to the function being performed?
- adopted in an honest and **good faith** belief that it was necessary to fulfill that purpose or goal?
- **reasonably necessary** to accomplish that purpose or goal? This condition is met if it can be shown that accommodating individuals sharing the characteristics of the claimant is impossible without imposing *undue hardship*.The employer must consider all reasonable accommodation options.

[83] **The *Andrews* test– the *Charter* analysis:** The leading case on Section 15 is *Andrews v. Law Society of British Columbia*, in which the Supreme Court of Canada interpreted Section 15 in equality rights cases. In general terms, in order to prove discrimination—meaning that the challenged law is considered in breach of Section 15—a claimant must show that:

municipalities under study. Results of the analysis are as follows. At the time of our study, the City of Edmonton took the extraordinary step of comprehensively reviewing their zoning bylaws through a human rights lens and making necessary adjustments to ensure consistency with the *Charter* and the AHRA.

1. Reference to user characteristics (in general and use-class definitions)

We identified issues with the definitions of permanent supportive housing facilities in the municipal zoning bylaws of Grande Prairie County, Calgary, Red Deer, and Lethbridge. These definitions clearly identify *the users* of these facilities, but by regulating users rather than *the use* they could be construed as *ultra vires*. Hence, these definitions could be deemed incongruent with AHRA or Section 15 of the *Charter*. Some excerpts of the bylaw are below (the red text highlights potentially objectionable phrases):

a. *"Group Care Facility" means a facility which provides residential accommodation for up to seven persons, most or all of which are handicapped, aged, disabled, or in need of adult assistance and who are provided service or supervision, excluding foster homes. [Grande Prairie County]*

b. *"Social Care Facility" means:*

(a) places of care for persons who are aged or infirm or who require special care or a day care facility;

(b) a building or part of a building, other than a home maintained by a person to whom the children living in that home are related by blood or marriage, in which care, supervision or lodging is provided for four (4) or more children under the age of 18 years, but does not include a place of accommodation designated by the Minister of Family and Social Services as not constituting a child care institution; or

(c) a hostel or other establishment operated to provide accommodation and maintenance for unemployed or indigent persons. [Grande Prairie County]

c. *"Addiction Treatment" is defined as a use where one or more persons with alcohol, drug or similar addiction issues live under the care or supervision of professional health or counselling care providers. [Calgary]*

d. *"Assisted Living Facility" means a building, or a portion of a building operated for the purpose of providing live-in accommodation for six or more persons with chronic or declining conditions requiring professional care or supervision or ongoing medical care, nursing or homemaking services or for persons generally requiring specialized care. [Red Deer]*

- The law directly or indirectly imposes on them a disadvantage compared to other comparable persons,
- The disadvantage is based on a ground listed in or analogous to a ground listed in Section 15, and
- The disadvantage constitutes an impairment of the human dignity of the claimant.

e. *"Group Home" means development using a dwelling for a residential social care facility providing rehabilitative, and/or supportive care for 4 to 10 persons who, by reason of their emotional, mental, social or physical condition, require a supervised group living arrangement. [Lethbridge]*

2. Restrictions on who can occupy which type of housing

Zoning here considers who can live in which type of housing. The following example is from Red Deer, which could potentially violate the *Charter* and the AHRA because of the nature of restrictions placed on the type of individuals who can occupy garden suites:

> *Garden Suites residence is restricted just to "elderly parents" or "cognitively impaired adult" of the registered owner. [Red Deer]*

Minimum separation distance

Zoning bylaws that take up this issue are concerned with prescribing MSDs to dissuade concentration of one type of use, especially when it is for a permanent supportive housing. We noticed the use of MSDs for certain controversial uses, such as adult mini-theatres and liquor stores. It might be challenging for municipalities to defend MSDs based on a planning rationale, as many seem to have been in place based on morality and social concerns at the time when the bylaw was enacted—and which may be less relevant today. Some examples are:

a. *A Mini-Theatre shall be located only on a Site with a minimum radial separation distance of 150.0 m or more from the property line of any Site zoned residential, any Site with an existing Public Education Services or Private Education Services, any Site with an existing Religious Assembly, Public Park or other Use that may have a playground as an ancillary element. [Edmonton]*

b. *An Adult Mini-Theatre must be located in a building at least 460m from the property line of any parcel that: (i) is designated as a residential district; (ii) has an existing School Authority—School or School—Private; (iii) has a Place of Worship; (iv) has a Park or Natural Area; (v) has any use that may have a playground as an element of the use. [Calgary]*

c. *An Adult Establishment must not be located closer than 250 m to the nearest Dwelling, Recreation Facility, Education Institution, Elementary School, Junior High School, High School, Place of Worship, Day Care Facility, Community Centre or Park. [Medicine Hat]*

Community standards bylaws

Community Standards Bylaws in Alberta municipalities have a long and contentious history. These bylaws attempt to regulate individuals' behaviour and activities in public spaces, based on local standards of social and moral values, and issues related to maintenance of private properties. They can regulate noise, graffiti, panhandling, littering, and loitering; they also place limits on public assembly. Critics argue that sections of the bylaws, such as those that put limits on peaceful

assembly, go against the *Charter*, which allows "freedom of peaceful assembly" as a fundamental freedom assured to Canadians.

These bylaws came to public attention when a southern Alberta municipality, the Town of Taber, enacted a bylaw that implemented a curfew period during which minors are not allowed in public places unaccompanied by an adult. The bylaw puts strict restrictions on acceptable behaviour in public places, such as prohibitions on spitting, assembly, and panhandling.

Through our research we discovered that it is not just Taber that developed this bylaw: A few other Alberta municipalities have similar bylaws in their books, long before Taber enacted its own. We located sections in municipalities such as City of Red Deer, Strathcona County, and the Town of Ponoka,[84] which could lead to potential human rights violations. As an example, the following is an excerpt from the Community Standards Bylaw 3383/2007 of the City of Red Deer:

> *No person shall be a member of an assembly of three or more persons in any public place or any place to which the public is allowed access where a peace officer has reasonable grounds to believe the assembly will disturb the peace of the neighbourhood, and any such person shall disperse as requested by a peace officer.*

Of note is that the enforcement of these bylaws is not widespread, which begs the question of whether these bylaws are effective or relevant today.

Non-availability of legal aid services

A few respondents in our study complained about a lack of human rights legal aid services in Alberta, making it difficult for them and members of the public to pursue a case on human rights grounds. These individuals essentially equate this situation with denying justice to those who have encountered discrimination.

The Alberta Government has the Property Rights Advocate Office in the Ministry of Justice and Solicitor General. While the Office does not provide direct assistance for property rights disputes, it documents concerns about individuals' property rights affected by various factors, including municipal planning and zoning decisions, and communicates these concerns to the provincial government. The Property Rights Office could be a place to raise issues that result from the intersection of human rights and municipal planning and zoning. However, because of the lack of direct assistance and potentially lengthy delays in government action, the Office may not be the most effective means to provide immediate remedies to those who think they are discriminated against.

Alberta is also missing community-based civil society organizations such as the Pivot Legal Society in BC. Pivot works in partnership with marginalized people and grassroots organizations to challenge legislation, policies, and practices that undermine human rights. For example, their legal team defended the constitutional rights of sex workers by successfully challenging federal

[84] Strathcona County and Town of Ponoka are outside the scope of the study.

legislation that puts their lives in danger.[85] They were also a part of the *Abbotsford* case[86], which helped homeless people secure their right to shelter themselves and make equal use of public space.

We thus advocate for a service in Alberta similar to the Ontario Human Rights Legal Support Centre. Ontario's legal centre is a Government of Ontario-funded agency that provides direct legal services to individuals who have experienced discrimination. This centre provides advice on human rights inquiries, assists individuals to file human rights applications, and represents applicants at mediations and hearings at the Human Rights Tribunal of Ontario.

Conclusion

Our findings show that human rights issues in Alberta municipalities have evolved over a decade or so, but are on the rise in the last few years. We observed two factors in particular that have an effect on how human rights are affecting land-use planning at the municipal level in Alberta:

1. Increasing challenges to municipal bylaws based on Sections 2, 7 and/or 15 of the Charter and court decisions in favour of protecting these rights.
2. New federal legislation or amendments to existing federal regulations, some emerging as a result of the court rulings arising out of protecting human and Charter rights.

These two factors have prompted municipalities to review, revise, or even rescind existing bylaws, create new land-use classes, or revise existing zoning bylaw to accommodate new resulting land uses.

As new federal legislation influences land-use planning at the municipal level in an unprecedented way, it gives rise to a new set of human rights issues, such as locating safe injection sites and cannabis dispensaries in the municipal fold. These issues are becoming part of the perennial and outstanding issues of secondary suites, user characteristics, minimum separation distances, and keeping livestock within the city limits. All of this makes human rights—now more than ever before—a critical issue at the municipal level.

Nevertheless, over the years, both the Province and municipalities have made significant progress on the human rights front. For instance, the Province revised the AHRA to include age (in relation to the provision of goods, services, accommodation or facilities), sexual orientation, and gender identity, as well as expression as grounds of discrimination. Municipalities in Alberta have amended their bylaws to bring them in line with human rights legislation and the *Charter*. Cases in point include (a) in Calgary, removing prohibition on secondary suites in residential areas, and (b) in Edmonton, changes to the group homes use-class, commencement of pilot study on backyard chickens and the review of zoning bylaw that reflect a fresh human rights perspective. Most potential human rights and *Charter* issues in Alberta still involve the prohibition or exclusion

[85] *Bedford v Canada (Attorney General)*, 2013 SCC 72, [2013] 3 SCR 1101.

[86] *Abbotsford, supra* note 38.

of definitions of various forms of supportive housing, restrictions on their locations, and the problematic inclusion of user characteristics in the zoning class definitions.