


BRITISH COLUMBIA LUNG ASSOCIATION



RADON AND RENTERS: Current BC Law and Potential for Reform

**Healthy Indoor Environments,
Legal Brief No. 5**

This project was made possible by funding from:

**Author: Noah Quastel LLB LLM PhD
Director, Law and Policy,
Health Indoor Environments,
BC Lung Association**

January 30, 2021



Summary

Since 2007 Health Canada has recognized indoor radon as a significant health problem, setting guidelines for indoor concentrations at 200 Bq/m³. Radon is the leading cause of lung cancer after smoking but it is easily tested and fixed. This document examines British Columbia laws that might protect renters from elevated radon or offer redress where elevated radon levels are found in rental accommodation.

We examined the *Residential Tenancy Act*, *Occupiers Liability Act*, *Public Health Act*, municipal Standards of Maintenance Bylaws and alternatives elsewhere. It is our view that current general provisions on good repair of residential tenancies are sufficient for renters to assert their rights with landlords or seek redress at the Residential Tenancies Branch. Public health officers are able to assist tenants in testing for radon and may issue orders against landlords where appropriate. There is still room for improvement, and we suggest regulatory, legislative, and policy change that could better protect renters.

We suggest that regulations to the *Residential Tenancy Act* and *Public Health Act* could better specify health and safety standards for renters, including specifying that residential accommodation comply with Health Canada's Radon Guidelines. We also suggest British Columbia move towards more comprehensive radon policy which could ensure subsidies and incentives for renters and landlords to test and mitigate. Part of a good radon policy is establishing a system of mandatory professional certification of radon mitigators to ensure any radon mitigation work, in rental accommodation or elsewhere, is up to high standards.

Table of Contents

1. INTRODUCTION	3
a. RADON IS THE #1 CAUSE OF LUNG CANCER IN NON-SMOKERS	3
b. THE UNIQUE CHALLENGES OF RADON FOR RENTERS	5
2. RESIDENTIAL TENANCIES LAW.....	6
a. MAINTENANCE AND GOOD REPAIR OBLIGATIONS	6
b. QUIET ENJOYMENT	8
c. TENANTS IN STRATA UNITS.....	9
d. PRECEDENT AND REVIEW	11
e. INVESTIGATION AND ENFORCEMENT POWERS	11
3. STANDARDS OF MAINTENANCE	12
4. PUBLIC HEALTH AND HAZARDS	13
5. OCCUPIERS' LIABILITY.....	16
6. PROPERTY MANAGERS DUTIES	20
7. ALTERNATIVES ELSEWHERE.....	20
8. CONCLUSION.....	22
a. HOW RENTERS AND HOUSING ADVOCATES CAN ACT NOW	22
b. POTENTIAL FOR REFORM	22

1. Introduction

a. Radon is the #1 Cause of Lung Cancer in Non-Smokers

Radon gas is a naturally occurring radioactive gas resulting from the breakdown of uranium in rock and soil. When radon is released from the ground and into outdoor spaces, it is diluted and is not dangerous. However, radon also enters indoor spaces. Radon is invisible, odourless, and tasteless and can seep into homes and other enclosed spaces through any opening where the building contacts the ground (i.e. cracks in the foundation and walls, floor drains, window casements, et cetera).¹ Radon creates ionizing radiation which can break down DNA in lung cells when it is breathed in.

In Canada, radon exposure is the second leading cause of lung cancer after smoking, and accounts for an estimated 16% of lung cancer deaths.² An estimated 29,800 Canadians contract lung cancer each year. In 2020, it was estimated that approximately 21,200 Canadians would die from lung cancer, accounting for 25% of all cancer deaths for that year.³ Radon causes approximately 3,360 deaths per year, or slightly more than one in 100 deaths in Canada.⁴

Because uranium is everywhere in the Earth's crust and radon comes from uranium, radon is found in almost all homes in Canada. Radon is measured in becquerels per metre (Bq/ m³). Health Canada has set a National Radon Guideline of 200 Bq/m³ for homes and other regularly occupied spaces.⁵ An estimated 7% of homes in Canada have radon levels above 200 Bq/m³. Our current knowledge categorizes some areas of BC— the Kootenays, Okanagan and Northern region— as well above the national average. In Castlegar, for instance, a sample of 1000 homes found 44% had levels above 200 Bq/m³ and in one subdivision 32 out of 33 homes had unacceptably high radon levels.⁶

Radon is easy to test for using home testing kits that sell from \$20 to \$50. If elevated radon levels are found, reducing radon levels in a home ('mitigation') is effective and relatively inexpensive—professional mitigators can put a system in place in a single day and charge an average of about \$2,900, including materials, per home. Radon

¹ Government of Canada, 2020. Radon: About. Available at <https://www.canada.ca/en/health-canada/services/health-risks-safety/radiation/radon.html>.

² Chen, J., Moir, D. and Whyte, J., 2012. Canadian population risk of radon induced lung cancer: a re-assessment based on the recent cross-Canada radon survey. *Radiation protection dosimetry*, 152(1-3), pp. 9-13.

³ Canadian Cancer Society, 2020. Lung Cancer. Available at <https://www.cancer.ca/en/cancer-information/cancer-type/lung/statistics/?region=pe>.

⁴ Based on Statistics Canada measures of 283,706 deaths in 2018. see Deaths by Month. Available at <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310070801>.

⁵ Health Canada, 2009. Government of Canada Radon Guideline. Available at <https://www.canada.ca/en/health-canada/services/environmental-workplace-health/radiation/radon/government-canada-radon-guideline.html>

⁶ Donna Schmidt Lung Cancer Society, 2017 Lessons from Castlegar. Presented to the Canadian Association of Radon Scientists and Technologists Annual Conference available at <https://www.carst.ca/resources/Conference%202017/Presentations%202017/Radon%20Presentation%20CARST%202017%20-%20castlegar.pdf> Accessed July 7, 2020.

BC Lung/HIE Radon and Renters

mitigation is a relatively inexpensive way to avoid disease and save lives.⁷ Despite these statistics, public awareness remains low and a vast majority of British Columbian households (92%) have not tested for radon.⁸

Law and policy to protect people from elevated radon has been slow to develop in Canada. The federal government has a National Radon Program which has made strides in building awareness and developing guidance materials. However, provinces maintain jurisdiction over key areas under which radon action falls—buildings, public health, and air quality. British Columbia has taken some limited steps in addressing radon, including testing some government buildings and making changes to the *BC Building Code* in areas known to have radon problems.⁹ One Health Authority has ordered testing in childcares, making use of provisions in the *Community Care and Assisted Living Act* which empower medical health officers to attach terms and conditions to a license.¹⁰

The British Columbia Real Estate Association and Real Estate Council of British Columbia have moved to consider radon a latent defect. Radon is now on the property disclosure statement, the topic of special guidance to real estate licensees and the subject of educational courses for real estate agents.¹¹ Overall, however, there remains an urgent need to have more homes in the province tested and to address high radon levels in the existing building stock. This stands in contrast to many US states which have specific radon legislation, and the European Union where the Basic Safety Standards Directive requires member states to engage in radon planning.¹² As we will discuss further below, BC has no explicit laws, regulations or policies to address the unique problems renters

⁷ Health Canada, 2012. Cross Canada Survey of Radon Concentrations in Homes, Final Report. available at <https://www.canada.ca/en/health-canada/services/environmental-workplace-health/reports-publications/radiation/cross-canada-survey-radon-concentrations-homes-final-report-health-canada-2012.html> accessed January 20, 2020.

⁸ The figure is for households not in apartments. See Statistics Canada, 2017. Knowledge of radon and testing Table: 38-10-0086-01.

⁹ *BC Building Code*, s 9.13.4. Soil Gas Control. available at <http://www.bccodes.ca/building-code.html> accessed July 7, 2020. Also see Note A-9.13.4. Soil Gas Control. see also Table C-4 Division B Appendix C, for Locations in British Columbia Requiring Radon Rough-Ins. for history of radon control see Government of British Columbia, 2014. Information Bulletin, Building and Safety Standards Branch. New Radon Rough-in Requirements. Information Bulletin, Building and Safety Standards Branch, online: https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/construction-industry/building-codes-and-standards/bulletins/b14-07_new_radon_rough-in_requirements.pdf Accessed July 7, 2020. BC Government, 2018. Building and Safety Standards Branch. Information Bulletin No. B18 – 04 August 24, 2018. available at https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/construction-industry/building-codes-and-standards/bulletins/b18-04_2018_edition_of_the_bc_building_code.pdf accessed July 7, 2020.

¹⁰ For a fuller analysis see Quastel, N., Siersbaek, M., Cooper, K. and Nicol A-M. 2018. Environmental Scan of Radon Law and Policy: Best Practices in Canada and the European Union. Toronto and Burnaby: Canadian Environmental Law Association and CAREX Canada available at https://cela.ca/wp-content/uploads/2019/07/Radon-Policy-Scan-Full-Report-with-Appendices_0.pdf accessed July 7, 2020.

¹¹ Devji, S. 2020. Live Online Course and FAQ Created for REALTOR® Education About Radon Gas. British Columbia Real Estate Association. Available at <https://www.bcrea.bc.ca/education/live-online-course-and-faq-created-for-realtor-education-about-radon-gas/> accessed July 30, 2020; Real Estate Council of British Columbia, 2020. Radon Precautions for Real Estate Professionals. Available at <https://www.recbc.ca/professionals/knowledge-base/guidelines/radon-precautions-real-estate-professionals> accessed September 8, 2020.

¹² For US laws, see Environmental Law Institute, 2019. Database of State Indoor Air Quality Laws. Database Excerpt: Radon Laws. available at https://www.eli.org/sites/default/files/docs/2019_radon_with_cover_boldded.pdf accessed January 20, 2020. European Union Basic Safety Standards Directive.96/29/Euratom. Available at <http://www.ensreg.eu/nuclear-safety-regulation/eu-instruments/Basic-Safety-Standards-Directive> accessed January 20, 2020.

face around radon. However, broad provisions about rental units being ‘suitable for occupation’ and general liability rules around safety mean there are ways renters can be protected in BC. We found that many countries and sub-national states around the world have radon policies with special protections for renters and BC could introduce significant legislative changes to better protect renters.

b. The Unique Challenges of Radon for Renters

From a public health perspective, radon prevention should help as many people as possible. A key goal of public health policy is to take measures to reduce the risk of disease and prevent new cases of chronic disease from occurring. The risk from indoor radon exposure occurs largely in homes.¹³ Almost a third of dwellings (32%) in British Columbia are rented.¹⁴ Rental rates are somewhat higher in the Lower Mainland, where radon is less of a problem, but there are significant percentages of dwellings that are rentals in high radon-prone regions, such as Kootenay-Boundary (20%), Central Kootenay (23%), East Kootenay (22%), Fraser-Fort George (including Prince George) (27%), Central Okanagan (including Kelowna) (27%), Okanagan Similkameen (26%).¹⁵ Health equity is another important principle of public health. Health equity means that all people can reach their full health potential and should not be disadvantaged from attaining it due to their social position or other socially determined circumstances (such as gender or race).¹⁶ Improving the health outcomes of the whole population often requires focusing on the needs of less advantaged populations,¹⁷ many of whom rent rather than own their homes.¹⁸

Radon cannot be detected in the normal inspection process when renters look for homes. BC’s *Residential Tenancy Act* provides for a formalized process of inspections with the landlord and tenant walking through the unit, noting any deficiencies and both signing a condition inspection report.¹⁹ Details of what needs to be addressed in the inspection are specified in the *Residential Tenancy Regulation*²⁰ but these cover topics

¹³ Chen, J. 2019. Risk Assessment for Radon Exposure in Various Indoor Environments. *Radiation Protection Dosimetry*, 185,2, 143–150.

¹⁴ Statistics Canada, 2020. Data tables, 2016 Census: Dwelling Condition (4), Tenure (4), Period of Construction (12) and Structural Type of Dwelling (10) for Private Households of Canada, Provinces and Territories, Census Divisions and Census Subdivisions.

¹⁵ See Statistics Canada, 2020 *ibid*.

¹⁶ c.f. Ontario Ministry of Health and Long Term Care, 2018. Ontario Public Health Standards: Requirements for Programs, Services, and Accountability available at http://www.health.gov.on.ca/en/pro/programs/publichealth/oph_standards/docs/protocols_guidelines/Ontario_Public_Health_Standard_s_2018_en.pdf accessed January 20, 2020 at p. 20.

¹⁷ Powers, M., Faden, R.R. and Faden, R.R., 2006. *Social justice: the moral foundations of public health and health policy*. Oxford University Press, USA. at p. 82).

¹⁸ Phipps, E. 2018. *Towards Healthy Homes for All: RentSafe Summary and Recommendations*. Rentsafe Canada. Available at https://rentsafecanada.files.wordpress.com/2018/10/rentsafe-summary-report_final.pdf.

¹⁹ *Residential Tenancy Act* S.B.C. 2002, c. 7, s. 23.

²⁰ *Residential Tenancy Regulation*, BC Reg 477/2003, s.20.

BC Lung/HIE Radon and Renters

such as window coverings or appliances that landlords and tenants can see on short term inspections. Radon, being invisible, cannot be seen.

Renters do not have the same incentives as homeowners to fix their homes. The problem with ‘split incentives’ is common in many aspects of landlord-tenant relationships. If a landlord buys and supplies components of a home, they have an incentive to do so at the lowest possible cost. Alternatively, the tenant has various incentives (such as having efficient energy heating and radon mitigation) but no control over the means to do so. There can also be a time element. Tenants often have no idea for how long they will reside in their current location. This detracts renters from investing in upfront capital cost investments into their units. Low-income tenants in private housing are particularly prone to these problems. A clear solution here is for the government to impose quality standards or provide incentives.²¹

Renters often are relatively powerless compared to landlords. Many municipalities in British Columbia have low vacancy rates, meaning it is difficult for renters to find new accommodation. Renters often have to bear the brunt of poor treatment from landlords because they would otherwise have nowhere to live. Renters will have little ability to influence landlords in the absence of legal requirements.

For renters to be protected from radon there needs to be special rules to ensure they are informed about radon levels, or objective health and safety standards that ensure landlords fix the problem.

2. Residential Tenancies Law

a. Maintenance and Good Repair Obligations

Residential Tenancies legislation in British Columbia –the *Residential Tenancy Act*--covers most rental situations, including government owned social housing.²² The *Act* provides that

- s. 32(1) A landlord must provide and maintain residential property in a state of decoration and repair that
- (a) complies with the health, safety and housing standards required by law, and
 - (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Some landlords may accept their obligations under the *Residential Tenancies Act* and seek to comply with the law. Alternatively, tenants can make an application to Residential Tenancy Branch (RTB) for a determination as to the law and apply for an order that the

²¹ Bird, S. and Hernandez, D., 2012. Policy options for the split incentive: Increasing energy efficiency for low-income renters. *Energy Policy*, 48, pp.506-514.

²² For exceptions see *Residential Tenancy Act*, SBC 2002, c. 78, at s. 4.

BC Lung/HIE Radon and Renters

landlord rectify the situation (s. 62(4)) or end the tenancy earlier (s 68(2)(a)). As well a tenant can apply to have rent reduced to reflect damages (s. 67) or to redirect amounts towards the cost of repairs (s 62(4)b). The *Residential Tenancy Act* also provides for emergency repairs, allowing a tenant to initiate repairs and later deduct this from rent (s. 33). However high radon is seldom viewed as an urgent issue, nor is it one of the specific listed areas of repairs (for example, major leaks in pipes or defective locks).

It is likely, but not certain that the RTB would consider Health Canada's Radon Guidelines as 'law' as per 32(1)(a); but more certain that it would fit within the broader language of "suitable for occupation" under 32(1)(b). There are no decisions on point in BC but courts and/or ruling bodies in other provinces with similar legislation have issued decisions where radon has been found to be problematic.

In Ontario, the *Residential Tenancies Act*, 2006, SO 2006, c 17 has a provision almost identical to that of BC:

s. 20(1): A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.

In the Ontario case of *CET-67599-17 (Re)*²³ the tenant applied for an order determining that the landlord failed to meet the maintenance obligations under the *RTA*, or failed to comply with health, safety, housing or maintenance standards. The 78-year-old tenant was not living in the unit at the time of application as he was undergoing cancer treatment and living with relatives. He argued that he experienced seizures because of the condition of the unit and claimed several repair issues. He submitted an Inspection Report from a Property Inspections company that showed there was no vapour barrier in the unit's crawlspace and that this may have led to radon gas entering the home through the subflooring. The Board held that evidence demonstrated structural issues with the roof and crawlspace including the risk of radon gas permeating the rental unit. Therefore, a 100% rent abatement was warranted until repairs were complete, including ensuring radon did not permeate the unit.

As well, there are series of cases before Québec's Régie du logement that deal with radon. Section 1913 of the *Quebec Civil Code* provides that

s. 1913: The lessor may not offer for rent or deliver a dwelling that is unfit for habitation. A dwelling is unfit for habitation if it is in such a condition as to be a serious danger to the health or safety of its occupants or the public, or if it has been declared so by the court or by a competent authority

In the 2000s and 2010s there were a number of cases before the Régie du logement where radon was recognized as being an issue in principle, but the board fell short of

²³ *CET-67599-17 (Re)*, 2017 CanLII 60362 (ON LTB).

BC Lung/HIE Radon and Renters

deciding in favour of the renter.²⁴ However, the renter was successful in *Vanderwerf v. Dolan*, 2019 QCRDL 37417. Using a home radon testing device, the tenant measured high radon, left the apartment and went to the Régie seeking moving costs, damages and release from a long-term lease. The tenant provided a lab report from the testing device showing 699 Bq/m³ which was not contradicted. He was awarded \$1,000 in moral damages for troubles and inconveniences and \$2,000 in moving expenses.

On the basis of these decisions, it appears highly likely that British Columbia's Residential Tenancy Branch would treat elevated radon as something landlords need to fix.

Other cases from Quebec suggest that tenants should be careful in how they obtain radon tests.

- (i) In *Pickard c. Arnold* (2015)²⁵ the plaintiff asked the Régie for damages of \$7,304.70 as rent reduction given the presence of radon in the dwelling. The landlords, however, hired a consulting engineer who concluded that the measurement period used by the tenant was too brief to draw a conclusion as to an excess of radon. The Régie Tribunal denied the plaintiff's claims based on the expert's findings.
- (ii) In *Bramley c. Vanwynsberghe* (2017)²⁶ there were conflicting test results between the landlord and tenant. While the tenant's tests showed results above Health Canada's Radon Guideline limit, the landlord's tests came out below 200 Bq/m³. Faced with contradictory evidence, the administrative judge concluded that the level of radon was not particularly significant.

At the minimum, tenants need to ensure they follow proper guidelines for testing for radon, as shown in documents such as Health Canada's *Guide for Radon Measurements in Residential Dwellings (Homes)*.²⁷ However, tenants should also be mindful that an unscrupulous landlord could tamper with a radon test, such as through using a home testing device but moving it to a drafty location, or purposefully placing it near an open window. If a tenant suspects that there may be a 'battle of evidence' the best recourse is to have professional testing done, which can cost a few hundred dollars.

b. Quiet Enjoyment

A further provision of the *Residential Tenancy Act* states that a tenant is entitled to quiet enjoyment of their unit (s. 28). This is a common law principle and exists prior to and

²⁴ *Duff Conacher c. National Capital Commission*, file 22-051117-006G; 22-060118-001T-060227 decision of 28 September 2006; *Barak c. Osterrath*, 2012 CanLII 150609, *Bonin c. National Capital Commission*, 2013 CanLII 122747 (QC RDL).

²⁵ *Pickard c. Arnold*, 2015 CanLII 129833.

²⁶ *Bramley c. Vanwynsberghe*, 2017 QCRDL 11313.

²⁷ Health Canada, 2017. *Guide for Radon Measurements in Residential Dwellings (Homes)* <https://www.canada.ca/en/health-canada/services/publications/health-risks-safety/guide-radon-measurements-residential-dwellings.html>.

independent of statutory wording.²⁸ For a landlord or another tenant to run afoul of this principle, they must substantially interfere with the resident’s quiet enjoyment, restricting the tenant’s ability to use their residence in an ordinary lawful way. That is, it “must be of such severity that the premises become “untenable”—uninhabitable as a residence.”²⁹ We found no decisions in which this was argued with respect to radon. However, it has been extensively used with success to handle second hand smoke problems.³⁰ As one Ontario decision states “having to live with the constant smell of second-hand smoke, and particularly cigarette smoke that is hazardous to one’s health, amounts to substantial interference with reasonable enjoyment.”³¹ While this clause may strengthen the case for action on radon, it is typically used when one tenant’s actions are interfering with those of another, and one tenant seeks to restrain another’s behaviour or have the other tenant evicted.³²

c. Tenants in Strata Units

Radon will not generally be a problem for units on the second story and above in high rise buildings, but can be a problem in basements, ground contact units, rowhouses and townhomes. Tenants and landlords in strata units are subject not only to the *Residential Tenancy Act* but also the *Strata Property Act*, its regulations and the strata’s own bylaws and rules. While the *RTA* provisions on repairs still apply, they are only as good as the landlord’s own rights to make repairs under the *Strata Property Act*. In a strata development, individual owners own their units, but they jointly own the common areas outside their lots. Radon may enter a unit from other units or common property in a way that makes it difficult for a landlord to fix on their own.

Generally, an owner has no power to do work on the common areas of the development unless the strata corporation has specifically passed bylaws to give the owner exclusive use of a common area. In theory, if radon is entering a unit from the common area, the strata corporation should fix it, given its general obligations to “repair and maintain common property and common assets” (*Strata Property Act*, s. 72(1)). A strata corporation can also pass a bylaw to make an owner responsible for the repair and maintenance of limited common property that the owner has a right to use (s. 72(2)).

The *Strata Property Act* contains standard bylaws which set out the responsibilities of owners and of the strata corporation for repairs and maintenance. Strata corporations can

²⁸ *Lawrence v. Kaveh*, 2010 BCSC 1403, see also the extensive discussion *Y.A., Y.E., S.A. & B.A. v Regina Housing Authority*, 2017 SKORT 75, upheld *Regina Housing Authority v Y.A.*, 2018 SKQB 70.

²⁹ *Y.A., Y.E., S.A. & B.A. v Regina Housing Authority* *ibid.* at para. 95.

³⁰ *Hassan v Niagara Housing Authority* (February 5, 2001), Hamilton Docket No.99-002412-DV [2000] O.J. No.5650 (Div Crt), *Feaver v. Davidson*, 2003 CarswellOnt 4189, [2003] O.H.R.T.D. No. 103, *Lawrence v. Kaveh*, 2010 BCSC 1403; TST-38271-13 (Re), 2013 CanLII 51007 (ON LTB); *Y.A., Y.E., S.A. & B.A. v Regina Housing Authority* *ibid.* at para. 92.

³¹ *TNT-83545-16 (Re)* 2016 CanLII 72018 (ON LTB) at para 11.

³² *Residential Tenancies Act* 56 (2)(a)(i) provides for a director to order the termination of a tenancy if the tenant unreasonable disturbs another tenant.

BC Lung/HIE Radon and Renters

amend these bylaws over time, but it is also common for them to be retained. These bylaws set out that the owner must repair and maintain their own strata lot (*Strata Property Act*, Schedule of Standard Bylaws, Div. 1, s. 2), and the strata corporation must repair and maintain the common assets, and common property (Schedule of Standard Bylaws Div. 1, s. 8). An owner who has the use of limited common property must repair and maintain it, except for repair and maintenance that is the responsibility of the strata corporation under these bylaws (Schedule of Standard Bylaws, Div. 1, s. 2). In all likelihood, the owner (who takes it upon himself to fix radon) would need to make some alterations to the structure and exterior of the building, and so would require written approval of the strata corporation (Schedule of Standard Bylaws Div. 1 s. 5(1)). However, the strata corporation must not unreasonably withhold its approval (Schedule of Standard Bylaws Div.1, s. 5(2)). It is also likely that the owner will have to make some alterations to common property, which, again, the standard bylaws require written approval for (Schedule of Standard Bylaws s. 6(1)). Under the standard bylaws, there may also be action against another owner who allows radon to enter their own unit and then flow to other parts of the building. Schedule of Standard Bylaws, s. 3 provides that an owner, tenant, occupant or visitor must not use a strata lot in a way that causes a nuisance or hazard to another person.

Ideally, the landlord would recognize that any elevated radon is a problem and apply to the strata council if its cooperation was needed to fix the problem. Fixing radon should flow from the requirements of the *Act*, and the fact that the members of the strata council have a duty of care to act in the best interests of the strata corporation (s. 31). If the strata cooperation was not forthcoming, the landlord could make use of a series of dispute resolution processes, including:

- Requesting a hearing at a strata council meeting (s. 34.1);
- Organizing a special general meeting (requiring a written demand signed by persons holding at least 20% of the strata corporation's votes) (s. 43);
- Seeking to have the bylaws changed (for which $\frac{3}{4}$ of votes is required);
- Using a voluntary dispute resolution process (provided for in the standard bylaws);
- Using a mediation-arbitration process (s. 177 to 189);
- Going to the Civil Resolution Tribunal (for small claims up to \$5,000) (s. 189.1); and
- Going to BC Supreme Court (s. 164, s. 165).

As well, the tenant can seek damages or rent reduction under the *Residential Tenancy Act* in the face of elevated radon which would give a monetary incentive for the landlord to ensure the strata council acts to properly abate the problem. The tenant has some further options if the landlord is not willing to take up the issue with the strata council. The tenant can directly approach the strata council on an informal basis. They also have a right to obtain copies of any strata bylaws and rules and can check to see if there is any guidance

BC Lung/HIE Radon and Renters

concerning radon (s. 146). The *Strata Property Act* explicitly provides that tenants can make use of the various dispute resolution processes, including asking for a hearing at the strata meetings (s. 34.1), organizing a special general meeting (s. 43), using a mediation-arbitration process (s. 177 to 189), going to the Civil Resolution Tribunal (s. 189.1) or to the Supreme Court (s. 164, s. 165).

d. Precedent and Review

In Canadian superior courts, judges are bound to follow common law principles and statutory interpretation laid down by prior decisions and higher courts—the principle of *stare decisis*. However, the RTBC, as an administrative tribunal, does not work this way. Further, the superior courts are wary of imposing their own standards on specialized tribunals. There is a ‘privative clause’ in the *RTA* at section 84.1 that provides: “The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding” and that: “A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.” The RTB also has no significant appeal process, and the British Columbia Supreme Court can only interfere in findings of fact or law at the RTB if they are “patently unreasonable”³³—ie. exercised arbitrarily or in bad faith, exercised for an improper purpose, are based entirely or predominantly on irrelevant factors or fail to take statutory requirements into account.³⁴ The courts can only intrude if the original decision was “openly, evidently, clearly” unreasonable.³⁵

The RTB does maintain a publicly accessible database of past decisions. Some Canadian courts have ruled that administrative tribunals such as the RTB cannot arbitrarily ignore past decisions and must show them some respect.³⁶ Where arbitral consensus exists, it raises a presumption that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. The demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable.

e. Investigation and Enforcement Powers

BC’s *Residential Tenancy Act* gives the RTB powers of investigation. The director may conduct investigations to ensure compliance with the *Act* and the regulations whether or not the director has accepted an application for dispute resolution in relation to the

³³ By working of s. 58 (2) of the *Administrative Tribunals Act*, see *Schaper v. Beachamp*, 2011 BCSC 833 (CanLII), upheld on appeal at 2012 BCCA 208 (CanLII), see also *Bennett v. Wamboldt*, 2012 BCSC 1251.

³⁴ S. 58 (3) of the *Administrative Tribunals Act*.

³⁵ *Havey v. 0697418 B.C. Ltd.*, 2014 BCSC 130.

³⁶ The following paraphrases *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at para 16 to 18.

BC Lung/HIE Radon and Renters

matter (s. 87.1). In theory that could be used to help renters with radon, but we found no evidence that there is administrative support at the RTB for exercising that function.

There is, however, an enforcement unit at the RTB that can ensure compliance with RTB decisions. In 2019 the unit was given new funding after a task force found a lack of mechanisms to enforce RTB decisions.³⁷ After a hearing, a director can impose requirements or order a monetary penalty (s. 87.3) up to \$5,000 per day of contravention (s. 87.4).³⁸ The government website for the unit states that: “Complaints may be submitted for consideration of an investigation only when all attempts to resolve the matter have been made through the RTB dispute resolution service and have not resulted in compliance. The unit will assess complaints based on repeat and serious contraventions of the law or failure to comply with orders.”³⁹

3. Standards of Maintenance

Many British Columbia municipalities have standards of maintenance bylaws that cover the conditions of property. However, none to date explicitly mention radon.

One advantage for renters of having protection under standards of maintenance bylaws is that city bylaw offices can inspect the property, issue warnings and fines or otherwise enforce the bylaw. As well these bylaws have been used as evidence at RTB dispute resolution hearings.⁴⁰ We also know of at least one city in Canada (Waterloo, Ontario) that uses the business license process to enforce standards of maintenance, denying permits to landlords who do not maintain rental properties in good condition, and allowing enforcement by medical officers of health, as well as building inspectors, enforcement officers and police officers.⁴¹

The provincial government also provides explicit guidance to municipalities on Standards of Maintenance bylaws, stating that “a standards of maintenance bylaw will provide a useful tool to ensure safe and healthy rental accommodation.” The province provides a sample bylaw that includes detailed maintenance standards covering areas such as heating, ventilation and plumbing.⁴² However, the BC government model bylaw does not mention or indirectly lead to, any protections around radon.

³⁷ Zeidler, M. 2019. New enforcement unit adds 'teeth' to B.C. tenancy laws. CBC News. Available at <https://www.cbc.ca/news/canada/british-columbia/new-enforcement-unit-adds-teeth-to-b-c-tenancy-laws-1.5132748>.

³⁸ *Residential Tenancy Act* S.B.C. 2002, c. 7 s. 87(1).

³⁹ BC Government, 2020. Residential Tenancies, Compliance and Enforcement. Available at <https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/compliance-and-enforcement> accessed July 29, 2020.

⁴⁰ Tenant Resource and Advisory Centre, 2020. Repairs and Maintenance: Standard of Maintenance Bylaws. Available at <https://tenants.bc.ca/your-tenancy/repairs-and-maintenance/#standards-of-maintenance-bylaws> accessed July 28, 2020.

⁴¹ City of Waterloo's Rental Licensing Bylaw 2011-047.

⁴² See BC Government, 2020. Standards of Maintenance Bylaw available at http://www.housing.gov.bc.ca/pub/htmldocs/pub_guide.htm accessed June 18, 2020 and BC Government, 2020. Standards of

Most BC municipalities do not have these bylaws in place, and when they do, they often focus on “community standards” rather than indoor health and safety concerns—aiming instead to ensure calm, ordered, and quiet outdoor environments through attention to issues such as graffiti, garbage, or noise. We found a few bylaws which refer to health and safety concerns in rental accommodation,⁴³ however none explicitly mention radon nor have provisions (about air pollution, for instance) that could plausibly extend to radon.

4. Public Health and Hazards

The *Public Health Act*, SBC 2008 c. 28 contains provisions that, on their face, might be used to help renters faced with radon problems. Health officials could work with tenants to use their inspection powers to help test for radon, and issue orders against landlords to mitigate. That said, public health officers currently do not normally get involved with the affairs of renters (outside a very narrow window of action as prescribed in the *Health Hazards Regulation*, BC Reg 216/2011 and which do not help with radon), nor do they normally interpret their powers to support such activity.

The *Public Health Act* empowers public health officers to, with the agreement of occupants, inspect places to see if health hazards exist (s. 23(a)(iv), and s. 24(1)), and make orders to prevent the health hazard (s. 30-31). What counts as a “place” is not defined, but the *Act* clearly contemplates that it can include private dwellings and specifies special procedures whereby a public health officer needs to obtain a warrant or procure the consent of the owner or occupant to enter the dwelling (s. 25 (2)(b)).

Much turns, then, on what counts as a “health hazard.” The *Act* provides that this can be prescribed by regulation and the *Health Hazards Regulation* has a section which covers inadequate rental accommodation and describes conditions that make up a health hazard. However, it is restricted to requiring potable water, minimum limits on air space per unit, and a window that can open.⁴⁴ These provisions do not extend to radon. That said, the *Public Health Act* provides a very general definitions of “health hazard” as “a condition, a thing or an activity that endangers, or is likely to endanger, public health.”⁴⁵ However, we found no cases in BC that indicate the scope of this general provision. Recourse to “public health” is also somewhat unhelpful, as it is also undefined. In theory, public health officers could draw on this very general definition and use the provisions on preventing health hazards to assist renters in establishing radon levels, and to issue orders for landlords to conduct radon testing or to mitigate elevated radon.

Maintenance Bylaw: Sample Bylaw. Available at http://www.housing.gov.bc.ca/pub/htmldocs/pub_sample.htm#Part%20%20-%20Maintenance accessed July 28, 2020.

⁴³ Vernon, Rental Unit Standard Of Maintenance Bylaw Number 5120, 2008; Chilliwack Bylaw No. 3733; Abbotsford, Bylaw No. 1256-2003.

⁴⁴ *The Health Hazards Regulation*, BC Reg 216/2011 at s. 7.

⁴⁵ *Public Health Act*, SBC 2008, c 28 s. 1.

Alberta Health Services has ordered radon mitigation and developed a guidance document on radon in rental accommodation. Inspectors draw on general nuisance clauses in the *Public Health Act* RSA 2000, c P-37 (at s. 59 to 61) and the *Nuisance and General Sanitation Regulation*, Alta Reg 243/2003. While BC does not have a ‘nuisance’ clause, a comparison between provincial legislation indicates similarities between provisions. “Nuisance” is defined as “a condition that is or that might become injurious or dangerous to the public health, or that might hinder in any manner the prevention or suppression of disease” (*Public Health Act*, s. 1(ee)). The *Act* provides for inspections to determine the presence of a nuisance, with separate clauses for public spaces (s. 59) and private spaces (s. 60) and for orders to be issued to prevent or abate nuisances (s. 62). In one case in Calgary, inspectors responded to a renter’s complaint, worked with the renter to complete tests and ordered the landlord to mitigate. Out of this process a Standard Operating Procedure (SOP) has been drafted but it remains unavailable to the public. Interviews with the public health official involved indicate that the SOP drafting was spurred by the fact the official had taken specific radon mitigation training.⁴⁶ In principle, similar procedures could be created in BC, given the similarities in the legislation.

Public health officials in BC have suggested to us that their working definition of “public health” is tied to problems that are obviously shared and collective—contagious diseases being the prime example. They thus argue that public health officials have no legislative mandate to assist renters concerning radon. However, that is a more restrictive interpretation of the concept of ‘public health’ than is found in BC law, other parts of Canada and widely accepted scholarly and international approaches.

- BC’s *Public Health Act*, as we discussed, does not define public health, but the *Act* gives some indication of what can count as public health in its description of public health plans. The broad purpose of public health plans is to “promote and protect health and well-being” (s. 3(1)). As well, the minister can specify further purposes, many of which clearly touch on radon: Identifying and addressing the health needs of particular groups within the population, monitoring and assessing the health status of the population, including surveillance and monitoring of factors influencing the health of the population, preventing and mitigating the adverse effects of diseases (s. 3(2)). The *Act* also contemplates rental accommodation as a clear area of action, suggest this falls within ‘public health’. For instance, officials can inspect and make orders in relation to rental accommodation, (s. 34) and there are provisions for further regulations to cover rental accommodation (see s. 34, and s.123).
- There is not much case law in Canada regarding what ‘public health’ characterizes. There is a decision by the Ontario Information and Privacy Commissioner which held that air quality and other environmental concerns fall within public health.⁴⁷ In Alberta, a 2006 Queen’s Bench case—*BPCL Holdings Inc. v. Alberta*—involved an attempt by a

⁴⁶ Interview with Ryan Lau, the inspector who oversaw the process, April 18, 2018.

⁴⁷ *Ontario (Natural Resources) (Re)*, 2001 CanLII 26150 (ON IPC).

BC Lung/HIE Radon and Renters

large institutional landlord to strike down Alberta health regulations that prescribed *Minimum Housing and Health Standards*.⁴⁸ The landlord claimed that conditions in residential units were outside the ambit of public health and so the regulations were ultra vires as not within the scope of the legislation. Justice Slatter dismissed the landlord's application and held that "housing standards are not so totally remote from the topic of public health that the subordinate legislation must automatically fail at the most general level" (para. 16). At paragraph 22, Justice Slatter found: "The power to make regulations respecting private dwellings, wells, cisterns, water tanks, outdoor lavatories, palliative services, and the like show that the *Act* recognizes no clear distinction between public health and private health. At some level all issues of public health come down to the health of individuals."

- More generally, in recent decades public health practitioners have shifted away from an idea of public health as only being concerned with infectious diseases or imminent threats. More current definitions, such as by the World Health Organization, state that public health is "the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society." Activities to strengthen public health capacities and service aim to provide conditions under which people can maintain to be healthy, improve their health and wellbeing, or prevent the deterioration of their health. Public health focuses on the entire spectrum of health and wellbeing, not only the eradication of particular diseases. Many activities are targeted at populations such as health campaigns. Public health services also include the provision of personal services to individual persons, such as vaccinations, behavioural counselling, or health advice.⁴⁹ This broader approach is at times describes as the "new public health" and as something that "we, as a society, do collectively." It is a collective responsibility, geared toward improving the health and well-being of an entire community—or state, or country—as opposed to diagnosing or treating particular individuals. In addition, public health addresses the "conditions to be healthy" meaning that it is focused on "the prevention of disease and the promotion of health", as opposed to medical care for those who are already ill.⁵⁰ These wider approaches focused on disease prevention certainly support public health interventions concerning radon in the home.

It is our view that a legal basis does exist to support the involvement of public health officials and health authorities on the issue of radon, including assisting renters.

⁴⁸ *BPCL Holdings Inc. v. Alberta*, 2006 ABQB 757, upheld *BPCL Holdings Inc. v. Alberta*, 2008 ABCA 153.

⁴⁹ World Health Organization, Europe. 2020. Public Health Services. Available at <https://www.euro.who.int/en/health-topics/Health-systems/public-health-services>.

⁵⁰ Burris, S., Berman, M. Penn, M. and Holiday, T. 2018 *The New Public Health Law: A Transdisciplinary Approach to Practice and Advocacy*. Oxford University Press, at p. 4.

5. Occupiers' Liability

Under principles of occupiers' liability a plaintiff can seek relief in the courts if a hazard causes the plaintiff to suffer losses.⁵¹ This suggests the possibility for substantial damages awards where plaintiffs can show on the balance of probabilities that their sickness or loss of employment income is attributable to radon exposure. The common law established general obligations of an "occupier" — a person in control of premises — to exert a duty of care. Liability could attach to an occupier if a plaintiff could show: (1) the damage must have been caused by an unusual danger; (2) the danger must be one about which the occupier knew or ought to have known; (3) the occupier must have failed to use reasonable care to prevent the invitee's injury or damage from the unusual danger; and (4) the invitee must have employed reasonable care for his or her own safety and security. However, traditionally, at common law, no duty of care was owed by a landlord to his or her tenant.⁵² Now, provincial legislation now sets up a statutory duty of care which courts have ruled is a distinct duty from that of negligence at common law.⁵³ BC's *Occupiers Liability Act* specifies that it applies to tenancies.⁵⁴ Courts have also suggested that in assessing what counts as an undue hazard, landlords should bear risk rather than tenants.⁵⁵ Further, the government is bound by the *Act*, such as where it owns buildings or acts as a landlord — such as in social housing.⁵⁶

We did not find any cases where occupiers' liability law has been used for lung cancer victims exposed to radon. However, a variety of factors suggest high radon concentrations could give rise to a successful claim.

- (a) Circumstances of other cases could extend to the circumstances of elevated radon situations. In British Columbia cases have considered, inter alia: failure to install smoke alarms in residential premises,⁵⁷ slip and fall due to the absence of a handrail on steep stairs;⁵⁸ snow and icing conditions;⁵⁹ a faulty balcony railing which gave

⁵¹ *MacLeod v. Yong*, [1997] B.C.J. No. 2108 (S.C.), aff'd 1999 BCCA 249 (CanLII), 67 B.C.L.R. (3d) 355.

⁵² *Sythes and Co. Ltd. v. Gibsons Ltd.*, 1927 CanLII 41 (SCC), [1927] 2 D.L.R. 834 (S.C.C.). *MacLeod v. Yong*, 1999 BCCA 249 (CanLII), 67 B.C.L.R. (3d) 355.

⁵³ *Rendall v. Ewart (1989)*, 1989 CanLII 232 (BC CA), 38 B.C.L.R. (2d) 1 (C.A.).

⁵⁴ *Occupiers Liability Act* R.C.B.C 1996, c. 337 s. 6(1).

⁵⁵ *MacLeod v. Yong*, 1999 BCCA 249 (CanLII), 67 B.C.L.R. (3d) 355; *Tolea v. Ialungo*, 2008 BCSC 395.

⁵⁶ *Occupiers Liability Act*, s. 8(1), cases where provincial governments have accepted liability under similar provisions include *Hamilton v. Ontario Corporation #2000533 o/a Toronto Community Housing Corporation*, 2017 ONSC 5467 and *Hickey v. New Brunswick Housing Corporation*, 2014 NBCA 36.

⁵⁷ *Bueckert v. Mattison* (1996), 1996 CanLII 6701 (SK QB); *Daniels v. McKelvey*, 2010 MBQB 18 (CanLII), *Leslie v. S & B Apartment Holding Ltd.*, 2011 NSSC 48 (CanLII).

⁵⁸ *MacLeod v. Yong*, 1999 BCCA 249 (CanLII).

⁵⁹ *Hunter v. Anderson*, 2010 BCSC 1037.

BC Lung/HIE Radon and Renters

way leading to a three story plummet;⁶⁰ an unlit and unguarded basement stairwell at the back of the residence at night resulting in the loss of vision in one eye;⁶¹ insufficient locks leading to a sexual assault;⁶² theft of goods;⁶³ an unsecured planter that ultimately fell and hurt a small child,⁶⁴ and a cracked sidewalk causing a broken ankle.⁶⁵ In Ontario, cases consider falling dumbbells at a fitness club,⁶⁶ unsecured park benches,⁶⁷ unsecured apartment garages allowing in attackers,⁶⁸ and dangerous bricks around a fire pit.⁶⁹ Across Canada there are also a number of specific cases that consider environmental health problems, including: faulty renovation procedures leading to release of heavy metals,⁷⁰ use of chemical defoliants creating toxic areas of a military base,⁷¹ and mouldy housing affecting an Indigenous community.⁷²

- (b) The test of reasonable foreseeability means that occupiers cannot hide behind ignorance of radon. There are positive obligations on occupiers to inspect. The onus on occupiers extends to inspecting the premises and that ‘doing nothing at all’ in the face of a known risk does not satisfy the standard of ‘reasonable care’.⁷³ An occupier cannot passively rely upon lack of knowledge of the premises’ condition. They have a positive duty to inspect and take whatever reasonable steps are necessary to ensure its premises are safe.
- (c) The courts will consider whether an occupier has been provided with an indication as to potential risks of harm. The standard of reasonableness for each party must be determined according to their respective positions and responsibilities. The standard of reasonable inspection imposed on a landlord will likely be elevated above that imposed on a tenant.⁷⁴ In a case concerning elevated radon, the courts may thus consider the particular features of radon—structural and hidden—and the

⁶⁰ *Jack v. Tekavec*, 2010 BCSC 1773.

⁶¹ *Zavaglia v. MAQ Holdings Ltd.* (1986), 1986 CanLII 919 (BC CA) 6 B.C.L.R. (2d) 286 (C.A.).

⁶² *Q et al. v. Minto Management Ltd. et al.*, 1985 CanLII 2103 (ONSC) upheld (1986), 1986 CanLII 2518 (ON CA), 57 O.R. (2d) 781

⁶³ *Robertson v. Stang*, 1997 CanLII 2122 (BC SC); *Coueslan v. Public Storage Canadian*, 2000 BCPC 137.

⁶⁴ *Klajch v. Jongeneel et al.*, 2001 BCSC 259, affirmed (on this point) *Klajch (Guardian ad litem of) v. Jongeneel*, 2002 BCCA 1.

⁶⁵ *Kiceluk v. Oliverio*, 2001 ABQB 704.

⁶⁶ *Sores v. Premier Fitness Clubs*, 2011 ONSC 2220.

⁶⁷ *Doyle v. Petrolia (Town)*, 2003 CanLII 6577 (ONSC).

⁶⁸ *Allison v. Rank City Wall Canada Ltd.*, 1984 CanLII 1887.

⁶⁹ *Taylor v. Allard*, 2009 CanLII 10986.

⁷⁰ *MacIntyre v. Cape Breton District Health Authority*, 2009 NSSC 202 (court finding breach of duty of care but not causation); affirmed *MacIntyre v. Cape Breton District Health Authority*, 2011 NSCA 3.

⁷¹ *R. v. Brooks*, 2009 SKQB 509 duty of care found (at para 102) but certification falters on basis of lack of common class, affirmed *R. v. Brooks*, 2010 SKCA 55

⁷² *Grant v. Canada (Attorney General)*, 2009 CanLII 68179, class proceeding certification, duty of care under Occupier’s Liability prima facie established at para 107.

⁷³ *Waldick et al. v. Malcolm et al.*, 1987 CanLII 4303 (ON SC) aff’d *Waldick v. Malcolm*, 1991 CanLII 71 (SCC), [1991] 2 S.C.R. 456.

⁷⁴ *Zavaglia v. MAQ Holdings Ltd.* (1986), 1986 CanLII 919 (BC CA), 6 B.C.L.R. (2d) 286 (C.A.) *Klajch (Guardian ad litem of) v. Jongeneel*, 2002 BCCA 14 (CanLII), 174 B.C.A.C. 184, *Tolea v. Ialungo*, 2008 BCSC 395.

BC Lung/HIE Radon and Renters

extensive public outreach about, and testing for, radon conducted by the federal and provincial governments as well as the ease with which the risk could have been remedied.

- (d) Courts impose an objective standard distinct from customary practices or existing building codes. What is reasonable depends on the context. Compliance with local custom is not determinative of whether a particular defendant met the requisite standard of care, and “the existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to courts, in no way ousts the duty of care owed by occupiers.”⁷⁵ The mere fact that a structure (such as a staircase) may be compliant with a building code, a building by-law or evidence as to industry standards, does not determine the issue as to whether it was unsafe. That is a determination for the court on all the evidence.⁷⁶

Assuming that courts would accept a duty of care to remove high radon concentrations, plaintiffs will face a series of further challenges.

(a) Causation: Radon-induced cancer has a long latency period, and only in the rare case with indoor radon exposure stand out from other factors, such as genetics, smoking, diet, age, and other chemical exposures.⁷⁷ Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury. The basic test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant.⁷⁸ This applies to multi-cause injuries. The plaintiff bears the burden of showing that “but for” the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned (and provinces have specific legislation that provides for this).⁷⁹ Canadian courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of injury. Courts impose liability under this test not because the evidence establishes that the defendant’s act caused the injury, but because the act contributed to the risk that injury would occur.

⁷⁵ *Waldick v. Malcolm*, 1991 CanLII 71 (SCC), [1991] 2 S.C.R. 456 at p. 474.

⁷⁶ *Musselman et al v. 875667 Ontario Inc. et al 2010 ONSC 3177*, aff’d in: *Musselman et al v. 875667 Ontario Inc. et al 2012 ONCA 41*; see also *Mott v. Brantford (City)*, 2008 CanLII 1948 (ONSC).

⁷⁷ Dearing, D. “Radon Litigation: An Overview of Homeowners’ Potential Causes of Action”, 20 *Cumb. L. Rev.* 825 1989-1990, p. 837-38; Cross, F., and Murray, P. 1988., *Liability for Toxic Radon Gas in Residential Home Sales*, 66 *N.C. L. Rev.* 687; Prussman, J. 1991. *The Radon Riddle: Landlord Liability for a Natural Hazard B.C. Env’tl. Aff. L. Rev.* 715.

⁷⁸ *Athey v. Leonati* 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458.

⁷⁹ *Resurfsice Corp. v. Hanke* 2007 SCC 7 (CanLII), [2007] 1 S.C.R. 333 at para 21, see also, e.g. *Negligence Act*, R.S.B.C. 1996, c. 333, section 1; *Negligence Act* R.S.O. 1990, c. N.1, s.1.

Recourse to a material contribution to risk approach is necessarily rare and justified only where it is required by fairness.⁸⁰

(b) Damages: The plaintiff will likely have to show actual harm (illness, loss of income etc.). Most jurisdictions follow the precedent established by centuries of tort law and deny recovery for "at risk" injuries absent physical harm or manifested disease. Canadian courts are adamant that "the risk of a future disease is not actionable in the absence of a present injury."⁸¹ Likewise, Canadian courts appear unwilling to award damages for cost of medical surveillance in anticipation of cancer.⁸² Courts will accept psychiatric illness⁸³ (for 'nervous shock' as it was long-labeled,⁸⁴ now taken much more seriously⁸⁵). It thus remains possible, but unlikely, that a Canadian court would find "cancerphobia" to meet this threshold.

(c) Apportionment of Responsibility and Duty to Mitigate: Provincial negligence statutes provide for apportionment of liability for damages, and this can include apportionment between multiple plaintiffs as well as between plaintiff and defendant. Courts have held that plaintiffs contributed to damages by failing to take reasonable care for their own safety.⁸⁶ For instance, if a seatbelt was available but not worn, the evidence must establish that it was operational and the plaintiff's injuries would have been reduced by usage to justify a finding of contributory negligence.⁸⁷ As such, a person who contracts lung cancer from both radon exposure and smoking is not thereby excluded from recovering due to radon exposure but may receive reduced compensation levels.

From the foregoing, it should be clear that landlords face a non-negligible risk that court cases in occupiers' liability may be successful. That said, there remain significant uncertainties and obstacles for plaintiffs concerning causation, whether the standard of care requires attention to radon when this was not in building codes or other legislation, and problems of the cost of litigation in the face of uncertain (if any) damages.

⁸⁰ *Clements v. Clements* 2012 SCC 32 (CanLII), [2012] 2 S.C.R. 181 at para 15. With few Canadian cases it is informative to look to United Kingdom precedent: see *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305; and *Barker v. Corus UK Ltd.*, [2006] UKHL 20, [2006] 2 A.C. 572. *Sienkiewicz v. Greif (UK) Ltd.*, [2011] UKSC 10, [2011] 2 All E.R. 857.

⁸¹ *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20 at para 58, citing *Grievous v. F T Everard & Sons and others*, [2007] UKHL 39.

⁸² *Dow Chemical Company v. Ring, Sr.* (2010) 2010 NLCA 20.

⁸³ *Saadati v. Moorhead*, [2017] 1 SCR 543, 2017 SCC 28.

⁸⁴ *Duwyn et al. v. Kaprielian* (1978), 1978 CanLII 1271 (ON CA), 22 O.R. (2d) 736 at p. 755 (C.A.). *Heighington et al. v. The Queen in right of Ontario et al. Alejandria et al. v. The Queen in right of Ontario et al.*, 1987 CanLII 4425 (ONSC).

⁸⁵ *Saadati v. Moorhead*, [2017] 1 SCR 543, 2017 SCC 28 at para. 21.

⁸⁶ *Bradley v. Bath*, 2010 BCCA 10 (CanLII), paras. 24-27.

⁸⁷ *Harrison v. Brown*, 1985 CanLII 724 (BC SC), [1985] B.C.J. No. 2889 (S.C.); *Thon v. Podollan*, 2001 BCSC 194 (CanLII); *Ford v. Henderson*, 2005 BCSC 609 (CanLII).

6. Property Managers Duties

Many larger rental buildings will have professional managers. Renters should be aware that rental property managers are professionally governed as real estate licensees by the *Real Estate Services Act*, S.B.C. c. 42. The Real Estate Council of British Columbia (RECBC), the governing body for real estate licensees, has recently issued guidance and checklists concerning radon for rental property managers.⁸⁸ RECBC advises rental property managers that radon exceeding Health Canada's Guideline of 200 Bq/m³ constitutes a material latent defect, and that this must be disclosed to all potential tenants. Property managers are to discuss with tenants options such as requesting a test and/or remediation before taking possession of the property.

This offers renters not only the possibility of taking up radon issues directly with managers (and possibly referring them to RECBC checklists), but also of making use of the complaint and discipline process when licensees fail to act. The *Real Estate Services Act* sets up a process for persons to make complaints, RECBC to investigate, and hold disciplinary hearings.⁸⁹ Complaints can be filed online through the RECBC website by email or mail.⁹⁰ This will not result in monetary awards to a renter-complainant, but may result in administrative penalties, order reprimands, fines, suspension or cancelling a license against a wayward licensee.

7. Alternatives Elsewhere

We found many international jurisdictions with specific policies and provisions relating to radon and renters:

Explicit requirements in radiation protection law. Norway's *Radiation Protection Regulations* specify that radon should be mitigated to under 200 Bq/m³ in dwellings in which the owner neither lives nor stays.⁹¹

Specify radon as a particular contaminant/hazard in landlord-tenant law. In the United Kingdom, the *Homes (Fitness for Human Habitation) Act 2018* together with regulations take explicit steps to protect tenants through listing out a series of indoor contaminants, air quality issues and health hazards which affect rented accommodation

⁸⁸ Real Estate Council of British Columbia, 2020. Radon Checklist for Rental Property Managers available at <https://www.recbc.ca/professionals/knowledge-base/guidelines/radon-precautions-real-estate-professionals> accessed July 31, 2020; see also Real Estate Council of Alberta. Radon Checklists for Property Managers. <https://www.reca.ca/wp-content/uploads/2019/06/Radon-Checklist-Property-Managers-Residential.pdf>

⁸⁹ *Real Estate Services Act*, SBC 2004, c 42, s. 36 to 47.

⁹⁰ Real Estate Council of British Columbia, 2020. File a Complaint. Available at <https://www.recbc.ca/public-protection/report-concern/file-complaint>, accessed September 1, 2020.

⁹¹ Norwegian Radiation and Nuclear Safety Authority, 2017. Regulations on Radiation Protection and Use of Radiation (Radiation Protection Regulations). Available at <https://www.dsa.no/publikasjon/radiation-protection-regulations.pdf> accessed July 29, 2020.

BC Lung/HIE Radon and Renters

(and so render it unfit for human habitation). This list includes radiation from radon. Tenants can go to court to obtain orders for repairs.⁹²

Disclosure rules for renters. Illinois and Maine have disclosure rules for radon and rental accommodation, specifying release to tenants of any known elevated radon levels.⁹³ For instance, Maine goes furthest of these two US states, and requires the landlord to provide a written radon notice to tenants and prospective tenants, including information on the risks of radon; the date and results of the most recent radon test (including tests conducted by a tenant showing elevated radon levels); the tenant's right to conduct a test; and any completed mitigation. As well, legislation directs the state health department to develop a standard disclosure statement for landlords to use, including an acknowledgment that the tenant has received the disclosure.

Health officials empowered to investigate radon and issue orders. As we discussed above, Alberta Health Services has ordered radon mitigation and developed a guidance document on radon in rental accommodation.

Professionalizing services and reporting. It is a good idea to require landlords to use independent, certified testing and mitigation professionals. If radon testers and mitigators are certified, they can also be directed to report test results and mitigation activity to the state. Absent such a law, a rental housing policy should require such reporting by landlords. This will also assist provinces in tracking compliance with the law and in furthering radon policy in general through improving databases and maps. 24 US states and the District of Columbia have mandatory certification requirements for mitigators.⁹⁴ 13 US states have requirements that mitigators release data to state agencies.⁹⁵

Subsidy and incentive. One of the central features of radon policy is offering incentives to low-income groups to help with testing and mitigation.⁹⁶ Policy makers should consider distribution of subsidized or free radon testing kits, extending tax credits, direct grants and

⁹² (see United Kingdom Ministry of Housing, Communities & Local Government, 2019. Guide for tenants: Homes (Fitness for Human Habitation) Act 2018. Available at <https://www.gov.uk/government/publications/homes-fitness-for-human-habitation-act-2018/guide-for-tenants-homes-fitness-for-human-habitation-act-2018> accessed June 18, 2020.

⁹³ Illinois, Ann. Stat. Ch. 420 § 46/25, Maine, 14 M.R.S.A. Section 6030-D.

⁹⁴ California, (Cal. Bus. & Prof. Code Radon Certification) Sec. [106750 - 106795]; Connecticut, (Conn. Gen. Stat. Ann. Sec. 20-420.), District of Columbia, D.C. Code Ann. Sec. 28-42014203; Florida (Fla. Stat. Ann. Sec. 404.056 (2)); Illinois, (Ill. Ann. Stat. Ch. 420 Sec. 44/25. (420 ILCS 44/) Radon Industry Licensing Act, Ill. Ann. Stat. Ch. II 422.10; Indiana, (IND. Code Ann. Sec. 16-41-38-2. IND. Code Ann. 5.1-1-22); Iowa, (Iowa Code Ann. Sec. 64144.3(136B)); Kansas (Kan. Stat. Ann. Sec. 48-16a01); Kentucky, (KY. Rev. Stat. Ann. Sec. 211.9101 211.9135.); Maine, (ME. Rev. Stat. Ann. tit. 22 Sec. 773.); Maryland, (Maryland Environment Code § 8-305), Minnesota, (Minnesota Statutes Sec. 144.4961); Montana, (Mont. Code Ann. Sec. 75-3-603.); Nebraska, Neb. Rev. Stat. 38-121 (kk.); New Hampshire, (N.H. Rev. Stat. Ann. Sec. 310-A:189-a.); New Jersey (N.J. Stat. Ann. Sec. 7:28-27.1. N.J. Stat. Ann. 26:2D-71.); Ohio, (Omo. Rev. Code Ann. Sec. 3723.02.); Pennsylvania, (PA. Stat. Ann. tit. 63 Sec. 2005-6. PA. Stat. Ann. tit. 25 240.1 to 240.111); Rhode Island, (R.I. Gen. Laws. Sec. 23-61-5), Tennessee (Tenn. Code Ann. Sec. 62-6-302.), Utah, (Utah Code Ann. Sec.58-55-305), Virginia (VA. Code Ann. Sec. 54.1-201. VA. Code Ann. 32.1-229.01.); West Virginia, (W. VA. Code Sec. 16-34-1 et seq.)

⁹⁵ Florida (Fla. Stat. Ann. Sec.404.056(2)(c)). Illinois (420 ILCS 44/30), Indiana (Rule 410 IAC 5.1-1 - Radon—Section 410 IAC 5.1-1-25 5o Section 410 IAC 5.1-1-28); Iowa (Iowa Code Ann. Sec. 64144.3 (136B.2); Kansas (Kan. Stat. Ann. Sec. 48-16a10); Maine (Maine Revised Statutes, tit. 22 (2) §778); Minnesota Statutes Sec 4620.7350); Nebraska (Neb. Rev. Stat. 180- 11-004.01); New Jersey (N.J. Stat. Ann. Sec. 26:2D-74); New York (10 N.Y. Codes Rules & Reg. Section 16.130); Ohio (Omo. Rev. Stat. Ann. Sec. 3701-69-13); Pennsylvania (25 Pa. Code § 240.303); Rhode Island, Section 216-RICR-50-15-2.7.7.

⁹⁶ See for instance Environmental Law Institute (ELI) and the U.S. Environmental Protection Agency. 1996. A Radon Guide for Tenants. EPA #402-K-98-004 available at https://www.epa.gov/sites/production/files/2014-08/documents/tenants_guide.pdf at p. 6 Boulder County, 2020. Public Health Radon Reduction Roadmap: Recommended Practices and Policies to Reduce Exposure to Radon in our Communities available at <https://assets.bouldercounty.org/wp-content/uploads/2019/03/radon-reduction-roadmap.pdf> at p. 2.

other incentives for radon work to rental accommodation. Landlords and their organizations are more likely to support radon measures that do not simply pass onto them the costs for supplying a social good.

As we will describe in the conclusion, it is our view that there is already enough to work with in BC to forge considerable change without new legislation. Beyond that we argue that renters should receive explicit protections in regulation and legislation, and that this is best done in concert with broader radon policies.

8. Conclusion

a. How Renters and Housing Advocates Can Act Now

Our review of BC law shows that landlords currently have significant obligations to address radon in rental accommodation under the *Residential Tenancy Act*, both under provisions on adequate repair (s. 32) and quiet enjoyment (s. 28). Property managers, as real estate licensees, are under professional duties to disclose radon as a latent defect and to take seriously renters concerns about radon. What is needed now is for renters and housing advocates to learn about radon as a problem and to take up the issue with landlords, property managers, and at the RTB. Many renters will need help with testing and taking the necessary steps to ensure that their landlords do not unscrupulously win any battles of conflicting radon test results. Public health officials also have the legal power to assist renters to investigate, and renters, housing advocates and health organizations should work with health officers and health authorities to ensure time and resources are directed to the problem of radon and renters.

b. Potential for Reform

Residential tenancy law in BC should be updated to include explicit requirements for radon testing, disclosure to existing and prospective tenants, and mandatory remediation if levels are over 200 Bq/m³ using C-NRPP certified professionals.

Considerable inroads be made through regulatory change. The *Residential Tenancy Regulation* B.C. Reg. 477/2003 already specifies standard information that must be included in a condition inspection report that is filled in by landlord and tenant at the beginning of the tenancy (s. 20). It includes issues of maintenance and repair. This could be extended to include disclosure requirements, mandating that the landlord convey any known radon testing. The Schedule to the *Residential Tenancy Regulation* includes standard terms of a rental agreement, including, at section 8, that the landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant and that the landlord must comply with health, safety and housing standards required by law. This could be strengthened by explicitly referencing radon and indoor air quality concerns (as in the UK) or, in turn, referencing an updated *Health Hazards Regulation* (under the Public Health Act). This would make clearer

BC Lung/HIE Radon and Renters

that radon mitigation is a legal requirement for residential tenancies. Similar changes to regulations under the *Public Health Act* would have the further benefit of making clear to health officials that they can assist renters with testing for radon and issue orders directly to landlords. We also advise that the provincial government update its model Standard of Maintenance bylaw to foreground indoor air quality concerns and specifically radon. That said, radon as a problem can easily be pushed aside, and we favour clear legislative provisions which bring the issue to everyone's attention.

Further the specific concerns of renters will be strengthened by a broader radon policy. New laws and policies are needed to systematically address radon across the built environment. British Columbia can follow the lead of the Basic Safety Standards Directive in the European Union, which directs member states to develop effective radon policies aimed at reducing population level exposure and reducing lung cancer risk.⁹⁷ The issue of mandatory professional certification for radon mitigation work, for instance, *could be* attached to legislative changes to the *Residential Tenancy Act*. But rather than limit professional certification requirements to landlord-tenant concerns, it would be better treated as a broader issue in all radon mitigation work. Likewise, subsidies and incentives are a cost effective⁹⁸ intervention to help drive radon mitigation across the built environment. Our opinion is that the political success of subsidy and incentives for radon testing and mitigation will be greater as part of a comprehensive radon policy than as a standalone effort for renters. But by extension, one of the strengths of a radon policy is that it can incorporate renters' concerns around radon as an important part of a focus on health equity.

⁹⁷ European Union Basic Safety Standards Directive. 96/29/Euratom. Available at <http://www.ensreg.eu/nuclear-safety-regulation/eu-instruments/Basic-Safety-Standards-Directive> accessed July 30, 2020.

⁹⁸ Gaskin, J., Coyle, D., Whyte, J., Birkett, N. and Krewski, D., 2019. A cost effectiveness analysis of interventions to reduce residential radon exposure in Canada. *Journal of Environmental Management*, 247, pp.449-461.