

Foreclosure

for Landlords and Tenants

in Alberta



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You should **not** rely on this booklet for legal advice. It provides general information on **Alberta law only.**

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This booklet is meant to explain the foreclosure process in Alberta for landlords and tenants. If a rental property is foreclosed upon, the rights of the tenant and the rights of the landlord will be affected.

Throughout the booklet, the owner of the property will be referred to as the landlord, and the person who is renting the property will be referred to as the tenant.

What is foreclosure?

Foreclosure is a legal process for a mortgagee (a lender, usually a bank) to sell, or take ownership of, a property when the mortgagor (the property owner, the landlord) defaults on the mortgage.

In other words, the landlord who got a mortgage in order to buy or refinance the property that is being rented out has not been able to meet the promises made under the mortgage. The bank is worried about losing money, so the bank wants to either become the owner of the property or sell the property to collect the money that is owed under the mortgage.

In Alberta, if a bank wants to sell a property, the bank must follow the legal process for foreclosure, or get the landlord's consent to the sale.

Does the landlord have to tell the tenant if the property is being foreclosed on?

No. There is no requirement in Alberta for the landlord to tell a tenant about a foreclosure.

What are acts of default under a mortgage?

A mortgage agreement contains all of the promises that the landlord makes to the bank. If the landlord does not fulfill these promises, then the landlord has committed an "act of default."

Each mortgage is different, but common acts of default include:

- failing to pay mortgage payments;
- allowing significant damage to occur to the property;
- failing to insure the property; and
- failing to pay taxes or condominium fees on the property.



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What law in Alberta deals with foreclosure?

There are several laws in Alberta that apply to foreclosures:

- *Law of Property Act*,
- *Land Titles Act*,
- *Alberta Rules of Court*; and
- contract law (the mortgage between the landlord and the bank is a contract, so the terms of the mortgage will govern parts of the foreclosure process).

Does a tenant have any rights in the process?

Not really. A tenant does have rights, but most of them come second to the rights of the bank.

When it comes to land, the people with the strongest rights are those "registered on title". This means that the bank's rights (their mortgage, protecting the money they are owed) are listed on the title to the land.

When a person buys a house, they often do not have the full amount needed to pay for the house, so they will commonly get a "mortgage." A bank lends that person money to buy the house and the person must pay the money back to the bank over time. In the meantime, the bank registers a mortgage on the title, which gives them the right to foreclose against the property if the landlord does not pay the bank what the bank is owed. This means that the landlord is legally the owner of the house, but the house is collateral for the money that was borrowed to buy the house. In this case, the bank is known as a "secured creditor."

Sometimes, there may be more than one mortgage registered on title. These debts are listed in the order that they occur. This means that if the house is sold and the "first" debt is fully paid, leaving some money left over, the second debt that is listed can now be paid, and so on.

A residential tenancy agreement is usually not listed on title, and if it is, will almost always be listed after a mortgage. As a result, the tenant's rights come after the rights of those who have their interests registered on title.

In fact, there is no obligation for a landlord to inform tenants of the foreclosure. As a result, it is very rare that a tenant can do anything to preserve their rental arrangement.

Can the tenant find out if the property they are renting is being foreclosed on?

Maybe. If a tenant thinks that the landlord is in financial trouble, then the tenant can:

- talk to the landlord;
- run a search at the Court of Queen's Bench to find out if a lawsuit has been started against the landlord. There is a fee for this service. The tenant will need to know the name of the owner of the property, and this information can be found in the lease or the Notice of Landlord; or
- conduct a title search on the property. Some lawyers register a "Certificate of Lis Pendens" (which means a certificate of a pending lawsuit) on the title to the property when there is dispute involving land. An Alberta Registry Agent can conduct this search for a fee.

None of these methods guarantee that the tenant will find out about a foreclosure. The tenant might not find out until they are served with a court order, requiring them to move out of the property.

How long can foreclosure take?

The time a foreclosure takes depends on the situation. The entire foreclosure process can take from three months to a year or more. Even though there are specific steps that must be taken in every foreclosure, each situation is different.

Will the tenant have to move out?

It depends on what stage of the foreclosure process the property is in, and what the landlord and bank decide to do. Sometimes a landlord is able to work something out with the bank, or is able to bring the mortgage current, in which case the landlord remains the owner of the property. Sometimes, if the property is sold through the foreclosure, the new owner will become the landlord.

More commonly, however, a tenant is required to vacate the property. Whether the bank becomes the legal owner of the property, or the property is sold to another person during the foreclosure process, the bank or new owner will usually be entitled to possession of the property within 30 days from the date the tenant is served with the Order. If a tenant is served with a Court Order requiring them to move, then the tenant should contact the lawyer



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whose name and contact information is on the front of the Order and ask for clarification of when s/he has to move. The tenant could also ask the lawyer for an extension on the time to move, but the lawyer may not agree to that request.

The notice periods under the *Residential Tenancies Act* do not apply if a Justice or Master of the Court of Queen's Bench issues an Order in the foreclosure requiring that the property be vacant.

Does the tenant still have to leave if it's winter and cold outside?

Yes, the tenant must leave if they have been ordered to do so by the Court. The weather or temperature outside does not matter. If the tenant does not move, then the new owner can get a Civil Enforcement Agency (bailiff) to force anyone living in the property to leave.

How do tenants usually find out about the foreclosure?

Unfortunately, most tenants find out when they are served with a Court Order stating that the property must be vacated in 30 days. If this happens to you, then you should contact the lawyer whose name and contact information is given on the front of the Order to clarify when you need to leave the property. You can ask the lawyer for more time to move, and the lawyer may grant your request, depending on the circumstances.

What are signs that the landlord is having financial difficulties?

Usually a tenant will have no idea if their landlord is having financial problems, but some signs might be:

- lack of maintenance of the building;
- utilities for the building being shut off; and
- receiving no response from the landlord to inquiries.

What is the Court process for foreclosure?

A foreclosure action starts in the same way that other lawsuits do: the Plaintiff (the bank) files and serves a Statement of Claim (which starts the lawsuit and sets out the facts on which the claim is based) against the Defendant (the landlord).

The landlord then has 20 days in which to file and serve a Statement of Defence or Demand for Notice. If the landlord does not do either of these things within 20 days, then the Plaintiff can note the Defendant in default. This basically means that the bank is telling the Court that the landlord is not fighting or defending the claim.

Once these steps are over, the bank must file an Affidavit of Value (which includes an appraisal that sets out the current fair market value of the property) and an Affidavit of Default (which includes the amount owing on the mortgage, the amount in default, and other specific information). The bank can now apply to the Court for various remedies (for example, sale of the property). The Court will decide what to order based on the circumstances.

Rarely, the Court will decide not to issue an order. This would occur, for example, when the Court finds that the landlord did not commit an act of default under the mortgage. This means that the bank had no grounds to start the foreclosure.

Usually, the Court will first grant a Redemption Order. A Redemption Order will order that:

- the landlord has a specified time to bring the mortgage current (in other words, the landlord has a specified amount of time to make all of the payments that the Court orders must be made);
- if the landlord does not pay all of the money within the time period, then the property will be offered for sale; and
- the sale be done by a specified method. There are three usual methods:
 1. listing the property with a real estate agent;
 2. advertising the property for sale in a newspaper or other publication; or
 3. a posting at the courthouse.

Sometime after the property has been listed, there will be another court application(s). If there are no valid offers from a third party on the property, then the bank will apply to become the legal owner. If there is a valid offer on the property, then the Court must approve and accept the offer and order that the property can be sold to the purchaser. If the Court does not accept an offer for whatever reason, then the property remains listed for sale. Basically, for the property to be sold, the Court must first approve the offer.

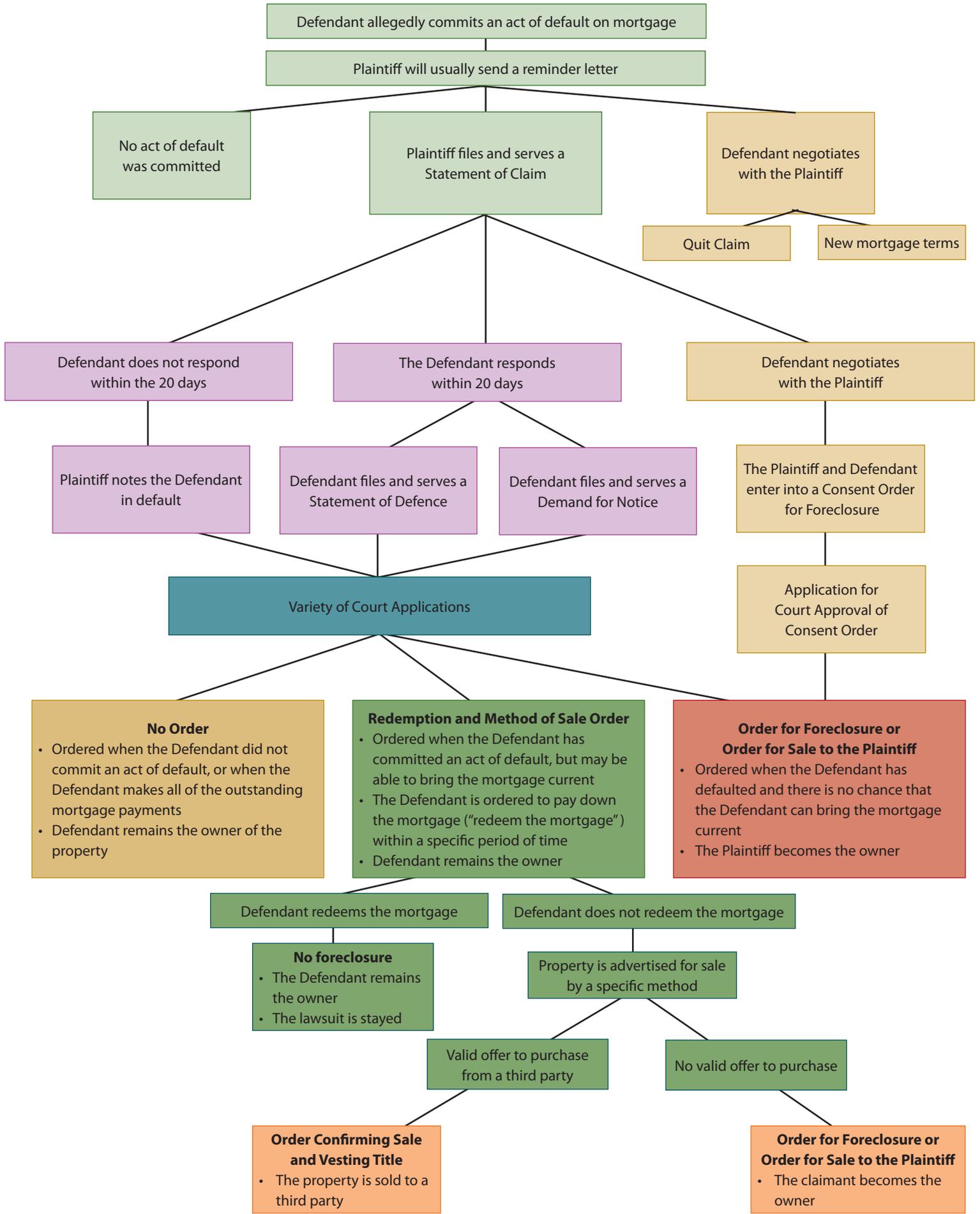
Sometimes the Court will make an Order for Foreclosure or an Order for Sale to the Plaintiff. This will occur, for example, when the landlord has committed an act of default under the mortgage, and the Court does not believe that there is any way that the landlord can rectify (or fix) the default. For example, if the landlord has absolutely no money or other assets, is unemployed, and owes the bank over a year's worth of mortgage payments, the Court might decide that there is no chance the landlord will be able to redeem the mortgage. If the court makes an Order for Foreclosure, then the bank will become the owner of the property.

Whether it is the bank or a third party that becomes the owner of the property, they will usually be entitled to possession of the property within 30 days. This means that if there is a tenant living in the property, the tenant will be served with a Court Order requiring them to move within 30 days. If the tenant does not move, then a Civil Enforcement Agency can be hired to force the tenant to leave the property.

Does a foreclosure always go through the Courts?

Not necessarily. Usually, if the landlord commits a default under the mortgage, the bank will attempt to contact the landlord to remind the landlord of their obligation under the mortgage. Sometimes the landlord and the bank will be able to work something out between themselves (for example, an alternative pay schedule), and then the landlord will remain the owner of the property.

Sometimes the bank and the landlord will not be able to work out a way for the landlord to remain the owner of the property. In this case, the owner and the bank may decide to proceed with a Quit Claim, or a Consent Order.



Defendant allegedly commits an act of default on mortgage

Plaintiff will usually send a reminder letter

No act of default was committed

Plaintiff files and serves a Statement of Claim

Defendant negotiates with the Plaintiff

Quit Claim

New mortgage terms

Defendant does not respond within the 20 days

The Defendant responds within 20 days

Defendant negotiates with the Plaintiff

Plaintiff notes the Defendant in default

Defendant files and serves a Statement of Defence

Defendant files and serves a Demand for Notice

The Plaintiff and Defendant enter into a Consent Order for Foreclosure

Variety of Court Applications

Application for Court Approval of Consent Order

No Order

- Ordered when the Defendant did not commit an act of default, or when the Defendant makes all of the outstanding mortgage payments
- Defendant remains the owner of the property

Redemption and Method of Sale Order

- Ordered when the Defendant has committed an act of default, but may be able to bring the mortgage current
- The Defendant is ordered to pay down the mortgage ("redeem the mortgage") within a specific period of time
- Defendant remains the owner

Order for Foreclosure or Order for Sale to the Plaintiff

- Ordered when the Defendant has defaulted and there is no chance that the Defendant can bring the mortgage current
- The Plaintiff becomes the owner

Defendant redeems the mortgage

Defendant does not redeem the mortgage

No foreclosure

- The Defendant remains the owner
- The lawsuit is stayed

Property is advertised for sale by a specific method

Valid offer to purchase from a third party

No valid offer to purchase

Order Confirming Sale and Vesting Title

- The property is sold to a third party

Order for Foreclosure or Order for Sale to the Plaintiff

- The claimant becomes the owner

What is a Quit Claim?

A Quit Claim is an agreement where the landlord transfers the ownership of the property to the bank. It is negotiated by the bank and the landlord, and does not involve the courts at all. The bank then becomes the owner of the property and is bound by the *Residential Tenancies Act*. Quit Claims are rare in Alberta.

What is a Consent Order?

A Consent Order for Foreclosure means that the landlord and the bank negotiate a Consent Order, and then apply to the Court for approval of the Order. There is some court involvement, in that the Court must approve the Consent Order, but the rest of the foreclosure process is eliminated. This method of proceeding is common in Alberta. Usually this type of Order will allow the tenant 30 days to vacate the property. The bank will become the legal owner of the property.

How can a tenant get involved in the court process?

Most commonly, the tenant will not know about the foreclosure until it is too late to be involved in the court process at all.

If you do find out that the property you are renting is in foreclosure before a final Order is made, you can file a Notice of Address for Service with the Clerk at the Court of Queen's Bench. The *Alberta Rules of Court*, Rule 11.24, allows for a tenant to do this, and the *Rules* include an example form of what this Notice should look like (see Form 48). You can find the *Rules* online at the Alberta Queen's Printer website (www.qp.alberta.ca). The tenant can then serve a copy of this Notice on the Plaintiff's lawyer (the bank's lawyer).

This Notice tells the Plaintiff that the tenant wants to know about all the formal steps, such as court applications, that occur during the foreclosure process. Once the Notice has been served, the Plaintiff must serve the tenant with documents from the foreclosure action. This Notice does not mean that the person will be able to ask the Court to order something; it only lets the person know when an application is occurring.

Can the tenant make a Court application?

If a tenant receives notice of a court application, then the tenant can go to Chambers (which is open court) and watch and address the Court during the application. If the tenant wants to ask the Court to grant some type of relief (for example, to have longer than 30 days to move from the property), then the tenant should file and serve an affidavit (a sworn document) on everyone involved in the foreclosure before the court date.

The tenant may want to contact the Plaintiff's lawyer to find out more information about the application. Tenants can also seek legal advice from a lawyer, or can hire a lawyer to represent them.

Can a tenant appeal an Order?

No, generally a tenant cannot appeal a foreclosure Order of the Court of Queen's Bench. The tenant will usually not be a party to the action (in other words, will not have been named in the court documents), and so has no right to appeal. Even if a tenant is a party to the action, there are only limited reasons for appeal. Even though it seems unfair that the tenant is caught in the problem between the landlord and the lender, disagreeing with the Order is not grounds for appeal.

If you want to appeal an Order, you may want to contact a lawyer to receive legal advice.

What happens to the security deposit?

The landlord must deliver the security deposit to the tenant, subject to any deductions made for damages or unpaid rent, within 10 days of the tenant giving up possession of the unit. If you are a landlord going through a foreclosure, you are still responsible to return the tenant's security deposit.

If the property is purchased by a third party, and the tenancy is not terminated by a Court Order, then the purchaser becomes the new landlord. New landlords are responsible for security deposits, even if they did not receive an amount for the security deposit from the former landlord.

If a landlord does not deliver the security deposit, an estimate, or statement of account within 10 days of the tenant giving up possession of the unit, the tenant can contact Service Alberta, which handles offences committed under the *Residential Tenancies Act*.

Is foreclosure the same as bankruptcy?

No. Foreclosure occurs because of a breach of contract. For example, the bank gave money to the landlord to buy a property, and in return, the landlord promised to pay that money, plus interest, back to the bank. If the landlord does not pay the bank, then the landlord has breached the contract made with the bank and the bank can then start foreclosure proceedings. Usually, only one asset will be involved, such as a house.

Bankruptcy occurs when someone cannot meet all of their financial obligations. A person in bankruptcy does not control any assets; instead, a trustee controls the assets and decides what happens to those assets. Bankruptcy is also a court process, but it is very different from foreclosures. Sometimes both foreclosures and bankruptcy can occur at the same time.

What do the words mean?

Glossary

Act of Default	Occurs when an owner does not fulfill specific promises made under the mortgage. For example, not paying the mortgage payments is considered an act, or acts, of default.
Alberta Court of Queen's Bench	The Superior Court in the province of Alberta. All matters dealing with foreclosure will be dealt with in the Court of Queen's Bench.
Foreclosure	A court process started by a mortgagee (in this booklet, the bank) to either gain ownership of a property, or to force a sale of a property, in order to satisfy the unpaid debt secured by the property.
Mortgagee	A mortgagee is a person or business that is owed a debt under a mortgage. For example, when a bank gives a mortgage to a property owner, then the bank is considered a mortgagee, and the property owner is a mortgagor. In this booklet, the mortgagee is referred to as a "bank" but can, in reality, be a variety of different lending institutions, or anyone who has loaned money under a mortgage.
Mortgagor	A mortgagor is a person who owes a debt to another person or business. For example, when a bank gives a mortgage to a property owner, then the property owner is considered a mortgagor.

Where can I get more help?

Community Resources

Law Society of Alberta Lawyer Referral Service

The Lawyer Referral Service can help people who need legal services with finding a lawyer. The Service operates out of the Calgary and Edmonton offices, but can provide contact information for lawyers from across Alberta.

Toll Free: 1-800-661-1095

In Calgary: 403-228-1722

Website:

http://www.lawsociety.ab.ca/public/lawyer_referral.aspx

Legal Aid Alberta

Legal Aid Alberta may be able to offer information or representation services to those who meet financial guidelines across Alberta.

Phone: 1-866-845-3425

Law Information Centres

LInC coordinators can assist people in understanding Alberta's court processes. They can assist with court forms, inform of the steps involved in legal proceedings, and refer to other resources that may be able to help. They cannot provide legal advice or representation.

Calgary Courts Centre

Main Floor, 601 5 Street SW
Phone: 403-476-4744

Red Deer Courthouse

Main Floor, 4909 48 Avenue
Phone: 403-755-1469

Edmonton Law Courts Building

Second Floor South
Law Society Library
1A Sir Winston Churchill
Square
Phone: 780-644-8217

Grande Prairie Courthouse

10260 99 Street
Phone: 780-833-4234

Legal Clinics

Clinics can provide you with legal information. Some clinics offer representation services. Financial restrictions may apply.

Calgary Legal Guidance

100, 840 7 Avenue SW, Calgary, AB T2P 3G2
www.clg.ab.ca; Phone: 403-234-9266

Central Alberta Community Legal Clinic

301, 5008 Ross Street, Red Deer, AB T4N 1Y3
www.communitylegalclinic.net; Phone: 403-314-9129

Edmonton Community Legal Centre

200, 10115 100A Street, Edmonton, AB T5J 2w2
www.eclc.ca; Email: intake@eclc.ca
Phone: 780-702-1725

Grande Prairie Legal Guidance

10116 102 Avenue, Grande Prairie, AB T8V 1C2
www.gplg.ca; Email: gplg@thecommunityvillage.ca
Phone: 780-882-0036

Lethbridge Legal Guidance

423 5 Street South, Lethbridge, AB T1J 2B6
www.lethbridgelegalguidance.ca; Phone: 403-380-6338

Student Legal Services of Edmonton

Emily Murphy House

11011 88 Avenue, Edmonton, AB T6G 0Z3
www.slsedmonton.com
Email: info@slsedmonton.com
Phone: 780-492-8244

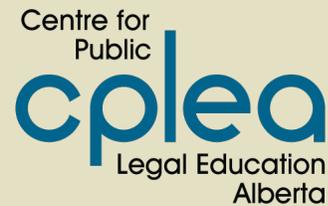
Student Legal Assistance (Calgary)

Volunteer law students from the University of Calgary offer their services to the Calgary and area public. Representation is available based on income.

University of Calgary Campus, Room 3390,
Murray Fraser Hall, Calgary AB, T2N 1N4
<http://www.slacalgary.com>; Phone: 403-220-6637

CPLEA

The Centre for Public Legal Education Alberta is a non-profit organization whose purpose is to provide Albertans with reliable information about their rights and responsibilities.



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Service Alberta

Paul Messner
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