

# BRITISH COLUMBIA LUNG ASSOCIATION

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## RADON IN REAL ESTATE:

TRANSFORMING BC'S INDOOR  
ENVIRONMENTS



## Summary for Policy Makers

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## **Executive Summary**

Radon gas is a naturally occurring radioactive gas that occurs widely in soils, and which can enter, and over time reach high concentrations in buildings. Chronic exposure to elevated concentrations of radon is now the leading cause of lung cancer after smoking in Canada, responsible for approximately 15% of lung cancer deaths. There are clear solutions to the problem, with low cost tests to evaluate whether radon levels exceed Canada's Radon Guideline, and ready and inexpensive solutions for fixing homes and other buildings.

The Healthy Built Environment program at the British Columbia Lung Association seeks law reform in British Columbia to address radon, and in 2019 conducted research on how radon could be address in real estate transactions, analyzing existing BC law, and taking cues from existing policy and legislation in European countries, American states, and other Canadian provinces. We also conducted surveys, webinars, and workshops with real estate licensees/realtors. We found that real estate transactions are an important occasion to address radon, given sellers obligations, buyers interests, and possibility of reducing population level exposure to elevated radon. Radon is a latent defect and sellers of real estate need to disclosure known levels. Real estate licensees have significant obligations to proactively raise radon with their clients and to provide them with information on how to address it and include clauses in the Contract for Purchase and Sale. We found that few real estate professionals in British Columbia were knowledgeable about radon but there was considerable appetite for more knowledge and higher standards. This made clear that considerable inroads could be made through clarifying existing law and professional standards.

During the course of our research and outreach we contacted senior management of the British Columbia Real Estate Association (BCREA), Real Estate Council of British Columbia (RECBC) and the Office of the Superintendent of Real Estate (OSRE) to introduce the science, health, and current policy context of radon, after which these organizations began to take steps. These included adding radon to the Property Disclosure Statement (BCREA), issuing guidance to members/licensees on radon that treats it as a latent defect (BCREA and RECBC), publishing checklists for buyers' agents, sellers' agents, and rental property managers (RECBC) and including radon in legal update materials for licensees (RECBC). These were proactive moves which aligned with our reading of what these organizations could do within their existing mandates and legislation.

In this summary report for policy makers, --updated from an earlier version in June 2020 to reflect the full suite of changes at RECBC--we outline our main policy reform findings and suggest further steps that real estate associations, regulators, and the provincial government and its agencies can take. We call for a process of study and revision to ensure the new guidance from RECBC is acting as intended. We ask the provincial government to take further steps around educating buyers and sellers of real estate, including introducing radon warning statements. More importantly we think ensuring radon is discussed and dealt with in real estate transactions also requires steps beyond BCREA and RECBC's control—such as community testing, adequate databases, professionalization of radon testers and mitigators, subsidies and incentives, and clear rules enforcing radon guidelines in workplaces, rented homes, schools, daycares and businesses.

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## Introduction

Radon gas is a naturally occurring radioactive gas that occurs widely in soils, and which can enter, and over time reach high concentrations in, buildings. Chronic exposure to elevated concentrations of radon is now the leading cause of lung cancer after smoking in Canada, responsible for approximately 15% of lung cancer deaths (or about 3,360 people) in the country.<sup>1</sup> It is estimated that 7% of homes in Canada have radon levels above Health Canada’s Guidelines of 200 Bq/m<sup>3</sup>, with some areas more affected than others.<sup>2</sup> Our current knowledge puts some areas of BC— the Kootenays, Okanagan and Northern region-- as well above the national average. In Castlegar, a sample of 1000 homes found 44% had levels above 200Bq/m<sup>3</sup> and in one subdivision 32 out of 33 homes had unacceptably high radon levels.<sup>3</sup> However, radon is easy to test with home testing kits that sell from 20 to 50 dollars. Once 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 one day and charge an average of about 2,900 dollars, including materials, per home.

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<sup>1</sup> 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.

<sup>2</sup> Henderson, S. B., Kosatski, T., and Barn, P. 2012. How to ensure that national radon survey results are useful for public health practice. *Canadian Journal of Public Health*, 103(3) pp. 231 -34.

<sup>3</sup> Donna Schmidt Lung Cancer Society, 2017 Lessons fro 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



Law and policy to protect people from elevated radon has been slow to develop in Canada. While the federal government has a National Radon Program, provinces maintain jurisdiction over key areas radon action falls under-- buildings, public health, and air quality. British Columbia has taken some limited steps to addressing radon, includes testing some government buildings, and making changes to the *BC Building Code* in areas known to have radon problems.<sup>4</sup> One Health Authority has ordered testing in childcares, making use of provisions in the *Community Care and Assisted Living Act*, that empowers medical health officers to attach terms and conditions to a license.<sup>5</sup> Overall, however, there remains

<sup>4</sup> 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](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](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.

<sup>5</sup> 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](https://cela.ca/wp-content/uploads/2019/07/Radon-Policy-Scan-Full-Report-with-Appendices_0.pdf) accessed July 7, 2020

an urgent need to have more homes in the province tested and to address high radon levels in the existing building stock.

Through the Summer and Fall of 2019 we researched the role of radon in real estate, taking cues from existing policy and legislation in European countries, American states, and Canadian provinces. We conducted literature reviews, compared BC's current radon practices to other places, and how, within BC, radon compares to other environmental contaminants in property. We conducted an online survey of BC realtors (e.g. members of local real estate boards in BC) and held 7 workshops with realtors. We also visited Calgary, Alberta and Halifax, Nova Scotia where we had informal discussions with regulators, radon mitigators, radon scientists, and real estate professionals. This document is a summary of our findings and recommendations for policy makers. We discuss existing duties of buyers, sellers, and real estate licensees and have clear recommendations for industry associations, regulators (currently the Real Estate Council of British Columbia--RECBC and the Office of the Superintendent of Real Estate--OSRE), and the provincial government.

## Real Estate Transactions are Important for Radon Action

We think real estate transactions are an important component of radon action. Approximately 7% of homes are bought and sold each year in British Columbia (with 85,800 residential sales per year<sup>6</sup>, total homes of 1,832,420 and approximately 1,240, 870 being owner occupied.<sup>7</sup>) When people buy homes they are focused on health and safety concerns, creating a unique point in time to reach the population and ensure homes are tested and mitigated. Radon is also a significant consumer protection issue for buyers and sellers of homes. Many US states have passed legislation requiring sellers to disclose known radon levels<sup>8</sup>, and in Canada there is growing momentum around recognizing radon as a latent defect (as further discussed below). Some US states require sellers to provide informational pamphlets to buyers at the time of forming the Contract for Purchase and Sale.<sup>9</sup>

Radon awareness is also an important piece of real estate agent practice. In the United Kingdom, some US states, and in some Canadian provinces it is now common for real estate agents to educate their clients on radon and help the radon problem and include solutions in the Contract for Purchase and Sale. Indeed, and as we detail in our

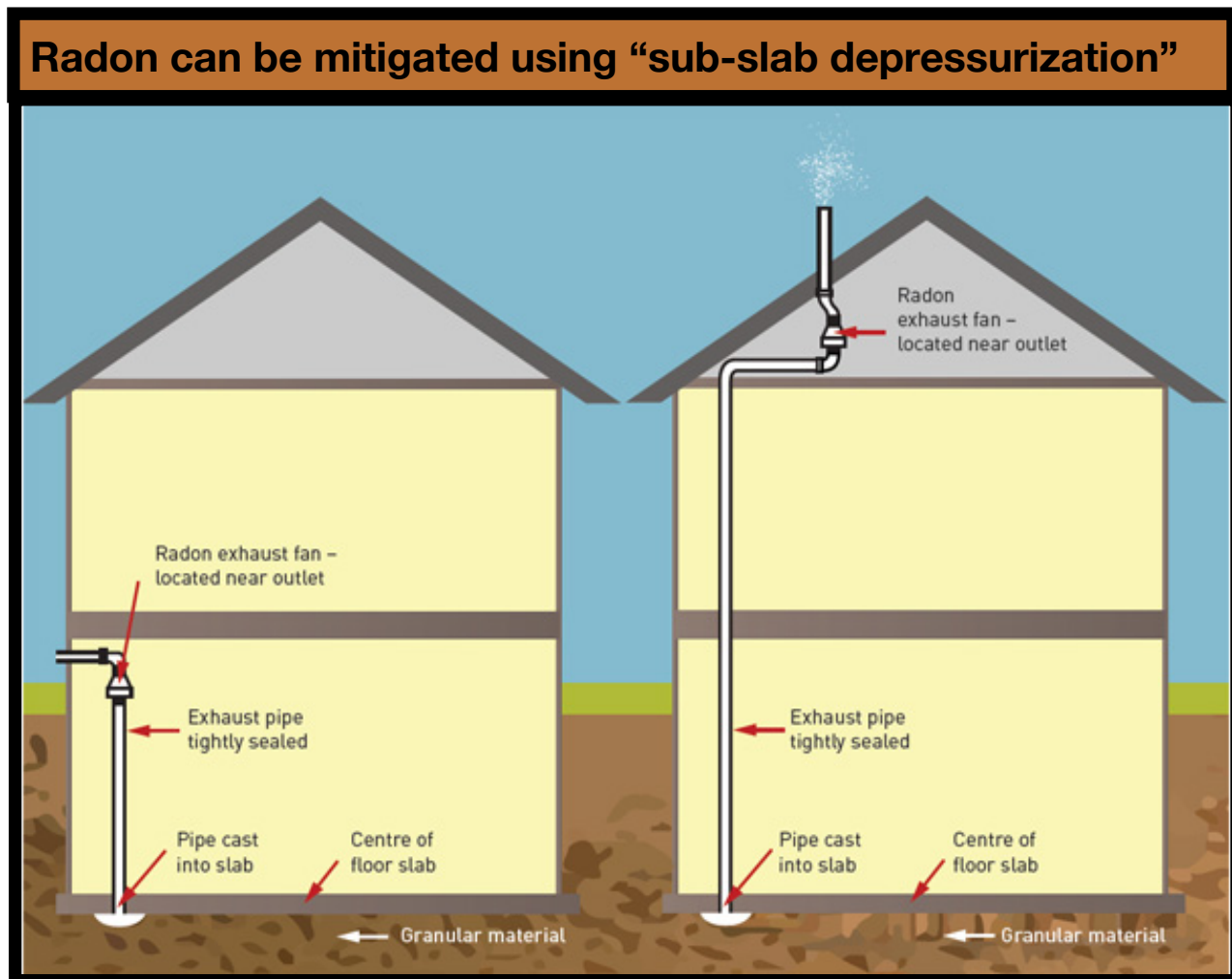
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<sup>6</sup> BCREA, 2019. Housing Forecast Update, February 2019: Housing Market Adjusts to Mortgage Stress Test [http://www.bcrea.bc.ca/docs/economics-forecasts-and-presentations/housingforecast\\_.pdf](http://www.bcrea.bc.ca/docs/economics-forecasts-and-presentations/housingforecast_.pdf) Ten year average, 2008 to 2018.

<sup>7</sup> Canadian Rental Housing Index, 2019. Community Profile Snapshot, British Columbia. Available at <http://rentalhousingindex.ca> see also Stats Canada. Chart 2 Homeownership rates by provinces and territories, 2006 and 2016 <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/cq-c002-eng.htm>-- listing 1,881, 970 homes, and a 68% home ownership rate

<sup>8</sup> A complete list of US state radon laws is available from Environmental Law Institute, 2020. Database of State Indoor Air Quality Laws, Radon Excerpt. Available at <https://www.eli.org/buildings/database-state-indoor-air-quality-laws> accessed July 7, 2020

<sup>9</sup> Delaware Code, tit. 6, §§ 2570–2578 Florida Statutes § 404.056, Illinois Compiled Statutes Ch. 420, §§ 46/10, Iowa Code § 558A.1, Kansas State Act 58-3078a et seq., Minnesota Statutes § 144.496, Montana Code Annotated 2017, Montana Radon Control Act, 75-3-606, New Hampshire NH Rev Stat § 477:4-a (2015), Rhode Island General Laws §§ § 5-20.8-2, also see Bernstein, T. 2018. State Policies Are Still Needed to Reduce Radon Risk. Environmental Law Institute Blog. Wednesday, January 17, 2018 available at <https://www.eli.org/vibrant-environment-blog/state-policies-are-still-needed-reduce-radon-risk> accessed July 7, 2020



Source: Health Canada, 2013. Radon Reduction Guide for Canadians. Ottawa.

companion document, *Radon in Real Estate: Recommendations for Licensees*<sup>10</sup>, real estate agents have significant obligations to proactively raise radon with the clients and to provide them with information on how to address it. Real estate industry associations, regulators, and the provincial government can also do much more to help eliminate high radon from homes and save lives.

## Radon Has Been Missing from Real Estate Transactions in BC

Responses to our survey suggest radon was not being discussed in real estate transactions. A large majority of respondents who took our survey reported that buyer-clients had never voiced concern around radon (83% or 298/360). And of those who did report clients raising the issue, most reported it only having come up a few times (74% or 46/62). Few realtors had ever been given instructions by their buyer-clients to ask about

<sup>10</sup> Quastel, N. 2020. Radon and Real Estate Recommendations for Licensees. British Columbia Lung Association.



radon in a home: Most answered “never” (85% or 305/361). Of those who said it had happened, most (61% or 34/56) said it only happened once or twice in their career. Some of these numbers could be explained by low radon in the Lower Mainland (with much of the province’s population). However, even in the high radon areas of the Kootenays, and Okanagan Mainline more than half reported buyers never voicing concern (Kootenays— 52% or 47 of 91 respondents; Okanagan Mainline-- 62% or 41 of 67 respondents).

Our survey results also suggested BC real estate licensees do not know very much about radon. To start, we asked about subjective impressions of knowledge, asking what phrase reflected participants understanding. 24% (or 91 respondents) stated ““Almost nothing, I am taking the survey as a way of learning”. The vast majority selected answers that indicated a vague awareness but reflected a sense of having insufficient knowledge to act on it or advise clients (66% or 245 respondents). About 10 percent of those who answered (37) expressed confidence in advising clients. When asked about formal education or seminars, only 11.5 % had had any formal education. We went on to ask questions that tested objective knowledge through specific questions. When asked what Canada’s Radon Guidelines were, 72 percent said they had no idea, and only 18.6 percent identified Canada’s Radon Guidelines as 200 Bq/m<sup>3</sup>. Less than third (27%) of respondents identified a long term (91 day) test in winter as the best way to test for radon. (One half said they had no idea). Most (63% or 222/350) were not aware of any provisions on radon in the *BC Building Code*.

## A Clear Need For Action

While a general lack of awareness explains some of the problem, we can also look to the lack of clear guidance for buyers, sellers, or real estate licensees at the time we conducted the survey. The only explicit rules (e.g. mentioning radon explicitly) we found in BC pertaining to real estate transactions at that time were in the Real Estate Council of British Columbia’s *Professional Standards Manual*. It provides links to public health documents outlining the problem and *suggests* that real estate licensees research and be able to provide information sources to clients about radon. We found that the Manual’s provisions at that time did not provide clear enough direction to licensees.

Responses to our survey showed that very few real estate licensees/realtors were aware of radon or knew of the provisions on radon in the *Manual*. Of 402 respondents, 94.4% said they were not aware of any guidelines or standards around radon that currently apply to BC real estate licensees. Results were not much better in the Kootenays (91% or 83 of 91 who responded), and about the same in Okanagan Mainline (95% or 63 out of 66 who responded).

Our initial reaction was to look to what could be done within BC’s existing legal framework to ensure radon is discussed in real estate transactions. We could also draw on the example of Alberta, where the Real Estate Council there had declared radon a la-

tent defect, published checklists, and created mandatory education for licensees. We initially met with senior management of RECBC and the British Columbia Real Estate Association (BCREA) to introduce the science, health, and current policy context of radon, and gauge awareness of radon and interest in reform, and this helped instigate action in those organizations. Significant steps taken now include

- BCREA issued a bulletin stating that radon was a latent defect in September 2019,<sup>11</sup>
- We applied to BCREA's provincial Standard Forms Committee to add radon to the Property Disclosure Statement, resulting in changes as of April 2020<sup>12</sup>
- BCREA created a Frequently Asked Questions document on radon in April, with contributions from our team<sup>13</sup>
- BCREA began a series of webinars on radon for Continuing Professional Development credits, in conjunction with our program. This ran monthly in June, July, and August of 2020 (with a last session planned for September) reaching approximately 70 participants per session. BCREA and BCLA will co-create a more permanent online course in the Fall of 2020
- As of July 2020, RECBC significantly revamped their guidance on radon, replacing the Professional Standards Manual with new Regulatory Standards Information. Along with declaring radon to be a latent defect there are clear directives for licensees to address the issue with clients. There is a web page dedicated to providing information on radon and detailing relevant regulatory standards.<sup>14</sup> A further web page offers Radon Precautions for Real Estate Professionals, including checklists for buyers' agents, sellers' agents and rental property managers.<sup>15</sup>
- In consultation with RECBC we have been told that guidance on radon will be included in yearly legal updates that are part of the relicensing process.

These are excellent initial steps. We are pleased to see them enacted and they are in line with our understanding of the powers of these organizations to act on the issue. They should not, however, be taken as everything that needs to be done.

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<sup>11</sup> Van Ert, A. 2019. REALTORS® and Radon: Protecting Buyers and Sellers. British Columbia Real Estate Association. Available at <https://www.bcrea.bc.ca/practice-tips/realtors-and-radon-protecting-buyers-and-sellers/> accessed June 30, 2020.

<sup>12</sup> Devi, S. 2020. Live Online Course and FAQ Created for REALTOR® Education About Radon Gas. Jun 10, 2020. 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 June 30, 2020.

<sup>13</sup> Devi, *ibid.*

<sup>14</sup> RECBC, 2020. Radon Precautions Regulatory Standards Information available at <https://www.recbc.ca/professionals/knowledge-base/articles/radon-precautions-regulatory-standards-information> accessed August 19, 2020

<sup>15</sup> RECBC, 2020. Radon Precautions for Real Estate Professionals. Available at <https://www.recbc.ca/professionals/knowledge-base/guidelines/radon-precautions-real-estate-professionals> accessed August 19, 2020



## Defining Existing Legal Obligations

As part of our research we examined existing legal obligations on buyers, sellers, and real estate licensees. While these are broadly in line with RECBC's analysis we think there are important aspects worth making clear.

**Buyers of real estate** have an interest in avoiding high radon, not only in terms of their long-term health, but also as part of their legal obligations to others. Here, we emphasize that while British Columbia has very few laws that directly address radon, there are a variety of general provisions concerning safety of the built environment that imply action on radon.

- Employers are under a general duty to ensure workplaces are safe.<sup>16</sup> There are also specific provisions covering ionizing radiation.<sup>17</sup> Workers who contract lung cancer can also make claims under Workers Compensation law if high radon is found in their workplace.<sup>18</sup> Ontario has set an example and issued guidelines for how the federal Naturally Occurring Radioactive Materials (NORM) Guidelines work together with general duty clauses to require radon reduction in workplaces to below 200 Bq/m<sup>3</sup> where possible.<sup>19</sup> This reasoning should be persuasive in BC.
- In BC, landlords need to ensure rental accommodation is in good repair.<sup>20</sup> Ontario and Quebec tribunals have ruled in favour of renters' rights to avoid high radon based on similar fitness of repair provisions.<sup>21</sup>
- Person who control buildings may be liable in damages under the *Occupiers' Liability Act*. If a building owner or landlord does not take adequate steps to ensure the building is safe, a tenant, or a visitor to a building who is harmed, can sue in court for compensation.<sup>22</sup> Occupiers have been found liable for damages caused by a range of omissions, including failing to install smoke alarms<sup>23</sup>, failing to install hand rails on stairs<sup>24</sup>, poor lighting<sup>25</sup>, and unsecured planters.<sup>26</sup>

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<sup>16</sup> British Columbia, Occupational Health and Safety Regulation, BC Reg 296/97, Part 4 - General Conditions - 296/97 at s. 4.1;

<sup>17</sup> OHS, s. 7.17 to 7.22. Exposures over 1 mSv (which corresponds to about 200 Bq/m<sup>3</sup>) require exposure plans

<sup>18</sup> Workers Compensation Act RSBC 1996, c 492 s. 5 (1), s. 6(1), Schedule B

<sup>19</sup> Ontario Ministry of Labour, Training and Skills Development, 2016. Radon in the workplace available at [https://www.labour.gov.on.ca/english/hs/pubs/gl\\_radon.php](https://www.labour.gov.on.ca/english/hs/pubs/gl_radon.php), see also Government of Canada, 2013. see also Government of Canada, 2013. Canadian Guidelines for the Management of Naturally Occurring Radioactive Materials (NORM). available at <https://www.canada.ca/en/health-canada/services/publications/health-risks-safety/canadian-guidelines-management-naturally-occurring-radioactive-materials.html> accessed July 6 2020.

<sup>20</sup> Residential Tenancy Act, SBC 2002, c 78 s. 32

<sup>21</sup> CET-67599-17 (Re), 2017 CanLII 60362 (ON LTB); Vanderwerf v. Dolan, 2019 QCRDL 37417; For broader rulings on indoor air quality see 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

<sup>22</sup> Occupiers Liability Act R.C.B.C 1996, c. 337 s. 6 (1)

<sup>23</sup> Bueckert v. Mattison (1996), 1996 CanLII 6701 (SK QB) Daniels v. McKelvey, 2010 MBQB 18, Leslie v. S & B Apartment Holding Ltd., 2011 NSSC 48

<sup>24</sup> McLeod v. Yong, 1999 BCCA 249

<sup>25</sup> Zavaglia v. MAQ Holdings Ltd. (1986), 1986 CanLII 919 (BCCA), 6 B.C.L.R. (2d) 286 (C.A.)

<sup>26</sup> Klajch v. Jongeneel et al., 2001 BCSC 259, affirmed (on this point) Klajch (Guardian ad litem of) v. Jongeneel, 2002 BCCA 14 (CanLII)

- New Home Warranty legislation protects buyers of new homes from defects. Already, Ontario's home warranty plan provider, Tarion, recognizes and will compensate new home buyers who find high radon levels.<sup>27</sup>

Given growing awareness of radon in British Columbia, we think it is only a matter of time until we see courts and tribunals make the link between these existing rights and obligations and radon.

**Sellers of real estate** should now be disclosing known high radon levels as a latent defect. Radon is a significant health risk that cannot be detected by a reasonable person through a normal home inspection. Examples where Canadian courts have found latent defects include: Unstable slopes,<sup>28</sup> defective subfloors,<sup>29</sup> leaky skylights,<sup>30</sup> radioactivity,<sup>31</sup> radioactive material on property in the immediate area,<sup>32</sup> mold,<sup>33</sup> and water damage.<sup>34</sup> Quebec has Civil Code provisions on latent defects<sup>35</sup> which courts have found could be applied to radon.<sup>36</sup> The Real Estate Council of Alberta has issued a bulletin stating that if test results show 200 Bq/m<sup>3</sup> or higher, and the seller has done nothing to mitigate the radon gas, this is a material latent defect which must be disclosed to potential buyers.<sup>37</sup>

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<sup>27</sup> Radon Gas and Tarion's Warranty Coverage. available at <https://www.carst.ca/resources/Documents/Final%20-%20TARION%202013%20Radon%20Gas%20-%20Information%20for%20builders.pdf> Accessed August 27, 2019

<sup>28</sup> McCluskie v. Reynolds (1998), 1998 CanLII 5384 (BC SC), 65 B.C.L.R. (3d) 191 (S.C.)

<sup>29</sup> Cardwell et al v. Perthen et al, 2006 BCSC 333, aff'd 2007 BCCA 313

<sup>30</sup> Cardwell ibid. at para 131 and 132

<sup>31</sup> provided as a hypothetical example in McGrath v. MacLean, 1979 CanLII 1691 (ON CA) at para. 16: but found in 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

<sup>32</sup> Sevidal v. Chopra, 1987 CanLII 4262 (ON SC)

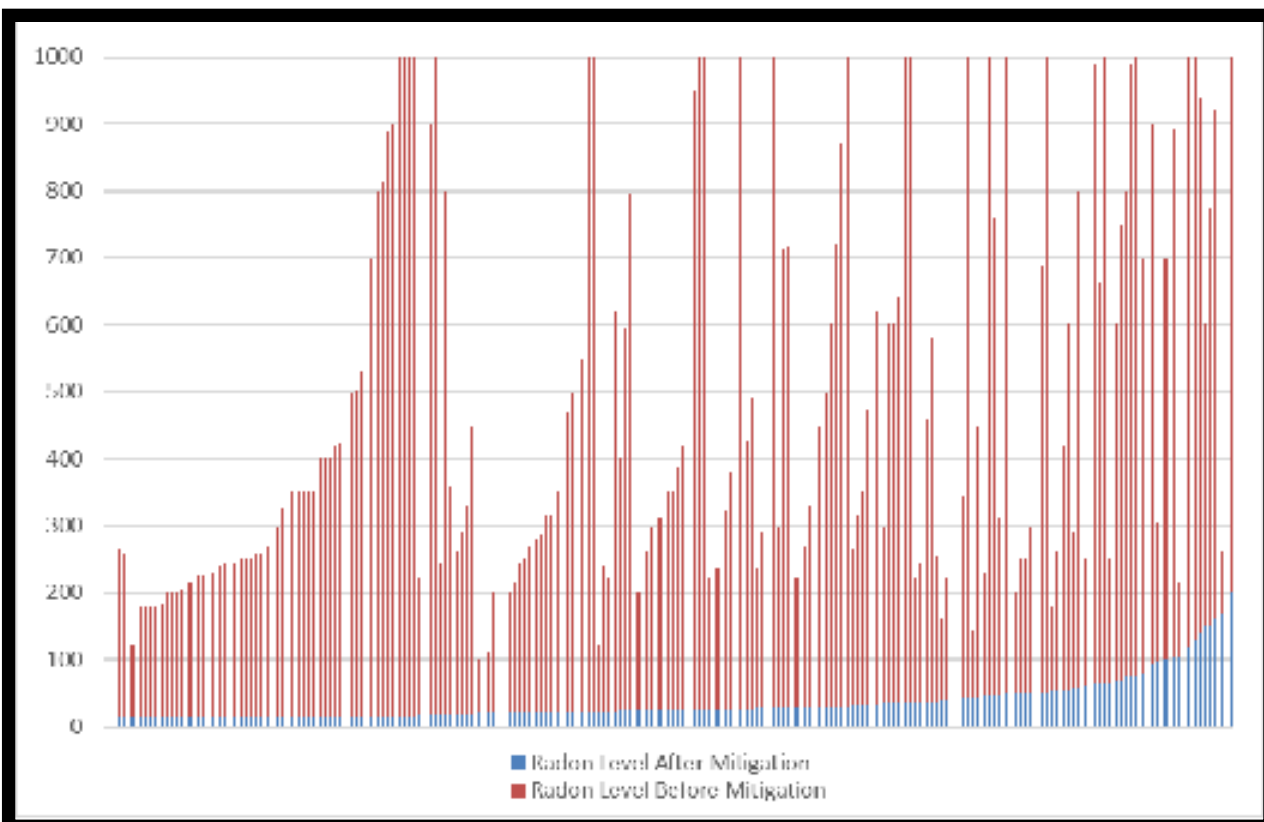
<sup>33</sup> Gibb v. Sprague, 2008 ABQB 298 (CanLII).

<sup>34</sup> Stone v. Stewart (2009), 83 R.P.R. (4<sup>th</sup>) 309 (Ont. S.C.J.).

<sup>35</sup> Quebec Civil Code, art. 1726

<sup>36</sup> Pouliot c. Leblanc 2011 QCCQ 7882

<sup>37</sup> Real Estate Council of Alberta, 2019. Radon Information Bulletin. available at <https://www.reca.ca/industry/legislation/information-bulletins/radon.html> accessed September 26, 2019



Post mitigation testing by CNRPP Professionals show all almost all homes mitigated to below 200 Bq/m<sup>3</sup> and 90% below 100 Bq/m<sup>3</sup>, even where pre-mitigation radon levels exceeded 1000 Bq/m<sup>3</sup>. Courtesy of CNRPP and Pam Warkentin.

We detail responsibilities of real estate licenses in detail in a companion document, *Radon in Real Estate: Recommendations for Licensees*. To summarize, licensees must act in the best interests of their client,<sup>38</sup> and act with reasonable care and skill.<sup>39</sup> This implies disclosing to the client all known information with respect to any real estate being dealt with<sup>40</sup> and using reasonable efforts to discover relevant facts that a reasonable purchaser might consider.<sup>41</sup> An agent should also check the completeness and accuracy of all information which it is usual or customary for brokers to verify.<sup>42</sup> We think this means that licensees have significant obligations to *proactively* raise radon with the clients, know local radon risks, provide clients with information on how to test and mitigate, and help the buyer and seller reach an agreement around testing and mitigation for radon (and include this in the Contract for Purchase and Sale). We emphasize that real estate licensees should also know when to defer to radon-certified home inspectors, testers, and mitigators for assessing and fixing individual buildings.

<sup>38</sup> DeJesus v. Sharif, 2010 BCCA 121; Paniccia v. Eckert, 2012 BCSC 1428

<sup>39</sup> Real Estate Rules (3-4)

<sup>40</sup> The Real Estate Council's Real Estate Rules 3-3 (f)

<sup>41</sup> Real Estate Rules (3-3(h)); Perrault v. North Vancouver (District), 2010 BCSC 382 (CanLII) at paras. 15-19; see also Canadian Real Estate Association Realtor Code, Art. 4

<sup>42</sup> Shaak v. McIntyre, [1991] B.C.J. No. 2607 (S.C.) (QL), at para. 65; Cosway v. Boorman's Investment Co. Ltd., 2008 BCSC 206 (CanLII) at para. 3)

We found significant problems with the provisions on radon RECBC’s older *Professional Standards Manual*. It did not provide clear direction, did not instruct real estate professionals to proactively deal with radon and failed to specify it was a latent defect. These core concerns are now largely addressed by the new guidance documents created in July 2020. We were especially pleased to see the issue of latent defects foregrounded—in our workshops and webinars, a majority of realtors (56% or 138/240) felt that RECBC should issue bulletins concerning radon as a latent defect.

## Radon in the Contract for Purchase and Sale

A core issue with radon in real estate transactions is who should arrange for, and bear the costs, of, radon testing and, if necessary, mitigation. This is a potentially problematic area, and we were pleased to see BCREA and RECBC support the use of radon contingency clauses. These allow the buyer and seller to include radon in the contract for purchase and sale, have the seller pay the costs for radon testing and mitigation, but for the buyer to control the process and ensure quality of testing and mitigation work.

**The problem with short term testing.** The standard practice in much of the United States is for sellers to test and mitigate prior to the sale, and this is promoted by the Environmental Protection Agency<sup>43</sup> and local state agencies, such as the New Jersey Department of Environmental Protection.<sup>44</sup> Indeed, it has driven much radon testing and mitigation, with some estimates putting 90 percent of all radon tests having occurred in a realty context in the United States, and as many as 15 to 25% of homes sold being tested for radon.<sup>45</sup> Our surveys indicated some short testing prior to sale occurs in BC. As well, the Canadian Association of Radon Scientists and Technologists has issued promotional materials and guidelines around Radon and Real Estate which tries to accommodate industry demand for short term tests.<sup>46</sup> Unfortunately, short-term tests are inaccurate, due to the fact that radon levels in a home fluctuate significantly by time of day and over a number of days.<sup>47</sup> Health Canada discourages short term tests, insisting that best practices in radon

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<sup>43</sup> EPA, 2018. Home Buyer’s and Seller’s Guide to Radon. EPA 402/K-13/002 | March 2018 (revised) at p. 11 available at <https://www.epa.gov/sites/production/files/2015-05/documents/hmbuyguid.pdf> accessed September 10, 2019

<sup>44</sup> New Jersey Department of Environmental Protection, 2019. Radon Testing and Mitigation: The Basics. available at <https://www.nj.gov/dep/rpp/radon/radontes.htm>

<sup>45</sup> Edelstein, M.R. and Makofske, W.J., 1998. Radon's deadly daughters: science, environmental policy, and the politics of risk. Rowman & Littlefield. p. 192. For a broader critique of short-term testing also see p. 122

<sup>46</sup> CARST Guideline for Conducting a Radon Screening Assessment as Part of a Real Estate Transaction of a Residential Dwelling in Canada available at <https://carst.ca/resources/Documents/CARST%20Guideline%20for%20Conducting%20a%20Radon%20Screening%20Assessment%20as%20Part%20of%20a%20Real%20Estate%20Transaction%20of%20a%20Residential%20Dwelling%20in%20Canada%20-%20Final%202018.pdf> accessed December 12, 2019

<sup>47</sup> Stanley, F.K., Irvine, J.L., Jacques, W.R., Salgia, S.R., Innes, D.G., Winkvist, B.D., Torr, D., Brenner, D.R. and Goodarzi, A.A., 2019. Radon exposure is rising steadily within the modern north American residential environment and is increasingly uniform across seasons. Scientific Reports, 9(1), pp.1-17; see also CBC News, 2019. Short-term home radon tests faulty 99% of the time, Calgary study finds. Dec 4, 2019. available at <https://www.cbc.ca/news/canada/calgary/radon-test-kits-not-effective-short-term-university-research-calgary-1.5384088>

testing require 3 month tests during the winter, to allow for seasonally higher concentrations, and variations that occur from day to day.<sup>48</sup> As well, a minority of BC real estate licensees (or realtors) we spoke to favoured making radon the responsibility of sellers (66/205 or 32%) and most thought it should be negotiated between the parties (111/205 or 54%).

The Radon Contingency Clause provides a form of solution here. (Alternative names are ‘radon holdbacks’ or ‘radon bonds’). The buyer sets aside part of the sale price (e.g. the expected costs of remediation) and pays it into a special account, typically held in trust by a lawyer. This can then be paid out to cover remediation costs, and any excess is paid to the seller. The process is commonly used in the United Kingdom under the label of “Radon Retention Bond”.<sup>49</sup> And has been widely recommended by academics,<sup>50</sup> by the New Brunswick Realty Association,<sup>51</sup> the Alberta Real Estate Council,<sup>52</sup> the New Jersey Department of Environmental Protection<sup>53</sup> and other U.S. state agencies.<sup>54</sup> Use of such a clause can protect sellers from potential litigation, raise awareness of radon, facilitate testing, and ensure buyers have control over the quality and workmanship of mitigation. Moreover, it is in the material interest of both sellers and buyers to know that such clauses are available and may affect the negotiation process. We also stress that real estate licensees that do nothing effectively put responsibility for the risk of high radon on to the buyer.

## Need for Reflection and Revision on Real Estate Licensees Guidance

We were encouraged by the actions of BCREA and RECBC but continue to have some concerns, based on our research.

**Knowledge and Application of the Guidance.** Responses to our survey showed that very few real estate licensees/realtors were aware of radon or knew of the provisions on radon in the old *Professional Standards Manual*. Of 402 respondents, 94.4% said they

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<sup>48</sup> Health Canada, 2017. Guide for Radon Measurements in Residential Dwellings (Homes). Available at <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/health-risks-safety/guide-radon-measurements-residential-dwellings/radon-measurements-homes-eng.pdf>, accessed June 1, 2019

<sup>49</sup> BRE Global, 2018. Frequently Asked Questions About Radon. available at <https://www.bre.co.uk/page.jsp?id=3150buying4> accessed September 26, 2019.

<sup>50</sup> King, R.D., 1993. Legal Implications of Residential Radon Contamination: The First Decade. Wm. & Mary J. Envtl. L., 18, p.107. p. 162)

<sup>51</sup> New Brunswick Real Estate Association, 2018. I am selling my house. What should I know about Radon? available at <http://nbrea.ca/i-am-selling-my-house-what-should-i-know-about-radon/> accessed September 29, 2019. see also New Brunswick Real Estate Association, 2018. I am buying a home. What do I need to know about Radon? available at <http://nbrea.ca/i-am-buying-a-home-what-do-i-need-to-know-about-radon/> accessed September 29, 2019

<sup>52</sup> Real Estate Council of Alberta, 2017. The Regulator. Vol 23, Issue 4. available at <https://www.reca.ca/wp-content/uploads/2018/07/November-2017-Regulator.pdf> Accessed October 1, 2019. at p. 9

<sup>53</sup> Department of Environmental Protection. Information for Buyers and Sellers <https://www.nj.gov/dep/rpp/radon/homebs.htm>

<sup>54</sup> for Virginia, see Paris, R. 2017 Radon in Virginia Real Estate Transactions. available at <http://www.vdh.virginia.gov/content/uploads/sites/7/2017/12/Radon-in-VA-Real-Estate-Transactions-2-HR-rev-SEP-2017-w-VDH-logo.pdf> accessed December 16, 2019; for Colorado see Colorado Department of Public Health and Environment, 2009. Dealing with Radon in Real Estate Transactions. available at <https://www.tchd.org/DocumentCenter/View/1328/Dealing-with-Radon-in-Real-Estate-Transactions?bidId=> accessed December 16, 2019.

were not aware of any guidelines or standards around radon that currently apply to BC real estate licensees. Results were not much better in the Kootenays (91% or 83 of 91 who responded), and about the same in Okanagan Mainline (95% or 63 out of 66 who responded). We are worried about potential gaps in knowledge translation and query, given the past problems with the Professional Standards Manual, whether real estate professionals will reliably follow new guidance. We are willing to take a ‘wait and see’ approach. We recommend follow up studies to evaluate whether licensees have become knowledgeable about radon, are aware of their duties, and are proactively raising the issue with clients and incorporating it into their practice.

**Education of Licensees.** The lack of awareness and understanding of radon and the associated duties of licensees clearly pointed to the need for education. Hence, we were pleased to work with BCREA on providing webinars for continuing professional development credit. We also found a large majority of realtors we spoke with in our workshops and webinars (71% or 168/238) favoured further education. Here, we were not surprised to see that voluntary education for credits was more popular among licensees than mandatory education (47% or 112/238 versus 24% or 56/238). However, given the logistics of a large province with thousands of real estate licensees, we are worried about the numbers of people a voluntary system through BCREA will reach. For instance, 70 webinar participants per month amounts to, even over a many year period, a paltry fraction of total real estate licensees. BC should follow other provinces in Canada, where there is now detailed mandatory instruction on radon --Alberta, Quebec, New Brunswick, and Nova Scotia-- generally through relicensing requirements.<sup>55</sup> RECBC has informed us that there will be some reference to radon in the legal updates component of their relicensing education. Again, we take a wait and see approach: We suggest close monitoring of levels of knowledge and awareness, with an eye to revisiting educational requirements if awareness of radon among licensees remains low.

**Radon Contingency Clauses.** In our workshops/webinars we discussed the issue of allocating costs of fixing radon, and Realtors generally did not like the idea of rules specifying that either buyer or seller be responsible. A majority though it should be negotiated by the parties (111/205 or 54%). However, when we asked licensees/realtors in our workshops only a minority envisioned negotiating these, either for sellers (24% or 45/190) or for buyers (61/168 or 36%). We also heard a lot of negativity around such clauses, such as that sellers do not like the delays and uncertainty, that demanding such clauses can “kill deals”, and sellers might be suspicious that buyers are overspending on mitigation. We think it is likely that given RECBC’s directions, and the likelihood that contingency clauses become more common, attitudes might change. Again, we suggest follow up studies to evaluate whether the current direction is working.

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<sup>55</sup> Real Estate Council of Alberta, 2019. Renewing My Licence. available at <https://www.reca.ca/professionals-learners/licensing-renewals/renewing-my-license/>. Alberta course materials on file with author. For other provinces we have relied on personal communications with Health Canada Regional Radiation Specialist, Atlantic Canada (June 25-28, 2018).

## New Government Action to Reach the Wider Public

We remain concerned about low levels of awareness around radon in the general public. Statistics Canada’s Households and the Environment Survey includes survey data on knowledge of radon.<sup>56</sup> The 2017 results showed half of Canadian households reported never having heard of radon. For BC, 52% had heard of radon, slightly higher than the national average, but of those, 35% gave an incorrect description, and only 8% had tested for radon. Our survey of realtors suggest that this low level of awareness is also reflected in residential property buyers and sellers. A large majority of realtors who took our survey reported that buyer-clients had never voiced concern around radon (83% or 298/360). And of those who did report clients raising the issue, most reported it only having come up a few times (74% or 46/62). Few realtors had ever been given instructions by their buyer-clients to ask about radon in a home: 85% (or 305/361) answered “never”. Of those who said it had happened, most (61% or 34/56) said it only happened once or twice in their career.

Clearly, more effort is needed to ensure the general public is aware of radon issues when buying and selling homes. BCREA and RECBC have taken significant steps that are within their current mandate as professional associations or regulators empowered by the *Real Estate Services Act*. These efforts are premised on having oversight over real estate professionals and assume that new guidance will trick down to the general public. We remain concerned about the degree to which real estate licensees can fully carry the load of educating the public. We also think the general public needs to learn from sources other than real estate licensees—in part to help assess whether real estate professionals are addressing radon in the right way.

In part a general education and awareness campaign by the provincial government could help here. But one innovation we think would be particularly useful would be warning statements for buyers in regions of the province prone to elevated radon. (Here, the list of municipalities provided in the BC Building Code for radon rough-ins in new construction could be a reference). Some US states have statutes that requires sellers to pass on pre-written statements to buyers. These generally explain that radon may be a present danger in the property, explain the legal duties of sellers concerning radon, and advise testing.<sup>57</sup>

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<sup>56</sup> Statistics Canada, 2017. Households and the environment survey. Knowledge of radon and testing. Table: 38-10-0086-01 Available at <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3810008601>

<sup>57</sup> Delaware Code, tit. 6, §§ 2570–2578, Iowa Code § 558A.1 et seq., Illinois Compiled Statutes Ch. 420, §§ 46/10; Florida Statutes § 404.056, Kansas State Act 58-3078a, Montana Code Annotated 2017, Montana Radon Control Act, 75-3-606. Minnesota Statutes § 144.496 New Hampshire NH Rev Stat § 477:4-a (2015); Rhode Island General Laws §§ 5-20.8-2

<sup>57</sup> Minnesota Statutes § 144.496. The statement is available for download here: <https://www.health.state.mn.us/communities/environment/air/docs/radon/realstatedis.pdf> accessed August 19, 2020



Some states take extra steps to make sure the buyer signs off on having received the information.<sup>58</sup> These can be co-authored by non-governmental health organizations and public health agencies as well as broadened to include a range of public health concerns around indoor environments— providing an important way to further awareness and education about household pollutants that cause injury, disease and death. In Appendix 1 we attach the Minnesota Radon Warning Statement. In our workshop/webinars, we found strong support for mandatory information on radon (64% or 146/228 participants). We were also surprised to find a large majority favoured the provincial government mandating this through legislation (78% or 160/206).

We think the the BC government should include mandatory statements in real estate transactions as part of adopting radon legislation. Statements should be verified and approved by health agencies and non-profits.

## We Still Need Broader Radon Policies

In our surveys and during our workshops and webinars we received unexpected feedback emphasizing that the provincial government should be taking a lead role in addressing radon as a public health issue. We agree. While the efforts of BCREA and RECBC are laudable, these organizations are not in a position, given their current mandate, to fully drive a transformation of real estate transactions to fully address radon. In other projects we expect to spell out our recommendations for provincial and municipal level policies. Here, we can suggest how such broader policies could work to shift real estate transactions. Many of these can start now and be developed by not only the provincial government and its agencies but also municipal governments and non-profit civil society organizations.

**Broad Public Education.** Radon policy faces the challenge that the issue remains poorly understood. Education campaigns would serve to enhance buyer and seller awareness of radon (and so contribute to changing real estate transactions). We think the best educational campaigns, however, also involve testing homes and collecting results to create better maps and knowledge of risks in each community. This would in turn increase the number of homes with known radon levels, as well allow for more precise knowledge of local radon risks.

**Clarifying New Home Warranty.** The *Homeowners Protection Act* provides for mandatory home warranty, and details what needs to be included in home warranty coverage. BC should follow the lead of Ontario and make clear that radon is covered by home warranty protection. We think there is a role for real estate industry associations and regulators to work with BC Housing to incorporate radon awareness into home warranty provider policies, and to ensure builders are educated on radon issues. We would prefer however, to see legislation or regulation to clarify that radon is covered. Regulation should

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<sup>58</sup> For example, see Delaware-- 6 DE Code 2572A; Illinois-- 420 IL Comp. Stat. 46/1, Montana Annotated Coe de 2017 75-3-606.

make clear that fixing radon is well within a builders' control and cannot be excluded from coverage by contract.<sup>59</sup>

**Testing and Mapping.** The current state of radon maps in BC is poor compared to other jurisdictions, such as the United States<sup>60</sup> and the United Kingdom.<sup>61</sup> The British Columbia Centre for Disease Control is beginning to create a radon database for the province but needs much better readings. We need more sample testing of municipalities across the province, reporting of the results, and easy to read radon maps: This, in turn would help real estate licensees and home buyers know the risks they face in choosing whether to test for radon.

**Subsidies for testing and mitigation.** We need to see high radon in homes and buildings as a public health issue and send the message that this is of concern to the people of British Columbia. Homeowners of limited means should get help to ensure they are protected from high radon. Subsidizing the costs of radon test kits and mitigation in high radon areas—through direct grants or tax credits— is a cost effective public health intervention which can be compared to other investments we make in our health care system.<sup>62</sup> Subsidies would also go a long way to educating people about radon and driving mention of radon in real estate transactions.

**Certification of Professionals.** Many of the realtors we spoke with expressed doubts about the potential quality of testing and mitigation services and thought issues of fraud or poor workmanship could be an issue between buyer and seller. Currently Health Canada maintains the Canadian National Radon Certification Program (C-NRPP), which covers testing and mitigation. Although C-NRPP maintains standards for radon testing and mitigation, membership is voluntary. In the United States, 25 states have laws that require radon professionals to be certified.<sup>63</sup> We recommend that individuals and organizations use C-NRPP certified professionals, and that the BC government moves to make membership in CNRPP mandatory. We also want to see greater support for home inspectors to get certified as radon testers, so they are qualified to evaluate radon systems as part of the services they give to buyers of real estate.

**Standards for workplaces, commercial spaces and rental accommodation.** No one should have to work, study, live or play in buildings with elevated radon levels—and bear unnecessary risk of lung cancer. Unfortunately, BC continues to lack explicit

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<sup>59</sup> see e.g. s. 11 of the Homeowner Protection Act Regulation, BC Reg 29/99, Schedule 2, which provides that a warranty provider may exclude some items from home warranty insurance.

<sup>60</sup> Environmental Protection Agency, 1993. Map of Radon Zones. Available at <https://www.epa.gov/radon/find-information-about-local-radon-zones-and-state-contact-informationradonmap> accessed September 10, 2019

<sup>61</sup> Public Health England, 2019. UK Maps of Radon. available at <https://www.ukradon.org/information/ukmaps> Accessed September 10, 2019.

<sup>62</sup> Gaskin, J., Coyle, D., Whyte, J., Birkett, N. and Krewksi, D., 2019. A cost effectiveness analysis of interventions to reduce residential radon exposure in Canada. *Journal of Environmental Management*, 247, pp.449-461. For federal campaigns see Green Budget Coalition, 2020. Recommendations for Budget 2020, Radon: Challenging All MPs Whose Ridings Have High Radon Levels—Support a Radon Tax Credit <https://greenbudget.ca/recommendations/a-tax-credit-for-radon-remediation-logical-next-step-for-feds/>

<sup>63</sup> See The Policy Surveillance Program, 2020. State Radon Laws, available at <http://lawatlas.org/datasets/state-radon-laws> accessed January 7, 2020.

rules that ensure employees, students, tenants and customers know radon levels or have guarantees around radon levels. In each of these cases, there are strong justifications on the basis of power imbalances, inability of individuals to make decisions over spaces controlled by others, justice, and the public good for mandatory legislation. Firm requirements would also drive due diligence requirements in real estate. We found that the existence of explicit laws covering other environmental concerns in buildings (such as asbestos, fuel tanks and soil contamination) drove specific procedures for real estate transactions (such as testing as part of environmental site assessments or clear duties to investigate for real estate licensees). An alternative approach would be for government agencies—the Residential Tenancies Branch, Worksafe BC, BC Housing and others—to offer specific guidance, directives and interpretive bulletins specifying that current general provisions on health and safety include radon.

## **Conclusion**

Real estate transactions are an important area for radon awareness and reform of existing practices. We are glad to see that there is a lot that real estate licensees, their trade associations and governing bodies can, and have shown willingness to, do to improve the situation right now, even before contemplating new legislation. British Columbia's real estate community has acted quickly to get up to speed and match innovations occurring elsewhere in Canada. These steps include clarifying real estate licensee roles to proactively discuss radon, treating radon as a latent defect, and introducing radon education for licensees.

We are also conscious that radon policy is an evolving process, and we are starting in British Columbia from a baseline of very limited awareness of the issue. We also think that new programs and policies to more generally address radon will also serve to encourage more homes to be tested and mitigated as part of real estate transactions. As knowledge and awareness grows in the general public, more sellers will be aware that their homes might have a significant, but latent, defect, and more buyers will ask about radon. Real estate licensees will be under more pressure to be knowledgeable and give advice. We think the current efforts of RECBC and BCREA are a good way to get the ball rolling and expect that over time there will be increased public appetite for more robust measures (such as having sellers ensure their homes do not have high radon prior to sale). We emphasize that attention to real estate transactions are one component of a larger suite of policies that make up comprehensive plans to address radon and reduce lung cancer in the province.

## Appendix 1 — Minnesota Radon Sheet



### Radon in Real Estate Transactions

**All Minnesota homes can have dangerous levels of radon gas.** Radon is a colorless, odorless and tasteless **radioactive gas** that can seep into homes from the soil. When inhaled, its radioactive particles can damage the lungs. Long-term exposure to radon can lead to **lung cancer**. About 21,000 lung cancer deaths each year in the United States are caused by radon.

The only way to know how much radon gas has entered the home is to conduct a radon test. MDH estimates 2 in 5 homes exceed the 4.0 pCi/L (picocuries per liter) action level. Whether a home is old or new, **any home can have high levels of radon**.

The purpose of this publication is to educate and inform potential home buyers of the risks of radon exposure, and how to test for and reduce radon as part of real estate transactions.

#### Disclosure Requirements

Effective January 1, 2014, the Minnesota Radon Awareness Act requires specific disclosure and education be provided to potential home buyers during residential real estate transactions in Minnesota. **Before signing a purchase agreement to sell or transfer residential real property**, the seller shall provide this publication and shall disclose in writing to the buyer:

1. whether a radon test or tests have occurred on the property
2. the most current records and reports pertaining to radon concentrations within the dwelling
3. a description of any radon levels, mitigation, or remediation
4. information on the radon mitigation system, if a system was installed
5. a radon warning statement

#### Radon Facts

**How dangerous is radon?** Radon is the number one cause of lung cancer in non-smokers, and the second leading cause overall. Your risk for lung cancer increases with higher levels of radon, prolonged exposure, and whether or not you are a current smoker or former smoker.

**Where is your greatest exposure to radon?** For most Minnesotans, your greatest exposure is at home where radon can concentrate indoors.

**What is the recommended action based on my results?** If the average radon in the home is at or above 4.0 pCi/L, the home's radon level should be reduced. Also, consider mitigating if radon levels are between 2.0 pCi/L and 3.9 pCi/L. Any amount of radon, even below the recommended action level, carries some risk.

#### Radon Warning Statement

"The Minnesota Department of Health strongly recommends that ALL homebuyers have an indoor radon test performed prior to purchase or taking occupancy, and recommends having the radon levels mitigated if elevated radon concentrations are found. Elevated radon concentrations can easily be reduced by a qualified, certified, or licensed, if applicable, radon mitigator.

Every buyer of any interest in residential real property is notified that the property may present exposure to dangerous levels of indoor radon gas that may place the occupants at risk of developing radon-induced lung cancer. Radon, a Class A human carcinogen, is the leading cause of lung cancer in nonsmokers and the second leading cause overall. The seller of any interest in residential real property is required to provide the buyer with any information on radon test results of the dwelling".

