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Crowned Royal

PLUS

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Cover photo by Jessica Nobert.

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Each year in May, Canadians celebrate Victoria Day. To celebrate this year, our feature articles describe the role of royals in Canada and around the world. See also our special report on insurance.

Feature

Crowned Royal

What Needs to be Done if Canada Wants to Remove the Monarch?

Myrna El Fakhry Tuttle

Canada severing ties with the Royal Family requires amending the Constitution and reviewing treaties signed with Indigenous Peoples.

In 1931, Canada became part of the British Commonwealth. It remains one of 54 Commonwealth nations to this day. Canada is a constitutional monarchy, which means it is headed either by a King or Queen. The patriation of Canada's Constitution from Britain in 1982 gave Canada full independence. This did not change the Queen's role as monarch of Canada, but it did restrict her powers in government.

Presently, the Queen is the head of state in 16 countries, counting the United Kingdom, Australia, Canada, New Zealand, and other countries in the Caribbean and Pacific Ocean. However, the recent claims of racism within the British monarchy, and the history of this monarchy, made me think twice about whether Canadians want to keep the Queen as head of state.

Discrimination, Colonialism and Slavery

In 1701, England's *Act of Settlement* secured a Protestant succession to the throne and prohibited Roman Catholics, and anyone married to a Roman Catholic, from inheriting the throne. Old succession laws also stated that, under male primogeniture, a younger brother took priority over an elder daughter in the line of succession. Only when there were no sons, as in the case of Queen Elizabeth II, did the crown pass to the eldest daughter.

Photo by Damir Mijailovic from Pexels

Gender and faith discrimination in the succession to the throne did not end until 2013. At that time, the British Parliament enacted the *Succession to the Crown Act*.

The *Succession to the Crown Act* ended the male preference primogeniture by amending the provisions of the *Bill of Rights* and the *Act of Settlement*. Under the new rules, the British monarch's first-born child succeeds to the throne, regardless of their gender. This Act also allows those in the line of succession to marry Roman Catholics. The Act applies to those born after the 28th of October 2011 and came into force in 2015.

However, the ban against heirs who are Roman Catholics from ascending the throne remains untouched.

In addition to discrimination, there is also the history of the British monarchy's involvement in slavery. Queen Elizabeth I was associated with Britain's slave trade in the 1500s where the "monarch supported Captain John Hawkins, who captured 300 Africans and exchanged them for hides, ginger, and sugar in 1562". The current Queen Elizabeth II has never commented on her predecessors'

actions and never apologized on behalf of the monarchy. However, in 2018, Prince Charles described Britain's role in the slave trade as an "atrocity".

A February 2021 poll found that 45 per cent of Canadians would prefer an elected head of state.

I do not believe Canadians want, in the year 2021, a head of state who represents a colonial power that was connected to discrimination and slavery. Canadians want government officials to guarantee government institutions take measures on discrimination and racism by respecting and representing all citizens. This raises the question of whether Canada should split from the monarchy which would require amending the Constitution and discussing treaties signed with Indigenous peoples.

Amending the Constitution

The role of the Queen, including her representatives in Canada (the Governor General and the provincial Lieutenant Governors), is enshrined in the Canadian Constitution.

The Constitution Act, 1867 states that the "Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into one Dominion under the Crown of the United Kingdom", with "a Constitution similar in Principle to that of the United Kingdom".

Article 9 of the *1867 Constitution Act* states that "Executive Power of which and over Canada is hereby declared to continue and be vested in the Queen". Article 10 provides that the Governor General "[carries] on the Government of Canada on behalf and in the name of the Queen".

Article 17 mentions that the Parliament of Canada consists of the Queen, the Senate and the House of Commons. Article 24 allows the Governor General to summon Senators in the Queen's name. These are just a few examples. There are more articles in the Constitution related to the Queen.

According to Lagasse & Baud:

> ***The Canadian constitution operates according to a 'rule of recognition' or a 'principle of symmetry' which states that whoever is the Queen of the United Kingdom is the Queen of Canada. There are several possible constitutional sources for such a rule or principle. It may be that Canada remains connected to the British Crown despite the Canada Act 1982, that the preamble to the Statute of Westminster, 1931 has legal force or that Canada simply follows British law of succession by convention. But no matter the source, the result is the same: matters of royal succession are determined by the United Kingdom and any change to this practice requires a paragraph 41(a) amendment.***

The *Constitution Act, 1982* did not change the office of the Queen or the Governor General and retained Queen Elizabeth II as Canada's Head of State. However, there are ways to change that.

According to article 41(a) of the *Constitution Act, 1982*, amendments to "the office of the Queen, the Governor General and the Lieutenant Governor of a province" require the unanimous consent of "the Senate and House of Commons and of the legislative assembly of each province".

Canada is a constitutional monarchy, which means it is headed either by a King or Queen.

Under this article, the office of the Queen, the Governor General and the Lieutenant Governor of a province cannot be touched unless all the provinces and the federal government

agree to do so. This includes getting rid of the monarchy. Clearly, this might be challenging to accomplish.

It is important to note that before any constitutional amendment, there should be a national referendum approved upon by the prime minister and cabinet, on whether to sever ties with the monarchy.

Treaties with Indigenous Peoples

If Canada were to remove the Queen as its head of state, this could have a significant impact on treaties between the Crown and Indigenous peoples.

Starting in 1701 in the British colonies of North America, the Crown entered into treaties with Indigenous groups to support "peaceful economic and military relations". According to the Government of Canada, there are 70 historic treaties in Canada signed between 1701 and 1923.

Royal historian Carolyn Harris said "if Canada were to transition to a different form of government, it could reopen some of these treaties".

The governor general, who is the Queen's representative in Canada, is responsible for those treaties. But according to poet and activist El Jones, governors general have not done much regarding Indigenous reconciliation. She stated that "if the governor general were actually working towards Indigenous sovereignty and working with Indigenous nations in order to use the Crown position to, for example, solve land claims or to intervene on cases where Indigenous people are challenging pipelines or environmental issues, then I think the office would have a role".

Associate professor at the University of Manitoba Niigaan Sinclair said that in many Indigenous communities, there is "reverence for the Queen". He explained that "ending the relationship between the Crown and Indigenous groups would involve a new approach to Indigenous land claims, in addition to constitutional amendment". He added: "Indigenous peoples are invested in working with the relationship as it stands today, as opposed to blowing it all up and starting again".

In February 2021, and after the resignation of former governor general Julie Payette, the Confederation of Treaty Six registered an official complaint with Buckingham Palace about the position being left vacant.

The role of the Queen, including her representatives in Canada (the Governor General and the provincial Lieutenant Governors), is enshrined in the Canadian Constitution.

Indigenous people might have serious concerns if Canada wants to drop the Queen as its head of state. Perhaps a way to manage a transition would be close consultations with these groups considering their historical relationships with the Crown. Also, any constitutional amendment must take into consideration Indigenous rights and access to their lands, territories and resources.

Canada Can Discuss Its Next Head of State

In September 2020, Barbados announced it will remove the Queen as its head of state in November 2021. "The time has come for us to leave our colonial past behind," said Governor General Sandra Mason.

In January 2021, and after the resignation of Julie Payette, who was accused of causing a toxic workplace environment, there were calls in Canada to leave the monarchy. A February 2021 poll found that 45 per cent of Canadians would prefer an elected head of state.

After recent allegations about the Royal Family, a poll indicated fifty-three per cent of respondents are of the opinion that the British monarchy "no longer has its place in the 21st-century". They believe Canada should drop the monarchy. Also, forty-three per cent of respondents said "the recent events show the Royal Family holds racist views".

In Australia, also after the claims against the Royal Family, there have been talks about a new referendum (the first one took place in 1999) to drop the Queen as head of state. Former Australian Prime Minister Malcolm Turnbull reiterated his calls to cut ties with the British monarchy.

At the time of writing this article, thirty-three nations in the Commonwealth identify as republics. More countries will presumably follow Barbados in stepping away from the monarchy's history of discrimination and colonialism. Will Canada do the same?

Myrna El Fakhry Tuttle

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Royal Families Around the World

Charles Davison

Around the world, monarchs hold different roles in government and more.

Canadians live in a "constitutional monarchy". So, we are somewhat familiar with how our system has evolved to the point where the Queen is mainly a figurehead at the top of our government. Over many centuries, the British, and then Canadian, systems moved away from the King or Queen holding absolute power over their subjects. Now, the sovereign's role is representative and symbolic in almost all respects.

What might surprise many Canadians are examples from around the world where monarchs still hold actual – sometimes absolute, unchecked – power over their citizens and subjects. Wikipedia lists 44 countries (as of 2019) around the world which are considered monarchies. Many of those countries are members of the Commonwealth. And most of them, like Canada, have the Queen as their ceremonial and symbolic Head of State. Among the others, the actual roles and powers of the royal persons vary widely.

Ceremonial Royals

Most of the remaining monarchies of Europe (mainly Belgium, Denmark, the Netherlands, Norway, Spain and Sweden) are like the United Kingdom and the Commonwealth countries. The states are fully democratic and the sovereigns usually play only symbolic roles. Perhaps the most notable recent exception is that of King Juan Carlos of Spain. He was instrumental in restoring democracy to that country after the death of the fascist dictator Francisco Franco in 1975. More recently, he has abdicated and gone into exile because of allegations of corrupt financial dealings while he was in power. In some smaller European nations – for example, Monaco and Lichtenstein – a prince is Head of State. He shares actual power with elected legislative assemblies.

Some Middle Eastern countries are monarchies, where we can find some of the the most authoritarian and dictatorial examples of present-day royal families.

Since the end of the Second World War, the monarchy in Japan – where there is still an Emperor ("Emperor of God" – *Tenno*) – has also been limited to a ceremonial role. Before 1945, however, the Emperor still wielded significant authority and the Japanese revered him as having directly descended from heaven. Many considered the Emperor to be personally responsible for Japanese war decisions. After the war, there was talk of putting him on trial for war crimes. The Emperor was instrumental in arranging the Japanese surrender in 1945, and one of the main conditions was that his powers and authority would remain intact. Ultimately, the Allies agreed to allow the Emperor to stay in place but only on the basis he would cede real power to elected representatives of the Japanese people. Japan is now a fully-functioning democracy where the Emperor plays a symbolic role similar to the monarchs of modern Europe.

The King's Critics

In other countries considered somewhat democratic, monarchs are not as benign as in Japan, Europe and the Commonwealth. In

some places there are still strict laws against criticism of the king such that offenders are often sentenced to long periods of imprisonment. In Morocco, for example, there are several democratic institutions but the king continues to wield significant power. Authorities deal severely with acts or statements which are seen to be critical of him (or the government or royal family). Journalists can be arrested and detained if they are found guilty of publishing criticisms of the monarch, his family and the government generally.

Photo by Jennifer Murray from Pexels

Similarly, Thailand is usually considered to be a relatively democratic country in which citizens elect the members of one of the branches of the National Assembly. However, the King – whom most Thais revere – still holds significant authority. Any criticism or moves to limit his powers bring harsh responses. As I write this article in April 2021, the news out of Thailand describes clashes in the streets between the military and protesters demanding government reform and greater curbs on the King's powers. Many protesters have been hurt. Leaders of the movement have been arrested and charged with offences such as sedition and "insulting the royal family", which is punishable by up to 15 years in prison.

Absolute Rulers

Some Middle Eastern countries are monarchies, where we can find some of the the most authoritarian and dictatorial examples of present-day royal families.

Saudi Arabia is perhaps the most well-known example. The King and royal family of Saudi Arabia continue to hold absolute, real power over the country and its people. The family is said to be large enough that it has been able to place its members into most positions of power and authority at almost all levels and positions of government. Most laws are enacted by Royal Decrees issued by the King. Any public criticism of the King or royal family is punished swiftly and harshly. In 2018, a well-known critic of the royal family, Jamal Kashoggi, was murdered and his body dismembered in Turkey by a group of men directly tied to, and acting under orders from, the Saudi Crown Prince. Due to the realities of international politics, however, few (if any) steps were taken against the Prince or other royals, or the government of Saudi Arabia itself, for having ordered and taken part in this murder. Hundreds of other dissidents and others alleged to oppose the King languish in Saudi jails and prisons.

In some places there are still strict laws against criticism of the king such that offenders are often sentenced to long periods of imprisonment.

Other examples – also from the Middle East – of absolute monarchies where the ruler has overall authority over his people include Qatar (where the Emir is the Head of State) and the Sultanate of Oman. Both regimes are fairly repressive and do not respect the human rights of citizens. All power rests with the monarch, and any criticism or questioning of his decisions or rulings is punished severely.

It may surprise readers to know that another example of a monarch considered to have absolute power over his territory and citizens is the Pope. He rules Vatican City, though thankfully somewhat more benevolently than the other absolute monarchs mentioned

above. Although the Pope is elected to his position, once installed he has virtually unlimited authority not just over the Roman Catholic Church but also over Vatican City, its occupants and its functioning. Recent news articles about criminal proceedings taking place at the Vatican – one for financial crimes and another for sexual offences – have included comments about the Pope's overall authority. He can decide on the procedures to be followed and information to be provided to the accused and their lawyers, all on the basis that he is the sole source of law and legal power within the City.

Elected Monarchs

Most monarchs inherit their title and positions from their ancestors, but another who, like the Pope, is elected to the position is the King of Malaysia ("He Who is Made Lord" – Yang di-Pertuan Agong). Every five years the King is elected from among the nine leaders of the various Malaysian states. The position is mainly ceremonial, however, and the system of government is modelled upon the British system of democracy. (The British put this arrangement in place as Malaysia gained its independence from the United Kingdom in 1957.)

Wikipedia lists 44 countries (as of 2019) around the world which are considered monarchies.

A rare, recent example of a monarch who gave up his powers to allow his people to attain democracy is that of the "Dragon King" (Druk Gyalpo) of Bhutan. The current King took the position when his father abdicated in 2006 and was crowned in 2008. The new King continued a process his father had started, of democratising the country and bringing a new constitution into effect. He remains Head of State and has authority to appoint many other high government officials (and cannot be made to answer for his decisions or actions in court). But the constitution commits him to always act in the best interests of the people of Bhutan. Most actual political power now rests with assemblies whose members are elected by all Bhutanese. These elected bodies have the power to force the King to abdicate if they see fit.

An Uncertain Future

What does the future hold for royals around the world? History has shown an undeniable move towards greater democratization over centuries. Our own system, as it presently exists, is the result of centuries of struggle (sometimes violent) and evolution away from the dictatorship of absolute, unrestricted power being vested in a single individual recognized as the King or Queen. Even in places like present-day Saudi Arabia, there are brave souls who argue for change. And even as they would preserve the monarchy for at least ceremonial purposes, they want greater powers placed in the hands of the people and representatives elected by them to govern their countries. In some situations, revolutions and other upheavals have led to the ouster of monarchs and their families. But despite those changes, for many people there seems to be something endearing about the idea of at least a figurehead representative of the nation state in the form of a royal leader whose personal history and background links the present-day nation to its past.

Charles Davison

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Special Report Insurance

Act Now: Insurance policies and the duty to notify

Evan Oikawa

Insurance policies require insureds to notify the insurer of claims and potential claims.

Insurance policies, like any other contract, contain certain legal obligations. For example, insurance policies of all types require insureds to notify the insurer of loss or damage – or in the case of liability insurance, claims or potential claims. This duty typically flows from the insurance policy itself. Sometimes, the duty may arise from "statutory conditions" in legislation that, by law, form part of the insurance contract.

The duty to notify allows insurers to assess liability and lessen any loss. If the insurer does not receive proper notice, they may deny coverage. This could result in the insured having to defend a lawsuit and potentially pay a court judgment without any help from the insurer. Unfortunately, it is not always clear when the insurer has received notice, particularly in liability claims.

Liability claims

Two types of liability insurance policies exist. Previously, insurance companies issued "occurrence" policies. Under these policies, if the insured acted carelessly during the policy period, they would be covered for any claims arising from the carelessness, even if the claim occurred after the policy period. But this type of policy caused problems for insurers, because they would not know for many years how many claims had occurred in a given year. This made it difficult to set premiums.

When an insured fails to comply with the duty to notify, they are said to forfeit their rights under the insurance policy.

So, insurers began issuing "claims made" policies. Under these policies, the insurer covers claims made during the policy period and any claims made later, provided the insured gives notice of the potential claim during the policy period. With these policies, insurers can learn the number of claims and pending claims in a given year and set premiums for the following year accordingly.

Whether an insured has complied with the notice requirement depends on the specific facts of the case. *Trisura Guarantee Insurance Company of Canada v Duncan* shows how a court may decide this issue. The facts are as follows.

Keybase, an investment organization, dismissed one of its advisors, John Allen, for negligent and fraudulent handling of client accounts. Gregory Duncan and James White, two other advisors, assumed responsibility for Allen's clients.

A few years later, various Allen clients sued Keybase. Keybase settled the case, but expressly agreed its advisors would not be released by the settlement. Later, the clients sued Duncan and White, alleging they had provided improper advice about how to mitigate the losses that Allen had caused.

Duncan and White sought a defence from their insurer, Trisura, under an insurance policy which Keybase had arranged for its advisors. However, Trisura argued the claims fell outside the policy period. Duncan and White applied to court for an order compelling Trisura to defend them. The court granted that order. Trisura appealed and the case went before the Nova Scotia Court of Appeal.

The insurance policy in question was a "claims made" policy. So, the court had to address whether Keybase had notified Trisura of the potential claims against Duncan and White during the policy period. According to the court, the lower court had correctly focused the analysis on what Trisura knew and when they knew it.

Photo by Negative Space from Pexels

Trisura argued that the claims reported to it during the policy period concerned Allan and Keybase only – not Duncan or White. In their view, they had not received proper notice of the Duncan/White claims. However, the court agreed with the lower court that Trisura had appreciated the liability risk to Duncan and White, even though the original lawsuit had not named them as defendants. A risk remained that the plaintiffs could sue them later – which is indeed what happened. So, in these circumstances, the court found Trisura had knowledge of the potential claims. The policy thus deemed the claims against Duncan and White as having occurred during the policy period.

Relief from forfeiture

When an insured fails to comply with the duty to notify, they are said to forfeit their rights under the insurance policy. However, a court may apply "relief against forfeiture" in certain circumstances. In Alberta, section 520 of the *Insurance Act* contains the statutory authority for a court to apply this principle. However, a court can only grant relief where the failure to comply constitutes "imperfect compliance," rather than "non-compliance." *Qualiglass Holdings Inc. v. Zurich Indemnity Company of Canada* illustrates the difference between these two concepts.

The duty to notify allows insurers to assess liability and lessen any loss.

Five plaintiffs obtained a judgment against their former accountant, David Chinnery. Chinnery filed for bankruptcy, so the plaintiffs tried to recover the debt from Chinnery's insurer, Zurich.

Chinnery had a "claims made" liability insurance policy. The policy covered claims made during the policy period. However, during the policy period Chinnery did not notify Zurich of the claims against him. So, Zurich took the position the policy did not cover the plaintiff's action.

The court had to address whether it could grant relief from forfeiture. In doing so, it described the difference between non-compliance and imperfect compliance. Non-compliance occurs when the insured fails to do something which, on the policy wording, is necessary to trigger insurance coverage. By contrast, imperfect compliance happens when the insured fails to do something which is not necessary to trigger coverage under the contract. Relief from forfeiture can only be granted in the latter case.

Based on its wording, Chinnery's policy covered claims occurring during the policy

period. The plaintiffs had made the claim against Chinnery during the policy period. In the court's view, this event had triggered coverage under the policy, based on its plain wording. Although the policy contained a clause requiring the insured to report the claim "as soon as practical," this was not necessary to trigger coverage. So, the court found Chinnery's failure to promptly report the claim constituted imperfect compliance, not non-compliance.

This duty typically flows from the insurance policy itself.

Next, the court considered whether it should use its discretion to grant relief from forfeiture. According to case law, a court will consider two things: prejudice (unfairness) to the insurer and the reasons for imperfect compliance. The court found Zurich had not suffered any prejudice, and the evidence did not suggest Chinnery had attempted to gain any advantage by not promptly reporting the claim. So, the court granted relief from forfeiture and ordered Zurich to pay the judgment.

Conclusion

Insureds must give notice of claims in accordance with the insurance policy. If an insured fails to give proper notice, they may lose their rights under an otherwise valid insurance policy. The courts will sometimes lessen the harshness of this rule by granting relief from forfeiture. The courts will apply this principle when it would be unfair to enforce the insurance policy as written, and the failure to comply constitutes imperfect compliance.

The above information has broader implications for self-represented litigants. The duty to notify in an insurance policy is just one legal obligation – the law imposes many other duties. For example, court rules are full of deadlines which counsel and self-represented litigants must meet. Regardless of your legal issue, be mindful of deadlines and be sure to always act promptly. As stated above, failing to do so may result in a loss of your legal rights.

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Vehicle Insurance: What are you paying for anyway?

Erin Halma

If you own a vehicle, you probably pay for insurance on it. But you may not know what you are actually paying for and why governments require it.

This article briefly describes why governments require vehicle insurance. It then gives an overview of the insurance systems for mandatory insurance in Alberta, British Columbia, and Saskatchewan. In all these jurisdictions, people can buy additional insurance products (such as collision, comprehensive, or extended third-party liability coverage) that supplement the mandatory insurance.

Why mandate vehicle insurance?

As vehicles made their way into everyday life, so too did vehicle accidents, which often resulted in injuries or property damage. Tort law already allowed people with injuries or property damage to sue at-fault people for certain damages suffered. However, if the at-fault person could not afford to pay for the damage they caused, the person who suffered damages would not actually be compensated for their losses.

Governments became concerned that people who suffered injury or property damage from an accident may not receive enough compensation. In response to this concern, governments made vehicle insurance mandatory. This insurance shared losses between owners of vehicles and helped make sure people could receive compensation if they were injured or their property damaged.

Bow River in Canmore, Alberta
Photo Credit: Jessica Steingard

In most Canadian jurisdictions, there are two basic components to mandatory vehicle insurance:

1. third-party liability
2. first-party no-fault benefits

Third-party liability is what responds when someone sues you for damages. It is a pool of money that is used to pay for any damages award against you. It involves the insurer stepping in to defend the action on your behalf – hiring lawyers and determining how to run the claim. It provides you with protection from personal liability if there is a claim against you. It also protects the injured person, as it ensures there is money available to cover some or all of their damages.

First-party no-fault benefits are available when you are injured in an accident, even if you are at fault or there is no one to sue for the accident. Where there is someone to sue, these benefits are available more quickly while any litigation resolves. They are generally paid to you by your insurer, usually on an as-needed basis. These benefits provide a basic level of care to cover certain expenses. For

example, these benefits may include a wage loss supplement and cover certain medical and rehabilitation expenses. These benefits provide some compensation if there is no one to sue for the accident.

First-party no-fault benefits may be available to you, the person who purchased insurance, or your family members. They may also be available to anyone who is driving or riding in the vehicle, or to those injured by the vehicle. All of this depends on what the law requires and whether the insurer agrees to provide more than the minimum legal requirements.

Since vehicle insurance is provincially regulated, there are different systems in place in each province. The next part of this article describes those found in Alberta, British Columbia, and Saskatchewan.

Insurance Systems

Alberta

Alberta has a modified tort system with private insurers. In this system, the primary way to get compensation is to sue the at-fault person for damages suffered as a result of the at-fault person's negligence. The court determines whether the person was negligent, and the amount of compensation (known as damages) the injured person should get. Most cases do not actually end up in court because the parties reach an agreement before trial.

In Alberta, … damages for pain and suffering for minor injuries are limited to $5,365 (in 2021).

Generally, the rules that govern this law are found in earlier court decisions. However, government can set certain rules in legislation or regulations. In Alberta, the government has made some changes to tort law, the primary being that damages for pain and suffering for minor injuries are limited to $5,365 (in 2021).

Vehicle insurance in Alberta is provided by the private market. There is no government insurer that Albertans must purchase their insurance from. But all insurance providers must follow any rules set out by the government.

In Alberta, you must carry $200,000 of third-party liability insurance on your vehicle. The insurer must provide up to $50,000 of first-party no-fault benefits, with benefits available for two years after the accident.

Third party-liability insurance may pay for bodily injury and property damage, including vehicle damage. However, compensation for vehicle damage is scheduled to change on January 1, 2022 from this tort model to one where your insurer provides you with compensation directly to the degree you are not at fault. Stay tuned.

British Columbia

British Columbia has a care-based model of insurance administered by a public insurer. Many people refer to this system as first-party no-fault benefits. But this article uses the term care-based model because the benefits available under this system are usually far greater than the first-party no-fault benefits found in tort models.

Customers must purchase a certain level of insurance from the government insurer, the Insurance Corporation of British Columbia (ICBC). Customers can then purchase additional insurance coverage on the private market.

This model works by the government implementing a lawsuit ban so that people cannot bring a claim in court for damages arising from vehicle accidents. In exchange for banning lawsuits, the law sets out extensive rules around what benefits people are entitled to if they are injured in an accident. Disputes about benefits are resolved by the Civil Resolution Tribunal, instead of a court.

Under this care system, you are entitled to benefits even if you are responsible for the accident. There are certain restrictions on this though. One example is that people convicted of certain *Criminal Code* offences related to the accident may not receive the full level of benefits. Another example is that people who intentionally cause an accident or who intentionally cause injury may not receive benefits.

In British Columbia, there is no limit on the total amount of benefits available, although there are limits on some of the different types of benefits. For example, there is a yearly maximum for wage loss benefits, but there is no lifetime maximum for those benefits. Find more information about vehicle injury insurance in British Columbia on ICBC's website.

This [care-based] model works by the government implementing a lawsuit ban so that people cannot bring a claim in court for damages arising from vehicle accidents.

Although most lawsuits are banned, basic insurance still includes $200,000 of third-party liability coverage. This third-party liability coverage is important if you cause damage that a person can still sue for or if you drive your vehicle in a jurisdiction where there is no lawsuit ban, such as in Alberta.

Mandatory insurance also includes compensation for vehicle damage when someone else is at fault without you needing to sue that person. ICBC pays this directly to you to the degree you are not at fault. Find more information about vehicle damage insurance in British Columbia on ICBC's website.

Saskatchewan

Saskatchewan has a hybrid model of insurance administered by a public insurer. The hybrid model is a mix between a care-based model and a tort model. Customers can choose which model is right for them. If they choose the care-based model, they can still sue for certain additional losses they suffer.

Customers must buy a certain level of insurance from the government insurer, Saskatchewan Government Insurance (SGI). They can then buy additional insurance coverage on the private market.

The mandatory insurance includes a choice between care-based insurance benefits or tort coverage. The default is the care-based model, so if you want tort coverage, you must elect out of the care-based model.

First-party no-fault benefits are available when you are injured in an accident, even if you are at fault or there is no one to sue for the accident.

The tort coverage allows you to sue for damages, including pain and suffering. Like in Alberta, the tort coverage option includes a level of no-fault insurance benefits as well. However, these benefits are less than what is available under the care-based model.

Even if you choose the care-based coverage, you can still sue for certain losses that are not covered by your insurance. For example, this coverage compensates for lost income up to a certain level. If you lost more income than is payable under care-based coverage, you may be able to sue to recover the excess. However, you cannot sue for pain and suffering.

If there is a dispute about benefits, customers choose whether to bring their dispute to the Automobile Injury Appeal Commission or the Court of Queen's Bench. Find more

information about vehicle injury insurance in Saskatchewan on SGI's website.

Vehicle damage is covered by this insurance. If someone else is at fault, their insurance will cover the cost of repairs. If you are at fault for the collision, or there is no one at fault to collect from, your insurance will cover the cost of repairs above your deductible. Find more information on vehicle damage insurance in Saskatchewan on SGI's website.

If you have been involved in a vehicle accident, you should seek legal advice on your entitlement to compensation.

Erin Halma

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Everything You Need to Know About Wedding and Special Event Insurance

Victoria Chiu

Wedding and special event insurance is a special kind of cancellation insurance that can protect you if your event goes awry.

When you're thinking about planning a big event—whether it's a wedding, huge birthday bash or blowout retirement party—no one wants to think about cancellations or other disasters that could throw things off course. That said, when you're putting a lot of time and money into planning an important event, it's smart to consider what you can do to protect yourself if anything goes awry. That's where wedding (and other special event) insurance comes in!

What is wedding and special event insurance?

It's commonly called "wedding insurance" because this kind of insurance is usually used for weddings. However, the full name is "wedding and special events insurance," and it can cover all kinds of occasions. In short, it is a special kind of cancellation insurance that people sometimes get for large, expensive events. Cancellation insurance covers the money you have spent planning the event. Like other kinds of insurance, wedding and special event insurance helps protect you from circumstances you can't control. For example, if your wedding has to be cancelled or postponed, or something throws it off course, wedding insurance reimburses you for any money you've put into planning it up until then.

Many venues require liability insurance from people hosting an event in their space. This covers any liability you might incur during the actual event and is different from cancellation insurance.

Why get special event and wedding insurance? What kinds of special events need insurance?

You might consider wedding insurance to safeguard against potential money-losing situations.

For example, let's say unforeseen circumstances out of your control force you to postpone your wedding right before it's scheduled to happen. If you've already spent a lot of money on planning your wedding, a forced postponement could potentially mean losing out on thousands of dollars depending on your agreements with your vendors. If you have wedding insurance, however, you can get back all the money you've put into your wedding.

Another example many couples have become all too familiar with this past year is that of a worldwide crisis. If a situation like a global pandemic breaks out during your wedding planning process, you might be forced to postpone or cancel entirely. This can be a huge

hassle for folks who have already put money down on venue deposits, photographers, florists, catering and more to try to reschedule without incurring additional costs. Wedding insurance can lift some of that stress. It gives you peace of mind that you can immediately get back money you've already paid. You won't have to worry about nonrefundable deposits or being unable to postpone without paying more money.

Photo by cottonbro from Pexels

This kind of insurance also isn't limited to circumstances that affect the entire event. If a special gown is destroyed, wedding rings are lost, the catering company suddenly has to pull out or the violin quartet set to play music during the ceremony can no longer make it, special event and wedding insurance can cover the cost of replacing those goods or services.

Again, weddings are the most common example, but this same rationale applies to other kinds of special events as well. If you're planning a costly charity auction, fundraiser, banquet or holiday party, special event insurance can protect you from bad weather, vendor cancellations and more.

Not every event may require a special additional insurance policy, but this depends heavily on personal circumstances. In the case of weddings, some couples who have homeowners' insurance may have some existing coverage for items such as wedding bands under their property insurance. Some homeowners' insurance providers are able to add riders for weddings. As always, it's important to check with your insurance provider to see if you have any existing coverage to make sure you can:

1. fill in the gaps where you're not fully covered, and
2. avoid overlapping coverage.

When should you get special event and wedding insurance?

As soon as you can! Ideally, you want to have insurance in place before any mishaps can occur. Just make sure you are within the maximum and minimum periods of time your insurance provider will allow you to purchase your policy. Often, this maximum period is around one year before the wedding or event date. The minimum is typically around one month to three days before the event date.

What is covered by special event and wedding insurance?

Almost anything you could think of that could be connected to the wedding or special event. Some examples of what could be covered include:

- Total cancellation or postponement of the event due to bad weather, military deployment, illness, injury, vendors failing to show up and more
- Vendor issues, such as if the DJ backs out, the venue goes out of business or the photographer doesn't show up
- Replacement of damaged bridal clothing for weddings
- Replacement of lost or damaged event-specific goods, such as wedding (but not engagement) bands, wedding cake, stationery and wedding gifts (see your insurance provider for exceptions)
- Costs of a honeymoon that has been cancelled due to a cancelled wedding

You can also get coverage for destination

weddings and events if one of the insured parties is a Canadian resident.

To see which costs are covered by your insurance policy, check with your insurance provider. If certain items are not covered, you can often get additional policies to cover those costs, as explained below.

Do you need additional special event-related coverage?

If your insurance policy does not cover things you would like covered, you have the option of buying additional insurance policies to specifically cover other potential damages. For instance, if your bridal attire is not covered under your wedding insurance, you can ask about a supplemental policy to cover that specific cost. If the cost of lost, stolen or damaged gifts are not covered for your blowout birthday bash, a supplemental policy can repair or replace non-monetary gifts within a limited time period. Again, consult your insurance provider for any exceptions or conditions for supplemental policies.

What is not covered by special event and wedding insurance?

Most special event and wedding insurance policies do not cover a change of heart. That means if you voluntarily decide not to host your event anymore, you will not get back the money you have spent on it. If a third party, such as a parent, has paid for the event, there may be exceptions to this rule.

For weddings, most insurance policies will not cover the cost of watches and other jewelry (including engagement rings) beyond the wedding bands, even if this jewelry is attached to clothing.

Many insurance policies also will not cover cancellations arising from pre-existing conditions. This would be the case if, for instance, the organizer has epilepsy and she suffers a seizure that causes the event's cancellation. Check with your insurance provider to see what terms apply.

What is the cost of special event and wedding insurance?

The cost can vary a lot depending on where you are, how large your event is and how much coverage you want. Basic insurance policies can start at around $200 and the cost can go up to more than $2,000 for comprehensive, large-scale policies.

Final considerations

Overall, the most important thing to consider is your own circumstances. Every person and event are different, and what is right for one event may not be necessary for another. At the end of the day, though, if you think you could benefit from peace of mind that special event and wedding insurance could give you, it could be the best money you've ever spent.

Victoria Chiu

Victoria Chiu is a law student at the Faculty of Law, University of Alberta and a volunteer with Pro Bono Students Canada.

Insurance: What does the tax man say about it?

Hugh Neilson

Insurance is complex enough – what happens when it intersects with our tax system?

We have good news…

Under the *Excise Tax Act*, insurance is a financial service, making it exempt from GST. If we only had to address the GST, this would be a simple, short article. However…

And we have bad news!

The interaction of insurance with the income tax system is not as straightforward. Various types of insurance carry different, sometimes surprising, income tax implications. Two broad-based questions arise:

1. Is tax relief available for insurance premiums?
2. Do insurance benefits attract an income tax cost?

A third issue arises when employers provide insurance to employees – do employees pay taxes on these benefits?

Property Insurance

The income tax implications of property insurance typically align with the other income tax issues related to that property. Insurance is a cost of owning property. As such, if the property is used for personal enjoyment (e.g. a home, vacation property or personal vehicle), the premiums are also personal and generate no tax relief. However, if the property is used to generate income (e.g. a rental property, business premises or a vehicle used to earn income), the premiums are deductible from that source of income. Some property has mixed use (e.g. real estate with mixed rental and personal use, or a personal vehicle sometimes driven for business). The insurance (like the other costs) must be apportioned between income-earning and personal use (e.g. based on time used personally versus for rental; based on business and personal distance driven).

… an individual cannot claim medical expenses under the Medical Expense Tax Credit (METC) if they are reimbursed for those expenses.

If the property is damaged, related insurance benefits will offset the costs of repairs. The insurance proceeds will be taxable or non-taxable on the same basis as the repairs themselves. But what if the property is not repaired? The insurance proceeds would generally reduce the cost of the underlying property because part of the property was "disposed of".

If the property was destroyed, the insurance proceeds are the sale proceeds. Again, the tax treatment will follow the nature of the property. Where the proceeds exceed the property's cost, a capital gain will result. This may mean taxes are payable, even if the property was used entirely for personal use. This might happen where a building is insured

at its replacement cost, which is greater than its original purchase price. The proceeds could mean a significant gain, especially if the property has appreciated over many years of ownership.

Where the property is replaced, generally one can elect to apply the "replacement property" provisions of the *Income Tax Act*. Basically, so long as the policy holder spends the full insurance proceeds on replacing the destroyed (or stolen) property, they can apply any gains to reduce the cost of the new property. This means they do not have to pay taxes on the insurance payout. The policy holder must acquire the replacement property within two tax years after the year of the final determination of the insurance proceeds. The final determination of insurance proceeds is often done in the same year in which the property is destroyed. But in some cases, it may be many years later. This might occur because of a lengthy adjustment process. Or it could be because of a dispute that goes before the courts.

The gains may also be exempt due to the principal residence exemption. This requires reporting the disposition and designating the property as the owner's principal residence. Remember not to overlook this when rebuilding, rather than selling, the home.

Ouch – that hurt!

We often purchase insurance to mitigate the costs of injury or disability. This covers a broad array of insurance products.

Insurance that covers medical (including dental) costs attracts no direct income tax costs. However, an individual cannot claim medical expenses under the Medical Expense Tax Credit (METC) if they are reimbursed for those expenses. The insurance premiums *are* generally eligible medical expenses, and can be included for METC purposes. Out of-pocket medical expenses must be significant to generate any tax benefit – only costs over

Photo by Edar from Pixabay

3% of the individual's net income (capped at $2,397 for 2020 and $2,421 for 2021, with annual adjustments for inflation) generate any credit. When calculating the METC, remember not to overlook costs such as an employee's share of premiums paid through employment (premiums payments by the employer are generally not taxable) or premiums paid for out-of-country coverage.

I'm off sick!

Many individuals have "disability insurance", perhaps more accurately described as "income replacement insurance". This insurance pays benefits if the individual is unable to work due to illness or injury. Many employers provide such coverage. The tax implications of this coverage can vary markedly.

... benefits paid from a life insurance policy as a consequence of the death of the insured are not taxable.

The first question to ask is whether the insurance benefits are paid in a lump sum or periodically. Lump-sum benefits are not taxable. Periodic benefits – usually a percentage of the income the individual would have earned had they continued working – are much more common.

Where the employee pays the full premium (commonly referred to as an "employee-pay-all" plan), the benefits are non-taxable. Typically, such coverage pays benefits

considerably lower than the employee's normal income, reflecting their tax-free nature. No tax relief is available for the premiums.

Where the employer pays any part of the premiums, all periodic benefits are taxable to the employee. Normally, the insurance company issues a T4A slip, making both the employee and CRA aware of these amounts. The employer-paid premiums are not a taxable benefit. Premiums paid by the employee generate no tax relief when paid. However, the recipient of benefits can reduce their taxable benefits received by deducting the amount of the premiums they have paid. That sounds simple, but if neither the employee nor the employer has maintained a record of these premiums, re-creating these records can be challenging.

A relatively new product called critical illness insurance has largely escaped the attention of the tax system. These policies normally pay a fixed amount where the insured individual is diagnosed with certain conditions defined in the policy (cancer and heart disease are common conditions included). The Canada Revenue Agency (CRA) has noted that nothing makes benefits received under these plans taxable. Similarly, no tax relief applies to the premiums paid. Employer-paid premiums would be taxable to the employee.

Death and taxes

The cliché "two certainties" collide when we consider life insurance. Often, the tax answers here are simple – benefits paid from a life insurance policy as a consequence of the death of the insured are not taxable. Similarly, the premiums generate no tax relief. Interest paid on the death benefit is taxable and is typically reported on a T5 slip. Where an employer pays for life insurance coverage, the premiums are taxable to the employee.

Unfortunately, little in the tax system is this simple. In limited circumstances, premiums can be tax-deductible, but the requirements are complex. Put simply, the policy holder must assign the policy to a lender as required collateral for a loan and use the borrowed funds to earn income. This might include borrowings invested in a securities portfolio, a rental property or a business. The premiums are only deductible to the extent of the loan. For example, no more than two thirds of the premiums could be deductible for a policy with a death benefit of $750,000 used as collateral for a $500,000 loan. Other complexities exist, especially where the insurance policy goes beyond simple term insurance.

Many individuals have "disability insurance", perhaps more accurately described as "income replacement insurance".

The life insurance industry has created many products that blend insurance coverage with investment objectives. Tax law restricts the extent of any investment component, and the life insurance companies are careful to stay within these limits. Often, the insured can cash out these policies during their lifetime. A portion of the proceeds may be taxable income. The insurance issuer will calculate the "adjusted cost basis" (ACB) of the policy (basically, premiums paid less mortality risks covered to date). Any cash received from the policy in excess of its ACB is taxable. Many individuals have been surprised to receive a T5 slip for this income, believing that they had received a tax-free insurance payout, or had realized a capital gain, which is only partially taxable.

Some policies allow "policy loans". These can result in taxable income to the extent that the loans exceed the ACB. If the policy holder repays the loan, a deduction can be available, reversing previous income inclusions. However, no deduction is available where the loan is repaid from amounts payable on the death of the insured. In short, the loan must be

repaid during the insured's life for a deduction to be available.

Overall

As the above makes clear, many complexities can arise when insurance meets income tax. While this article has discussed some of the more basic issues, qualified professionals should review specific situations, as other complexities can arise.

Hugh Neilson

Hugh Neilson, FCPA, FCA, TEP, is an independent contractor with Kingston Ross Pasnak LLP, and a member of the Video Tax News editorial board in Edmonton, Alberta.

Have You Heard?

Sexual Violence Awareness Month

Did you know May is Sexual Violence Awareness Month?

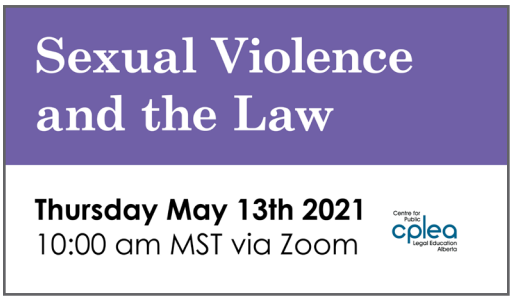
WEBINAR | Sexual Violence and the Law

Does your work include helping people who have experienced sexual violence? This panel discussion will showcase the incredible work organizations across the province are doing to support these individuals.

Participating organizations are:

- CPLEA
- Sexual Assault Centre of Edmonton
- Elizabeth Fry Northern Alberta
- Association of Alberta Sexual Assault Services
- Workers' Resource Centre
- Alberta Civil Liberties Research Centre

Join us on May 13th at 10am MST for this 90-minute panel. Register now on Eventbrite.



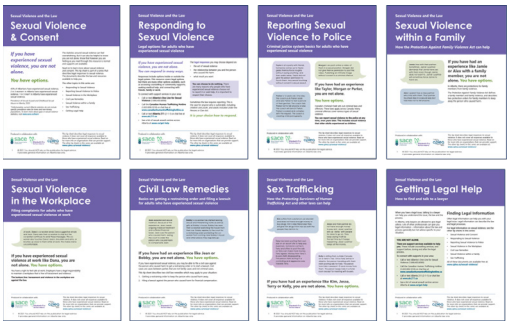
NEW RESOURCE | Sexual Violence Info Sheets

CPLEA partnered with the Sexual Assault Centre of Edmonton and Elizabeth Fry Northern Alberta to create a series of info sheets on legal responses to sexual violence.

Topics include:

- Sexual Violence and Consent
- Responding to Sexual Violence
- Reporting Sexual Violence to Police
- Sexual Violence within a Family
- Sexual Violence in the Workplace
- Civil Law Remedies
- Sex Trafficking
- Getting Legal Help

All of the info sheets are available for free – to download, print or order print copies – from www.cplea.ca/sexual-violence/.



NEW LAW | Clare's Law

As of April 1, 2021, Albertans who believe they are at risk of domestic violence can apply for information about their partner. The *Disclosure to Protect Against Domestic Violence (Clare's Law) Act* and the *Disclosure to Protect Against Domestic Violence Regulation* set out who can apply, what information can be disclosed and the process for doing so. The legislation is named after a young woman killed by an ex-boyfriend who had a history of violence against women.

Read more on the Government of Alberta's website.

Got questions about COVID-19 in Alberta? Visit our **COVID FAQs page**.

For more legal information on a variety of topics, visit: www.cplea.ca

Centre for Public cplea Legal Education Alberta

Lesley Conley

Lesley Conley is a Project Coordinator with the Centre for Public Legal Education Alberta.

Columns

Regional Anomalies in Canada's National Consumer Insolvency & Bankruptcy Rates

Mark Macneill

Data on consumer insolvency and bankruptcy, as well as laws on personal property exemptions, show great variances between regions, provinces and territories.

This article references Statistics Canada's most recent Annual Consumer Insolvency Rates by Province and Economic Region – 2010-2019 (Per 1,000 Population Aged 18 Years and Older).

Insolvency is a person's inability to pay the debts they owe on time. Bankruptcy is one legal procedure for dealing with insolvency. Other options include debt consolidation, consumer proposals and more.

In 2019, New Brunswick, Nova Scotia and Newfoundland had Canada's highest insolvency rates at 8.0, 7.8 and 7.6 people per 1000, respectively. The national average for insolvency in 2019 was 4.6 people per 1000. In contrast, British Columbia was at 2.8 people per 1000, followed by Manitoba at 3.2 per 1000. Let's look closer at these regional anomalies.

... Atlantic Canadian rates averaged 50% to 100% higher than the national average in 2019.

Low Rates in Canada's Northern Territories

Canada's three northern territories – with adverse weather, harsh climate and terrain, remoteness and higher living costs – have amazingly lower insolvency rates than most of Canada:

- Yukon at 2.3 per 1000,
- the Northwest Territories (N.W.T.) at 1.1 per 1000, and
- Nunavut at 0.2 per 1000 population.

Furthermore, their respective bankruptcy rates are 0.3, 0.4 and zero, all per 1000 people.

In Nunavut (an Inuit Land Claims settlement and governance region), the 2016 Canada census reports that 85.9% of the population is Inuit and 85% of housing is public housing. This data indicates an entirely different economic structure versus non-Indigenous communities, where housing is privately financed. As well, employment in the North includes traditional and seasonal work. This work does not always fit with institutional lending and financial practices of colonial systems. Such practices are often incompatible with Inuit culture, governance and land ownership systems.

The N.W.T. and the Yukon have different demographic and culture profiles both from Nunavut and from the rest of Canada. Per the 2016 Census, the N.W.T. and the Yukon are inhabited by 50.7% and 23.3% Aboriginal peoples, respectively. The N.W.T and Yukon Indigenous populations are comprised primarily of First Nation and Metis, with Inuit as a minority. This is compared to Nunavut's population being predominantly Inuit, at 85.9% of the total population.

When it comes to Aboriginal governance and title in the three territories, a communal land ownership system is in place where Indigenous land claims and self-governance exist, particularly in Nunavut and the N.W.T. Title is typically held by either the Crown or an Aboriginal government, and public housing is the norm. Long-term land leases exist for private and commercial use (e.g. 99 years).

Debt, insolvency and bankruptcy rates are low, nominal or non-existent in the northern and Aboriginal territories and communities. Traditional forms of living and self-sustenance are maintained, including seasonal hunting, trapping and barter. These activities are not compatible with 'colonial settler style' western world lending practices. Also, remoteness and communications challenges make data from the region not as reliable or easy to get. Such challenges may also contribute to the absence of any significant insolvency or bankruptcy in these regions.

Cape Breton Island Triples Canada's Consumer Bankruptcy Rate

Turning now to Canada's earliest settled region, the East Coast, we see that Atlantic Canadian rates averaged 50% to 100% higher than the national average in 2019. Within that region, Cape Breton Island (C.B.I.) had nearly triple the national average personal bankruptcy rate at 5.2 per 1000 people versus 1.8 per 1000. The insolvency rate was more than double at 10.9 per 1000 versus the national average of 4.6 per 1000.

The national average for insolvency in 2019 was 4.6 people per 1000.

Comparatively, Halifax and P.E.I. stand at 5.9 and 6.1 per 1000 for insolvency, approximately half C.B.I.'s rate. Numbers like these, along with C.B.I.'s chronic child poverty and perennially high unemployment, are indicative of unaddressed systemic economic issues.

These social-economic markers are tell-tale of chronic underlying causes not existing in other areas of our country. C.B.I. was involuntarily annexed to rival and neighboring Nova Scotia in 1820, and remains today a colonial appendix of that province.

Property Exempt from Seizure in Bankruptcy Proceedings

We see further regional differences in what property the laws protect from seizure in bankruptcy across Canada. In Nunavut, communities are only accessible by sea or air, and some only receive bulk goods by shipment once or twice a year during the ice-free period. Because of this, essentials which are not readily purchasable year-round in the region are exempt from seizure. This includes clothing, household furnishings and appliances, and medical or dental aides.

In fishing regions (such as Nova Scotia) and in farming regions (such as P.E.I., Nova Scotia, New Brunswick, Manitoba, Saskatchewan and Alberta), equipment or seed and livestock are protected. In P.E.I. – a long-established agricultural producer of potatoes and other crops – bankruptcy legislation protects enough seed for up to 100 acres. In Nova Scotia, farm equipment and fishing nets are protected. In Newfoundland, if the bankrupt's primary occupation is farming, fishing or aquaculture, then personal property used to earn income are exempt up to $10,000. In New Brunswick, certain amounts of seed grain and potatoes for seeding or planting purposes are protected: 40 bushels of oats, 10 bushels of barley, 10 bushels of buckwheat, 10 bushels of wheat and 35 barrels of potatoes. In Quebec, where French culture is a priority policy, farm property is fully exempt. And, in Ontario, up to $29,000 for livestock, fowl, bees, books, tools and implements of the trade are protected from bankruptcy for farmers.

In the prairie provinces, farms are largescale and a core part of the economy. In Manitoba,

bankruptcy protected productive agricultural assets include:

- farm machinery, dairy utensils and farm equipment needed for the next 12 months,
- all animals reasonably necessary for the next 12 months,
- one motor vehicle, if required for agricultural operations (for all other bankrupts, the exemption is a personal vehicle up to a value of $4500),
- enough seed for all land under cultivation,
- the horses, stables, barns and fences on the farm, up to 160 acres, and
- up to 160 acres of farm land.

In Saskatchewan, the protection for agricultural assets include livestock & equipment (enough for up to 12 months), two bushels per acre under cultivation, and enough cash or current crop for farming costs to the next harvest. Alberta is somewhat like Manitoba, though to a lesser extent, and provides protection for up to 160 acres along with livestock & equipment for up to 12 months of operations.

The Prairies | Photo Credit: Nathalie Tremblay

Other categories of protected property under provincial and territorial legislation include:

- food and fuel
- clothing for the claimant and their dependents
- household furnishings for the claimant and their dependents
- motor vehicles
- medical and dental aids for the claimant and their dependents
- sentimental items
- pets
- home equity
- tools needed for work
- business and hunting income
- pension plans

Debt, insolvency and bankruptcy rates are low, nominal or non-existent in the northern and Aboriginal territories and communities.

Only Ontario and British Columbia do not protect food and fuel. Other provinces and territories either exempt or provide some limited protection of food and fuel. Of the remaining categories, the most protective jurisdiction is Nunavut. It exempts clothing, household furnishings, medical and dental aids, tools of trade for business and hunting. These exemptions recognize the difficulty of accessing goods in the region, the harshness of the environment and, to a large extent, a continued reliance on hunting. They also recognize the need for weapons for protection in the pristine and wild environment. Clothing is also exempt in all jurisdictions except Newfoundland and Alberta, which both set a limit of up to $4,000 per bankruptee.

With respect to sentimental items (including religious, jewelry and furniture items), most jurisdictions do not give complete protection:

- Newfoundland exempts up to $500 in value,
- Saskatchewan exempts up to $7500,
- Manitoba protects only religious articles and furniture, and

- Quebec exempts family papers and portraits, medals and other decorations, along with items needed for religious services.

With respect to pets, only Newfoundland and New Brunswick give protection from bankruptcy within legislation.

Given Canada's recent super hot residential real estate market, the protection of home equity varies across Canada. With hyper-inflated home values, this category may now fall under policy review for future increases in protected value limits. As it stands now:

- Nova Scotia, P.E.I., New Brunswick and Ontario do not protect home equity,
- Manitoba offers home equity protection up to $2,500 while the Yukon offers $3,000,
- B.C. offers $9,000 to $10,000, depending on location,
- Newfoundland and Quebec offer up to $10,000 of protection,
- Nunavut offers $35,000 while the N.W.T. offers $50,000,
- Alberta, for one owner, allows up to $40,000, and
- Saskatchewan offers the most favourable protection at $50,000 plus up to160 acres of land.

Tools of the trade in Quebec and Nunavut are exempt. Other jurisdictions have value limits ranging from $650 in New Brunswick to up to $10,000 in Alberta and B.C. Finally, quite significant is the category of income and pension plans, which again provinces across Canada treat differently. The Yukon, N.W.T., Nova Scotia and B.C. provide no exemption for income and pension plans. Other jurisdictions offer some exemption.

For complete information on personal property exemptions for bankrupts, see legislation in each province.

Looking for more information? Check out these free legal information resources from CPLEA:

- Consumer info sheets (including on bankruptcy, being a guarantor, collection agencies and foreclosure in Alberta)
- Help with Debt Alberta (connecting you to resources depending on your situation)
- Consumer Law in Alberta FAQs
- Bankruptcy in Canada FAQs

Mark Macneill

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COVID-19 Vaccines in the Workplace: Employees

Lauren Chalaturnyk

With COVID-19 vaccine roll-outs ramping up, employees may be wondering how to deal with vaccines in the workplace.

In a companion article, our firm provides information for employers about COVID-19 vaccines in the workplace. In this article, we address questions employees may have.

Can my employer require that I get the COVID-19 vaccine?

Yes, but it is not as simple as your boss telling you to get the vaccine or else you will be fired.

Employers have an obligation under occupational health and safety laws to ensure the health, safety, and welfare of their employees. For some worksites, meeting this obligation might include having a vaccination policy in place, for some or all workers.

On the other hand, employers must also respect employee rights under human rights laws (including discrimination and accommodation) and privacy laws (including disclosing medical information). Employers must ensure the policy serves a legitimate health and safety purpose and is proportionate to that purpose. In this context, proportionate means that the vaccine must be the best, and perhaps only, option for addressing the employers' workplace health and safety obligations. For example, requiring vaccination for all workers at a nursing home might be necessary to reduce the threat of COVID-19. On the other hand, widespread vaccination at a small office may not be necessary if other less restrictive measures are sufficient to guard against the risks of infection and spread.

Before implementing a vaccination policy, employers should give all workers advance notice of the policy and provide employees with an opportunity to ask questions. This notice period gives employers time to inform employees and ensure that employees understand the policy. This notice period can also serve as working notice if you do not agree with the new policy and choose to quit your job.

Read our other article for employers for tips on implementing a vaccination policy.

Can my employer ask for proof of vaccination?

Yes, but your employer only needs enough information to know you are vaccinated. For example, your employer cannot ask when or where you were vaccinated, or which vaccine you received. In almost all cases, your employer should not be keeping your vaccination or other medical records on file as this can amount to a fairly serious invasion of privacy.

However, right now, there are talks of vaccine passports or even a registry. We will have to wait to see if the government provides further direction on vaccine records and how employers may be able to access these records.

What if I cannot get the COVID-19 vaccine for good reason?

You may have a valid reason for not getting the vaccine, such as health concerns or religious beliefs. Workplace vaccination policies should always have exemptions to the vaccine requirement available to you. Your

employer can ask for proof, though, that you fall under an exemption. For example, you may be required to provide a doctor's note or some form of sworn statement (such as a statutory declaration).

Under human rights laws, employers have a duty to accommodate employees up to the point of undue hardship. The policy should say how the employer will accommodate employees who do not or cannot get vaccinated. For example, if you cannot get vaccinated due to a health risk posed by the vaccine, your employer may agree to continue to let you work from home until the public health threat passes.

If you have concerns about discrimination or accommodation, you can contact the Alberta Human Rights Commission (or the Canadian Human Rights Commission if your workplace falls under federal legislation).

Photo by Nataliya Vaitkevich from Pexels

Can I be fired for not getting vaccinated?

In most cases, probably not. If your employer has a vaccination policy and you do not follow it (i.e., you do not get vaccinated and are not exempt from the policy), the policy should say what the consequences are for doing so. Terminating an employee with cause is a high bar to meet and usually requires documented progressive discipline, such as multiple written warnings. That being said, there may be situations where an employee refusing to be vaccinated poses a safety risk to others and does call for termination. But that termination would very likely be without cause, and you would be entitled to reasonable notice or pay in lieu of notice.

Can a potential employer ask if I am vaccinated during an interview?

No, this would violate human rights laws. However, a potential employer may make being vaccinated a condition of an offer and indicate they have a workplace vaccination policy.

Can I ask my coworkers if they are vaccinated?

No. Vaccination records are personal health information, and your coworkers have no obligation to share this with you. Your employer is also prohibited from sharing medical records about one employee with other employees.

What can I do if my coworkers refuse to get vaccinated and my employer does not have a vaccination policy?

Your employer does not have to implement a vaccination policy. Further, the government is not making the COVID-19 vaccine mandatory for everyone. So, some people may choose not to get vaccinated.

If you have concerns, you can talk to your employer. You can also talk with Occupational Health and Safety if you are concerned your employer is not meeting its legal obligations to provide a healthy and safe workplace.

If your employer is not following public health measures, you can contact Alberta Health Services.

Is my employer responsible if I have a negative reaction to the vaccine?

Probably not.

If your employer requires you to be vaccinated, workers' compensation benefits may cover allergic reactions to vaccines. If vaccinations in the workplace are voluntary, then you may not be eligible for workers' compensation benefits. For example, WCB Alberta and WorkSafeBC have more information on when benefits are available in Alberta and B.C., respectively.

For more information on Alberta's vaccine program, visit the Government of Alberta's website.

Looking for more information? Check out these free legal information resources from CPLEA:

- Your Rights at Work (includes FAQs, info sheets and more)
- COVID-19 FAQs (including on parenting, employment, fines, vaccines and more)

Lauren Chalaturnyk

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COVID-19 Vaccines in the Workplace: Employers

Lauren Chalaturnyk

As the COVID-19 vaccine begins to roll out across Alberta, employers may be wondering how vaccinations will be managed in the workplace.

While this is a new issue that has yet to be tested in the courts or tribunals, there are guiding principles that employers should keep in mind when considering how to implement a vaccination policy in their workplace.

Because COVID-19 presents such a serious health risk, employers must ensure that they are providing a safe and healthy work environment in accordance with their obligations under the *Occupational Health and Safety Act*. To date, this has included measures such as increased PPE in the workplace, physical barriers, and physical distancing measures.

However, with the introduction of vaccines, health and safety obligations must be balanced with an employee's reasonable expectation of privacy and their rights under the *Alberta Human Rights Act*. Making a vaccine mandatory for employees is a significant invasion of their bodily autonomy and employers must remain mindful of that fact.

In determining how to manage vaccines in the workplace, employers should consider the following:

1. Any vaccination requirement should be clearly set out in a policy. We recommend that employers start considering what this policy should look like now, so that it is ready and employees have received plenty of notice before vaccines are available to the general public in late 2021.
2. Employers can make vaccines mandatory but must provide for some exemptions or exceptions where an employee cannot receive the vaccine on the basis of a protected ground in the *Alberta Human Rights Act* (i.e. disability). Exemptions might include unpaid leaves of absence, alternative work arrangements such as working from home, or provision of additional PPE for workers who cannot be vaccinated.
3. Employers should consider the nature of their workplace and whether mandatory vaccinations are necessary to achieve their obligations under the *Occupational Health and Safety Act*. If there are less invasive options that still meet those obligations, those should be considered before making vaccination mandatory.
4. The steps an employer can take when an employee refuses to get vaccinated will depend on why the employee has refused to be vaccinated. In almost all cases, termination should be avoided.
5. Employees can be required to provide medical information in relation to vaccinations or refusals to be vaccinated. However, any medical information collected by an employer is subject to strict requirements under privacy legislation and should be carefully collected and managed.
6. If an employer has made vaccination mandatory in the workplace and an employee suffers an adverse reaction to the COVID-19 vaccine, that employer is unlikely to be liable for that adverse reaction.

These are just some of the issues and principles that employers should take into consideration when determining how to manage COVID-19 vaccines in the workplace. While this issue is complex and ever-evolving, employers can position themselves to mitigate against many of the risks associated with vaccinations in the workplace if they start considering their policies and procedures now.

To learn more, join us for a complimentary webcast on February 18: COVID-19 Vaccines and the Workplace: Your Questions Answered. Our panel will go deeper and answer your questions. This is the fourth instalment of our series *Managing COVID-19 as an Employer in Alberta*.

Any policy, and its implementation, should be tailored to address specific workplace circumstances, which will vary from employer to employer. Please feel free to contact any member of our employment team to address issues of specific concern in your workplace.

This article first appeared on the website of Reynolds Mirth Richards & Farmer LLP on January 28, 2021 and is reprinted with permission.

Looking for more information? Check out these free legal information resources from CPLEA:

- Your Rights at Work (includes FAQs, info sheets and more)
- COVID-19 FAQs (including on parenting, employment, fines, vaccines and more)

Lauren Chalaturnyk

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Evidence That Rape Myths Still Prevalent in Court in 2021

Melody Izadi

Despite a social-conscious awakening, one trial proves archaic rape myths still exist.

Photo by S Hermann & F Richter from Pixabay

A much-needed push against old-think myths and stereotypes of sexual assault victims led to a revamp of the *Criminal Code*. The changes updated when and how prior sexual activity of a complainant can be used in court. It took many generations and a consorted effort amongst feminists, lobbyists and victims of sexual abuse to convince many that, for example, a sex trade worker *can* be sexually assaulted. It was an almost novel and frustrating concept that some thought just because a complainant is sexually active – or was sexually active yesterday or even had sex with the accused on a prior occasion – that her character was flawed. And further that she was not only lying but could never be a victim. It is almost inconceivable that this was something we had to argue about.

In tandem with this push for social change is the need to dispel with rape myths and stereotypes around how a sexual assault victim *should*, *must*, and *will* act. It can hardly be disputed that some may cry, some may act perfectly "normal", some may run into a police station, some may seek therapy, and some may not. In short, there is no "right" way to behave. The jurisprudence in our court system is clear: a judge cannot rely on these rape myths to assess a complainant's credibility.

There was a recent social resurgence of the need to recognize these stereotypes and myths and to disengage from them. From high-profile celebrities to one's next door neighbour, hundreds upon thousands of survivors screamed #MeToo. Survivors felt empowered to share their stories of sexual abuse, harassment and violence, and inspired others to do so without fear of repercussion.

I pause here for a moment to note that the #MeToo movement has not been all positive in terms of impact. As I have written about before, Marie Henein— a defence lawyer who is a woman of colour— faced unprecedented backlash and cruel hypocritical taunts for representing Jian Ghomeshi when he faced sexual assault charges. She was called a "traitor" to her gender for having the alleged audacity to do so. Ghomeshi was acquitted of all charges. Humbly I submit to you that the #MeToo movement cannot stand for the principle that any allegation of sexual assault must result in a verdict of guilty. That would be an irreconcilable, illogical fallacy and outcome of the intended purpose of the movement. It is still the burden of the prosecution to prove a criminal offence beyond a reasonable doubt— and that is surely difficult to accomplish when your complainants are caught lying red-handed in open court.

But what the #MeToo movement does stand for is a re-education of society on gender-induced rape myths. Just because a woman did not cry – or tell anyone right away, or report it to police, or quit her job, or break up

with the accused – does not mean the sexual assault did not happen. Though unfortunately, that impermissible legal logic found its way into the recent case of *R v Steele*. The Ontario Court of Appeal reviewed the trial judge's decision and reversed the acquittal. The Court found the trial judge grounded his reasoning in archaic myths about how a sexual assault victim *should* act.

In *R v Steele*, the Court of Appeal heard an allegation of the accused having had vaginal and anal intercourse with the complainant without her consent. The alleged assault took place after a day of drinking and hanging out together and in an abandoned trailer. The complainant, by all accounts, agreed to enter the trailer. The accused testified that the complainant invited him into the trailer and that the intercourse they had was consensual.

The jurisprudence in our court system is clear: a judge cannot rely on these rape myths to assess a complainant's credibility.

At trial, the judge held that, because the complainant testified she did not "like" the accused, she needed a proper explanation for entering the trailer. In other words: what was her excuse for agreeing to go into a trailer at night with a man she did not like? Because she did not give a good enough reason in her testimony, the judge reasoned she lacked credibility. This finding formed part of his basis for reasonable doubt.

The Court of Appeal held the following:

> *The implication in the trial judge's reasons is* ***that consent can be inferred from the complainant's entry into the trailer. This is wrong in law.***
>
> *...the trial judge went beyond assessing credibility and made an inference about consent because he could not imagine another reason to enter the trailer other than to have consensual sex. It was open to the trial judge to hold that the complainant's inability to answer impacted her credibility, but he went further.* ***In so doing, he relied on stereotypes and assumptions – that a woman would not enter a building at night with a man unless she wanted sex – to conclude that the complainant wanted to have sex.***
>
> *[Emphasis added]*

Troubling the Court of Appeal in its review of the trial judge's decision was another fact the trial judge relied on to discount the credibility of the complainant. When the complainant was in the trailer, she advised her parents (either via text or phone call) that she was at the Legion. When then asked why she was not home yet, she responded she would be home soon. The trial judge held this was not how a sexual assault victim, being held against her will in a trailer, would communicate with her parents.

The Court of Appeal ruled harshly:

> *Here the trial judge specifically found that [the complainant's] conversation with her father "does not appear to be the response of someone who has just been sexually assaulted." This is a classic example of an assumption made by a trial judge as to what a victim of an assault would do.*

Not surprisingly, the Court of Appeal granted a new trial. The trial courts will rehear the case. And the complainant and the accused will likely have to endure the pressures, hardships and emotional strains of a trial all over again. All because, somehow in 2021, and despite significant gains in social change, old-think rape myths dictated the course of justice.

Melody Izadi

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Lawyer: Friend or foe?

Erika Hagen

Debunking the myths and legends that haunt family law.

This article is the first in a series dedicated to debunking the myths and legends that haunt family law. Today's topic? Lawyers.

Many people experiencing a family breakdown have pre-conceived notions about the role of lawyers. These ideas come from TV, the "grapevine," past experience, etc. Some that I hear often are:

- "My ex hired a bulldog, and so I need to hire a bigger bulldog."
- "Our situation is very simple, so I don't need a lawyer."
- "If I hire a lawyer then I won't be able to go to mediation instead."
- "Lawyers just charge a lot of money and get nothing done."
- "My ex has a lawyer but I don't, so I can't talk to the other side."

Let's break down each of these myths.

Illustration by CPLEA

Myth: Only a Bulldog Can Take on Another Bulldog

I tend to think that the best way to approach a snarly adversary is to listen. Just as the best way to put out a fire is (usually) to put water on it. By doing so, the adversary tends to blow themselves out of steam fairly quickly, or at least give the appearance of being unreasonably aggressive. This leaves room for the non-bulldog to step in and take a more sensible command of the situation. In other words, at risk of being cliché, it is difficult to fight fire with fire. This is not "backing down from the fight." It is ending the fight. Ideally the role of the lawyer is to resolve the dispute – not entrench the parties and increase the conflict. Unfortunately there are times when the only option is to take an aggressive approach, but this should be done with caution rather than as the default approach.

The bottom line is that if you are interviewing potential counsel, the most important factor is that you feel comfortable with that counsel before retaining them. It is often a good idea to meet or chat with a few lawyers to find one that just feels right for you. It is a big decision and not one to make lightly.

Myth: Family Law is Simple and No Lawyer is Needed

Because so many people endure family breakdowns, it is assumed that the process is quite streamlined. While it can be, and while many people do conclude their matters without counsel, there are risks in doing so. In most client interviews that I conduct, the party I am speaking with is surprised to learn something very significant about their case that they did not know before. Maybe they will be entitled to spousal support and had thought they would not be. Maybe they had "waived" child support and learn that they can

seek back-pay. Maybe they thought the mom would get the kids by default and learn that they have a strong case for shared parenting. Maybe they thought it would be easy for their ex to hide money and learn instead that they are entitled to complete and substantive financial disclosure. Maybe they thought there was nothing worth "fighting over" and learn that their ex's pension is considered family property.

There are also some things that ONLY lawyers can do – such as providing Independent Legal Advice ("ILA") on family property agreements. Many people are surprised to learn that family property agreements require ILA for each party to be formalized or fully enforceable.

Lawyers are also experienced and can help to streamline proceedings and avoid unnecessary delays – especially in uncontested situations. Lawyers generally try to identify potential problems in the future that may not be identified otherwise and prevent such problems before they even happen. Even a 30-minute chat can be enormously beneficial.

Myth: Lawyers Mean Litigation

The *Rules of Court*, the Code of Conduct which governs lawyers, the *Divorce Act*, the *Family Law Act*, and just about everything else that guides family lawyers requires or encourages us to settle our files expediently. We must also provide our clients with all available options for doing so. Hiring a lawyer does not mean that you cannot go to mediation, it does not mean that you have to go to court, and it does not mean that you're giving up on finding an amicable resolution.

Most (if not all) lawyers are happy to:

- refer clients to therapists for co-parenting communication strategies,
- refer mediators,
- explore options like judicial dispute resolution, settlement meetings, arbitration, etc., or
- collaborate, in the general sense, with all involved parties to find sensible solutions.

Some lawyers even take files on a strictly no-litigation basis, called "Collaborative" family law.

Myth: Lawyers Waste Money

There is no denying that, unless a person qualifies for Legal Aid, legal counsel is expensive. However, there are many ways to minimize the expense. Some lawyers do not charge for all or part of an initial consultation which can help you get organized, understand what direction you wish to go, and prevent costly missteps. Some lawyers take on only certain part(s) of files, such as:

- drafting documents but not appearing in court,
- providing repeated consultations to guide you along the way, or
- providing only Independent Legal Advice before you sign an agreement.

There are an infinite number of possible approaches to take on various files.

My experience has been that I am least cost-effective either when the opposing side is being unreasonable or excessively litigious, and/or when my client prefers to litigate rather than negotiate. Conversely, my experience has also been that I am most efficient in my services when my client sees me as someone to collaborate and problem solve. Then we can both work together to prevent and solve problems as efficiently as possible.

Myth: If I Have No Lawyer I Cannot Contact My Ex's Lawyer

If you **do** have a lawyer, it is true that the opposing lawyer cannot speak to you without your lawyer present. However, if you **do not** have a lawyer, then you are your own lawyer (aka: "self-represented"). In this case you should communicate with the opposing

lawyer to try to bring about agreements and resolution. However, the other lawyer may ask that you communicate in writing (such as email) rather than verbally (such as on the phone). There are a lot of reasons for this, but the fact is that keeping communications in writing can be helpful to both sides as everyone can look back at it later to clarify what did or did not occur. My colleague, Sarah Dargatz, had some further insights into this issue in a 2019 LawNow article.

In conclusion, while not all lawyers are a good fit for all clients, lawyers are professional problem solvers who want to help their clients move forward with their lives. They do not want their clients to suffer needless stress or expense for the sake of a fight.

Looking for more information? Check out these free legal information resources from CPLEA:

- Families and the Law info sheets and booklets in English and French (on parenting, financial support, property division, moving, travelling, resolving disputes and more)
- Families and Relationships FAQs
- Divorce FAQs
- CPLEA TV videos (including about Family Docket Court in Alberta)

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Famous Cases

Criminal Sentencing of Aboriginal Offenders: *Ipeelee*

Peter Bowal and Malhar Shahani

In *Ipeelee*, the Supreme Court of Canada again considered the *Gladue* Principles.

> *Over a decade has passed since this Court issued its judgment in* Gladue. *As the statistics indicate, s. 718.2(e) of the* Criminal Code *has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system … The failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in* Gladue.
>
> *R v Ipeelee, 2012 SCC 13 at para 63*

In the last column, we described the Supreme Court of Canada *Gladue* decision from 1999. This decision impacts sentencing of Aboriginal persons for the crimes they commit. The race-based *Gladue* Principles require Canadian judges to consider several mitigating factors for Aboriginal offenders, apparently to reduce their prison sentences. This special sentencing approach is not available to reduce incarceration for non-Aboriginal offenders who have suffered equally (or more) challenging childhoods.

Gladue added bureaucratic and delay burdens to an already overloaded justice system. The ambiguous Principles lead to inconsistent judicial application and outcomes. *Gladue* did not curb Aboriginal incarceration rates in Canada – charges, convictions and imprisonments involving Aboriginal persons have increased.

It was predictable that the Supreme Court of Canada would re-visit the issue of Aboriginal sentencing under section 718.2(e) of the *Criminal Code*. This section requires "particular attention to the circumstances of aboriginal offenders" when sentencing using "all available sanctions other than imprisonment that are reasonable in the circumstances." This opportunity came up thirteen years after *Gladue* in the two unrelated cases of Manasie Ipeelee and Frank Ladue. Both were Aboriginal men charged with violating Long Term Supervision Orders. The Supreme Court of Canada heard the cases together and released one decision, recorded as *R v Ipeelee*.

Ipeelee

Manasie Ipeelee was a lifetime criminal, having collected some three dozen convictions as a youth and dozens more convictions as an adult. He blamed alcoholism from a young age and lack of parental guidance. The court designated him a habitual offender in 1999, after sexually assaulting and causing bodily harm to a homeless woman. For that crime, he was sentenced to six years in prison. After release from prison and still a high risk to re-offend, he became subject to a ten-year Long Term Supervision Order (LTSO). Breaching a LTSO is an indictable offence punishable by up to ten years' imprisonment. Ipeelee was caught violating it four times in the first year.

He breached the condition to abstain from alcohol in August 2008 when he was found intoxicated in public and in possession of two bottles of alcohol in Kingston, Ontario. Ipeelee pleaded guilty. The sentencing judge observed that "Mr. Ipeelee's aboriginal status had already been considered during sentencing for the 1999 offence". Given the threat Ipeelee posed to the public, his Aboriginal status was of "diminished importance" (para 15). The Ontario Court of Appeal dismissed the sentence appeal, concluding that "the

appropriate sentence will … not differ as between Aboriginal and non-Aboriginal offenders" (para 17). Ipeelee appealed his three-year prison sentence to the Supreme Court of Canada.

Ladue

Frank Ladue similarly grew up in the north, was a child of a broken home, and was surrounded by alcoholism. After more than forty criminal convictions, an LTSO was signed. He quickly and often breached the order and was sentenced to three years in jail for doing so. The judge acknowledged that although Ladue's past was tragic, that should not have any impact on this sentence.

The British Columbia Court of Appeal ruled that the sentencing judge did not properly consider Ladue's Aboriginal background according to *Gladue* and section 718.2(e). It reduced the imprisonment to one year. The Crown appealed.

Supreme Court of Canada

The Supreme Court of Canada considered how the *Gladue* Principles applied to figure out a fit sentence for an Aboriginal person's breach of an LTSO. The Court repeated the purpose of "overrepresentation of Aboriginal people in the Canadian criminal justice system" (para 58). It called on sentencing judges to "take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society" (para 60). 'Taking notice' is code to reduce imprisonment beyond what they would sentence similar non-Aboriginal offenders.

The Court acknowledged:

> ***statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of [the reforms], Aboriginal admissions to custody increased by 3% while non-Aboriginal admissions declined by 22%. From 2001 to 2006, there was an overall decline in prison admissions of 9%. During that same time period, Aboriginal admissions to custody increased by 4%. As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when*** Gladue ***was decided, they accounted for 17 percent of federal admissions in 2005. As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the situation today?"***
>
> Ipeelee ***at para 62.***

The Supreme Court of Canada conceded that its "decision in *Gladue* were not universally well received" (para 64), which we suggest is the greatest understatement in the decision. Therefore, it embraced *Ipeelee* to resolve the "misunderstandings, clarify certain ambiguities and provide additional guidance so that courts can properly implement this sentencing provision" (para 63).

The Court identified three criticisms of *Gladue*:

> ***(1) sentencing is not an appropriate means of addressing overrepresentation; (2) the*** Gladue ***principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity.***
>
> Ipeelee ***at para 64.***

It then batted these objections away, stating all "these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(e) of the *Criminal Code*." The Court simply reaffirmed that *Gladue* Principles are "required in every case involving an Aboriginal offender" (para 87).

The Court allowed the lower one-year prison sentences imposed on both Ipeelee and Ladue – the lowest sentence option – because they were Aboriginal offenders with difficult childhoods. This was one-tenth of the maximum sentence for serious offences.

Commentary

The Supreme Court of Canada continues to be obsessed with racial proportionality in prisons, which we suggest it was not appointed to bring about and is not equipped to maintain. The Court's role is not to guarantee equality of outcomes along racial lines. It refuses to contemplate that crime is, by definition, a matter of personal and individual will and choice.

This reaffirmation of *Gladue* was puzzling. The Court sought to reduce expectations it had set earlier and disregarded serious concerns. It directed judges to 'just keep doing what we told you to do and we'll hope for better outcomes.' Moreover, this occurred in the context of long-term offenders where the paramount consideration is not racial quotas in prisons but the protection of society.

Judges must explicitly contemplate and delineate the vague notion of "Aboriginal background." This must be accepted as the first and most indefinite victimhood in the crime being addressed. "Aboriginal background" serves as a mitigating factor – a form of excuse or explanation for committing crimes. It may outweigh the injury claimed by the offenders' victims. Regardless whether "Aboriginal background" has any connection to the current offence – especially when it is tied to the notion of Aboriginal over-representation in prison – *Gladue* and *Ipeelee* can have only one result: to favour non-custodial sentences or custodial sentences of shorter duration than for offenders of other races.

We have seen this is not working to reduce Aboriginal incarceration. The Court refuses to consider the logical possibility that the *Gladue* Principles might even increase Aboriginal incarceration in the long-term.

Conclusion

The Court accused its detractors and Canada's sentencing judges of "fundamental misunderstanding and misapplication" in their criticism of *Gladue* and its approach to section 718.2(e). The *Gladue* race-based sentencing approach has failed. Aboriginal incarceration rates are increasing. Yet in *Ipeelee*, the Supreme Court of Canada merely doubled down on *Gladue*.

The next column will feature the last of this trilogy of cases describing criminal sentencing for Aboriginal offenders. How effective have section 718.2(e) and the *Gladue* Principles been?

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Human Rights

Disabilities, Accommodation and Mask Rules: Human Rights Commission weighs in

Linda Mckay-Panos

The British Columbia Human Rights Tribunal released a screening decision about a customer's complaint of having to wear a mask in a store.

Recently, the British Columbia Human Rights Tribunal declined to accept a complaint in a case called *The Customer v The Store*, 2021 BCHRT 39 (*The Customer*). Since November of 2020, due to COVID-19, masks have been mandatory indoors in B.C. Before that, many businesses followed recommendations to make face coverings mandatory. Most recently, under Ministerial Orders passed under the authority of the *Emergency Program Act*, a visitor to an indoor public space must wear a face covering. There are exemptions to the rule. These include where a person is unable to wear a face covering because of a "psychological, behavioural or health condition" or "a physical, cognitive or mental impairment" (see s. 4 of the Order).

"The Customer" went into a grocery store without a mask. A security guard stopped her and asked her to wear a mask. She said she was exempt. When asked to provide a reason why she was exempt, she refused to provide many details, except to say they cause "breathing difficulties". When the security guard insisted that she wear a mask, she left the store.

The Customer complained that "The Store" discriminated against her based on physical and mental disability, thereby violating s. 8 of B.C.'s *Human Rights Code*. This ruling was made at the screening stage of the human rights complaint process. When asked, the Customer refused to provide the Tribunal with any information about her disability, or how it interfered with her ability to wear a mask. The Tribunal declined to proceed with the complaint.

The Customer argued that the Store's mask policy was discriminatory. The Customer also argued that, even if there was an order, there are exemptions and duties to accommodate. However, the Customer also had an obligation to demonstrate that:

> ***(1) she has a disability; (2) the Store's conduct had an adverse impact on her regarding a service, and (3) her disability was a factor in the adverse impact:*** **Moore v. British Columbia (Education),** ***2012 SCC 61 at para 33.***
>
> ***(*****The Customer,** ***para 12)***

The Tribunal held that the Customer had shown an adverse impact regarding a service—she could not enter the Store unless she wore a mask. However, she had not set out facts that, if proved, could establish that she has a physical or mental disability that was a factor in this adverse impact.

The Customer refused to tell the Tribunal whether she had a disability. She only said that wearing a mask causes her anxiety and makes it difficult for her to breathe. She argued that she should not have to disclose health conditions that are private—not to the Store nor the Tribunal.

The Tribunal declined to rule on the amount of information a claimant must disclose to a service provider. It did note: "whenever a person is asking for human rights-related accommodation, they are required to bring forward the 'facts relating to discrimination':

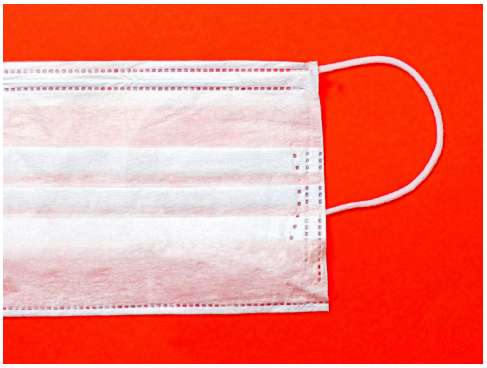

Photo by Anna Shvets from Pexels

Central Okanagan School District No. 23 v. Renaud, [1992] 2 SCR 970" (*The Customer*, para 16). The Tribunal went on to hold:

> ***[T]here is no question that when a person files a human rights complaint with this Tribunal, they must set out facts which could, if proven, establish that they have a disability. Without a disability, they are not entitled to accommodation or any potential remedy for discrimination under the Code. It is not enough, as the Customer has done in this complaint, to simply say that 'specific mental and physical disabilities are private matters'.***
>
> **(The Customer, *para 17)***

While there are very few decided cases on this issue, many human rights commissions across Canada have released guidance on masks and accommodation:

- British Columbia: A human rights approach to mask-wearing during the COVID-19 pandemic
- Alberta: COVID-19 and Human Rights
- Saskatchewan: COVID-19, Disability, and the *Code*
- Manitoba: COVID-19 and The Human Rights Code
- Ontario: COVID-19 and Ontario's Human Rights Code
- Quebec: Your rights and COVID-19
- New Brunswick: Mandatory masks in compliance with Human Rights Act
- Nova Scotia: Nova Scotia Human Rights Commission Statement on COVID-19 Pandemic
- Northwest Territories: COVID 19 Statement
- Newfoundland and Labrador: COVID-19 and Human Rights – Best Practices
- Prince Edward Island: Frequently Asked Questions on Mask Wearing Requirements
- Yukon: COVID-19 FAQs
- Canada: Statement COVID-19

Looking for more information? Check out these free legal information resources from CPLEA:

- Human Rights law info sheets (including your rights at work and while renting)

Linda McKay-Panos

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Youth & the Law

I'm Turning 18, Now What: Being an employee

Jessica Steingard

Whether you already have a job or are looking for your first, you should know your rights as an employee.

Employment is a contract between the employer and the employee. Each party agrees to do certain things. At its most basic, your employer agrees to pay you for the work you do.

The employment relationship is governed by the individual employment contract, the collective agreement (if you are part of a union), and the law.

This article discusses the laws that apply to employees and employers, as well as the administrative bodies that deal with issues under these laws. At the end, I have listed some resources for getting more help.

The Laws

Both the provincial and federal governments make laws for employers and employees to follow. The federal government makes laws for employees in industries that it regulates. These include shipping and navigation, railways, airports and airlines, radio broadcasting, telecommunications, banks, federal government workers, and First Nations administrations. The provincial government makes laws for most other workers. **Each piece of legislation says who it applies to.**

The Government of Canada has made the following laws:

- ***Canada Labour Code*** – employment standards and occupational health and safety laws that apply to federally-regulated workers across Canada
- ***Canadian Human Rights Act*** – human rights laws that apply to federally-regulated workers across Canada
- ***Employment Insurance Act*** – sets out EI benefits for eligible Canadian workers

The Government of Alberta has made the following laws:

- ***Employment Standards Code*** – employment standards laws for most Alberta workers
- ***Alberta Human Rights Act*** – human rights laws that apply to most Alberta workers (and other situations, such as providing goods and services, and renting)
- ***Labour Relations Code*** – laws for unions and about the bargaining process
- ***Occupational Health and Safety Act*** – laws everyone at a worksite must follow to ensure a safe work environment (includes industry specific standards)
- ***Workers' Compensation Act*** – benefits system for Albertans injured at work

Other provinces and territories have similar legislation as Alberta.

The above are some of the main laws that apply to employees and employers. Of course, there are many more, some which apply only to certain industries or workers.

Resolving Issues

There are several administrative bodies in Alberta that deal with employment issues. These bodies are created by legislation and are part of the executive branch of government. Some common ones are described below.

Photo by BRRT from Pixabay

Employment Standards resolves issues about Alberta's employment standards laws. These include paying wages, overtime, vacation pay, sick leaves, termination and more. If you are worried your employer is not meeting employment standards law, you can contact Employment Standards. For federally regulated employees, see Canada's Labour Program.

Alberta's **Human Rights Commission** receives complaints about discrimination in workplaces and by landlords or providers of goods or service. The Commission investigates complaints, encourages the parties to resolve the issues, and makes decisions (usually through the Tribunal) when necessary. The discrimination must be related to one or more grounds (listed in the Act) and lead to a negative result (such as getting fired, not being allowed to rent an apartment, etc.). For federally regulated employees, see the Canadian Human Rights Commission.

The **Alberta Labour Relations Board** deals with issues between employers and trade unions. Trade unions represent employees to employers or management. The Board applies and interprets Alberta's labour laws. It investigates issues, encourages parties to resolve their issues, and makes binding rulings when necessary. For federally regulated employees, see Canada's Labour Program.

Alberta **Occupational Health & Safety (OHS)** enforces the province's OHS laws. It inspects worksites, investigates complaints and prosecutes breaches of the law. If you have a concern about the safety of your workplace (including unsafe or dangerous work, injuries or incidents), you can file a complaint anonymously with OHS. For federally regulated employs, see the Canada Industrial Relations Board.

The **Workers' Compensation Board (WCB)** supports Albertans injured at work. If you are hurt at work and need more than first aid or if you miss time from work, you should report the injury to your employer and then to WCB.

Getting Help

Besides the boards and offices listed above, there are lots of resources available to help you if you have questions or concerns related to your work.

The **Workers' Resource Centre (WRC)** supports Alberta workers with employment-related issues. Talk with them about Employment Insurance, lost wages (Employment Standards), workplace injuries, human rights, CPP-disability, short and long-term disability, and AISH.

You can also reach out to a **legal clinic** in your area that provides pro bono (free) legal services. Most have income thresholds you must be under. Find a list of legal clinics on LawCentral Alberta.

The **Centre for Public Legal Education Alberta (CPLEA)** creates free legal information resources to help you understand your rights as an employee. See our:

- Info sheets and booklets about what to do after you have lost your job, human rights at work and more
- FAQs about employment standards and OHS laws
- LawNow articles about a variety of employment law topics
- Your Rights at Work webpage

Looking for more information? Check out these free legal information resources from CPLEA:

- Your Rights at Work (includes FAQs, info sheets and more)

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