LawNow
relating law to life in Canada

The Law of Fun

PLUS

Addressing Accessibility Barriers

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Summer means no school, vacations and having fun! This issue of LawNow looks at the laws that apply to some favourite fun activities. Plus, we report on current initiatives to address accessibility barriers.

Feature

The Law of Fun

Heading into Alberta's Great Outdoors This Summer? Passes and permits you should know about

Jeff Surtees and Jessica Steingard

It's your responsibility to know the rules before you head out to enjoy parks, camp, hunt or fish, and operate off-highway vehicles or boats.

One positive thing to come out of COVID-19 is that more Albertans are exploring the beautiful outdoors of our province.

Before venturing out though, you should know about a few passes and permits. Otherwise, you may run the risk of a very expensive adventure!

Park Passes

If you want to spend time in any national park or Kananaskis Country and the Bow Valley, you need a pass. Vehicles travelling through do not.

Parks Canada issues passes for national parks in Alberta (Banff National Park, Jasper National Park, Waterton National Park, Wood Buffalo National Park and Elk Island National Park). You can buy a Discovery Pass, which covers admission to more than 90 national parks and historic sites for one year. These passes are available at any park gate or park visitor centre, or online. The price depends on the number and ages of the people using the pass. For example, a family/group pass is good for up to 7 people in a vehicle and is $139.40 (taxes included). If you are only planning to be in a park for a few days, you can buy a single-location pass.

If you want to spend time in any national park or Kananaskis Country and the Bow Valley, you need a pass.

In the spring of 2021, the Government of Alberta introduced a **Conservation Pass for Kananaskis Country and the Bow Valley**. All vehicles parked at the provincial park and public land sites must have a pass. You can buy a pass online, or in-person at designated locations. The pass connects to up to two license plates registered at the same address. Annual passes and day passes are available.

Camping Permits

Camping is a favourite Alberta pastime. But it is not as simple as pitching a tent on whatever flat piece of land you find! You cannot camp on someone's private land or on Crown land unless you have permission to be there.

Alberta offers many campgrounds. Some you must reserve ahead of time, others are first come, first served. Some are government-run on Crown land, others are privately-run on

private land. Some offer hook-ups for camping trailers and motor homes, others simply offer tent pads or space.

We also categorize camping as front country or backcountry. **Front country camping** includes individual and group campsites, walk-in tenting, equestrian camping and winter camping.

You cannot camp on someone's private land or on Crown land unless you have permission to be there.

Backcountry camping is accessible by foot, horseback or mountain bike. These sites are at least 1 km from the parking lot! There are **designated backcountry campgrounds** and **random backcountry camping**. There are rules about what activities you can do and where you can set up camp. You need a **Kananaskis Conservation Pass** to camp at designated backcountry campgrounds in Kananaskis Country. You can only random backcountry camp in certain wildland provincial parks and public land use zones. You also need a **Public Lands Camping Pass** to random camp along the Eastern Slopes of the Rocky Mountains.

Visit the Alberta Parks webpage to find more info and rules about camping in Alberta parks and to reserve a spot. Or visit Alberta Campground Guide to find privately-run campgrounds in Alberta.

Fishing & Hunting Licenses

Hunting and fishing are legal activities in Alberta. But they are heavily regulated. So, before you grab a fishing rod and reel in your big catch, make sure you know what the rules are.

First, anglers (fisher folks!) and hunters must have an active Wildlife Identification Number (WIN). You use this number to buy licenses and wildlife certificates and to apply for draws for tags. Your WIN never expires.

View from Mount Lipsett, Alberta
Photo credit: Jessica Steingard

To hunt some animals or keep some fish, you need a tag. This is a government-issued, pre-numbered ticket that allows you to keep a specified animal. The government uses tags for conservation purposes – so that animals are not hunted to extinction. If law enforcement officers find you with a catch or hunt that you do not have a tag for but should, there are serious penalties.

Anyone fishing in Alberta must also buy an annual fishing license from the Alberta government. There are a few exceptions. The following individuals do not need a license but must follow all rules and regulations in place:

- children 15 years and under
- adults 65 years and older
- a First Nations person who is defined as Indigenous under Canada's *Indian Act*

A fishing license generally allows you to catch and release. You need tags to keep some fish. There are lots of other rules attached to the license too – where and when you can fish, types of equipment you can use, etc. Our recommendation? Read the latest edition of the **Alberta Guide to Sportfishing Regulations** before you go.

Two final notes about fishing:

- Fishing season runs April 1 to March 31 of each year. There are two free fishing weekends in Alberta (when you do not need a license to fish): Family Day long weekend and the weekend following Canada Day in July. You must still follow all

rules and regulations, including knowing when you can and cannot keep fish.

- The rules can change each year. So, brush up before you head out in the spring.

Hunting is a whole other story! Hunters must also follow strict rules and regulations, including hunting licenses, tags, gun licenses and registrations, and more. Check out the latest edition of the **Alberta Guide to Hunting Regulations** for more information about hunting.

Off Highway Vehicle Permits

As of June 2021, there are no fees or permits needed to simply use an off-highway vehicle (OHV) on land regulated by the provincial government in Alberta. That could soon change. The recently passed Bill 64, *The Public Lands Amendment Act* allows for "fees relating to the use or occupation of public land, including the carrying on of activities on public land."

For more rules and regulations, see our 2017 LawNow article ("How Are Off Road Vehicles Regulated in Alberta?").

There are lots of rules and regulations for OHVs, including where you can ride, how old you must be, and more. For example, if you are using an OHV on a highway (very broadly defined as anywhere people ordinarily operate vehicles), then you must follow the same rules as vehicles. As well, most OHVs must be registered and insured (with exceptions for OHVs owned by farmers for use on private land and for military vehicles). For more rules and regulations, see our 2017 LawNow article ("How Are Off Road Vehicles Regulated in Alberta?").

The bottom line is, if you are going to use an OHV, you must understand the rules in the area you plan to ride. For Crown land, read Alberta's **Guide to Outdoor Recreation on Provincial Crown Land**. You can also check with the local Alberta Environment and Parks office or a local OHV club for more information.

Boating Licenses and Registrations

The federal and provincial governments share responsibility for the laws about boating. Under Canada's Constitution, the federal government can make laws about navigation, shipping and fisheries. The provincial government can make laws about water use, pollution, and activities that happen on the environmentally important riparian land that surrounds water bodies. In practice, the two levels of government work closely together on many of these things.

This spring, the federal government introduced new rules for watersports in Banff National Park to protect park waters from harmful aquatic invasive species. You need an inspection for all motorized watercraft. And you need a **self-certification permit** for non-motorized watercraft and water recreational gear – including canoes, kayaks, paddleboards, inflatables and more. Review the Government of Canada's website before you head out!

This spring, the federal government introduced new rules for watersports in Banff National Park to protect park waters from harmful aquatic invasive species.

You do not need a driver's licence to operate a boat in Alberta. However, a person operating a boat with a motor that is ten or more horsepower must carry *proof of competency*. The most common way to prove competency is to carry a **Pleasure Craft Operator Card**, which you can get after taking an online course and passing a test. Information about how to apply for your card and answers to many frequently asked questions is available

on the Transport Canada website. Operators of unpowered boats do not have to prove competency.

Boat with motors ten horsepower or greater must have a **Pleasure Craft Licence**. The licence must be on board, and the licence number must be displayed on both sides of the boat's bow in visible numbers at least 3 inches high. There are no registration requirements for unpowered watercraft in Alberta. More information about Pleasure Craft Licences is available from Transport Canada.

Know Before You Go

The moral of the story? There is a lot of fun to be had outdoors this summer in Alberta. Just make sure you know the rules before you go!

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Ride at Your Own Risk: Amusement parks and liability

Lee Klippenstein

What does it mean to do something at "our own risk"? And who is ultimately responsible when accidents do happen?

When I was young, winter officially ended with family outings to (the recently closed) Wild Rapids waterslide park in Sylvan Lake or to Calgary's Callaway Park. These amusement parks offer thrill and excitement – our bodies are placed in unnatural positions and subjected to high speeds. They are the epitome of fun.

Amusement park rides can turn these thrills into disasters. Action Park in New Jersey, the subject of a recent documentary, is an extreme example. Six people died during the park's 18-year run, and countless more were injured. Action Park was once advertised as the world's biggest water park. However, the constant stream of lawsuits led to its closure in 1996.

In Alberta, tragedy struck in 1986 at West Edmonton Mall's Galaxy Land. A mechanical failure caused the Mindbender roller-coaster to derail. This disaster took the lives of three people and hospitalized 19 more. Catastrophes like this are rare, yet the possibility of harm is ever-present.

Reasonable notice of the waiver clause is crucial, but practically speaking, it comes down to shared responsibility.

This article will examine the legal rights we give up when we enter an amusement park. What does it mean to do something at "our own risk"? And who is ultimately responsible when accidents do happen?

Safety Standards and Regulations

Amusement parks are designed to be safe. Governments regulate the operation and maintenance of these parks through a variety of means. In Alberta, standards for these rides are set by the *Amusement Rides Standard Regulation* under the *Safety Codes Act*. The Alberta Elevating Devices & Amusement Rides Safety Association (AEDARSA) is an additional, independent, body which helps to enforce and maintain these standards. This means that amusement park attractions are subject to a strict set of rules. Park owners have a legal duty to protect riders.

Accidents may be rare, but what happens when they do take place? The events which lead to the injury are always relevant. Was the rider following the rules, or misbehaving? Was there a mechanical failure, or did the ride attendant act negligently? In most instances, the legal responsibility for an injury is determined by the park's liability waiver.

What is a Waiver?

Waivers are a common element of many contracts. They require you to consciously give up a right or privilege that you would otherwise have. In the amusement park context, guests are asked to give their consent to a subset of waivers known as "liability waivers." They require you to give up your right to make a legal claim against a company

for any injury, illness, or death that results from enjoying their services. At most amusement parks, it is mandatory to agree to a liability waiver before you get on any ride – you must either "take it, or leave it."

Amusement parks obtain liability waivers in two main ways:

1. Formal written contracts where a person signs an express liability waiver, or
2. Exclusionary terms written out on a ticket, and then reinforced through notices displayed in the park. These are commonly referred to as "ticket case" liability waivers.

Formal liability waivers are typically used when the activity you wish to participate in is clearly defined. A zipline course is a good example. The owner knows that you will follow a set path through their attraction. They can carefully craft a liability waiver that considers all the hazards along the way.

Photo by Stas Knop from Pexels

In an amusement park, with multiple rides with differing risks, a more flexible liability waiver is necessary. Ticket case waivers are therefore more common. In such instances, you pay for admission to a park and are simply handed a ticket to ride on any attraction in it. Alternatively, tickets may be purchased at machines and then exchanged for entrance to a specific ride. The terms of the liability waiver will be posted on the back of the ticket and then reinforced through signage in the park.

Both types of liability waivers require that the individual agreeing to the terms understands what they are giving up. This understanding is not guaranteed by signing a document or accepting a ticket. I will focus on ticket case waivers, as they are more common in amusement parks.

Ticket Case Waivers

How do you agree to these terms and when are they binding?

The general rule that applies to all liability waivers is that the owner must take *reasonable steps* to inform the customer of the waiver for it to be enforceable. Printing the terms on the back of a ticket and handing it to a guest is not enough to gain the customer's consent.

Waivers … require you to consciously give up a right or privilege that you would otherwise have.

The reasonability standard is often used by courts, yet it is often unclear what the standard means. A recent British Columbia Court of Appeal decision, *Apps v Grouse Mountain Resorts Ltd*, is helpful in spelling out what "reasonable" notice means for a liability waiver. In *Apps*, the court reviews the caselaw and finds four consistent rules. These rules, with some explanation, are as follows:

1. The more onerous the exclusion clause the more explicit the notice must be.

There is a difference between agreeing to waive your right to sue for bodily harm and waiving your right to sue for loss of property. If an amusement park requires a guest to give up their right to sue for a broken neck, they must do more work to ensure that the guest knows this than if they were only asking the guest to give up their right to claim for a missing purse.

2. A waiver of [the amusement park's] own negligence is among the most onerous of clauses.

The *Apps* decision states that consumers would be rightfully "taken aback" to learn that an exclusionary clause released a park from liability for its own negligence. This asks customers to legally forgive any failures of the park to uphold its responsibility for their guests' safety. Such an exclusionary clause requires significant efforts to inform the guest of the clause.

3. The form, location and architecture of the notice are factors to be considered when assessing the reasonableness or efficacy of the notice.

This principle relates to the practical aspects of the notice. The court looks at factors such as the location and frequency of signage, how easy it is to read the notice, and whether the customer easily understands the requested exclusions.

In Alberta, standards for these rides are set by the Amusement Rides Standard Regulation under the Safety Codes Act.

4. Although reasonableness of the notice is an objective test, the circumstances of the plaintiff are to be taken into consideration. This includes the plaintiff's age, level of education and previous experience with waivers of the same or similar recreational areas.

This rule takes the amusement park guest's personal circumstances into account. In *Apps*, the injured plaintiff was an employee and season ticket holder at a Whistler ski resort. The fact that he had signed a liability waiver with his employer was deemed to be irrelevant – he did not bother to read either waiver. This does not mean that ignorance is bliss. It only shows that blindly agreeing to terms at one establishment does not mean that you are also blindly agreeing to terms at another. The court did not find the personal circumstances of the injured guest in *Apps* to be enough to prove "proper notice" at the ski hill he was hurt at.

Conclusion

The takeaway from the *Apps* decision is that people who agree to liability waivers must be given clear and reasonable notice of the rights they are waiving. For ticket case waivers in particular, this means that the parks have a significant responsibility to communicate exactly what the guest is giving up.

Alberta laws and AEDARSA's enforcement help to ensure that attractions are safe. However, it is wise to assume that the ticket you are offered is an agreement to waive your right to sue for any injury if an accident happens.

Reasonable notice of the waiver clause is crucial, but practically speaking, it comes down to shared responsibility. The park must take reasonable steps to inform you of the rights that you are waiving, but there is also a responsibility on the part of the guest to pay attention and decide whether these risks are acceptable. If a park is asking you to waive your right to sue for something as extreme as their own negligence, perhaps it is best to take a moment to reflect on whether the excitement is worth the risk.

Lee Klippenstein

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Contact in Sports: Acceptable or criminal assault?

Charles Davison

By voluntarily taking part in an activity, individuals implicitly consent to interactions with others that would otherwise be criminal assaults.

A visitor to Earth would probably notice something odd about some of our favourite pastimes. Societies around the world consider some behaviour – of one citizen against another – to be criminal and deserving of severe punishment. But sometimes, societies glorify and reward the same behaviour if it is part of a sport or athletic activity.

In Canada, we often think of our beloved hockey at the mention of "sport". The highest levels of hockey showcase impressive puck-handling and goal scoring (and goal keeping!). But they also come with body checks and other rough behaviours, some of which land a player in the penalty box. Players engage in minor forms of violence to get possession of the puck for their team and to prevent the other team from scoring. Players also engage in various forms of misconduct such as tripping, slashing, charging and sometimes even fighting. When referees catch these acts they had out penalties:

- 2 minutes off the ice for minor infractions
- longer penalties for more serious misconduct, and
- multi-game suspensions and fines for the most serious behaviour.

Even in a consensual fight, individuals do not have free license to try to deliberately injure, wound or maim other people.

For the most part, Canadian society is content to let hockey organizations deal with rules' infractions within their games. Sometimes, however, the misconduct – and more importantly, its result – is so serious that police and the courts become involved.

Over the years, Canadian judges have approached these cases – in hockey and in other contact sports – based on consent. By voluntarily taking part in an activity, individuals implicitly (and sometimes explicitly) consent to interactions with others that would otherwise be criminal assaults. In criminal law, an assault is any unwanted physical touching by one person to another. Willingly taking part in a sport that includes people touching one another – even roughly sometimes – implies consent to that touching. This is not an assault in law.

Sometimes the touching goes beyond the scope of the consent. This may mean one person committed assault. Within the National Hockey League (NHL), it is accepted that there are frequent body checks and fights between players. In minor leagues, there are often rules against some, or any, of those forms of contact. Some leagues are strictly "no contact" organizations. In some cases, judges have

imposed more severe sentences on minor players in recreational, "no contact" leagues compared to professional players. The reason being is that, at the professional level, there is a greater tolerance – even expectation – of more physical contact than in the lower leagues.

However, where a player purposely sets out to injure another, something closer to the "usual" criminal rules apply. Even in a consensual fight, individuals do not have free license to try to deliberately injure, wound or maim other people.

Photo by Tony Schnagl from Pexels

Where the Crown prosecutor decides a sporting act has crossed the line and starts a prosecution, the usual defences are available to the accused. They could argue the act was within the scope of what the other player consented to as part of the game. The player may also be able to claim self-defence. This defence has been successful for charges where the accused struck the other player believing the other player was going to attack him in a way or with a force beyond that of ordinary play. A strike after the play ends would not be either an ordinary part of the game or an act of self-defence.

The most recent, high-profile example a hockey incident that ended up in court is likely the 2004 prosecution of Todd Bertuzzi. He played for the Vancouver Canucks and pled guilty to "assault causing bodily harm" after he assaulted a player for the Colorado Avalanche during an NHL game in Vancouver. Bertuzzi (along with other Canucks) tried to goad the Colorado player into a consensual fist fight. Apparently, they were retaliating against a hit by the Colorado player against a fellow Canuck a few games earlier. When the Colorado player did not engage, Bertuzzi brought the other player down and punched him hard in the right temple. The judge at the sentencing could not say for sure whether this was on purpose. The other player suffered a serious concussion and long-term brain damage, limiting his future physical activities.

In deciding the sentence for Todd Bertuzzi, the judge considered several factors. One factor was the public notoriety Bertuzzi had attracted due to the assault , including extensive and on-going national and international media attention. He was penalized more than $500,000 due to the NHL suspending him. The suspension is said to have ended the Canucks' playoff chances that year. Before the incident, Bertuzzi was involved in various community charities and was considered to be of good background and character. He was not an "enforcer" – a player whose main role is to physically intimidate or fight with players on the other team.

In criminal law, an assault is any unwanted physical touching by one person to another.

Perhaps somewhat surprisingly, the judge accepted the penalty both the defence and Crown were suggesting – conditional discharge with one-year probation. A discharge means an accused is not convicted of the offence and does not have a criminal record. Judges can grant one where it is in the interests of the accused and not contrary to the public interest. The judge considered all the other forms of sanction and punishment imposed on Todd Bertuzzi. And they decided Bertuzzi did not need to be convicted to be deterred from engaging in similar conduct again.

In making their decision, the judge quoted from an earlier, similar case:

> ***[I]n a hockey game, one accepts that some assaults which would otherwise be criminal will occur and consents to such assaults. … [H]owever, … to engage in a game of hockey is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create [in] the hockey arena a sanctuary for unbridled violence …***

Similar principles govern other sports where body contact is expected, such as the martial arts, boxing, and North American football. Players should know and accept that others may touch them in ways that might be a criminal act if committed outside of the sport setting. By taking part in these activities, participants consent to this contact. However, charges may be laid if the nature of the contact goes beyond what is usual in that sport, or if injury is deliberately inflicted.

Charles Davison

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Does Elite Sport Respect Young Athletes' Human Rights?

Myrna El Fakhry Tuttle

We all enjoy watching national and international sports events. But most of us have no idea about an athlete's journey to make it to these events.

To become elite athletes and reach the top of their sport, children may leave their families and begin training extensively at a very early age. Most of the time, these children live in residential training centres which can be far from their home. Even when they still live with their parents, these young athletes normally do not have enough time, between training and school, to spend with their families.

Children Involved in Sport

Article 1 of the *Convention on the Rights of the Child* (CRC) defines "child" as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

The CRC does not tackle the issue of children involved in sport but many of its articles protect children's rights. For example, article 3 states that the best interests of the child shall be a primary consideration. Article 19 protects children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of persons responsible for the child. Also, according to article 24, "State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health…".

Unfortunately, these norms may not apply in the cases of high performance sport. Imposing strict training regimes on children can lead to physical, emotional and sexual abuse and violence. Donnelly & Petherick talked about the problems children face when they join these training programmes:

> ***They are not permitted to be children; they are denied important social contacts and experiences; they are victims of disrupted family life; they are exposed to excessive psychological and physiological stress, they may experience impaired intellectual development; they may become so involved with sport that they become detached from the larger society; they face a type of abandonment on completion of their athletic careers.***
>
> ***(See: Peter Donnelly & Leanne Petherick; Workers' Playtime? Child Labour at the Extremes of the Sporting Spectrum at p 312 [Donnelly & Petherick].)***

Competitive sport requires harsh training and discipline that children must be committed to. In some sports (e.g. tennis, gymnastics, figure skating, ice hockey, etc.), children as young as four years old train frequently. Also, some children as young as six years old train intensively and participate in competitions.

Imposing strict training regimes on children can lead to physical, emotional and sexual abuse and violence.

A further complication is that children are not old enough to decide whether they want to become athletes. Therefore, parents and coaches decide for them:

> *A child under the age of six to seven years cannot consent to compete in elite sport, as it does not understand the concept and consequences of this decision. Even a few years later, young teenagers do not have the same kind of informed consent as adults. Therefore, it is mostly adults (e.g. the child's parents, coaches) who make the decision as to whether their child participates in competitive sport.*

The rest of this article looks further at some of the concerns Donnelly & Petherick identified.

Health Concerns

Participating in sports has health benefits, but intensive training may have the opposite effect. Athletic children can have their physical growth delayed due to the strict training they follow.

Photo from Pexels/Pixabay

In addition, some children may be forced, at an early age, to take illegal drugs to boost their performance. While their performance can be improved in the short term, doing so can affect their health in the long run.

Research has shown that between two and ten percent of young athletes use illegal drugs. This usually takes place under the influence of the coaches, or under false excuse (coaches giving to unaware athletes).

Moreover, children who follow an intensive training may develop eating disorders such as anorexia and bulimia. In sports that depend on judges' evaluation – like gymnastic, diving, figure skating, etc. – about 35% of the athletes have eating disorders. These disorders can damage the bones, stop physical growth, cause injuries and lead to early retirement from sport.

According to Paulo David:

> *Elite athletes have to follow a special diet so they stay physically fit. In addition to mastering the skills of a challenging sport, they also have to focus on their appearance and beauty. This can be very hard especially that those young athletes are still in a sensitive phase of their development.*
>
> *(Paulo David at p 75.)*

Abuse by Coaches

Under article 19 of the CRC, coaches may become the main caregivers since young athletes spend more time with them than with their parents. These athletes rely on the coach's knowledge to enhance their performance. In this case, coaches become the protectors of the children from all forms of abuse, violence and exploitation. (See: Paulo David; Human Rights in Youth Sport: A Critical Review of Children's Rights in Competitive Sport, 2005 at p 56 [Paulo David].)

Coaches have great authority over athletic children since they spend a fair amount of time with these athletes. But it may not all be good. We have seen media articles of coaches abusing abuse young athletes physically and sexually. In some cases, athletic children can be victims of abuse on a daily basis:

A River Bluff High School, in South Carolina, football player died after coaches punished his team for poor performance in a scrimmage the day before with a series of sprints and strenuous exercises in 95-degree heat, athletes forced to participate in physically injurious or sexually degrading initiation rituals (e.g. hazing), allowed to return to the playing field too soon after a concussion, sexually assaulted by coaches, psychologically degraded or humiliated by coaches based on gender, sexual orientation, body shape or performance, or required or encouraged to follow nutrition and weight loss regimes that lead to eating disorders and abuse of appearance- and performance-enhancing drugs such as anabolic-androgenic steroids. Simply put, the kinds of abuse we see in youth sports would not be tolerated in the classroom or in the workplace. Yet there are no laws that specifically address such abuse in the context of sports.

The World Health Organization (WHO) Consultation on Child Abuse Prevention provided the following definition:

> *Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power.*

The WHO and the European Commission have insisted on protecting the health of young athletes since abuse can take place in intensive training programmes. In 1997, the WHO affirmed that:

> *Organization of children's sports activity by adults does have a potential for abuses to occur if those who set the amount of sports participation and the training regimen are inexperienced and unfortunately, many coaches are not sufficiently aware of children's complex physical and psychological developmental needs and the stages they go through use adult models.*
>
> *(Paulo David at p 53.)*

In July 2020, and in relation to the Tokyo Olympics, Human Rights Watch reported that Japanese young athletes have suffered physical, verbal and sexual abuse during training. According to the report, the abuses include punching, slapping, kicking, hitting, beating with an object, and excessive or insufficient food and water.

Photo by Mary Taylor from Pexels

No Time for Education and Leisure

Usually, children go to school and participate in leisure activities. But elite sports can hinder these childhood pastimes.

Article 31 of the CRC reads:

> *States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.*

The right to rest and leisure is a fundamental right, such as the right to food, adequate health, housing, etc. Unfortunately, that does not happen in competitive children's sports where children train for hours every day with no time for relaxation or entertainment.

Moreover, articles 28 and 29 of the CRC talk about the right of children to education.

Young athletes may not have enough time for a proper education since they train daily for long hours. Parents and coaches believe that school is not necessary if the child becomes an athlete in a rewarding sport. This can result in dropping out of school at an early age. A child may regret this decision in the long-term because not all young athletes make it to the top.

Finally, article 15 of the CRC recognizes the rights of the child to freedom of association. This right is usually violated in competitive sport, specifically in group sports. It is very hard for young athletes to change the club they belong to since the club can ask for remuneration to make up for the money spent on developing the athletes' skills. That limits the athlete's freedom to join the club they desire.

Child Labour?

Having said all the above, can we compare intensive training programmes to child labour?

Article 32 of the CRC talks about the right of children to be protected from economic exploitation and any work that is likely:

- to be hazardous,
- to interfere with the child's education, or
- to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Participating in sports has health benefits, but intensive training may have the opposite effect.

State parties must provide a minimum age for admission to work, as well as appropriate penalties and sanctions to ensure effective enforcement of this article.

Unfortunately, it is not easy to set a minimum age for entering high performance sports.

Young athletes train for long hours for years. Like child workers, and to earn a living, they usually exercise for about six to eight hours a day to compete and win:

> ***Social scientists of sport in Canada and Germany have argued for over 20 years that children's involvement in high-performance sport may be viewed as a form of child labour. Children participate in highly work-like conditions; adults depend on children's work for their own employment and income; the receipt of income, expenses, and prizes formalizes their working status, but many labour in the expectation of future income.***
>
> ***(Donnelly & Petherick at p 311.)***

A Taboo Topic

Sadly, children's rights in competitive sports is still a taboo topic. Because of this, there is little research in this area. As well, States have not implemented the CRC provisions and have failed to protect athletic children.

Pursuing wealth and fame has strongly affected young athletes and their human rights. Every child has a right to practice sport in an entertaining and protected environment, apart from all sorts of violence, abuse and exploitation. Young athletes should train and compete in a safe environment that respects and protects their human rights.

Myrna El Fakhry Tuttle

Myrna El Fakhry Tuttle, JD, MA, LLM, is the Research Associate at the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Special Report Addressing Accessibility Barriers

Accessibility Legislation Across Canada: The current situation

Linda Mckay-Panos

The *Accessible Canada Act* and similar legislation in four provinces address systemic barriers of accessibility.

According to Statistics Canada (2017), 22% of Canadians over the age of 15 live with at least one disability that limits their everyday activities. Federal and provincial human rights legislation prohibit discrimination based on mental and physical disability. However, many believe there is a need to proactively address systemic barriers. In 2019, Canada passed the *Accessible Canada Act* (ACA), which applies to matters under federal jurisdiction (e.g., banks, communications and transportation). In the preamble, the ACA recognizes the existing human rights framework that supports equality for people with disabilities in Canada. This includes:

- the *Canadian Charter of Rights and Freedoms*
- the *Canadian Human Rights Act*, and
- Canada's commitments as a State Party to the *United Nations Convention on the Rights of Persons with Disabilities*

The federal government notes that the ACA builds on this framework through a proactive and systemic approach that identifies, removes and prevents barriers to accessibility. According to the Federal Accessibility Legislation Alliance a barrier is "anything that does not allow people with disabilities to be included and take part in all areas of life and society. Barriers prevent people with disabilities from taking part in the same way that people without disabilities can".

The ACA defines barrier as:

> barrier *means anything — including anything physical, architectural, technological or attitudinal, anything that is based on information or communications or anything that is the result of a policy or a practice — that hinders the full and equal participation in society of persons with an impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment or a functional limitation.*

The purpose of the ACA is stated:

> ***5** The purpose of this Act is to benefit all persons, especially persons with disabilities, through the realization, within the purview of matters coming within the legislative authority of Parliament, of a Canada without barriers, on or before January 1, 2040, particularly by the identification and removal of barriers, and the prevention of new barriers, in the following areas:*
>
> *(a) employment;*
>
> *(b) the built environment;*
>
> *(c) information and communication technologies;*

(c.1) communication, other than information and communication technologies;

(d) the procurement of goods, services and facilities;

(e) the design and delivery of programs and services;

(f) transportation; and

(g) areas designated under regulations made under paragraph 117(1)(b).

The Accessibility Commissioner enforces the ACA. They can use a range of tools to ensure that organizations are meeting their obligations under the ACA. These include:

- inspections
- production orders (ordering an organization to provide records and reports)
- compliance orders (ordering an organization to correct a contravention, and to take steps to ensure the contravention does not happen again)
- notices of violation (notices setting out a warning or requiring an organization to pay a penalty of up to $250,000 per violation), and
- compliance agreements (when an organization agrees to correct a violation within set terms)

Four provinces have passed or will soon pass similar legislation to address accessibility barriers for matters under provincial jurisdiction. Ontario was the first to pass provincial legislation in 2005. The *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) serves as a model for both the ACA and all following provincial accessibility legislation.

Manitoba and Nova Scotia passed similar acts in 2013 and 2017 respectively. British Columbia recently introduced Bill 6, the *Accessible British Columbia Act*.

Photo by renma from Pixabay

"The federal government has voiced a hope that the remaining provinces will follow suit in legislating at least the same level of standards as those established under the ACA."

According to the Alberta Ability Network (AAN), like some other provinces and territories, Alberta's current disability policy exists as a patchwork of legislation. Alberta's legislation is made up of:

- Acts addressing specific aspects of accessibility (e.g., the *Service Dogs Act*)
- Acts dealing with other issues but which contain clauses on how disability affects the administration of that focus (e.g., the *Student Financial Assistance Act*)

AAN points out there are 30 current pieces of legislation in Alberta related to disability and accessibility. However, there are no central principles ensuring a consistent approach to accessibility.

AAN notes:

[T]he only central principle in Alberta legislation comes from the Alberta Human Rights Act, which includes physical and mental disability in its list of prohibited grounds for various types of discrimination. This, however, does not establish an active duty to accommodate. WCB legislation requires accessibility of employers when an injured employee returns to work, but legislation extending that expectation broadly is quickly becoming the norm.

AAN is a coalition of 170 organizations that believe Alberta's current human rights legislation is unclear about how to prevent discrimination against people with disabilities. The Alberta Accessibility Legislation Advisory Group of the AAN met with Alberta government officials to encourage them to pass provincial accessibility legislation. At a meeting on April 13, 2021 with MLA Nate Horner, the AAN made recommendations to ensure future accessibility legislation is "strong and effective". On May 5, 2021, MLA Horner communicated the following recommendations in a letter written to government:

- Remove and prevent barriers that affect people with disabilities in a variety of sectors
- Apply to all areas under provincial jurisdiction
- Set out clear requirements and not rely on voluntary compliance
- Include mechanisms for enforcement of accessibility standards
- Provide the disability community a meaningful role in the development of accessibility standards
- Set a timeline for making Alberta fully accessible, and
- Include built-in, regular reviews of the legislation to measure progress.

Nova Scotia's law, mentioned above, deals with potential conflicts between existing provincial provisions and new accessibility legislation. The preamble states that in areas of perceived contradiction, the *Accessibility Act* supersedes all previous law. The exception is where that law guarantees a higher standard of care and accommodation. It is believed that following this example in Alberta will avoid some complications experienced in Ontario and Manitoba.

It will be very interesting to see which jurisdictions across Canada will follow the federal government's lead in addressing the accessibility issues faced by many Canadians.

Linda McKay-Panos

Linda McKay-Panos, BEd, JD, LLM, is the Executive Director of the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Know Your Rights: A CNIB advocacy project

Jenna Persaud

Providing resources about discrimination for partially-sighted, blind and Deafblind individuals in Ontario, the project is now growing nationally.

About CNIB

CNIB is a non-profit organization driven to change what it is to be blind today. We deliver innovative programs and powerful advocacy that empower people impacted by blindness to live their dreams and tear down barriers to inclusion. Our work as a blind foundation is powered by a network of volunteers, donors and partners from coast to coast to coast. To learn more or get involved, visit cnib.ca.

About the Know Your Rights Project

Through the Know Your Rights Project, CNIB developed plain language legal information and resources (fact sheets, videos, training, etc.) to empower Ontarians who are blind, partially sighted or Deafblind to better understand their rights, navigate the Ontario legal system and self-advocate to challenge discrimination. The development of these important resources was graciously funded by the Law Foundation of Ontario.

The project began in the fall of 2018 with CNIB convening focus groups across Ontario. The focus groups identified patterns of discrimination in the following contexts:

1. Education
2. Employment
3. Housing
4. Healthcare

Photo by Mikhail Nilov from Pexels

5. Transportation
6. Built Environment
7. Government and Consumer Services

Resources

Legal Information Handbooks

CNIB created seven legal information handbooks for each category, as well as one on the topic of Self-Advocacy and Essential Legal Information. The handbooks are available in English and French and in a range of accessible formats on the Know Your Rights website.

Public Education Videos

The team also produced a four-part educational video series. Each video re-enacts a true incident of discrimination and shows how a person can self-advocate to challenge the discrimination.

CNIB staff and volunteers work with partially-sighted, blind and Deafblind individuals in Ontario.

You can view the public education videos on the Know Your Rights website.

Legal Information Training

The Know Your Rights team created a legal information training program delivered to CNIB staff and volunteers across Ontario. Training workshops identified the legal issues behind many real-life discriminatory scenarios that people who are blind or partially sighted may encounter.

The goal of the training was to help educate CNIB staff and volunteers so they can provide participants appropriate legal information and connect them with legal services.

Continuing Professional Development for Ontario Legal Professionals

In September 2019, the Know Your Rights Project partnered with ARCH Disability Law Centre. The partnership created and delivered Professional Development workshops to lawyers and paralegals in Ontario.

Each workshop focused on the obligations and duties of lawyers and paralegals under the Rules of Professional Conduct and Ontario's *Human Rights Code* for serving people who are blind, partially sighted and Deafblind.

The Know Your Rights Podcast

To continue outreach and education efforts, CNIB developed the Know Your Rights podcast. In each episode, host Jacob Charendoff leads informative conversations with people living with sight loss who have encountered discrimination and reaches out to lawyers and experts for their input.

The CNIB is now working to implement the Know Your Rights project in each of Canada's provinces and territories.

The goal of the podcast is to provide listeners with more information about legislation, resources, and laws in Ontario that can help challenge discrimination.

The Law Society of Ontario has accredited each podcast episode for 30 minutes of Equity, Diversity and Inclusion Professionalism content.

Listen to the podcast on the Know Your Rights website, iTunes, Spotify, Stitcher, Overcast, Soundcloud and YouTube.

Feedback

The Know Your Rights team received positive and constructive feedback from participants who attended training workshops and accessed the Know Your Rights resources. Several CNIB staff members specifically recommended delivering the Know Your Rights project nationally.

Expanding the Know Your Rights Project

Current Projects

CNIB is now working on expanding the Know Your Rights project nationwide. Currently, CNIB has received funding from the following Law Foundations to deliver the Know Your Rights project in their respective provinces:

1. The Manitoba Law Foundation
2. The Law Foundation of Newfoundland and Labrador
3. The Law Foundation of Prince Edward Island
4. The New Brunswick Law Foundation
5. The Chambre des notaires du Québec
6. The Law Foundation of Saskatchewan

The Ontario legal information handbooks are available for reference and download on the Know Your Rights website.

The Law Foundation of Ontario also awarded CNIB an "Access to Justice" grant, which

is helping to deliver the project in Atlantic Canada.

Teams in each of the six provinces facilitated focus groups and are currently drafting legal information handbooks specific to each province.

Future Projects

CNIB has applied for funding to deliver the Know Your Rights project in Nova Scotia. CNIB will apply for funding in 2022 to deliver the project in Alberta and 2023 to deliver it in British Columbia and the Yukon. After that, CNIB will look to bring the program to the Northwest Territories and Nunavut.

Connect With Us

For more information about the CNIB's Know Your Rights Project, visit cnib.ca/knowyourrights or email knowyourrights@cnib.ca.

Jenna Persaud

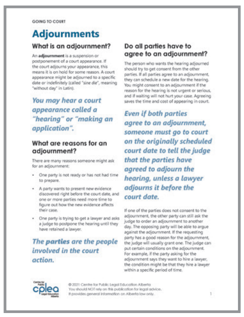
Jenna Persaud is the Senior Project Manager for the Know Your Rights project with the CNIB Foundation Ontario.

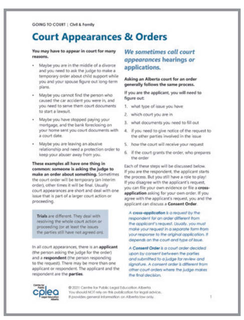
Have You Heard?

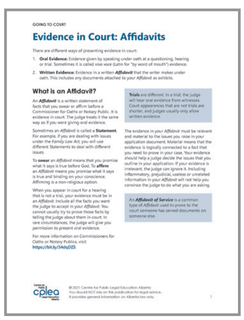
New Court & Elder Abuse Resources

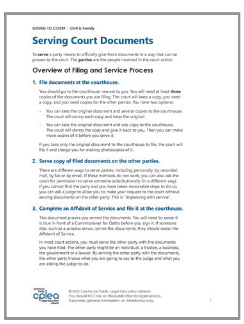
Going to Court Resources *NEW*

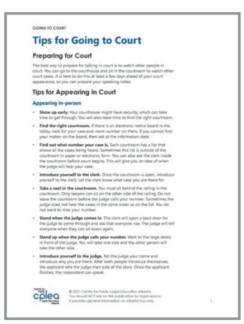
See our new info sheets below. Plus watch our **Going to Family Docket Court in Alberta video** for more info on what to expect at Family Docket Court.











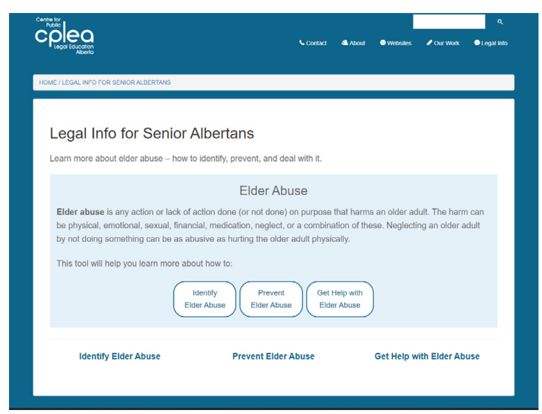
View all of CPLEA's court resources at www.cplea.ca/courts!

Elder Abuse Resources

Short information videos
(at www.youtube.com/cplealberta)

Legal Info for Senior Albertans

Use this tool to learn how to identify, prevent and deal with elder abuse.



Thanks to Justice Canada for project funding. **Find all of CPLEA's resources about elder abuse at www.cplea.ca/elder-abuse**

#momentsmatter

CPLEA is a proud to be part of the provincial #momentsmatter campaign! Positive, respectful workplace cultures are an important defence against sexual harassment.

#momentsmatter is a three year, province-wide campaign that celebrates Alberta leaders who are taking a personal role in building positive and respectful workplace cultures that help people feel safe and supported, help them grow and succeed – and help stop sexual harassment.

Learn more at https://momentsmatter.info

Let's stay in touch!

Are you interested in knowing What's New at CPLEA? Sign up to be on our mailing list to receive our monthly communication.

Centre for Public cplea Legal Education Alberta

Lesley Conley

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

Columns

Are Vaccine Passports Controversial?

Myrna El Fakhry Tuttle

Vaccine passports could be required to travel, to access some locations, or to receive goods and services. What should we be concerned about?

As the rollout of COVID-19 vaccines speeds up in Canada and around the world, we are talking about going back to our pre-pandemic lifestyles. But to return to normal life, we might be asked by employers or service providers to show vaccine passports as proof we are vaccinated.

Canada still has not adopted any kind of vaccine passport program. The federal government has been talking about requiring a standardized document for international travel only. That leaves it up to the provinces to develop some sort of document for domestic use.

Vaccine passports could be required to travel, to access some locations, or to receive goods and services. According to a May 2021 survey, 61% of Canadians agreed that vaccine passports should be required for public gatherings, sporting events, restaurants and businesses. Also, 79% supported the idea of vaccine passports for domestic and international travel.

A vaccine passport could be a certificate – paper or digital – containing personal health information. Individuals could be required to show the certificate in exchange for goods, services or access to some venues. Therefore, vaccine passports – particularly digital ones – have raised privacy and discrimination concerns.

What is Privacy?

Privacy is a fundamental right that allows us to:

> ***create barriers and manage boundaries to protect ourselves from unwarranted interference in our lives, which allows us to negotiate who we are and how we want to interact with the world around us. Privacy helps us establish boundaries to limit who has access to our bodies, places and things, as well as our communications and our information.***

Canadians' personal information – held by governments and private entities – is protected by:

- the *Canadian Charter of Rights and Freedoms* (the *Charter*) which does not mention privacy but provides protection under sections 7 and 8,
- the federal *Privacy Act* which manages the collection, use, disclosure, retention and disposal of personal information within federal government jurisdiction,
- the *Personal Information Protection and Electronic Documents Act* (PIPEDA), and
- provincial and territorial privacy laws, such as the *Personal Information Protection Act* (PIPA) in Alberta.

The Office of the *Privacy Commissioner of Canada* stated:

> ***Privacy is not simply a precious and often irreplaceable human resource; respect for privacy is the acknowledgement of respect for human dignity and of the individuality of man.***

In addition, the Supreme Court of Canada has ruled that the privacy rights of Canadians have a quasi-constitutional status.

Vaccines Passports and Privacy

As mentioned earlier, vaccine passports would require individuals to disclose personal health information – about their vaccination status – to protect public health.

Disclosure of personal health information is an infringement on our privacy rights. Currently, there is no legislation that allows a business to have a vaccine passport program. A business will have to comply with privacy laws and rely on individuals' consent in collecting the personal health information included in the vaccine passport.

Photo by Nataliya Vaitkevich from Pexels

If a private business wants to provide a safe environment by requiring vaccine passports of its customers or employees, they must establish the necessity, effectiveness and proportionality of these passports:

> ***Vaccine passports** need to be shown to be necessary to achieve the intended public health purpose; they need to be effective in meeting that purpose; and the privacy risks must be proportionate to the purpose, i.e. the minimum necessary to achieve it.*

Similarly, employers will have to show how the collection and use of the data or vaccination status is fair, necessary and relevant to return to work or have a safe workplace environment.

According to Tory's LLP, "an employer's reason for recording its employees' vaccination status must be clear and compelling".

According to Ann Cavoukian, Ontario's former information and privacy commissioner:

> ***[N]obody should have access to an individual's vaccination status, except for that person. You should be the one to control who you choose to reveal that to: so if you are at the airport, you're going to have to reveal it to the attendant, but that should be the extent of it digitally. They shouldn't retain the data.***

Vaccine Passports and Discrimination

Some people cannot get vaccinated for medical, disability or religious reasons. When it comes to vaccine passports, these individuals may be discriminated against. Even if the vaccine passport points out that these individuals are "medically exempt", they may still be treated differently.

Private entities must comply with provincial human rights acts. This means that proof of vaccination programs must not discriminate against those who cannot get vaccinated:

> ***Human rights legislation also affords individuals protection from discrimination in the area of goods, services and facilities. Accordingly, if a proof of vaccination program will result in differential treatment of unvaccinated customers, businesses will need to consider how to accommodate customers who cannot or choose not to be vaccinated on the basis of a prohibited ground of discrimination. (see my article "Can Private Businesses Ask for Proof of COVID-19 Vaccination?").***

A few things for governments and businesses to keep in mind:

- It is important to make sure people who can't be vaccinated (for example, for health reasons or because they are children, etc.)

are not discriminated against and are able instead to produce proof of a negative COVID-19 test.

- It is important that all Canadians have access to essential services, like grocery stores and health care. This might mean precautionary measures, such as masking and physical distancing, should continue in these settings.
- Finally, those without access to digital technologies must be able to use appropriately verified paper records.

Conclusion

At this time, the federal government has decided to leave vaccine passport programs to the provinces. Alberta has decided against such a program, though other provinces have said they will bring in vaccine passports. Many businesses are also considering proof of vaccination to provide services.

Vaccine passports may help end the pandemic and allow us to return to normal life. If so, vaccine passport programs must be created and regulated by governments to protect our privacy. It must be clear who can ask to see our vaccine passport, and how information will be collected, used, retained, and verified. In addition, an exception should be made for those who cannot be vaccinated.

Myrna El Fakhry Tuttle

Myrna El Fakhry Tuttle, JD, MA, LLM, is the Research Associate at the Alberta Civil Liberties Research Centre in Calgary, Alberta.

Criminal

Police Cannot Stop You in Your Driveway For Motor Vehicle Related Offences … Sort Of

Melody Izadi

How the Ontario Court of Appeal's recent decision affects driveway stops by police.

A lot of accused individuals call lawyers, outraged, saying they were driving perfectly yet a cop pulled them over. But what many do not know until a lawyer breaks the news to them is this: the *Ontario Highway Traffic Act* allows officers to stop a motor vehicle for any reason, or no reason, even if the driver is not committing an offence. Other provinces have similar laws. That is because driving is a privilege, not a right.

However, police can only enforce the *Highway Traffic Act* on public roadways, not private ones. And when police stopped Mr. McColman in his driveway after exiting his motor vehicle, the Ontario Court of Appeal was asked this puzzling question: can a police officer stop you in your driveway, then arrest you for a drinking and driving offence even though you were driving perfectly?

The Ontario Court of Appeal recently released its decision in *R v McColman 2021 ONCA 382*. They ruled that a motorist who had not breached Ontario's *Highway Traffic Act*, and where police did not initiate a stop until the accused parked in his parents' driveway, was a breach of the accused's rights under section 9 of the *Charter*. So no, if an officer sees you driving perfectly on a public roadway, they cannot attempt to stop you in your driveway.

Photo by paulbr75 from Pixabay

But do not get too excited. A careful distinction must be made here. If police are trying to initiate a traffic stop, you cannot speed home to your driveway to receive some kind of legal immunity. In *McColman*, the police did not attempt to stop the motor vehicle *until* he was in his driveway. They noticed signs of impairment *after* he exited the vehicle, on private property, and charged him accordingly. Split 2 to 1 in its decision, the Court of Appeal found this was a breach was a brazen one but not one in bad faith by police:

> ***[D]rivers should not be entitled to escape onto private property to avoid culpability. However, police officers should not be allowed to follow drivers onto private property to investigate their driving where there are no grounds to suspect any wrongdoing.***

In his dissert, Justice Hourigan flagged the potential loophole of a motorist pulling into an accessible driveway to avoid a roadside alcohol screening stop program by police. Likely police province-wide will not miss this apt and careful analysis by Justice Hourigan. This leads me to believe that the ripple effect of this decision will likely be police officers exercising their power to stop motorists even earlier, before the motorist is too close to home. They may also exercise their discretion

to stop motorists quickly to altogether avoid the issue of a *Charter* breach similar to that raised in *McColman*.

This case may go to the Supreme Court for the ultimate binding analysis So, what are motorists to do in the meantime? Get to a driveway as soon as possible when a police officer is behind you? Make sure to only drive poorly on private property? The answer (and a bit of free legal advice here) is this: drive safely, abide by the rules of the road, and for goodness sake don't drink and drive.

Melody Izadi

Melody is a criminal defence lawyer with the firm Caramanna Friedberg LLP, located in Toronto, Ontario.

Myths about Filing Claims

Sarah Dargatz

Debunking the myths and legends that haunt family law.

This article continues our series on debunking the myths and legends that haunt family law. In our last issue, Erika covered myths about lawyers. Today's topic: the family law process, particularly, filing claims.

Myth: If I file first, I have the upper hand.

To get a divorce or court order for parenting time, support or property division, one party must file a Statement of Claim at their local courthouse. Doing so opens a court file. The first person to file is called the Plaintiff or the Applicant, and the person who responds is the Defendant or Respondent. (I will use the terms Applicant and Respondent in this article for simplicity.) Sometimes, parties feel a rush to be the first to file a claim to achieve an advantage.

First, not all family law disputes need to, or should, start with a court action. One of the best first things anyone involved in a family law dispute can do is talk to a lawyer about their *process* options. Many families benefit from starting with mediation, engaging in the Collaborative Process, or exploring other options. Often an email to the other party, or their lawyer, starts a productive conversation that leads to everyone agreeing how to resolve the issues.

You should talk to a lawyer about whether filing is necessary in the early stages of a dispute and what strategy is right for you.

If the parties settle the issues, they may still need a Divorce Judgement or court order setting out the terms of the agreement. In this case, the parties can decide who will file as the Plaintiff/Applicant and who will be the Defendant/Respondent. It almost always does not matter who wears which label. The Applicant, or their lawyer, will likely do most of the work (for example, drafting and completing necessary paperwork) and pay for filing fees. These costs may affect who wants to take on that roll. In the case of a divorce, the parties can also file jointly using the labels "Spouse 1" and "Spouse 2" instead.

However, there are cases where it is important to file a claim sooner rather than later. One reason is to secure rights or to make sure the matter moves ahead. Filing a claim does not mean a judge will make all the decisions. The parties can still try to settle their issues. If the parties need to go to court at some point, they will use the existing court file.

If you are filing a family law claim, it does not really matter who files first. Each party gets an opportunity to present their evidence to the court. The Respondent responds in a Statement of Defence or Response and can file their own Counterclaim. Either party can apply to court for interim applications, where needed.

There may be some small advantages to filing a claim first, such as:

- Where there is a choice of court, the Applicant chooses where to file. For example, in Alberta, most *Family Law Act* matters can be started in either the Provincial Court or the Court of Queen's Bench.
- Where the appropriate judicial centre is uncertain, the Applicant can file in their

preferred judicial centre. The Respondent may then not feel it is worthwhile to challenge the location. For example, if you live in Leduc, your "correct" Queen's Bench judicial centre is Wetaskiwin, however, you may prefer to file in Edmonton.

There may also be some advantages to filing an individual interim court application first, such as:

- The Applicant picks the first court date, keeping in mind timelines set out in the Rules. The Applicant should make sure the Respondent is available and has enough time to file their response.
- The Applicant can file two affidavits (the initial affidavit and a limited reply to the Respondent's response affidavit). The Respondent can only file one response affidavit, unless there is a cross-application.

On the other hand, there may be some advantages to being the Respondent. First, you know what the Applicant is asking for. For example, the Respondent may want to wait to see if the Applicant requests partner support before even broaching the topic. Second, the Respondent may save some fees. The Applicant may incur more legal fees for having the Respondent personally served with the claim and for filing the documents to finalize the matter. This is especially true to get a Divorce Judgement.

There is rarely a need to race to file first. You should talk to a lawyer about whether filing is necessary in the early stages of a dispute and what strategy is right for you.

Not all family law disputes need to, or should, start with a court action.

Myth: If I ignore it, it will go away. Or I cannot get divorced because my former spouse will not sign the paperwork.

In most cases, we hope that both parties to a family dispute are engaged in the process

Illustration by CPLEA

and work toward an agreement. If they cannot reach an agreement, we hope the parties will participate in any court processes.

When a Respondent is served with a claim, they have strict timelines to reply. If they do not file and serve a Defence/Response, the court can note them in default. This means the Applicant can go ahead with their claim without any further notice to the Respondent. It also means the court can grant a judgment or order based on what the Applicant requested, so long as it complies with the law. **Ignoring a claim will not make it go away.**

Sometimes a Defendant will file the necessary paperwork to avoid being noted in default but will not engage in a meaningful way. Or, they will reach an agreement on the terms but not sign off on a consent order or agreement. In this case, the Applicant can apply to court for a final order. In the case of a divorce, the Applicant is entitled to it after being separated for one year. Yet, a court application may take time to process and may cost legal fees. The Applicant must decide if an application is worth the cost, even though it is possible.

Myth: I have to wait a year following separation to file a court application about parenting, support or property issues.

I covered this myth in more detail in a 2019 LawNow article. Follow the link to learn more!

Sarah Dargatz

Sarah Dargatz has been practicing family law since 2009. She is currently a partner at Latitude Family Law LLP.

Housing

Mould and Rental Properties

Judy Feng

Caselaw suggests mould can be a deficiency that affects whether a property is fit for living in. But who's responsible for it?

We recently heard about a tricky situation involving mould in a rental property. During a property inspection, the landlord found severe mould in the unit. The tenant apparently never said anything to the landlord about the mould. The remediation was going to be costly and take months.

The situation got me thinking of a few questions, including:

1. Who is responsible for mould in a rental property?
2. Does a tenant have to inform their landlord about mould in a rental property?
3. What can a landlord or tenant do if there's mould in the property?

Mould, otherwise known as mildew or fungus, is a living organism. The Environmental Public Health, Alberta Health Services website notes mould grows indoors in places that have water leaks, are very humid or have condensation problems. While mould usually doesn't make people sick, there's a higher risk of health problems if there's more of it in places a person spends a lot of time in – for example, at home. Mould can cause health problems including asthma flareups, itchy skin, stuffy nose and blocked sinuses, breathing problems, and irritation of the eyes, nose and throat.

Whenever we get a question about mould on a property, we direct people to the *Minimum Housing and Health Standards* and our publication. The *Minimum Housing and Health Standards* set out specific conditions that are essential to making a place safe, sanitary and fit for human to live in.

The *Standards* do not explicitly cover mould on rental properties. But, a review of caselaw suggests that mould can be a deficiency that affects whether a property is fit for living in. It can also be a deficiency that affects a tenant's benefit of the residential tenancy agreement and right to enjoy the property.

Photo by adege from Pixabay

Who is responsible for mould in a rental property?

Property owners/landlords are responsible for maintaining rental premises to the minimum standard. If the property falls below standard, they must fix it. Failing to meet the minimum standard is a breach of the *Residential Tenancies Act* (*RTA*). When a landlord breaches the rental agreement or *RTA*, the tenant has several remedies including:

- recovery of damages
- rent abatement (reduction)
- compensation for the costs to fulfill the landlord's obligations
- termination of the lease

Extending this line of thinking to mould means property owners/landlords must fix mould

problems on a rental property. That said, this brings us into the next question.

Does a tenant have to inform their landlord about mould in a rental property?

The *RTA* says tenants have a general responsibility to maintain the premises and keep it in a reasonably clean condition. We also know that landlords must maintain the premises to the minimum standard. This is where things get a little fuzzy, especially where a tenant knows about an issue in the property but does not say anything about it. How is a landlord supposed to fix a mould issue if the tenant doesn't say something about it?

Brown v. Libertas Property Management Inc., 2011 ABPC 148 sheds some light on this type of situation. In the case, the tenant claimed $1,495 for return of the security deposit, $3,040 in rent abatement and $3,000 in general damages based on several alleged breaches by the landlord. One issue involved water damage from a toilet leak, which led to mould/mildew growth in floor tile. The mould then caused or contributed to the exacerbation of the tenant's asthma. There were many other problems with the property including the loss of use of the basement bedroom and failure of the landlord to install a screen or repair the deck.

What's most interesting is what the judge said about the tenant's responsibility for informing the landlord about the mould: "[Moulds] and mildews have typical appearance and smell. They occur commonly and are within the experience of many people."

The judge found that the tenant was aware of the mould but failed to tell the landlord. The judge decided:

- The tenant should have advised the landlord when they became aware of what they thought was mould.
- The tenant could and should have taken some action of their own to prevent the mould from becoming a problem, which they did not.
- The tenant was in possession of the house and needed to maintain it. Even if the landlord knew of the mould but failed to act, the tenant should have acted on their own.
- Failing to advise the landlord of the mould and take any steps to deal with the mould situation contributed to the problem and the damages suffered by the tenant.
- The water leak, broken tiles, and mould affected the amenity of the house and contributed to the loss of the benefit of the tenancy agreement. Rent abatement (reduction) was appropriate.

Considering the landlord's breaches and the tenant's losses, the judge assessed the tenant's damages and rent abatement at $1,000. The judge dismissed the claim for general damages for anything other than the breaches of the agreement and the rent abatement. The judge ordered the landlord to pay the tenant $2,495 for the return of the security deposit and for damages.

What can a landlord or tenant do if there's mould in the property?

If the *RTA* and caselaw have taught us anything, it's that tenants should tell their landlord about issues on the property right away, including mould. Doing so allows the landlord to repair and fix the issue. As best practice, landlords and tenants should document and put in writing any remediation arrangements. For example, this may include:

- whether a tenant will be moving out during repairs
- how much the landlord pays for repairs
- whether the landlord offers any rent abatement (reduction)
- whether the tenant must take remedial steps or pay to fix the problem themselves

As mentioned in CPLEA's *Minimum Housing and Health Standards* publication, a tenant can take additional steps if a landlord is not fixing problems on the property. One option is contacting a local Environmental Public Health Office.

As for any circumstances that may make a mould situation contentious– well that involves findings of fact for the RTDRS or courts to decide.

Looking for more information?

Visit CPLEA's **Laws for Landlords and Tenants in Alberta** website.

Judy Feng

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Youth & the Law

I'm Turning 18, Now What: Family matters

Jessica Steingard

Wondering about family issues, like searching for biological parents, living with someone, getting married and more?

In Alberta, turning 18 means you are now an adult. You can make decisions for yourself. But you might also still feel like a kid. Chances are you are trying to figure out what your role is in your family. And your parents might be too.

Do you have to obey them if they tell you to unload the dishwasher? Or clean your room? Or pay rent? (More on that last one at a later date.)

Once you are an adult, there is no law saying you must obey your parents' rules. But common sense might say it is best to do so if your parents are still supporting you! And especially if you are still living at home.

There are a few family matters you might be thinking about now that you are 18.

Changing your Name

You must be 18 to change your own name. If you are 12 to 17 years, your parents or guardians must get your consent before changing your name. Alberta's *Vital Statistics Act* governs name changes.

See the Government of Alberta's website for more information on how to apply for a legal change of name.

Moving in with a Partner

The law does not say how old you must be to be in a relationship with someone. But there are a few laws that you might be interested in.

Photo by KoolShooters from Pexels

Adult interdependent relationships (AIRS) are a type of relationship for unmarried people in Alberta. You may hear people refer to "common law" couples, but AIRs are more than that. You should know if you are in an AIR because adult interdependent partners have certain rights – rights on separation (partner support and dividing property), rights on one partner's death, pension and insurance benefits, and more.

Let's look at an example … You and your partner move in together. You are young and in love! You live together for three years and two months. In that time, you buy furniture together, pay bills together, etc. You share one another's lives, function as an economic and domestic unit, and are emotionally committed to one another – you are in a relationship of interdependence. But then things change. And you decide to break up. Once you have lived with someone in a relationship of interdependence for at least three years, you are in an AIR. Suddenly the same rules that apply to married couples about how to divide property on separation now apply to you. As do rules about partner support.

You can also be in an AIR if you live in a relationship of interdependence and have a child together, by birth or adoption. You do not have to live together for three years in this case. You can also be in an AIR if you signed an Adult Interdependent Partner Agreement.

There are a few more rules about AIRs. To learn more, see CPLEA's FAQs and Living Together info sheet.

Getting Married

Once you turn 18, you can marry without your parents' permission. There are a few rules about getting married, including having capacity to marry, getting a license, and who can marry you. To learn more, see CPLEA's FAQs.

Having a Child

Maybe you are, or are about to become, a parent yourself! There are a lot of questions you might have – from the pregnancy to the childbirth and raising the child. Alberta' family laws apply to parents, regardless of their age.

CPLEA created a booklet for New Parents that talks about some laws you should know about. Read it, save it, download it, print it, or order a hardcopy from our website! The booklet is also available in French.

Searching for your Biological Parents

If you were adopted, you can start searching for your biological parents and siblings once you turn 18. You can request adoption records, which have both identifying and non-identifying information.

If your adoption went through in Alberta, contact the Alberta Post Adoption Registry. This registry keeps Alberta adoption records and provides identifying information to help people obtain Métis or Inuit status.

If your adoption was completed elsewhere, you must review the adoption policy for that province to see what information you can request.

Check out CPLEA's FAQs on Adoption Records in Alberta for more information.

Jessica Steingard

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