

IMPACT OF MARIJUANA LEGALIZATION ON INSURANCE JURISPRUDENCE

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INTRODUCTION

Historically insurance coverage issues have been wide reaching with respect to marijuana related matters voiding coverage. The areas discussed here include: automobile insurance, insurance benefits, property insurance and life insurance. Although it is still early days with respect to legalization, it can be anticipated that Canada will begin to see increased jurisprudence relating to social host liability, product recalls and contamination, employer's liability, and impairment with respect to vehicle accidents. In these areas, there remains little to no case law.¹

The most prominent cases surrounding denial of coverage with respect to material changes in risk. The courts have been confronted with issues around the scope of exclusion clauses, and statutory conditions of needing to notify of a material change in risk or a deliberate misrepresentation and how these provisions apply in the context of marijuana. The courts have upheld insurer's denial of coverage because of these exclusion clauses, which are canvassed in the forgoing case summaries.

AUTOMOBILE INSURANCE

The consumption of intoxicating substances while operating a motor vehicle has consistently attracted the scrutiny of Canadian insurers. However, the recent legalization of marijuana has proven of even greater cause for concern for automobile insurers.

In early 2018, in anticipation of legalization, Saskatchewan Government Insurance announced a new campaign targeting marijuana usage and DUIs. The campaign, "Driving High = DUI", clearly displayed the insurance companies' concerns of a sudden increase in impaired drivers.²

Insurance companies were not alone in their concern regarding an increase in impaired driving. In December 2018, following the decision to legalize marijuana, Bill C-46 came into effect, instilling

¹ Contant, Jason. "How Legalizing Pot Will Affect Your Insurance Policies." Canadian Underwriter. December 22, 2017. <https://www.canadianunderwriter.ca/insurance/marijuana-legalization-raises-legal-issues-related-property-policies-liability-coverage-auto-insurance-arc-group-canada-event-hears-1004114705/>.

² <https://www.sgi.sk.ca/news?title=driving-high-is-a-dui>

harsher penalties for impaired drivers. As a consequence of the new Bill, the maximum penalty for a conviction of a “simple” impaired driving offence was increased from five years to ten years imprisonment. While the amount of THC allowed in a driver’s system did not change, penalties were raised, and fines were introduced for refusal to be tested “after reasonable suspicion of impairment”.³ Additionally, police officers were granted the power to conduct roadside swab tests for THC detection.

Saskatchewan automobile insurance is governed by *The Insurance Act*, SS 2015, c I-9.11 [IA], Division 3.⁴ Division 3, section 8-41, statutory conditions 2(1)(a), 2(2)(a) state,

Prohibited use by insured

2(1) The insured must not drive or operate the automobile:

- (a) while under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile;

....

(2) The insured must not permit or allow the use of the automobile:

- (a) by any person while the person is under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the vehicle⁵

...

Therefore, an insured driver who either operates a vehicle, or permits someone to operate their vehicle, while under the influence of an intoxicating substance, to such an extent as being incapable of proper control of the vehicle, will likely be denied coverage as this is a prohibited act contrary to the *IA*. Drivers who consume marijuana, either medicinally or recreationally, should consider dosage and time lapsed when contemplating operation of a vehicle. Not only will impaired drivers face serious insurance implications, such as coverage denial, they now also face severe criminal penalties.

INSURANCE BENEFITS

PA v TD General Insurance Company, 2020 ONLAT

In the Ontario License Appeal Tribunal, *PA v TD General Insurance Company, 2020 ONLAT 19-001349/AABS*, the applicant’s spouse and children were injured in a car

³ <https://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/>

⁴ *The Insurance Act*, SS 2015, c I-9.11 [IA]. See also the *Automobile Accident Insurance Act*, RSS 1978, c. A-35 statutory conditions at s. 39 2(1)

⁵ *Ibid*, s 8-41, 2(1)(a), 2(2)(a)

accident. The applicant was not involved in the accident but claimed to be suffering from psychological impairments including PTSD, anxiety, depression, and insomnia as a result of the accident. The applicant was prescribed medical cannabis by medical doctors to treat his impairments. The respondent insurer paid for the medical cannabis for a period of time, later denying the claim on the basis that the medication was not reasonable nor necessary. The insurer denied that the treatment was necessary, claiming the cannabis was treating the applicant's pre-existing conditions. The insurer further claimed the applicant was a long-time user and the expenses he had accrued were for recreational purposes and to fund his ongoing use.

The questions put before the tribunal were whether the applicant was entitled to the cost of expenses for medical cannabis recommended by two physicians, and whether or not he would receive interest for overdue payment of benefits. The tribunal ruled in favour of the applicant, stating that the burden of proof rests with the applicant to demonstrate his entitlement to medical cannabis on the basis of reasonableness and necessity.

HOME INSURANCE

The *Cannabis Act*, SC 2018, c. 16 [the *CA*] provides an allowance of four marijuana plants per "dwelling home".⁶ This limit applies regardless of the number of adults living in the home. It is important to note that this provision does not extend to the provinces of Manitoba and Quebec.⁷

Most standard homeowner insurance policies include a "criminal activity exclusion" section. Based on the criminal exclusion section, insurers will likely be able to exclude, fight, or void coverage for those who exceed the four-plant maximum. However, insurance companies cannot rely on the criminal exception clause as a reason to deny coverage for individuals growing marijuana plants in the manner and amount prescribed by the *CA*.

⁶ *Cannabis Act*, SC 2018, c. 16 [The *CA*].

⁷ *Ibid.*

While insurers may no longer be able to rely on the criminal exception clause (for those growing 4 plants or less), homeowners with existing insurance policies must notify their insurance provider if they choose to grow marijuana plants. Failure to disclose this information could represent a material change in risk to the insurers, as argued in *Bahniwal v. Mutual Fire Insurance Co. of British Columbia* 2016 BCSC 433, CarswellBC 661 [*Bahniwal*], and in the more recent case, *Schellenberg v Wawanesa Mutual Insurance Company*, 2019 BCSC 196, CarswellBC 327 [*Schellenberg*].⁸

If an insured chooses to grow marijuana plants and/or alter their home for purposes of growing (such as growing lights, generators, etc.), it is essential to first consult the governing provincial Insurance Act. Failure to notify your insurer of the presence of marijuana plants and/or alterations may constitute a misrepresentation to your insurer. Any material change in risk to your insurance may result in a voided contract if any damage befalls this undisclosed property.

To better understand what constitutes a misrepresentation, a material change in risk, and what leads to termination of insurance, one must turn to the *IA*, Part VIII, Section 8-28, statutory conditions 1,4, and 5. The statutory conditions state the following,

Misrepresentation

1 If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material. [emphasis added]

...

Material change in risk

4(1) The insured must promptly give notice in writing to the insurer or its agent of a change that is:

- (a) material to the risk; and
- (b) within the control and knowledge of the insured.

(2) If an insurer or its agent is not promptly notified of a change under subsection (1) of this condition, the contract is void as to the part affected by the change.

⁸ *Bahniwal v. Mutual Fire Insurance Co. of British Columbia*, 2016 BCSC 422, CarswellBC 661 [*Bahniwal*] and *Schellenberg v Wawanesa Mutual Insurance Company*, 2019 BCSC 196, CarswellBC 327 [*Schellenberg*].

(3) If an insurer or its agent is notified of a change under subsection (1) of this condition, the insurer may:

- (a) terminate the contract in accordance with Statutory Condition 5; or
- (b) notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within 15 days after receipt of the notice, pay to the insurer an additional premium specified in the notice.

(4) If the insured fails to pay an additional premium when required to do so under clause (3)(b) of this condition, the contract is terminated at that time and Statutory Condition 5(2)(a) applies in respect of the unearned portion of the premium. [emphasis added]

Termination of Insurance

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(2) If the contract is terminated by the insurer:

- (a) the insurer must refund the excess of premium actually paid by the insured over the prorated premium for the expired time, but in no event may the prorated premium for the expired time be less than any minimum retained premium specified in the contract; and
- (b) the refund must accompany the notice unless the premium is subject to adjustment or determination as to amount, in which case the refund must be made as soon as is practicable.⁹ [emphasis added]

....

Schellenberg v Wawanesa Mutual Insurance Company, 2019 BCSC 196

The 2019 British Columbia case, *Schellenberg*, the court undertook the question of “what constitutes as a material change in risk” in the age of marijuana legalization. In this case, a fire destroyed the upper storey of a large outbuilding located on Mr. and Mrs. Schellenberg’s property.¹⁰ The outbuilding contained a medical marijuana growing operation licensed by Health Canada. The homeowners had recently finished the “grow op” with a new electrical system, upgrading the original 200 amps to 400.¹¹

Prior to the blaze, the homeowners had been insured by Wawanesa Insurance for two years, reviewing their policy each year. The homeowners acknowledged never informing the insurer of their “grow op” and/or the upgraded electrical system.¹² After the fire occurred, Wawanesa Insurance voided the homeowner’s policy based on a failure to disclose material change in risk. The Schellenberg’s assertion before the court was that because they did not intend to misrepresent the change in risk (both the grow op and the electrical system), that

⁹ *Supra* note 1, s 8-28, s 1,4,5.

¹⁰ *Ibid.*, *Schellenberg*.

¹¹ *Ibid.*, at para 1.

¹² *Ibid.*

Wawanesa Insurance was not entitled to void the policy and remained obligated to indemnify them.¹³

The court dismissed the Schellenberg's claims against Wawanesa Insurance, as well as "Hub"—the insurance broker. The Schellenbergs brought a concurrent claim against Hub, stating that they were to be held liable for breach of contract based on an oral or "implied" contract that arose from general directions when seeking "adequate coverage". The court cited a lack of expert evidence as reason why the Schellenbergs could not establish their claim for a breach of contract against Hub.¹⁴

In determining whether the Schellenberg's grow op constituted a material change in risk, the court in *Schellenberg* turned to section 29 of the British Columbia *Insurance Act*, RSBC 2012, c 1, to consider statutory condition 4,

Material change in risk

4. (1) The insured must promptly give notice in writing to the insurer or its agent of a change that is
 - (a) material to the risk, and
 - (b) within the control and knowledge of the insured.
- (2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void as to the part affected by the change.¹⁵

The court determined that the presence of 310 marijuana plants and an upgraded electrical system were to be considered a material change in risk for the insurer.¹⁶ Wawanesa Insurance's personal lines underwriting manager further testified that Wawanesa Insurance would not insure any property with a marijuana grow operation, whether or not it was legal, due to the inherent risk.¹⁷

The court in *Schellenberg* found that as a result of the change in risk being material to the insurer, and the assessment of the evidence, that not only should the Schellenbergs ought to

¹³ Ibid, at para 42.

¹⁴ Ibid, at para 128.

¹⁵ *Insurance Act*, RSBC 2012, c 1, s 29.

¹⁶ *Schelling*, supra note 5 at para 69.

¹⁷ Ibid, at paras 54.

have known the grow op would be considered material to the risk, but that Mr. Schellenberg actually did know. Therefore, the court determined that the changes made by the Schellenbergs constituted both a misrepresentation and a material change in risk pursuant to statutory condition 4.¹⁸

Lafferty v Co-Operators General Insurance Co., 2019 ABQB 515

In the 2019 Alberta Court of Queen's Bench case, *Lafferty v Co-Operators General Insurance Co., 2019 ABQB 515, 2019 CarswellAlta 1387 [Lafferty]*, the court further considered what constitutes a material change in risk for home insurance providers.¹⁹ The plaintiffs owned a home in Calgary that suffered damage from their tenants. The tenants used the home as an illegal cannabis growing op, and on December 1, 2010, the plaintiffs received an order from the AB Health Services deeming the property unsuitable for habitation.²⁰

The plaintiffs were unaware of the circumstances, having no knowledge of the tenant's grow op. The plaintiffs subsequently sought coverage from their insurer for the damage.²¹ The Co-Operators denied coverage, stating that the loss fell under the illegal drug operations exclusion, and in any event, the claim had been brought outside of the period of limitation.

The plaintiffs claimed that at an earlier meeting with the Co-Operators about an automobile insurance matter, they informed the insurers that the purpose of the home would be changing.²² The plaintiffs stated that they were not advised nor given any indication that the current home insurance would be inadequate, or that a rental property would constitute a material change in risk.²³

The court dismissed the plaintiffs' claims, ruling that the loss fell under the illegal drug operations exclusion. The Co-Operators "illegal drug operation exclusion statement" noted the following,

¹⁸ *Insurance Act*, RSBC 2012, c 1, s 29.

¹⁹ *Lafferty v Co-Operators General Insurance Co., 2019 ABQB 515, 2019 CarswellAlta 1387 [Lafferty]*.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

We do not insure against loss or damage:

Caused directly or indirectly, in whole or in part, by illegal drug operations or by an activity or decision of a government agency or other entity to prevent, respond to or terminate drug operations, regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage. Drug operations mean cultivating, harvesting, processing, manufacturing, distributing or selling of any substance falling with the Controlled Drug and Substances Act. This includes, but is not limited to cannabis (commonly known as marijuana) or any product derived from or containing cannabis.²⁴

Therefore, not only did the grow op constitute a material change in circumstances, the state of the law at the time of the incident excluded any and all marijuana grow operations, voiding the policy unequivocally.

As many landlords have likely fallen victim to circumstances similar to that in *Lafferty*, Saskatchewan's *IA* has created a provision to protect those "innocent persons". This inclusion protects innocent persons from total loss in circumstances wherein illegal activity would otherwise void coverage. Part VIII, statutory condition 8-29 considers "recovery by innocent persons" as follows:

Recovery by innocent persons

8-29(1) If a contract of insurance contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person:

- (a) whose act or omission caused the loss or damage;
- (b) who abetted or colluded in the act or omission;
- (c) who:
 - (i) consented to the act or omission; and
 - (ii) knew or ought to have known that the act or omission would cause the loss or damage; or
- (d) who is a member of a prescribed class.

(2) Nothing in subsection (1) allows a person whose property is insured under the contract of insurance to recover more than the person's proportionate interest in the lost or damaged property.

(3) A person whose coverage under a contract of insurance would be excluded but for subsection (1) must comply with the prescribed requirements.²⁵

²⁴ Ibid, at para 6.

²⁵ *Supra* note 3, s 8-28, 8-29.

Dangers of Growing Marijuana

There are many risks associated with growing marijuana in one's home. Insurance companies are in the business of quantifying risk and applying higher premiums to those customers who represent a higher risk. Dangers of growing marijuana in one's home include, but are not limited to: electrical fire caused by grow lights, water damage and mold, increased risk/target for burglary, and personal liability if a guest is injured while under the influence of marijuana grown on the premises.²⁶

Marijuana grows faster when the amount of carbon dioxide increases, which is why many grow operations use natural gas, propane, and other fuels to power carbon dioxide.²⁷ These accelerators all dramatically increase the risk of fire.²⁸ As previously mentioned, the higher the risk to the insurer, the higher the premium will be for the insured. An elevated premium will reflect the increased risk that grow ops pose to insurers and homeowners alike.

Multi-unit housing, such as apartments or condominiums, face exponentially heightened risks when considering marijuana growing operations.²⁹ The risk can no longer be contained to a single dwelling, as adjoining properties and units are at risk for exposure. To mitigate such risk, many multi-unit housing complexes have instituted strict no possession, use, selling, distributing, and growing policies.³⁰ Failure to comply with these contractual obligations may result in fines, eviction, and/or tenant liability for contractual breach.

Furthermore, marijuana cultivation poses an increased risk of theft for homeowners. Thieves may target homes they know to be growing valuable marijuana plants. Insurance agencies have yet to develop a uniform method of valuation for these plants. Some insurance agencies may choose to value the plants as personal property, while other insurers may insist that the marijuana plants fall under the tree, shrub, plant portion of the policy, usually carrying a maximum recovery of \$1,000 for each plant (as in *Stewart v TD General Insurance Co.*,

²⁶ Aaron S. Murray, Beard Winter Defender, Vol 12, Issue 3: <https://www.beardwinter.com/news/post/recreational-cannabis-legalization-part-1-homeowners-insurance/>

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ *The Residential Tenancies Act*, 2006, SS 2006, c R-22.0001, s 22.1.

2014 ONSC 854, OJ No 983).³¹ Accordingly, any homeowner wishing to cultivate marijuana plants in their home, need to pay special attention to the wording of each policy, as no uniform method of valuation has been set out in case law or statute.

Lastly, insurance companies may see an increase in social host liability claims. Homeowners may share up to 30 grams of dried marijuana with other visiting adults.³² It is expected that personal injury claims stemming from shared marijuana will increase sharply within the next few years.³³ Homeowners may also want to consider the implications and insurance liabilities of supplying (unknowingly) contaminated marijuana to their houseguests.³⁴

LIFE INSURANCE

When examining the impact of the legalization of marijuana on life insurance, it seems the insurance companies are placing an emphasis on the increased risk of illnesses that may be associated with or caused by marijuana consumption. Life insurance relies on policy holders to honestly disclose various risk factors.³⁵ Insurance policies calculate premiums through formulas that take a range of factors into account, namely, age, health, family health history, lifestyle choice, tobacco usage, and as of recent, cannabis usage.³⁶

Life insurance companies consider frequent tobacco usage as a “major risk factor that insurers charge a premium for”.³⁷ Insurers no longer consider moderate usage as a high-risk activity; however, high quantity use may still result in a variance in premium rates. Marijuana will be treated akin to that of tobacco usage by life insurance companies, while both smoking and edible forms will be taken into consideration.³⁸

³¹ *Stewart v TD General Insurance Co.*, 2014 ONSC 854, OJ No 983.

³² *Supra* note 4.

³³ *Supra* note 25.

³⁴ *Ibid.*

³⁵ Vin Heney, <https://www.lowestrates.ca/blog/finance/how-legalized-cannabis-impacting-life-insurance>

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

Akin to home insurance, individuals with life insurance policies must disclose any material facts, or any material changes in issue. Saskatchewan's *IA*, section 8-113 notes the following about disclosure of material facts for life insurance,

Disclosure of material facts

8-113(1) An applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers provided as evidence of insurability, every fact within the applicant's or person's knowledge that is material to the insurance and is not disclosed by the other.

(2) Subject to section 8-114 and subsection (3), a failure to disclose, or a misrepresentation of, a fact mentioned in subsection (1) renders the contract voidable by the insurer.

(3) A failure to disclose, or a misrepresentation of, a fact mentioned in subsection (1) relating to evidence of insurability with respect to an application for any of the following renders the contract voidable by the insurer, but only in relation to the addition, increase or change:

- (a) additional coverage under a contract;
- (b) an increase in insurance under a contract;
- (c) any other change to insurance after the policy is issued.

[emphasis added]

Batanova v London Life Insurance Company, 2019 BCSC 1147

A 2019 British Columbia case, *Batanova v London Life Insurance Company, 2019 BCSC 1147, 2019 CarswellBC 2051 [Batanova]*, examined the usage of medical marijuana by an insured individual, and the impact of consumption on his life insurance policy.³⁹ In 2012, the insured obtained a life insurance policy, naming his sister (and plaintiff) as his beneficiary. The insured died of a heart attack in 2014, perpetuating the plaintiff's claim under policy for death benefit. Upon investigation, the insurer, London Life Insurance Co., denied the claim. The insurer alleged that the insured made material misrepresentations and omitted material facts concerning his health when he applied for the life insurance policy.

At the time of the application for life insurance, the insured suffered from severe chronic back pain, arthritis, and spina bifida occulta. The insurer was aware of these conditions at the time of application; however, the insured did not disclose that he was using medicinal marijuana (on a daily basis) for his ailments. The plaintiff's action was therefore dismissed,

³⁹ *Batanova v London Life Insurance Company, 2019 BCSC 1147, 2019 CarswellBC 2051 [Batanova]*.

as the insured individual was found to have misrepresented a material change in risk to the insurance company.⁴⁰

CONCLUSION

Insurance companies face great risks when insuring individuals who consume and/or grow marijuana. Insured individuals must continue to act with full transparency in all their dealings with their insurer. Those who are insured but fail to inform their insurance provider of a material change in risk, such as a marijuana grow-op, or an increase in marijuana consumption, risk policy voidance. As we are approaching the two-year mark of legalization, case law on the matter has remained relatively silent; however, it can be speculated that the courts will soon be weeding through new territory and smoking out frivolous cases.

⁴⁰ Ibid.