



# Modernization of the *Workers' Compensation Act and Occupational Health and Safety Act*

## Third-Party Actions

---

### Background

Workers' compensation in Canada can be traced back to 1913 when the Chief Justice of Ontario, Sir William Meredith, issued his *Final Report on Laws Relating to the Liability of Employers* (known as the "Meredith Report"). The Meredith Report laid the groundwork for a system of workers' compensation that has remained largely intact until today.

There have been various attempts to summarize, what have become known as, the "Meredith Principles" of workers' compensation in Canada. The Newfoundland Court of Appeal summarized the Meredith Principles as follows:

1. compensation without fault;
  2. security of payment;
  3. collective liability on the part of the employers;
  4. an administrative body to collect assessments and disburse benefits; and
  5. an adjudicative body to assess quantum.<sup>1</sup>
- [emphasis added]

In commenting on the principle of collective liability, the Newfoundland Court of Appeal noted:

Meredith believed that collective liability was necessary to achieve the optimum objective - certainty of compensation - without imposing a possibly ruinous financial burden on some employers. The cost of assessments imposed on the employer would ultimately fall upon the general community through increased costs of goods and services.

Chief Justice Meredith saw compensation law as being a new system, separate and apart from tort law, ... For this new system to succeed he recommended, among other things, that workers give up their common law rights of action against

their own employers in exchange for specific guaranteed benefits as a trade-off for employers shouldering the expense of this new system.  
[emphasis added]

Based upon the Meredith Report, the Ontario legislature enacted the first *Workers' Compensation Act* in 1914. Shortly thereafter, the *Ontario Act* was amended to preclude causes of action against other employers and against employees of the worker's own employer or other employers.

The bar against common law rights of action against a worker's own employer, or against other employers and workers who are covered by the workers' compensation scheme, is commonly referred to as "immunity from suit".

Between 1914 and 1950, most provinces in Canada brought in workers' compensation legislation based on the Ontario model. Over the years, the specific details of the legislation has changed from jurisdiction to jurisdiction; but the Meredith Principles remain essentially intact.

### *Who is entitled to immunity?*

Initially, only the worker's own employer was entitled to immunity from suit. However, as noted above, immunity was soon extended to any employer covered by the workers' compensation scheme. Additionally, co-workers and workers of other employers covered by the workers' compensation scheme were also entitled to immunity from suit.

### *What happens to a worker's right of action?*

If a worker is entitled to compensation and is injured as a result of the negligence of their own employer or any other employer in an industry who is covered by workers' compensation (or against a worker of that employer), the worker's right of action is barred by the *Workers' Compensation Act*. The right of action has

---

<sup>1</sup> Reference re: Validity of Sections 32 and 34 of the *Workers' Compensation Act, 1983* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.)



# Modernization of the *Workers' Compensation Act and Occupational Health and Safety Act*

been removed by the *Workers' Compensation Act*. That is what is meant by immunity from suit.

### *Scope of coverage*

In considering the issue of third-party actions, it is necessary to understand that there are significant differences in the scope of coverage between various jurisdictions. According to the Association of Workers' Compensation Boards of Canada (the "AWCBC"), the scope of coverage in the various provinces and territories is as follows:

Newfoundland and Labrador	97.63%
PEI	97.06%
Nova Scotia	74.12%
New Brunswick	91.40%
Québec	93.17%
Ontario	74.48%
Manitoba	76.28%
Saskatchewan	73.33%
Alberta	92.63%
British Columbia	97.34%
Northwest Territories	100%
Yukon	99.76%

As can be seen, in Yukon, almost all employers are covered by workers' compensation and, therefore, almost all employers would have the benefit of the immunity-from-suit provisions. However, in provinces like Manitoba, Saskatchewan and Ontario, approximately 25% of employers are not covered by workers' compensation ("non-covered employers") and, therefore, would not be protected by the immunity-from-suit provisions. Non-covered employers typically protect themselves by purchasing liability insurance.

### *When does a worker still have a right of action?*

If a worker is entitled to compensation and is injured as a result of the negligence of a non-covered employer, or any other third party, who is not covered by workers' compensation, the worker's right of action is not barred. Situations where this typically may arise are as follows:

1. Motor vehicle accidents where the third-party vehicle is being operated by a homeowner or a non-covered employer.
2. Occupier's liability claims where the occupier is a homeowner or a non-covered employer.
3. Manufacturer's liability cases where the manufacturer is from another jurisdiction and, therefore, is not covered by workers' compensation in the jurisdiction where the work-related injury occurred.

In all 12 jurisdictions, the workers' compensation board (the "WCB") has a statutory right to bring the action against the non-covered third party to attempt to recover monetary damages for the worker's injuries. In all 12 jurisdictions, the WCB becomes entitled to retain some portion or all of the funds recovered and the worker may also be entitled to a portion of the amount recovered. The manner in which the third-party recovery is shared differs between jurisdictions.

### *Exception respecting third-party claims involving vehicles*

In seven jurisdictions, notably, the smaller provinces and territories (Manitoba, Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island, Yukon and the Northwest Territories), there are exceptions to the immunity-from-suit protections respecting claims arising from the use and operation of certain vehicles. In five jurisdictions (British Columbia, Alberta, Saskatchewan, Ontario and Québec), there are no exceptions to the immunity-from-suit provisions. The rationale for permitting claims arising from the use and operation of vehicles appears to be fourfold. Firstly, vehicles are typically required to carry liability insurance. Secondly, it has been suggested that vehicle liability insurance creates a larger insurance pool better able to absorb the costs of these kinds of claims. Thirdly, allowing these types of claims permits workers to recover their full common-law damages against the vehicle liability insurer. Finally, other employers paying into the system are relieved of the costs associated with the negligent operation of a vehicle by another employer or worker.



# Modernization of the *Workers' Compensation Act and Occupational Health and Safety Act*

## *Does the exception apply to motor vehicles or all modes of transportation?*

Dealing with the seven jurisdictions where there are exemptions to the immunity-from-suit provisions, the extent of the exemptions can be summarized as follows:

In three jurisdictions (Manitoba, Nova Scotia and Prince Edward Island), the exception to the immunity-from-suit provisions would apply only to motor vehicles that are driven on a highway. In four jurisdictions (Newfoundland, New Brunswick, the Northwest Territories and Yukon), the exception to the immunity-from-suit provision applies to any “mode of transportation” in respect of which liability insurance is required to be carried. In other words, this would typically include liability arising out of the use and operation of aircraft and ships.

## *Is there any limit on liability?*

Dealing with the seven jurisdictions where there are exemptions to the immunity-from-suit provisions, a further consideration arises as to whether or not there is any limit to the liability of employers.

In the Northwest Territories, there is a maximum liability as follows:

(4) The maximum liability for any employer or worker referred to paragraph (3)(c) is the amount payable, under the policy of liability insurance, in respect of the personal injury, disease or death.

In the other six jurisdictions (Manitoba, Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island and Yukon) there is no maximum limit of liability for claims against employers that have been excluded from the immunity-from-suit provisions.

## *Summary*

Seven of 12 jurisdictions permit third-party claims against employers arising out of the use and operation of vehicles or other modes of transportation. Of those seven jurisdictions, three allow third-party claims only against motor vehicles. The other four permit third-party claims against any mode of transportation, which would include airlines and shipping.

Of the seven jurisdictions that permit third-party claims against employers arising out of the use and operation of vehicles, only the Northwest Territories limits liability to the amount of the employer’s liability insurance.

## **Current status of right of action in Yukon and other approaches**

Currently, any action that arises against non-covered negligent persons who cause injury to a worker rests with the Yukon Workers’ Compensation Health and Safety Board (“YWCHSB”), which can choose whether to pursue recovery of YWCHSB’s costs, and losses and damages on behalf of the worker.

Yukon has a vehicle exception to the immunity principle that allows an action against another worker or employer where there is negligence involved and the injury was caused by the use and operation of a vehicle. However, YWCHSB still cannot pursue such an action on behalf of a worker against the worker’s own employer or co-worker.

“Vehicle” is considered any mode of transportation covered by liability insurance and includes motor vehicles, planes and helicopters.

## **Approaches**

### *Approach A: Status quo in Yukon*

The benefits and risks of maintaining the status quo are:

#### **Benefits**

- Maximizes financial recovery of damages and losses to an injured worker.
- Maximizes financial recovery to YWCHSB and protects employers from rate increases due to these types of incidents and accesses benefits from other insurance policies where negligence is involved in the use and operation of a vehicle.
- Maximizes protection of the Compensation Fund and risk to the Government of Yukon in disaster situations (such as plane crashes with multiple passengers).



# Modernization of the *Workers' Compensation Act and Occupational Health and Safety Act*

- Maintains employer and workers immunity of suit from its own workers and co-workers but not from other employers or workers (not in their employ).
- Supports an approach that is in line with the unique character of Yukon where a significant amount of travel by workers is by means of helicopter or plane, which carry a high risk of significant injury in the case of accidents.

## Risks

- Limits immunity protection for some employers when use and operation of a vehicle is involved and the employer has been negligent;
- Could put an employer in financial jeopardy if damages exceed insurance purchased.

Other frameworks exist across Canada; some of the benefits and risks of those approaches include the following:

### *Approach B: Limiting recovery to the amount of the employer's liability insurance*

#### Benefits

- Expands immunity for employers. Protects employers, as there would be no recovery against them in excess of their liability insurance.

#### Risks

- Limits financial recovery of workers who are seriously injured or dependents of deceased workers.
- May prevent seriously injured workers from accessing their underinsured coverage which might otherwise be called upon to cover the underinsured portion of their loss.
- Employers and owners of vehicles may not purchase adequate insurance to cover potential injuries that are caused by their negligence.
- Reduces YWCHSB's recovery of its costs which affects assessment rates for employers.
- Increases costs to the workers' compensation insurance scheme instead of spreading the costs to other insurance schemes covering negligence involving vehicles.
- Puts the Compensation Fund at risk and as a result increases the risk to the Government of

Yukon in disaster situations (such as plane and bus accidents with multiple passengers).

### *Approach C: Restricting the definition of vehicle to motor vehicles*

#### Benefits

- Aligns with the Meredith Principles and expands immunity for employers.
- Reduces the administrative burden on YWCHSB in advancing fewer actions. Expands immunity for employers involved in the operation of other forms of transportation such as planes and helicopters.

#### Risks

- Increases costs to the workers' compensation insurance scheme instead of spreading the costs to other insurance schemes covering negligence involving vehicles.
- Limits the financial recovery of workers who are seriously injured or dependents of deceased workers, for damages and losses they incur from other forms of transportation such as planes and helicopters.

### *Approach D: Removing the vehicle exception that permits actions against other employers and workers*

#### Benefits

- Aligns with the Meredith Principles and expands immunity for employers.
- Reduces the administrative burden on YWCHSB, as fewer civil actions would have to be advanced on behalf of YWCHSB and workers. Expands immunity for all employers involved in the operation of any vehicle.

#### Risks

- Limits and reduces financial recovery of workers who are seriously injured or dependents of deceased workers.
- Reduces YWCHSB's recovery of its costs, which affects assessment rates for employers.
- Increases costs to the workers' compensation insurance scheme instead of spreading the costs to other insurance schemes covering negligence involving vehicles.



# Modernization of the *Workers' Compensation Act and Occupational Health and Safety Act*

- Puts the Compensation Fund at higher risk and as a result increases the risk to the Government of Yukon in disaster situations (such as plane and bus accidents with multiple passengers).

The risk of reduced recovery to a worker increases as we move from option B to option D. The immunity-to-suit protection for an employer increases as we move from option B to option D. The risk to the Compensation Fund of potential rate increases for all employers increases as we move from option B to option D. The risk to the government in the case of disasters increases as we move from option B to option D.

It appears that the majority of the smaller jurisdictions in Canada have a similar framework to Yukon, where the population base is smaller and the potential risk to the integrity to the compensation fund is higher in the event of a catastrophic accident occurring involving a vehicle.



# Modernization of the *Workers' Compensation Act and Occupational Health and Safety Act*

## Summary of differences between approaches

### *Approach A: Status quo in Yukon*

1. Action not allowed against own employer or co-worker.
2. Action allowed against non-covered person who causes injury due to negligence.
3. Action allowed against another employer or co-worker if a vehicle is involved and there is negligence.
4. Recovery is not limited to amount of insurance employer has in place.
5. Motor vehicles, planes and helicopters are included.

### *Approach B: Limit recovery to amount of employer's insurance*

1. Action not allowed against own employer or co-worker.
2. Action allowed against non-covered person who causes injury due to negligence.
3. Action allowed against another employer or co-worker if a vehicle is involved and there is negligence.
4. Recovery is limited to amount of insurance employer has in place.
5. Motor vehicles, planes and helicopters are included.

### *Approach C: Restrict the definition of vehicle to motor vehicle*

1. Action not allowed against own employer or co-worker.
2. Action allowed against non-covered person who causes injury due to negligence.
3. Action allowed against another employer or co-worker if a vehicle is involved and there is negligence.
4. Recovery is not limited to amount of insurance employer has in place.
5. Motor vehicles only are included.

### *Approach D: No action permitted against any employer or worker*

1. Action not allowed against own employer or co-worker.
2. Action allowed against non-covered person who causes injury due to negligence.
3. Action not allowed against another employer or co-worker if a vehicle is involved and there is negligence.
4. Recovery is not limited to amount of insurance employer has in place.
5. Motor vehicles, planes and helicopters are included.