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Managing the Workplace



Recent Developments in Labour and Employment, Pension & Benefits and OHS/Workers' Compensation

Heenan Blaikie

Heenan Blaikie LLP • Lawyers | Patent and Trade-mark Agents | Toronto Montreal Vancouver
Québec Calgary Sherbrooke Ottawa Trois-Rivières Victoria Paris Singapore • heenanblaikie.com

INTRODUCTION

Recent Developments is an annual publication that serves as a supplement to our *Managing the Workplace* Seminar Series. This update provides an overview of Canadian developments for 2009 in the areas of employment, human rights, pensions and benefits, federal and provincial labour, workplace privacy and occupational health and safety/workers' compensation.

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EMPLOYMENT LAW UPDATE

Over the last year, the courts have tackled a wide range of employment issues. Some of these issues, which are discussed below, include the obligations of departing employees, the enforceability of non-competition covenants, and the ability of employees to commence a class action to seek damages for unpaid overtime pay.

A. RBC DOMINION SECURITIES V. MERRILL LYNCH CANADA INC.: THE DEPARTING EMPLOYEES' OBLIGATIONS

As stated by Justice Abella of the Supreme Court of Canada in her dissenting decision in *RBC Dominion Securities v. Merrill Lynch Canada Inc.*¹:

In the best of all possible worlds, employers and employees would treat each other with mutual respect, consideration and empathy. In the real world, however, as the dispute before us demonstrates, this aspiration is not always realized. The question, then, is at what point does the breakdown of an employment relationship cross the legal line from conduct that is disappointing to conduct that is compensable.

This case illustrates the dark side of a highly competitive industry. RBC Dominion Securities ("RBC") and the respondent Merrill Lynch Canada Inc. ("Merrill Lynch") are competitors in the investment brokerage business. Each had offices in Cranbrook, British Columbia. On November 20, 2000, all (except two) junior investment advisors and their assistants in the Cranbrook office left RBC, without notice, to work for Merrill Lynch. The move was coordinated by Don Delamont, the RBC branch manager. The RBC office was effectively hollowed out and all but collapsed. As a way of inducing the employees to terminate their employment with RBC, Merrill Lynch agreed to indemnify the employees for any damages awarded against them as a result of their departure from RBC.

The written employment agreements of the former RBC employees (including Delamont) did not contain a non-competition covenant. Prior to their departure, the employees copied RBC's client records and transferred them to Merrill Lynch. Shortly after their transfer and immediately upon request from RBC, Merrill Lynch returned the client records to RBC.

RBC sued its former employees (including Delamont), Merrill Lynch and James Michaud, a Merrill Lynch manager, claiming compensatory, punitive and exemplary damages. In particular, against its former employees (including Delamont), RBC sued for breach of fiduciary duty, breach of an implied contractual term not to compete unfairly upon leaving RBC's employ, breach of an implied contractual term to give reasonable notice of termination, and for conspiracy and conversion (relating to the removal of client records). In addition, RBC claimed damages against Delamont for inducing breach of contract. Against Merrill Lynch and Michaud, RBC sued for inducing RBC staff to terminate their contracts of employment without notice and to breach their contractual obligation not to compete unfairly, and for conspiracy and conversion.

At trial, RBC conceded that no damages arose "uniquely" from the transfer of the client records.

Trial Decision

The trial judge, Holmes J. of the Supreme Court of British Columbia, allowed the action, but dismissed the claims for conspiracy and breach of fiduciary duty against the employees. Holmes J. held that:

- The former RBC employees had failed to give reasonable notice of their resignation and had competed unfairly with RBC by engaging in concerted efforts to move clients to Merrill Lynch before RBC could protect its relationships, and removed confidential client records belonging to RBC;

- The former RBC employees, as well as Merrill Lynch and Michaud, were liable for conversion of the RBC confidential client records; and
- Delamont breached his contractual duty to perform his employment duties faithfully to RBC by promoting and coordinating the departure, while failing to inform RBC of the situation.

Holmes J. assessed damages as follows:

- Against the RBC employees (including Delamont): \$40,000 total for failure to give 2.5 weeks of reasonable notice of resignation and \$5,000 each for punitive damages;
- Against Delamont: \$1,483,239 for loss of profits due to breach of duty of good faith;
- Against the RBC employees, Merrill Lynch and Michaud, jointly and severally: \$225,000 for loss of profits due to unfair competition; and
- Against Michaud and Merrill Lynch: \$10,000 and \$250,000 respectively, for punitive damages.

Court of Appeal Decision

The Court of Appeal allowed the appeal of the RBC employees, Merrill Lynch and Michaud on two grounds. First, the Court of Appeal ruled that employees who have terminated their employment are not prevented from competing with their employer during their notice period (unless they are subject to an enforceable non-competition covenant in their written employment agreement). Second, the Court held that “the collapse of the branch was not a foreseeable consequence of Delamont’s chosen course of action, because ‘neither of the parties to this contract would have ever thought about this sort of alleged breach.’” As a result, the Court of Appeal set aside the damage awards (a) against the RBC employees, Merrill Lynch and Michaud, jointly and severally, in the amount of \$225,000 for loss of profits due to unfair competition, and (b) against Delamont in the amount of \$1,483,239 for loss of profits due to a breach of the duty of good faith.

Supreme Court of Canada

Chief Justice McLachlin, writing for the majority (Abella J. dissenting in part), confirmed the well-settled law that following the termination of employment, a terminated employee does not have a fiduciary or common law obligation not to compete with his or her former employer. Employees’ post-employment obligations are restricted to not misusing confidential information unless such employees (a) are subject to written employment agreements which contain valid post-employment obligations such as non-solicitation of clients or employees and non-competition covenants, or (b) are considered fiduciaries because of their duties and, thus, have additional obligations such as not to solicit the clients and employees of their former employer. However, fiduciary duties do not include an obligation not to compete with the former employer.

The Supreme Court of Canada restored the damage award assessed against Delamont in the amount of \$1,483,239 for loss of profits due to a breach of his duty of good faith. The Court found that the proximity test applied by the Court of Appeal was wrong. The correct question to ask was “whether, had the parties at the time of entering into the contract of employment directed their minds to the possibility that Delamont might orchestrate the departure of substantially all of the office’s investment advisors, would they have contemplated a loss of profit giving rise to damages.” The Court found that an implied term of Delamont’s contract was to retain the employees of RBC under his supervision. Thus, in “organizing their mass exit, he breached that duty of good faith. The damages for that breach are the amount of loss it caused to RBC.” The Court’s decision confirms that managers owe a duty of good faith to their employer, which includes not organizing or promoting the defection of employees under their supervision to another employer.

Given that it is now well-settled that terminated employees do not have a common law or fiduciary obligation not to compete against their former employer, employers who may be vulnerable in the event that certain key employees leave individually or collectively to join a competitor should ensure that the written employment agreements with these key employees contain reasonable and unambiguous restrictive covenants such as non-solicitation of clients and employees, and non-competition.

It must be noted that non-competition covenants are rarely enforced by courts. Since they are viewed as a restriction on an employee's ability to earn a living, courts have held that non-competition covenants will only be enforced if (a) they are reasonable in terms of restricted activity, the geographical area they cover and the time period of the restriction, (b) they are unambiguous, (c) they form part of an enforceable employment agreement, and (d) a covenant dealing with non-solicitation of clients would not adequately protect the business interests of the employer.

B. ARE RESTRICTIVE COVENANTS IN EMPLOYMENT AGREEMENTS ENFORCEABLE?

A 2009 Supreme Court of Canada decision dealt specifically with restrictive covenants in employment agreements. The Court sent a clear message to employers: Courts will not enforce unreasonable or ambiguous non-competition and non-solicitation covenants in employment agreements. The decision in *Shafron v. KRG Insurance Brokers (Western) Inc.*² reinforces the courts' long-standing practice of not enforcing overly broad or ambiguous restrictive covenants.

On December 31, 1987, Morley Shafron sold the shares he owned in his insurance business to KRG Insurance Brokers Inc. ("KRG") for \$700,000. The sale and purchase agreement did not contain restrictive covenants preventing Mr. Shafron from competing or soliciting clients of his insurance business. Following the purchase of the shares, KRG employed Mr. Shafron. In early 1988, Mr. Shafron entered into a fixed-term employment agreement with KRG.

The agreement contained a non-competition clause which prevented him from competing with KRG within the "Metropolitan City of Vancouver" for a period of three years following the termination of his employment. Following the expiry of his initial employment agreement, Mr. Shafron entered into a series of fixed-term employment agreements which contained similarly worded non-competition clauses. It is important to note that neither a city nor region known as the "Metropolitan City of Vancouver" ever existed.

In December 2008, as his employment agreement was about to expire, Mr. Shafron left KRG's employ to join another insurance agency. KRG commenced an action claiming that Mr. Shafron was wrongly competing in breach of his contractual non-competition obligation. The action also claimed that Mr. Shafron breached his fiduciary obligations to KRG not to use confidential information and solicit KRG's clients.

Supreme Court of British Columbia Decision

Parrett J., dismissed KRG's action. He found that the term "Metropolitan City of Vancouver" was neither clear nor certain, that Mr. Shafron owed no fiduciary duty to KRG, and that he had not breached his confidentiality obligations.

Court of Appeal Decision

The British Columbia Court of Appeal reversed the trial judge's decision on the issue of the non-competition covenant. The Court of Appeal applied the doctrine of "notional" severance to construe the non-competition territory as comprising the City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby.

Supreme Court of Canada Decision

Rothstein J., writing the unanimous decision of the Court, reversed the Court of Appeal's decision and restored the judgment of the trial judge. The Court confirmed the

presumption that restrictive covenants in employment agreements are *prima facie* unenforceable unless they are proved reasonable in terms of activity, duration and geographical scope. In order for a court to determine the reasonableness of the covenant, the terms of the covenant must be unambiguous. The onus is on the party seeking to enforce a restrictive covenant to show the reasonableness of its terms.

Rothstein J. noted that there are three doctrines available to render enforceable an ambiguous restrictive covenant provision, and found that none applied in this case. The three doctrines are 1) “notional” severance, where a contractual provision is “read down” so as to make it legal and enforceable, 2) “blue-pencil” severance, where words in a contractual provision are crossed out, and 3) rectification, where the parties agreed to something but mistakenly included something else in the contract.

Examining each doctrine individually, the Court began with notional severance. It concluded that this doctrine is not applicable to restrictive covenants in employment agreements since it would change “the terms of the covenant from the parties’ initial agreement to what the court thinks they should have agreed to.” Rothstein J. also stated that “[h]aving regard to the generally accepted imbalance of power between employers and employees, to introduce the doctrine of notional severance to read down an unreasonable restrictive covenant to what is reasonable provides no inducement to an employer to ensure the reasonableness of the covenant and inappropriately increases the risk that the employee will be forced to abide by an unreasonable covenant.”

In considering blue-pencil severance, the Supreme Court of Canada stated that the doctrine should be used sparingly and only in cases where “the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant.” In this case, KRG claimed that by including the word “Metropolitan,” the parties intended to cover the City of Vancouver and its suburbs. The Court

found that there was no evidence that the parties would have agreed to remove “Metropolitan” without varying other terms of the contract. The Court also found that the geographical scope of a non-competition covenant is not trivial. Consequently, it held that blue-pencil severance was not applicable in this case.

Lastly, the Court also found rectification to be inapplicable. For rectification to apply, the parties would have had to have been in complete agreement on the geographical area of the covenant and written down “Metropolitan” in error. The evidence did not support a finding that the word “Metropolitan” was added by mistake.

The Supreme Court of Canada’s decision reinforces the importance of carefully drafting employment agreement restrictive covenants. Such provisions must be clear, precise and reasonable in terms of the restricted activity, the geographical area they cover and the time period of the restriction. Overly broad or ambiguous clauses will not be enforced.

Employers should also bear in mind that Ontario courts will not enforce a non-competition covenant, even if such covenant is unambiguous, if a non-solicitation covenant would have adequately protected the employer’s business interests. Courts are not concerned about the best protection for employers when it comes to restrictive covenants – they are concerned about striking a balance between adequate protection for the employer and the individual’s right to earn a living.

C. OVERTIME CLASS ACTIONS: WHAT HAPPENED IN THE CIBC CLASS ACTION SUIT?

On June 2007, a class action was filed against the Canadian Imperial Bank of Commerce (“CIBC”) for compensation for unpaid overtime pay³ by Dara Fresco, a CIBC employee, on behalf of current and former non-managerial and non-unionized CIBC employees who worked at retail branches

as customer service employees. The claim sought \$600 million in unpaid overtime and punitive damages.

The suit claimed that the CIBC overtime policy (the “Policy”) was illegal because it required employees to obtain pre-approval in order to be compensated for overtime hours, and it allowed employees to elect to take time off in lieu of overtime pay.

CIBC is a federally-regulated employer and, as such, is governed by the *Canada Labour Code* (the “CLC”). The CLC provides that employees who are “required or permitted” to work in excess of the standard hours (eight hours a day or 40 hours in a work week) must be paid 1½ times their regular rate of pay. The CLC is silent on the issue of allowing employees to take time off in lieu of overtime pay.

The crux of Ms. Fresco’s case was that CIBC systemically assigned more work than could be performed within the standard work hours, and then required employees to work overtime “off the clock” to complete their tasks. Ms. Fresco argued that CIBC’s practice of routinely requiring unpaid overtime work raised common issues.

The Ontario Superior Court of Justice found that the Policy was lawful. The Court determined that under the CLC, employers are required to ensure that employees do not work in excess of the standard hours. The requirement to obtain pre-approval for overtime is a way to ensure compliance with the CLC’s requirements.

The Court stated that “an employee cannot foist services on an employer and expect to be paid wages for them.”

On the issue of employees’ ability to elect to take time off in lieu of overtime pay, the Court ruled that the Policy offered a more favourable benefit than the CLC requires because the Policy offered employees a choice between wages at time and a half, and time off at the rate of time and a half.

The Court held that Ms. Fresco’s real complaint was not with the Policy but with CIBC’s alleged practice of requiring work without payment, contrary to the Policy. This issue had to be decided on an individual basis. The Court ruled that even in the face of systemic wrongdoing, each claim would have to be resolved through individual fact-finding and legal analysis because despite the “superficial appearance of commonality,” ultimately instances of unpaid overtime occur on an individual basis. On that basis, the Court dismissed Ms. Fresco’s proposed class action. Ms. Fresco is appealing the Court’s decision.

The dismissal of the class action against CIBC may impact a similar claim filed against the Bank of Nova Scotia. The hearing in the Bank of Nova Scotia class action is scheduled for mid-November 2009. If Ms. Fresco’s appeal is unsuccessful, the ruling that each claim of working “off the clock” must be resolved individually could sound the death knell for similar class actions, including the Bank of Nova Scotia overtime class action.

That said, the impact of the CIBC decision may not have the same impact on the type of class action claim sometimes referred to as “misclassification” cases. In such claims, the issue is whether members of the proposed class are ineligible for overtime pay (for example because they fall within a statutory overtime exemption such as managers). This is the central question in the pending overtime class action against the Canadian National Railway Company (“CN”), which alleges that CN improperly classified first line supervisors as exempt managers. The Court in the CIBC decision stated that class action suits may be better suited to address misclassification type claims since the determination of the question as to whether the employees’ duties entitle them to overtime within the meaning of the applicable statute does not require an assessment of individual claims – “[s]uccess for one does mean success for all” in such cases.

On the issue of overtime, employers are reminded that:

- They may require employees to obtain approval before working overtime;
- They must ensure that (a) their hours of work and overtime policy complies with applicable employment standards legislation; and (b) such policy is known to employees, meaning that a copy of the policy has been provided to employees and the employees have acknowledged in writing that they have read and understand the policy;
- They must keep track of the hours worked by employees so that they can properly defend themselves in a claim for overtime pay;
- They must enforce their overtime policy – employers cannot turn a blind eye to the fact that employees work excess hours without obtaining approval for overtime. In such case, the employer would be required to compensate the employees who worked excess hours because it allowed them to work overtime hours by not forcing them to leave the office; and
- They may not refuse to pay overtime pay to employees who have worked excess hours without prior approval. However, employees who disregard the overtime policy by working excess hours without obtaining prior approval may be disciplined.

HUMAN RIGHTS UPDATE

A. *VILVEN V. AIR CANADA: THE UNCERTAIN FUTURE OF MANDATORY RETIREMENT IN CANADA'S FEDERAL SECTOR*

The Federal Court of Canada's recent ruling in *Vilven v. Air Canada*⁴ casts some doubt on the constitutional validity of mandatory retirement within the federal sector. The Court held that s. 15(1)(c) of the *Canadian Human Rights Act* ("CHRA") violates s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter") because it denies individuals the right to challenge mandatory retirement provisions. Section 15(1)(c) of the CHRA provides that it is not a discriminatory practice if an individual's employment is terminated "because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual." The matter was referred back to the Canadian Human Rights Tribunal (the "Tribunal"), which held that s. 15(1)(c) was not saved by s. 1 of the Charter. As a result, the Tribunal refused to apply s. 15(1)(c) and concluded that Air Canada's policy of mandatory retirement was discriminatory.

The complainants, Mr. Vilven and Mr. Kelly, were each forced to retire from their positions as pilots with Air Canada when they turned 60 years of age. The sole reason for the termination of their employment was the mandatory retirement provision of the collective agreement in effect between Air Canada and the Air Canada Pilots Association ("ACPA"). Mr. Vilven filed an age discrimination complaint against Air Canada and Mr. Kelly filed a complaint against both Air Canada and ACPA with the Canadian Human Rights Commission (the "Commission"). The Commission referred the complaints to the Tribunal, where they were heard together.

Findings of the Canadian Human Rights Tribunal

On the first hearing of the case, the Tribunal dismissed Mr. Vilven's and Mr. Kelly's complaints. The Tribunal found that 60 was the "normal age of retirement" within the meaning of s. 15(1)(c) of the CHRA for people working in positions

similar to the complainants. As a result, Air Canada's mandatory retirement policy did not amount to a discriminatory practice.

The Tribunal also dismissed the challenge by the "Fly Past 60 Coalition," an intervening group, that s. 15(1)(c) of the CHRA contravened the equality protections afforded by s. 15(1) of the Charter. The Tribunal concluded that although s. 15(1)(c) deprived the complainants of the opportunity to challenge the mandatory retirement policy, the loss of that opportunity did not violate their dignity, nor did it fail to recognize them as full and equal members of society.

Findings of the Federal Court

The complainants applied for judicial review, which was granted by the Federal Court.

The Federal Court upheld the Tribunal's finding that the collective agreement's mandatory retirement provision did not contravene the CHRA. More significantly, however, the Court overturned the Tribunal on the Charter issue, finding that s. 15(1)(c) of the CHRA does violate s. 15(1) of the Charter. The Court referred the complaints back to the Tribunal to be considered in light of these findings.

With respect to the provisions of the collective agreement, the Federal Court found that despite some errors in the Tribunal's reasoning, it acted reasonably in finding that 60 was the normal age of retirement for Air Canada pilots. In determining the comparator group, the Federal Court held that the Tribunal erred in its choice of "pilots who fly with regularly scheduled, international flights with [...] major international airlines." The Tribunal was unreasonable to focus on the status and prestige associated with pilots' positions at Air Canada, and instead should have examined the actual functional requirements of the positions. Using these requirements, the comparator group should have been pilots working for Canadian airlines who fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations. In spite of this

error, the Court found the age of 60 to be within the range of possible acceptable outcomes. In doing so, it relied upon two significant findings: first, the age of 60 was arrived at through negotiation between Air Canada and a strong union, and second, 56% of Canadian airline pilots have retired by the age of 60.

Regarding the challenge to s. 15(1)(c) of the *CHRA*, after consulting recent Supreme Court commentary in *R. v. Kapp*⁵, the Federal Court held that the provision violated s. 15(1) of the *Charter*. The Court applied “younger workers occupying similar types of positions who have not yet reached the normal age of retirement” as the comparator group. The Court found that the distinction created between these two groups promotes the perception that older workers are less worthy of the equal protection of the law and therefore creates a “disadvantage by perpetuating prejudice or stereotyping.”

In contrast to the Tribunal, the Court found this distinction to be an affront to human dignity. The Court considered both the objective and the subjective impact on human dignity created by denying Mr. Vilven and Mr. Kelly the opportunity to challenge the mandatory retirement provisions in their collective agreement. Applying *Kapp*, the Court relied upon four contextual factors to conclude that the *CHRA* offends human dignity and violates s. 15 of the *Charter*:

- There is discrimination against older people in the workplace, suggesting a pre-existing disadvantage. Section 15(1)(c) perpetuates this disadvantage;
- The distinction between the comparator group and the claimants’ group draws a distinction that is not based on the actual needs, capacity, or circumstances of the claimant;
- The mandatory retirement policies have no identifiable ameliorative purpose; and
- The claimants’ interest in their ability to continue to work in the career of their choice plays a crucial role in individual self-worth and dignity.

The Future of Mandatory Retirement

The Court referred the matter back to the Tribunal for reconsideration. In light of the Court’s findings, the Tribunal held that s. 15(1)(c) was not saved by s. 1 of the *Charter*. The Tribunal was particularly influenced by evidence that the social context has evolved significantly over the past decade and that mandatory retirement no longer offers the individual benefits it once did. Furthermore, the fact that the majority of provinces have eliminated mandatory retirement suggested to the Tribunal that s. 15(1)(c) did not satisfy a pressing and substantial objective.

The Tribunal went on to consider whether Air Canada’s mandatory retirement policy qualified as a *bona fide* occupational requirement. The Tribunal found it did not, because Air Canada could not show that it would suffer undue hardship if it were to accommodate the complainants. As a result, the Tribunal concluded that the mandatory retirement provisions in the collective agreement were discriminatory towards the complainants.

Section 15(1)(c) has been in the *CHRA* for a considerable period of time. However, the Federal Court’s ruling leaves a cloud of uncertainty around mandatory retirement provisions. This trend has already been witnessed in many provincial jurisdictions, which have done away with mandatory retirement in their provincial legislation. Federally regulated employers with mandatory retirement policies must now also exercise heightened caution going forward.

B. DUTY TO ACCOMMODATE RELIGIOUS OBSERVANCE DOES NOT REQUIRE PAID LEAVE, ONTARIO HUMAN RIGHTS TRIBUNAL HOLDS

The Ontario Human Rights Commission has long taken the position that the duty to accommodate requires employers to provide paid leave for the observance of non-Western Christian holidays. The recent decision of the Human

Rights Tribunal of Ontario in *Markovic v. Autocom Manufacturing Ltd*⁶ (“*Markovic*”) has corrected this long standing misinterpretation of the law. In *Markovic*, the Ontario Human Rights Tribunal ruled that despite the Human Rights Commission’s Policy on Creed and the Accommodation of Religious Observances, accommodation of religious observance does not always require that employees be given paid days off.

Mr. Markovic filed a discrimination complaint with the Commission after his employer, Autocom Manufacturing, required him to take unpaid leave to observe Eastern Orthodox Christmas. Shortly after the complaint was filed, Autocom developed a religious accommodation policy that allowed employees to choose an accommodation from several options, which did not include paid leave.

Decision of the Ontario Human Rights Tribunal

The Tribunal held that where a schedule of work based on public holidays permits Western Christians to have time off to observe their religious holy days, and requires other religions to work their holy days, the schedule is discriminatory in effect and the employer has a duty to accommodate. However, in the opinion of the Tribunal, there is no requirement for employers to give non-Western Christian employees two days of paid leave to mirror the Christmas and Good Friday paid public holidays. The Tribunal distinguished these facts from *Commission scolaire régionale de Chambly v. Bergevin*⁷ (“*Chambly*”). In *Chambly* the Supreme Court of Canada ruled that requiring Jewish teachers to take unpaid leave to observe Yom Kippur, a Jewish high holy day, did not discharge the employer’s duty to accommodate. The Supreme Court held that in those circumstances, the duty to accommodate required the employer to provide paid leave. *Markovic* was distinguished from *Chambly* on the grounds that it was a highly fact specific case and could not be interpreted as providing all non-Western Christian employees with paid leave. In *Chambly* it was impossible, for example, for the teachers to make-up the time off since they could only teach when

students were present, and the collective agreement specifically contemplated special leave which had been used for religious observances in the past.

The Tribunal concluded that the employer’s policy would satisfy its duty to accommodate, as providing a process for employees to arrange time off for religious observances through scheduling changes without a loss of pay is consistent with the Ontario *Human Rights Code*. Moreover, the provision of a menu of accommodation options to an employee does not unduly burden employees since accommodation is a process that requires interaction between employers and employees.

Nevertheless, the Tribunal warned that scheduling changes will not always provide reasonable accommodation. In some circumstances, such as in *Chambly*, it remains incumbent on the employer to explore other accommodation options.

Markovic Provides Needed Clarity on Employers’ Duty to Accommodate

This decision bodes well for employers. It suggests that employers who are required to accommodate religious observances can often discharge their duty to accommodate by providing a menu of accommodation options that does not include paid leave. *Markovic* further suggests to employers that the Human Rights Commission’s policies are not legally binding and, in some circumstances, reflect an inaccurate interpretation of the law. Consequently, employers should be mindful of this possibility and should be cautious when relying on any such policies.

PENSIONS & BENEFITS UPDATE

A. THE SUPREME COURT OF CANADA RELEASES THE KERRY DECISION: MORE GOOD NEWS FOR PENSION PLAN SPONSORS

In a decision released on August 7, 2009, the Supreme Court of Canada upheld the Ontario Court of Appeal's decision in *Nolan v. Kerry (Canada) Inc.*⁸ This decision provides welcome relief and greater certainty for pension plan sponsors and plan administrators.

Background

A predecessor to Kerry (Canada) Inc. established a defined benefit pension plan in 1954, which was assumed by Kerry in 1994. The pension fund was held pursuant to a trust agreement which required the pension fund to be used for the exclusive benefit of plan members, and for the payment of expenses incurred by the trustee to be paid by the company.

Until 1984, the company paid all expenses of the trust and Plan. Following a Plan amendment in 1985, Plan expenses for third parties for actuarial, investment management and audit services were paid from the pension fund. These expenses totalled \$850,000, which was the subject of the legal action.

Also commencing in 1985, the company started taking contribution holidays and did so until 2001. The total amount of the holidays was approximately \$1.5 million. This was also subject of the legal action.

Lastly, in 2000, Kerry amended the Plan to introduce a defined contribution ("DC") component. Thereafter the Plan had two parts, defined benefit ("DB") and DC. The DB part of the Plan was closed to new employees. Existing employees who participated in the DB part of the Plan had the option to participate in the DC component instead.

In addition to using the surplus in the Plan to take contribution holidays from the DB part of the Plan, Kerry

also decided to use the surplus assets to take contribution holidays in respect of the DC component.

This was also disputed by the appellants who were members of the employees pension committee and other former employees of Kerry who participated in the Plan.

Issues Before the SCC

1. Were the Plan expenses properly paid from the pension fund?
2. Was the company entitled to take contribution holidays in respect of the DB part of the Plan?
3. Was the company entitled to take contribution holidays in respect of the DC component, using surplus assets that had originated in the DB part of the Plan?
4. Could the costs of the legal action be awarded from the pension fund?

Decision of the SCC

Were the Plan expenses properly paid from the pension fund?

The Supreme Court upheld the Tribunal and Ontario Court of Appeal decisions holding that expenses of a trust are to be paid from the trust assets unless the trust agreement states otherwise. Based on the Court's analysis, it is critically important to examine the specific wording in the pension plan documents to determine the validity of paying particular expenses incurred in the operation of a pension plan from a pension fund. In this case, the Plan documents distinguished between trustee expenses and other expenses.

The Court also provided a useful analysis of the "exclusive benefit" wording in the trust agreement. The Court clarified the misconception that assets in a pension fund may not be used for any purpose when there may be a benefit accruing to persons other than members, stating that many people will benefit indirectly from a use of pension funds.

Lastly, the Court determined whether there should be a distinction between expenses incurred directly by the employer and expenses incurred through retaining third parties such as actuaries, administrators and investment consultants. The Court confirmed that such distinctions are incorrect and it is immaterial who the expenses are paid to so long as the expenses charged are reasonable and the services necessary.

Was the company entitled to take contribution holidays in respect of the DB part of the Plan?

The issue of whether an employer may take contribution holidays has been decided in the affirmative since the Court's decision in *Schmidt v. Air Canada Ltd.*⁹ in 1994. However, the Plan in *Kerry* did not refer specifically to calculations by an actuary as the pension plan in *Schmidt* did. The contributions by the company were simply to be sufficient to provide for the benefits promised under the Plan. The Court confirmed that even without reference to an actuary or actuarial calculations, actuarial analysis was required to determine the amount of the company's contributions. The actuary could therefore determine that no employer contributions were required.

Was the company entitled to take contribution holidays in respect of the DC component, using surplus assets that had originated in the DB part of the Plan?

The majority of the Court (5 justices) held that the DC contribution holidays were permissible. The minority (2 justices) dissented. The minority held that the two components of the Plan were in fact two separate trusts and two separate plans. The minority also held that using assets from the DB trust fund toward the DC component violated the "exclusive benefit" provision in the trust agreement.

The majority confirmed the decision of the Tribunal, stating that it does not necessarily follow that the creation of two differently funded pension arrangements results in two distinct pension plans and two distinct trusts. It was not

unreasonable for the Tribunal to conclude that the DB and DC arrangements could be components of a single Plan and that the 2000 Plan could be retroactively amended to create a single trust. There was no statutory prohibition against taking the DC contribution holidays, and nothing in the Plan documents that would prohibit such use of surplus funds. The retroactive amendment to the Plan simply served to establish that the DC members were beneficiaries of the trust from the date the DC component was added to the Plan.

Could the costs of the legal action be awarded from the pension fund?

The issues before the Court on the matter of costs was whether the Tribunal had authority to award costs payable from the pension fund and whether, apart from the jurisdictional issue, costs in the action might be properly payable from the pension fund.

The jurisdictional issue was straightforward. By virtue of the *Financial Services Commission of Ontario Act, 1997*,¹⁰ the Tribunal may award costs only against a party to the proceeding. As the pension fund was not a party to the proceeding, the Tribunal had no authority to award costs payable from the pension fund.

With respect to the broader issue of when costs may be awarded payable from a pension fund, the Court referred to a line of cases establishing that costs may be awarded from a pension fund where the proceedings are necessary for the due administration of the trust and where the litigation is not adversarial. The issues in this case before the Court were clearly adversarial. Costs therefore could not be awarded payable from the pension fund. Costs were awarded against the appellants in favour of Kerry.

Conclusion

This decision clarifies issues that have been problematic for a long time. It provides needed clarity with respect to

payment of expenses from pension funds, and gives timely support for employers' use of surplus assets in both DB and DB/DC pension plans.

B. BURKE DECISION

In *Burke v. Hudson's Bay Company*,¹¹ the Ontario Court of Appeal held that a transfer of a plan surplus was not required during a sale of business where the plan members had no entitlement to the surplus on wind-up. The plan at issue was a contributory DB pension plan for employees of the Hudson's Bay Company ("HBC"). When HBC sold its northern stores division to the North West Company, its employees were transferred from the HBC plan to the plan of the North West Company. The share of the HBC plan's assets attributable to those employees was transferred, but their share of the plan's surplus was not. The Ontario Court of Appeal found that the trust agreement gave HBC the rights to the surplus and therefore, since there was no entitlement to the surplus, there was no breach of trust in failing to transfer a portion of the surplus.

C. MULTI-MARQUES DECISION

In *Multi-Marques Distributions Inc. c. Régie des rentes du Québec*¹², two divisions of Multi-Marques Distribution joined a multi-employer pension plan ("MEPP"). The plan's trustees granted past service credits for the Multi-Marques employees, funded by contributions from Multi-Marques. In 1996 and 1997, the two Multi-Marques divisions were closed and there was a partial termination of the plan. At that time, there was an unfunded liability of \$4 to \$5 million. The MEPP agreement stated that if an employer withdrew from the plan without sufficient funding for benefits promised to members, the affected members' benefits would be reduced. In 2002, the plan's registration moved from Alberta to Quebec and the trustees were notified by the Régie des rentes du Québec that the MEPP violated the *Supplemental Pensions Plans Act* ("SPPA"); specifically, that full funding of plan benefits upon termination was required and the amount of the shortfall would be a debt of the employer.

Multi-Marques successfully appealed to the Quebec Court of Appeal, which held that the MEPP did not violate the terms of the SPPA. Further, it found that the SPPA did not determine the value of members' normal pension or the method of calculating that pension. Rather, these were determined by the terms of the pension plan. Since the terms of the plan at issue stated that it was possible for the plan to reduce benefits, it was not a violation of the SPPA.

In response to this decision, the government of Quebec included provisions in Bill 68, *An Act to amend Supplemental Pensions Plan Act, the Act respecting the Quebec Pension Plan and other legislative provisions*,¹³ to prohibit MEPPs from limiting or reducing service credits, the accrual of benefits or the value of benefits accrued based on the extrinsic factors, including the withdrawal of an employer from the pension plan or the termination of the pension plan.¹⁴

D. EXPERT COMMISSIONS ON PENSION REFORM

Ontario

In 2006, the Ontario government announced the creation of an expert commission to review Ontario's pension legislative scheme. The commission's mandate was broad, but focused on four main areas: the funding of DB pension plans, the rules relating to deficits and surplus, the Pension Benefits Guarantee Fund, and the sustainability of the pension system. The commission's report was released at the end of November, 2008.

The commission's main recommendations include:

- Reverting the pension regulator back to a single-purpose regulator system.
- Creating a single-purpose pension tribunal of Ontario dedicated to pension disputes.
- Creating an office of Pension Champion responsible for collecting information to inform the public on strategies and policies toward improving the pension system.

- Increasing the benefit levels of the Pension Benefits Guarantee Fund from \$1000/month to \$2500/month, and increasing premiums accordingly.
- Imposing stricter funding requirements.
- Allowing the limited use of letters of credit as a funding mechanism as security for a prescribed proportion of contributions owing.
- Providing for immediate vesting of pension benefits.
- Requiring plans to include an indexing provision that states the measures taken for indexation of benefits.
- Continuing to recognize partial wind-ups when 40% of active members of a plan are terminated in a two-year period.
- Extending grow-in rights, or the right to grow-in to enhanced retirement provisions in the event of a plan wind-up.
- Providing special provisions for MEPPs to recognize their unique features, including a proposal to eliminate solvency funding for MEPPs.
- Mandating pension advisory committees that include representation for both active and retired plan members.

Alberta and British Columbia

In October 2007, the Finance Ministers of Alberta and British Columbia announced the creation of a Joint Expert Panel on Pension Standards (the “Panel”) to review Alberta’s *Employment Pensions Plans Act*¹⁵ and British Columbia’s *Pension Benefits Standards Act*.¹⁶ The key issues to be examined were the role of pension plans in attracting and retaining the future workforce, encouraging the establishment and the maintenance of employee pension plans, and removing barriers to the creation and maintenance of pension plans in both provinces.

In November 2008, the Panel released over 130 recommendations for sustaining and improving the pension system in those provinces. The recommendations focus around the need to find a balance between protecting pension sponsors and encouraging the creation and maintenance of pension plans. The report suggests a joint

Alberta-B.C. Plan that would be available to all employers and employees in both provinces.

Other recommendations include the “pension judgment rule” as a different type of safe harbour for DC plan sponsors, the continued use of letters of credit, and the creation of a pension security fund where employees could keep surplus separate from the sponsor’s assets. Recommendations also consider specified contribution target benefit plans which would be available to single employers, and would encompass multi-employer plans and negotiated cost DB plans.

Nova Scotia

In November 2007, the Nova Scotia government announced the creation of an advisory panel to review its current pension legislative framework. The Nova Scotia Pension Review Panel released its final report in January, 2009. The themes of the report were funding, flexibility and governance.

The recommendations call for:

- Increased transparency, flexible legislation and the rejection of minimal acceptable levels of benefit.
- Target Benefit Plans that should be available for multi-employer or single-employer plans, governed by Joint Trusteeship of the Plan, under which employers would be required to pay 50% of the total contributions and be required to use all contributions for provision of benefits and plan expenses.
- Mitigation of the uncertainty of surplus use and ownership by calling for a 5% collar on surplus where any surplus up to 105% funding cannot be amortized.
- Introducing Funding Transition Rules that respond to the market losses in 2008 and assist with new rules and regulations.

FEDERAL LABOUR LAW UPDATE

A. RECENT INITIATIVES AT THE CANADA INDUSTRIAL RELATIONS BOARD

Elizabeth MacPherson became the Chair of the Canada Industrial Relations Board (the “Board”) in early 2008. One of the Chair’s stated priorities has been to have the Board focus on timely decision-making. By identifying bottlenecks in the decision-making process, the Board reports that it has reduced its backlog of cases to the lowest level since 1985-86. The Board’s stated goal is to ensure that no case takes more than twelve months from start to finish without extenuating circumstances.

The backlog of federal Board decisions is in part attributable to a large volume of duty of fair representation complaints filed by individuals against their unions. These cases make up 24% of the overall incoming case load, but account for 40% of the Board’s backlog. The Board is examining a process to effectively weed out cases with no evident chance of success and, where appropriate, relying on written argument rather than oral hearings.

The Board has also focussed its attention on developing criteria for more effective use of Letter Decisions, reserving formal Reasons for Decision for more complex cases and those of national or jurisprudential significance. Other initiatives include limiting hearing locations to major cities, and making changes to the way the Board handles case intake and the setting of dates, seeking to streamline the procedure for both. The Board also intends to focus more heavily on its role as a mediating body rather than simply on its ultimate role of adjudicating disputes between unions and employers.

B. WAGE EARNERS PROTECTION PROGRAM

Delayed since legislation amending the *Bankruptcy and Insolvency Act* was passed by the Liberal government in 2005, the Wage Earners Protection Program came into force on July 7, 2008. The Program puts in place protection for

workers whose employer entered bankruptcy or receivership after January 27, 2009.

The legislation and the policies of the Program protect up to four weeks of the maximum insurable earnings under the *Employment Insurance Act* (currently equivalent to about \$3150). Workers with unpaid eligible wages can make a claim to the Program for repayment. Eligible wages include salary, commission and vacation pay going back six months, as well as termination and severance pay (termination and severance pay were not originally part of the Program but were added to the list in March 2009). Unpaid wages above that cap must be pursued through the bankruptcy process.

The government estimates that 10,000 to 15,000 workers every year have unpaid wage claims against bankrupt employers. Under the previous regime, 79% of claimants recovered nothing. For those who achieved some recovery, the average payment was only 13 cents on the dollar and would often come only after lengthy bankruptcy proceedings.

The goal of the Program is to have benefits paid out within six to eight weeks. It has been estimated that 97% of workers will have their claims satisfied in full within the cap, so very few workers will be forced to pursue the remaining assets of the bankrupt company. Claims paid by the program are turned over to the government so that it can seek to recover its costs through the bankruptcy process where it has a degree of super-priority over other creditors.

C. PAY EQUITY

The 2009 budget promised to replace the existing complaint-based pay equity regime for federal public sector workers with one in which employers and bargaining agents are responsible to achieve pay equity through collective bargaining. The *Budget Implementation Act* tabled in February, 2009 includes the new *Public Sector Equitable Compensation Act*, which makes pay equity for unionized

employees an “equitable compensation issue” to be dealt with at the bargaining table.

The new pay equity regime requires individual unionized employees to file complaints with the Public Service Labour Relations Board if it is believed that pay equity has not been achieved through collective bargaining.

The complaints are not to be supported by a complainant’s union. Non-unionized employees can also complain if they believe compensation does not reflect pay equity.

The change is strongly opposed by public sector unions. The statute was enacted but has not yet come into force.

D. PUBLIC SECTOR RIGHT TO STRIKE

In the November 2008 Fiscal and Economic Statement, the government proposed that its budget would suspend the right of public sector unions to strike over wage demands and would limit wage increases for 2009 through 2011 to 1.5%, even for collective agreements already in place.

After the threat by opposition parties to bring down the government and the proroguing of Parliament by the Governor-General, the limit on the right to strike was removed. However, the limiting of wage increases to 1.5% remained. This is obviously highly controversial, particularly given its application to already bargained collective agreements. The measure is the subject of a constitutional challenge by public sector unions that allege that their members’ right to bargain collectively has been infringed.

E. REPLACEMENT WORKERS LEGISLATION

Over the last several years, a number of attempts have been made by the opposition parties to introduce legislation banning the use of replacement workers during strikes and lockouts at federally-regulated workplaces. A Bloc Québécois bill was defeated in 2007 and a second bill expired on the order paper when an election was called in 2008.

Two bills are currently before the house proposing substantially similar prohibitions. Bill C-337, introduced on March 11, 2009, and Bill C-386, introduced on May 14, currently sit at first reading.

F. BIRCH AND LUBERTI V. UTE

Earlier this year, the Supreme Court of Canada dismissed the Union of Taxation Employees’ application for leave to appeal the Ontario Court of Appeal’s decision in *Birch and Luberti v. Union of Taxation Employees, Local 70030* (“*Birch and Luberti*”).¹⁷ *Birch and Luberti* held that fines levied by a union against its members for crossing the picket line during a legal strike are unenforceable in court. The effect of the Supreme Court’s refusal to grant leave is that the Court of Appeal’s decision in *Birch and Luberti* will stand.

In the fall of 2004, the Union of Taxation Employees, Local 70030 (a component of the Public Service Alliance of Canada) engaged in a seven day legal strike at the Canada Revenue Agency (“CRA”). Jeffrey Birch and April Luberti were employees of the CRA and members of the Union. Mr. Birch and Ms. Luberti participated in the strike for the first four days, but chose to report to work during the last three days. As is typically the case for Union members, Mr. Birch and Ms. Luberti were subject to the terms of the Union’s constitution which in this case prohibited Union members from reporting to work during a legal strike.

After the strike concluded, the Union brought disciplinary proceedings against Union members who crossed the picket line, including Mr. Birch and Ms. Luberti. In accordance with the penalty provisions in the Union’s constitution, Mr. Birch’s and Ms. Luberti’s membership in the Union was suspended for three years (one year for each day that they crossed the picket line) and fines in the amount of \$476.75 were levied against each of them. This amount represented Mr. Birch’s and Ms. Luberti’s gross wages for the three days that they reported to work during the strike.

Mr. Birch and Ms. Luberti, together with other Union members who were fined by the Union for crossing the picket line, refused to pay the fines. The Union sought to enforce payment of the fines in the Small Claims division of the Ontario Superior Court of Justice.

The lower court held that the fines were unenforceable for two separate reasons. First, the Court applied the common law rule that a penalty clause in a contract is unenforceable unless the amount of the penalty represents a genuine pre-estimate of the damages that the innocent party will suffer if the contract is breached. Here, the Court rejected the Union's argument that the fines imposed were proportional to the value of the benefits that would have been negotiated with the CRA had Mr. Birch and Ms. Luberti not reported to work.

The Court found no evidence to support the Union's contention that the fine amounts corresponded in any manner with a pre-estimate of damages. The Court concluded instead that the fines were a penalty imposed "*in terrorem*" to dissuade union members from crossing the picket line. In the alternative, the lower court held that a daily fine in an amount that exceeded a Union member's net take home pay was unconscionable and therefore, unenforceable. Justice Smith wrote: "The imposition of a hefty fine at a time when members may already be suffering financially as a result of strike action, supports the conclusions that the fine provisions are very unfair."

The Union appealed the lower court's decision to the Ontario Court of Appeal. Before the Court of Appeal, the Union abandoned its argument that the fine amounts were a pre-estimate of damages and focused its efforts on the argument that the fines were not unconscionable. The Union made three arguments in this regard, each of which was rejected by the Court.

First, the Union argued that \$476.75 is a trivial amount. The Court of Appeal disagreed and considered a fine in the amount of gross wages to be excessive.

Second, the Union argued that the amount of the fines was justified because the fines represented the value to the CRA of the work performed by members of the union who crossed the picket line. Here, the Court concluded that the value to the CRA of the work performed had nothing to do with whether the amount of the fine is fair to a union member.

Third, the Union argued that the fines were needed to prevent union members from freeloading (*i.e.*, taking the benefits of a negotiated collective agreement without sharing in the burden of the collective action required to achieve the collective agreement). Here, the Court concluded that it was inappropriate to achieve union solidarity through the threat of an excessive fine, and that there were other means available to the Union to achieve support for the strike such as information campaigns, increasing strike pay and suspension of union membership.

In assessing whether the fine provisions were unconscionable, the Court of Appeal also considered the inequality of bargaining power between individual union members and the Union. The Court distinguished a union constitution from a typical commercial contract whereby the parties are generally free to negotiate terms. Unlike a typical contract, a union constitution is a contract of adhesion. When an individual joins a union, he or she must take the constitution as it is presented and has no ability to bargain over or change its terms. The Court concluded that because of the vulnerability of union members *vis-à-vis* their union, excessive penalty provisions in a union constitution amount to an abuse of bargaining power.

In February 2009, the Union applied for leave to appeal the Ontario Court of Appeal's decision to the Supreme Court of Canada. On May 7, the Supreme Court dismissed the Union's leave application with costs to Mr. Birch and Ms. Luberti. The result is that the Ontario Court of Appeal decision is good law.

G. MAJOR UPCOMING FEDERAL SECTOR NEGOTIATIONS

The following major federal sector bargaining units will see their collective agreements expire over the next several months:

- Canada Post: 6000 Canadian Union of Postal Workers employees in September, 2009
- Government of Canada: 3250 Association of Canadian Financial Officers employees in November, 2009
- VIA Rail: 2680 Canadian Auto Workers employees in December 2009
- CP Rail: 2890 United Steel Workers and International Brotherhood of Electrical Workers in December 2009
- Telus: 1000 Canadian Union of Public Employees in December 2009
- Groupe TVA: 1000 Canadian Union of Public Employees in December 2009

ONTARIO PROVINCIAL LABOUR LAW UPDATE

A. RECOURSE FOR EMPLOYEE'S DEFAMATORY CONDUCT: TO SUE OR NOT TO SUE

Heenan Blaikie's 2008 Conference on Labour, Employment and Pension Law focused on technology in the workplace, including the potential misuse of technology by employees. We identified that nearly 2% of employers have reported firing employees for offensive blog content, including posts on employees' personal home-based blogs. As a result of the increasing popularity of online blogs, unionized employers are questioning whether the appropriate recourse for offensive employee blog conduct is through discipline and grievance arbitration, or through the courts. While discipline will be appropriate where an employee has engaged in defamation or harassment on company time or using company resources, the answer is less clear when the employee writes a blog on his or her own time, using his or her own resources.

The Ontario Court of Appeal's recent decision in *DiCienzo v. McQuillan*¹⁸ suggests that so long as the defamatory conduct is primarily "employment-related," the proper forum continues to be grievance arbitration. In that case, the employer alleged that the employee, a union steward, made defamatory comments about the employer in a speech to members of another union. Although the employer initially embarked on a series of disciplinary steps pursuant to the applicable collective agreement, the employer eventually commenced a civil action.

The Court of Appeal upheld the motion judge's finding that the "essential character" of the dispute was employment-related and therefore fell within the parameters of the collective agreement. Reiterating the well known concept from *Weber v. Ontario Hydro*¹⁹ that disputes arising out of the employment relationship must be dealt with via arbitration, the Court of Appeal stated that the legal characterization of a dispute (i.e. a civil claim for defamation) does not determine the appropriate forum. Rather, the facts and context must be examined to determine if the dispute is connected to the workplace and

therefore subject to the grievance procedure. Since the statements at issue described conditions in the workplace, addressed workplace and labour relations issues and were delivered by a current employee of the company, the Court of Appeal held that the statements focused on the employment relationship as a whole and not on the personal characteristics of the owners of the company.

Furthermore, the Court of Appeal was not swayed by the argument that the employer had stated in one of the disciplinary letters sent to the employee that it reserved its right to civil remedies. According to the Court of Appeal, "Parties cannot avoid arbitration simply by pleading a common law tort."

This case suggests that for an employer faced with defamatory commentary from unionized employees about workplace issues in online discussion groups or blogs, recourse should be sought through the grievance procedure rather than the courts.

B. PROVING YOUR CASE: WHAT STANDARD DO YOU HAVE TO MEET?

At one time, many arbitrators required employers to meet the higher criminal burden of proof where alleged employee misconduct involved possible criminal activity.²⁰ While this approach has fallen by the wayside, in cases involving allegations of fraud or serious misconduct arbitrators have generally required "clear, cogent and convincing proof" that is "commensurate with the seriousness of the allegations" at issue.²¹ Whether this test represents a third standard of proof or is simply a variant of the civil standard, employers have often been expected to meet a higher evidentiary burden in cases involving allegations of serious employee misconduct.

However, in a recent decision the Supreme Court of Canada has declared "once and for all" that there is a single civil standard of proof that does not vary with the seriousness of the allegations. In *F.H. v. McDougall*,²² Justice Rothstein,

writing for a unanimous seven-judge panel, unequivocally rejected the suggestion that a higher standard of proof or more rigorous approach to the assessment of the evidence is required in civil cases involving allegations of criminal or immoral conduct. Justice Rothstein explained that a higher standard of proof in cases involving serious allegations is inherently problematic as it implies that in less serious cases, the evidence need not be scrutinized with such care. The law requires evidence to be scrutinized with care in all cases. Furthermore, evidence in every case, not just cases involving serious allegations, must be clear, cogent, and convincing in order to satisfy the balance of probabilities test.

This judgment should put an end to arbitrators requiring a higher standard of proof in cases involving serious allegations. However, the decision also firmly establishes that no matter what the subject of an arbitration, in order to substantiate any discipline imposed arbitrators must be satisfied that there is “clear, cogent and convincing evidence” of the wrongdoing.²³

C. PLANT CLOSURES DURING CERTIFICATION DRIVES: WHERE DO WE STAND AND WHAT WILL THE SUPREME COURT OF CANADA TELL US?

On August 7, 2008, the Supreme Court of Canada granted leave to appeal two decisions of the Quebec Court of Appeal denying employees any remedy against Wal-Mart for closing its store in Jonquière, Quebec following certification of the United Food and Commercial Workers union by the Quebec Labour Relations Board.

The Jonquière store was closed on August 29, 2005, following the union’s certification, resulting in the dismissal of approximately 190 employees. While Wal-Mart claimed that there was insufficient business to maintain the store, numerous employees filed complaints with the Quebec Labour Relations Board requesting an order to reopen the store and pay compensation to employees on the basis that

the store was closed for improper anti-union motives in breach of the Quebec *Labour Code*.²⁴

The Labour Relations Board addressed several complaints. In one decision, the Board dismissed an employee complaint, holding that an employer is legally entitled to close a business for any reason, even a socially undesirable one, so long as the closing was genuine and not a sham. The Board ruled that there was no reason to doubt the genuineness of the store closure. This decision was upheld by the Quebec Superior Court (June 28, 2007) and by the Quebec Court of Appeal (September 14, 2007).²⁵

However, in a subsequent complaint, the Board determined that the closing of the Wal-Mart store and the dismissal of the employees was a breach of the prohibition in s. 17 of the Quebec *Labour Code* against reprisal or sanctions against employees for union activity. The Board ruled that the store closure was not real or genuine based on evidence that the building had not been sold, demolished or replaced with a new tenant since its closure.²⁶

On July 13, 2006, the Quebec Superior Court dismissed Wal-Mart’s application for judicial review of the Board’s decision. Wal-Mart subsequently appealed to the Quebec Court of Appeal.

In a February 6, 2008 decision, the Quebec Court of Appeal overturned the lower court’s decision and set aside the Board’s ruling that the store closure was a reprisal for the union’s certification. The Court of Appeal determined that the Board erred when it imposed a burden of proof on Wal-Mart to demonstrate that the decision to close the store was not a ruse.

The Supreme Court of Canada’s decision to hear the appeals relating to the Jonquière store closing is significant news for the labour relations community, as it is widely anticipated that the Court will revisit its ruling in *IATSE, Local 56 v. Societe de la Place des Arts de Montreal*.²⁷ In that case, the Supreme Court of Canada held that in our democratic

system there is no basis to compel an employer to remain in business. As such, an employer may cease operations, even if the motivation is based on socially reprehensible considerations (such as union avoidance), and dismiss all of its employees. This decision has often been relied upon for the position that an employer may lawfully cease operations and terminate all of its employment relationships if it chooses not to deal with a union.

The Supreme Court of Canada's decision in the Wal-Mart case will provide guidance to employers in Ontario who wish to close businesses post union certification.

Currently in Ontario, unfair labour practices are governed by ss. 70 and 72 of the Ontario *Labour Relations Act*.²⁸ These sections stipulate that an employer may not interfere in the formation or selection of a trade union and may not refuse to continue to employ a person or threaten dismissal because that person wishes to join a union. These provisions are similar to those of the Quebec *Labour Code* that will be interpreted by the Supreme Court of Canada.

In interpreting these provisions, the Ontario Labour Relations Board has recognized that a certification drive does not prevent an employer from ceasing its operations for reasons unconnected to the organizing activity.²⁹ The Board has held that although an employer may cease operations during a certification drive, it has a significant onus to demonstrate that its actions were not motivated by anti-union animus.³⁰

It will be interesting to see how the upcoming decision of the Supreme Court will impact the Ontario Labour Relations Board's interpretation of the Ontario unfair labour practice provisions.

D. FRASER V. ONTARIO (ATTORNEY GENERAL) AND THE CONSTITUTIONAL RIGHT TO COLLECTIVE BARGAINING: AN UPDATE

In its landmark decision in *Heath Services and Support Facilities Subsector Bargaining Association v. British Columbia* ("B.C. Health Services"),³¹ the Supreme Court of Canada held that the process of collective bargaining is protected as a part of the right of freedom of association under s. 2(d) of the *Charter*. This decision has now been applied by a number of lower courts to extend collective bargaining to sectors traditionally exempt from unionization. For instance, in *Mounted Police Association of Ontario and B.C. Mounted Police Professional Association v. Canada (Attorney General)*,³² an Ontario court affirmed that pursuant to the *Charter*, members of the Royal Canadian Mounted Police have the option of forming a union for the purposes of collective bargaining.

Most notably, in *Fraser v. Ontario (Attorney General)*,³³ the Ontario Court of Appeal relied heavily on *B.C. Health Services* when it declared the *Agricultural Employees' Protection Act* unconstitutional because the legislation provided no meaningful collective bargaining process to agricultural workers. On April 2, 2009, the Supreme Court of Canada granted the province's request for leave to appeal. It is anticipated that the Supreme Court of Canada will use the *Fraser* appeal to further delineate the scope of the constitutional right to engage in collective bargaining.

WORKPLACE PRIVACY UPDATE

Workplace privacy continues to evolve in Ontario. From a statutory perspective, the privacy framework has not shifted substantially for private sector, provincially-regulated employers since this time last year. There is not yet any privacy legislation in force akin to the legislation that applies to public sector employers and federally regulated employers and the McGuinty government has not announced any plans to enact the draft *Privacy of Personal Information Act* that was developed back in 2002.

From a caselaw perspective, a number of interesting cases have been decided over the last year that touch on workplace privacy issues.

A. INSTALLATION OF SECRET VIDEO CAMERA AMOUNTS TO CONSTRUCTIVE DISMISSAL

In *Colwell v Cornerstone Properties Inc.*,³⁴ the Ontario Superior Court of Justice held that the secret installation of a video camera in a senior manager's office violated her employment contract and amounted to a constructive dismissal. The manager had been employed for over seven years when she discovered a hidden camera in the ceiling of her office. She was upset and asked for an explanation. Her immediate supervisor, the Vice President of Finance, claimed that he had installed the hidden camera several months earlier to assist in detecting alleged theft by the maintenance staff. He stated that he had full confidence in the manager, had no intention of spying on her, and did not consider her to be involved in the alleged thefts. He added that he was sorry the manager was upset; however, he felt no need to apologize as he believed he had a right to secretly install the camera in her office. The manager rejected the explanation as implausible, left her position and sued for constructive dismissal.

The Court found that the cost to human dignity caused by such surveillance, coupled with the Vice President's unbelievable explanation, left the manager unable to rely on the honesty and trustworthiness of her immediate supervisor, and amounted to more than mere "bad faith"

and "unfair dealing." The Court further found that the manager's contract of employment contained an implied term that the parties would treat each other fairly and in good faith throughout the existence of the contract and during termination. Accordingly, the Court held that the manager was justified in leaving what had become a poisoned atmosphere and had been constructively dismissed.

The Court awarded the manager damages for reasonable notice and costs, but rejected her claim for aggravated and/or punitive damages.

While it is not a novel concept that a poisoned work environment can trigger a constructive dismissal, *Colwell* is a new application of that principle. Not only does the decision suggest that employers must approach surveillance activities cautiously, it reminds employers that their own fairness, honesty and trustworthiness may be at issue before the court in a wrongful dismissal action, not only that of their employees.

B. IMPERIAL OIL LOSES LATEST CHAPTER OF DRUG TESTING SAGA

Imperial Oil has lost its appeal in the most recent bid to defend aspects of its Nanticoke petroleum refinery's drug and alcohol testing policy.

In the *Entrop* series of decisions in the late 1990s and early 2000s, the random, not-for-cause drug testing aspect of Imperial Oil's policy for safety sensitive positions was struck down as discriminatory, while random breathalyser testing was upheld for safety sensitive positions with limited supervision. In response to this decision, Imperial Oil researched alternate testing methods that could demonstrate current drug impairment and would be more akin to breathalyser testing. Based on advice that saliva testing could indeed show current cannabis impairment, Imperial Oil resumed its random drug testing program testing saliva

samples obtained from swabbing the inside of employees' cheeks.

The Union grieved, arguing, in part, that Imperial Oil's reinstated random drug testing program was an unreasonable exercise of management rights and was contrary to a provision in the collective agreement that required Imperial Oil to provide a workplace where individuals are treated with "respect and dignity."

The majority of the board of arbitration allowed the Union's grievance in relation to the random drug testing program. Imperial Oil filed an application for judicial review, lost at the Divisional Court, and appealed to the Ontario Court of Appeal. In *Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900*,³⁵ the Court of Appeal ruled that the board of arbitration was reasonable in deciding that Imperial Oil's new random drug testing program was contrary to its management rights and was prohibited by the "dignity and respect" clause of the collective agreement. The board of arbitration had appropriately distinguished saliva drug testing from breathalyser testing on the grounds that saliva drug testing does not permit immediate detection of drug impairment on the job. Thus, absent reasonable cause, the board of arbitration was reasonable in finding that random drug testing constitutes "...an unwarranted intrusion on [employees'] privacy" and "an unjustifiable affront to their dignity."

This decision suggests that contrary to the experience in the United States and the developing caselaw in Alberta, random drug testing will not be permissible in unionized workplaces, except as part of a post-rehabilitation program. Employers should determine if their collective agreements contain clauses similar to that at issue in the *Imperial Oil* case, and whether the wording of such clauses could be interpreted as encompassing obligations broader than forms of discrimination prohibited by the *Human Rights Code*.

C. JOHNSON V. BELL CANADA CLARIFIES EMPLOYER OBLIGATIONS REGARDING THE DISCLOSURE OF PERSONAL EMAIL

In *Johnson v. Bell Canada*,³⁶ the Federal Court held that employers are not required to disclose employees' personal e-mails in response to an access request made under the *Personal Information Protection and Electronic Documents Act*³⁷ ("PIPEDA").

The case arose after Johnson, a clerical employee of Bell Canada, requested access to any e-mails concerning himself from all sources within the company for the preceding two years. Bell Canada provided close to 600 pages worth of business-related e-mails to which Johnson's direct supervisor has access. Convinced that Bell Canada's search was inadequate and its disclosure incomplete, Johnson sought a court order requiring Bell Canada to disclose all e-mail messages between Bell employees referring to him, whether personal or business-related.

The Court concluded that personal employee e-mails are not subject to PIPEDA and therefore do not need to be disclosed by a corporation in response to an access request. The Court agreed with Johnson that e-mails about or concerning him met the definition of "personal information" under PIPEDA, but held that such e-mails were not collected, used or disclosed by Bell Canada in connection with the operation of its federal work, undertaking or business. Although personal e-mails sent on company servers may be captured by an organization's data storage system, only those e-mails that the organization collects because of a commercial need fall within the scope of PIPEDA.

The Court further held that Bell Canada's search in response to the request was sufficient. Bell was required to conduct a search "that could reasonably be expected to produce the personal information of Johnson that, in the ordinary course, would fall under PIPEDA." A requester who is unsatisfied with the results of a reasonable search

bears the burden to establish a *prima facie* case that the search was inadequate. Johnson had not met that burden.

Employers who are subject to *PIPEDA* are already aware of the potentially onerous nature of information requests and the significant time and energy that are required to respond to broadly worded disclosure requests. This case provides some comfort to federally regulated employers regarding what constitutes a reasonable search and the delineation between business-related records and personal records for *PIPEDA* purposes.

D. SUPREME COURT OF CANADA HOLDS: PRIVACY COMMISSIONER IS NOT EMPOWERED TO REVIEW DOCUMENTS FOR SOLICITOR-CLIENT PRIVILEGE

In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*³⁸ the Supreme Court of Canada found that the federal Privacy Commissioner cannot compel the production of documents potentially protected by solicitor-client privilege. While the Privacy Commissioner has important administrative powers, it does not have the power to determine legal rights. As a result, employees seeking the disclosure of such documents must resort to the courts.

The case arose following Annette Soup's dismissal from her employment with the Blood Tribe Department of Health. Soup suspected that she had been improperly dismissed based on inaccurate information that had been collected by her employer and used to discredit her before the Department's Board. Her request for access to a copy of her employee file was denied by the Department. Soup filed a complaint with the Privacy Commissioner of Canada, seeking access to her personal employment information under the *PIPEDA*. In response, the Department disclosed Soup's personnel file, but withheld a "bundle of letters" over which it claimed solicitor-client privilege.

The Interim Privacy Commissioner took the position that in order to fulfill his mandate, he must review the documents withheld by the Department to ensure that the solicitor-client privilege was properly claimed. The Supreme Court of Canada disagreed. It found that the power to review documents over which privilege is claimed rests in the courts. The Privacy Commissioner has no such power. Instead, the Commissioner can refer questions of privilege to the Federal Court for determination.

OHS & WORKERS' COMPENSATION UPDATE

A. ONTARIO GOVERNMENT INTRODUCES WORKPLACE VIOLENCE LEGISLATION

Ontario remains in the minority of Canadian jurisdictions which have not specifically addressed workplace violence and harassment in Occupational Health and Safety (“OHS”) legislation.³⁹ However, on April 20, 2009, Ontario moved to change that with the introduction of Bill 168,⁴⁰ which proposes amendments to the Ontario *Occupational Health and Safety Act*⁴¹ specifically addressing workplace violence and harassment.

Bill 168 defines workplace violence as the actual or attempted application of physical force to a worker, and workplace harassment as a course of vexatious conduct or comments that are known, or ought to be known, to be unwelcome. Notably, threatened violence is not expressly included in the definition of workplace violence. Under Bill 168 a series of obligations and worker rights would be applicable to workplace violence, which would differ from those applicable to harassment under the OHS statute.

Generally speaking, the rights and obligations in respect of workplace violence would be of a more proactive nature and obligations in respect of harassment would be reactive in nature. Bill 168 proposes that employers prepare policies for both workplace violence and harassment, and programs to carry out those policies. However, prior to preparing a workplace violence program, an employer is required to assess its workplace for violence risks. There is no requirement to assess the workplace for harassment. The right to refuse work would be specifically extended to include workplace violence but not harassment. An obligation would exist to notify the Ministry of Labour of a disabling injury caused by workplace violence.

Bill 168 would place a positive obligation on the employer and supervisor to disclose certain limited personal information to workers regarding workplace violence. Employers and supervisors would be expected to provide workers with information about a person in the workplace with a history of violent behaviour, if the worker is expected to encounter the person in the course of their work and the

workplace violence risk is likely to expose the worker to physical injury.⁴²

Bill 168 also proposes the unprecedented step of requiring an employer to protect workers from domestic violence.⁴³ The employer would be required to take every precaution reasonable in the circumstances for the protection of a worker where the employer becomes aware, or ought reasonably to be aware, of a domestic violence risk.

To date, Bill 168 has only received first reading. Ontario continues to emphasize the importance of worker protection from violence through compliance orders and prosecution, largely using the general duty which exists for employers to take every precaution reasonable in the circumstances for protection of a worker. In August, 2009, the *Centre for Addiction and Mental Health (CAMH)*⁴⁴ in Toronto was fined \$70,000 upon prosecution for failing to take precautions and have written procedures to protect nurses from violent patients.

B. SEIZURE OF ACCIDENT INVESTIGATION REPORT A BREACH OF SOLICITOR-CLIENT PRIVILEGE

The Ontario Court of Appeal ruled in July 2009 that internal accident investigation reports prepared at the request and for the use of legal counsel, are solicitor-client privileged and are presumptively prejudicial to the fair trial interests of the defendant if seized by the Crown. This ruling was made in the decision of *R. v. Bruce Power Inc.*⁴⁵, where the Court of Appeal re-instituted a stay of charges against Bruce Power and two of its supervisors made under the Ontario *Occupational Health and Safety Act* after a workplace accident occurred, and an internal investigation report was seized by the Crown.

The charges resulted from a workplace accident in 2002. Immediately following the accident, Bruce Power hired a lawyer specializing in OHS matters. Counsel requested that an internal investigation be conducted and a report prepared. An investigation committee, involving members of management and the unionized employees, was struck the day following the accident. Terms of reference for the investigation expressly provided that the investigation was

being undertaken in contemplation of litigation and that all documents created during the investigation, including the investigation report, would be held in confidence by legal counsel.

All witnesses interviewed in the investigation were advised that the interview was confidential and would be used by legal counsel in anticipated OHSA charges. A draft report was prominently marked with the word "Confidential." It was distributed to members of the investigation committee for review. Each member was asked to either return or destroy the copy of the report.

The Ontario Ministry of Labour inspector investigating the accident became aware of the report prior to charges being laid but did not attempt to obtain the report at that time after being advised by Bruce Power's corporate counsel that the report was privileged. The Crown seized the report from a worker member of the investigation team who had kept a copy. The worker member had previously undertaken to destroy all copies of the report that were in his possession. Based on the seizure of the report, Bruce Power and its supervisors moved to have the charges against them stayed at the start of the trial. The trial court stayed the charges and awarded costs against the Crown. The Crown appealed and the appeal court set aside both the stay and costs award.

In reinstating a stay of all charges, the Court of Appeal followed a long line of decisions holding that solicitor-client privilege is fundamental to the administration of justice in Canada and closely linked to the right to a fair trial. The Court held that where the Crown comes into possession of solicitor-client privileged information, prejudice to the defendant will be presumed but the Crown can rebut that presumption by explaining what information has been learned and the steps taken to prevent the prejudice. Ultimately, the Court of Appeal found that the report could be used to the detriment of the defendants—even though it did not contain any notes or advice from counsel—and that the Crown had not provided evidence to rebut the presumption of prejudice and would be unable to do so if the trial were allowed to proceed.

C. EMPLOYER NOT REQUIRED TO ASSUME SAFETY INSTRUCTIONS WILL BE DISOBEYED TO MEET DUE DILIGENCE THRESHOLD

On June 4, 2009, the Alberta Court of Queen's Bench released its decision in *R. v. Lonkar Well Testing Limited*.⁴⁶ Lonkar had appealed to the court after being convicted of an offence under the Alberta *Occupational Health and Safety Act*. The charge was laid after a worker died in a pressure vessel trailer from breathing oxygen-deficient air.

Prior to the accident, the worker had been specifically instructed to remove only 12 of 24 flange bolts from pressure vessel equipment. Once the bolts were removed the worker was to do no further work on the pressure vessel equipment. The worker initially complied with the instructions but was left alone for a period of time during which he removed the remaining bolts securing the equipment, and the equipment itself, which allowed vapours from the well to enter the trailer and displace oxygen.

In quashing the conviction, the Court of Queen's Bench found that Lonkar had proven that it had been duly diligent because it had done everything reasonably practicable to address foreseeable risks in the work in terms of training, materials, testing, direction and supervision. The Court held that the worker had no history of disregarding instructions from the employer and there was no reason to anticipate he would do so regarding the work in the pressure vessel trailer. The Court rejected arguments that Lonkar had not been duly diligent because further steps could have been taken, such as providing a gas monitor or performing a hazard assessment, or stronger warnings could have been given, because each of those steps assumes that the worker would disobey the instructions he had been given.

This decision represents a change, at least in Alberta, from a trend in Canadian OHS decisions which, by employing an exceedingly high due diligence threshold, have held employers to a standard of due diligence so close to perfection that the defence is being eroded.

D. B.C.'S PRONOUNCEMENT ON WORKERS' COMPENSATION ELIGIBILITY CRITERIA FOR WORK RELATED MENTAL INJURIES COULD LEAD TO MORE CLAIMS ACROSS THE COUNTRY

The matter of compensation for mental injuries which arise out of a work-related event is often a difficult and complex issue for workers' compensation boards. A successful *Charter* challenge to the British Columbia Workers' Compensation Board's mental stress policy has resulted in direct change to BC's policy on this issue, and may introduce significant change to the manner in which all Canadian workers' compensation boards adjudicate mental stress claims.

In *Plesner v. British Columbia Hydro and Power Authority*,⁴⁷ the B.C. Court of Appeal found that the test for employees claiming workers' compensation benefits for mental injuries under the B.C. *Workers Compensation Act*⁴⁸ (the "Act") violated s.15 of the *Charter*. In particular, the Court took issue with a B.C. Workers' Compensation Board Policy which required mental stress claims to meet a higher threshold of acuteness and trauma. The Court found that this distinction amounted to discrimination and declared sections of the Board Policy to be of no force of effect. Due to the similarities in workers' compensation legislation across Canada, it is anticipated that similar arguments will be made in other jurisdictions in the near future.

Mr. Plesner suffered post-traumatic stress disorder ("PTSD") as a result of a rupture of a natural gas pipeline at the B.C. Hydro and Power Authority station, where he was an auxiliary steam plant operator. He and his co-workers heard a loud hiss coming from the pipeline. Mr. Plesner became convinced that an explosion was imminent. He ordered an evacuation alert and the rupture was subsequently contained. As a result of the incident, Mr. Plesner was diagnosed with PTSD and was unable to return to work.

The B.C. Workers' Compensation Board denied Mr. Plesner's claim for workers' compensation benefits. The Workers' Compensation Appeal Tribunal similarly dismissed his claim, finding that while Mr. Plesner's injury was work related, "[h]is 'mental stress' injury was non-compensable on the basis that it did not fit within [the Act], when read together with [Board] Policy Item #13.30."

Section 5.1(1)(a) of the *Act* sets out the threshold for compensation for mental stress, and Board Policy 13.30 provides guidance relating to its interpretation. The Policy interprets s. 5.1(1)(a) as creating a two-part test for establishing mental stress in the context of a claim for workers' compensation benefits. First, the stress must be an acute reaction to a sudden and unexpected traumatic event. The Policy goes on to define "traumatic event" and provides examples to illustrate the requisite level of trauma. Second, the acute reaction must arise out of and in the course of employment. Applying this test, the Tribunal concluded that while Mr. Plesner's claim arose in the course of employment, it was not an acute reaction to a sudden and unexpected traumatic event.

On judicial review, the B.C. Court of Appeal found that s. 5.1(1)(a), when read together with Policy 13.30, violated the guarantee of equality under s. 15 of the *Charter*. Applying the approach developed by the Supreme Court of Canada in the *Law*⁴⁹ case (as informed by the decision in *Kapp*), the Court identified "workers who suffered physical injuries arising out of and in the course of their employment" as the comparator group for determining whether Mr. Plesner had suffered discriminatory treatment. The *Act* does not require that this comparator group meet the elevated requirement of an acute reaction to a sudden and unexpected traumatic event. Rather, it requires only that the injury arise in the course of employment. The Court concluded that Mr. Plesner was subjected to differential treatment based on mental disability.

Applying the four contextual factors established in *Law*, the Court held that this differential treatment demeaned Mr. Plesner's human dignity. First, people suffering from mental disability are subjected to pre-existing disadvantage, stereotyping, prejudice and vulnerability. Second, the reduced access to compensation by persons with mental injuries does not correspond to their actual needs, capacity and circumstances. Third, there is no identifiable ameliorative purpose behind this elevated threshold.

And fourth, Policy 13.30 treats those suffering from mental injuries as less deserving of compensation than those with physical injuries. The Court found that this is an affront to the human dignity of people with mental injuries and devalues them as human beings.

The Court held that s. 5.1(1)(a) of the *Act* and Policy 13.20 were not justifiable as a reasonable limit under s.1 of the *Charter*. It concluded that financial considerations and the problem of causation created by mental stress claims were insufficiently pressing and substantial objectives, given the circumstances. Furthermore, the standards of minimal impairment and proportionality were not met because the threshold required by the *Act* and Policy would unnecessarily exclude otherwise genuine claims on the ground that the event was insufficiently "traumatic." As a result, the Court severed the sections of Policy 13.30 which define and describe "traumatic event," declaring them of no force and effect.

Several Canadian jurisdictions, including Ontario, Manitoba, Newfoundland, Nova Scotia and Prince Edward Island, have similar exclusions to stress claims in their workers' compensation legislation. In light of the British Columbia Court of Appeal's decision in *Plesner*, these exclusions or higher entitlement thresholds could be open to a *Charter* challenge. ■

ENDNOTES

- ¹ [2008] 3 S.C.R. 79.
- ² [2009] S.C.J. No. 6.
- ³ *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.).
- ⁴ [2009] F.C.J. No. 475.
- ⁵ *R. v. Kapp*, 2008 S.C.C. 41 (CanLII).
- ⁶ 2008 H.R.T.O. 64.
- ⁷ [1994] 2 S.C.R. 525.
- ⁸ [2007] O.J. No. 2176 (C.A.).
- ⁹ [1994] 2 S.C.R. 611.
- ¹⁰ S.O. 1997, c. 28.
- ¹¹ 2008 O.N.C.A. 394.
- ¹² 2008 Q.C.C.A. 597.
- ¹³ 1st sess., 38th Leg., Quebec, 2008 (assented to June 20, 2008).
- ¹⁴ *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 14.1.
- ¹⁵ R.S.A. 2000, c. E-8.
- ¹⁶ R.S.B.C. 1996, c. 352.
- ¹⁷ [2009] S.C.C.A. No. 29.
- ¹⁸ 2008 O.N.C.A. 472.
- ¹⁹ [1995] 2 S.C.R. 929.
- ²⁰ See for example *Canadian General Electric Co. (Peterborough)* (1949), 1 L.A.C. 320 (Laskin).
- ²¹ See for example *Re City of Toronto and Canadian Union of Public Employees, Local 79* (2002), 107 L.A.C. (4th) 144 (Davie).
- ²² 2008 S.C.C. 53.
- ²³ See for example *Labourers' International Union of North America, Local 625 v. Vansmit Ltd. (Jay-Dee Concrete Forming)*, [2009] O.L.R.D. No. 2990.
- ²⁴ R.S.Q. c. C-27.
- ²⁵ *Plourde v. Cie Wal-Mart du Canada inc.*, 166 A.C.W.S. (3d) 703.
- ²⁶ *Cie Wal-mart du Canada v. Desbiens*, 167 A.C.W.S. (3d) 536.
- ²⁷ [2004] 1 S.C.R. 43.
- ²⁸ 1995, S.O. 1995, c. 1, Sch. A.
- ²⁹ *Dualex Enterprises Inc.*, [1993] O.L.R.D. No. 4797.
- ³⁰ *Extrufix, a Division of CPI Plastics Group Ltd.*, [2005] O.L.R.D. No. 2742.
- ³¹ [2007] 2 S.C.R. 391.
- ³² [2009] O.J. No. 1352 (S.C.J.).
- ³³ 2008 O.N.C.A. 760.
- ³⁴ [2008] O.J. No. 5092 (S.C.J.) (Q.L.).
- ³⁵ 2009 O.N.C.A. 420.
- ³⁶ 2008 F.C. 1086 (CanLII).
- ³⁷ S.C. 2000, c. 5.
- ³⁸ 2008 S.C.C. 44 (CanLII).
- ³⁹ Only Ontario, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nunavut and the Yukon remain without either a definition of violence or violence-related provisions in an OHS statute or labour statute. We include Quebec as a jurisdiction with provisions, as the Act Respecting Labour Standards includes psychological harassment provisions.
- ⁴⁰ Bill 168, *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)* 2009 1st Sess., 39th Legis., Ontario, 2009.
- ⁴¹ *Occupational Health and Safety Act*. R.S.O. 1990, c. O.1
- ⁴² Similar obligations exist in a few jurisdictions already, including Manitoba and Prince Edward Island.
- ⁴³ No similar provision exists in workplace violence legislation in any Canadian jurisdiction.
- ⁴⁴ *Centre for Addiction and Mental Health (CAMH)*, (13 August 2009), Toronto (Ont. Ct. J.).
- ⁴⁵ 2009 ONCA 573.
- ⁴⁶ 2009 ABQB 345.
- ⁴⁷ [2009] B.C.J. No. 856 (Q.L.).
- ⁴⁸ R.S.B.C. 1996, c. 492.
- ⁴⁹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

HEENAN BLAIKIE OFFICES

Montreal

1250 René-Lévesque Blvd. West
Suite 2500
Montreal, Quebec
H3B 4Y1
T 514 846.1212
F 514 846.3427

Québec

900, boul. René-Lévesque Est
Bureau 600
Québec (Québec)
G1R 2B5
T 418 524.5131
F 418 524.1717

Ottawa

55 Metcalfe Street
Suite 300
Ottawa, Ontario
K1P 6L5
T 613 236.1668
F 613 236.9632

Paris

Correspondance organique
Bourthoumieux, Avocats à la Cour
17, rue Marbeau
75116 PARIS, FRANCE
T 33 1 40 67 44 00
F 33 1 40 67 44 01

Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2900
Toronto, Ontario
M5H 2T4
T 416 360.6336
F 416 360.8425

Calgary

12th Floor, Fifth Avenue Place
425 - 1st Street SW
Calgary, Alberta
T2P 3L8
T 403 232.8223
F 403 234.7987

Trois-Rivières

1500, rue Royale
Bureau 360
Trois-Rivières (Québec)
G9A 6E6
T 819 373.7000
F 819 373.0943

Singapore

Representative Office
80 Anson Road, Suite 28-03
Fuji Xerox Tower
Singapore 079907
T 65 6221 3590
F 65 6887 4394

Vancouver

1055 West Hastings Street
Suite 2200
Vancouver, British Columbia
V6E 2E9
T 604 669.0011
F 604 669.5101

Sherbrooke

455, rue King Ouest
Bureau 210
Sherbrooke (Québec)
J1H 6E9
T 819 346.5058
F 819 346.5007

Victoria

737 Yates Street
Suite 514
Victoria, British Columbia
V8W 1L6
T 250 381.9321
F 250 381.7023