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Managing the Workplace

2010 Labour & Employment Seminar Series

Update and Supplement



Recent Developments in Workplace Law

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Introduction

Over the past year, there have been many important developments in labour and employment, pensions and benefits OHS and workers' compensation and privacy law. Recent Developments is Heenan Blaikie Ontario's annual publication designed to summarize the key developments and updates in these areas in 2010. Recent Developments serves as a supplement to the Managing the Workplace Seminar Series hosted by our Ontario Labour & Employment practice group.

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Employment Law

I. ONTARIO COURT OF APPEAL: DEPENDENT CONTRACTORS EXIST AND ARE ENTITLED TO REASONABLE NOTICE OF TERMINATION

Introduction

In *McKee v. Reid's Heritage Homes*¹, the Ontario Court of Appeal confirmed the existence of "dependent contractor" as an intermediate status between employee and independent contractor. The Court held that, in light of the near total exclusivity of their relationship and economic dependence on their principal, dependent contractors are entitled to reasonable notice of termination.

The decision in *McKee* is important for the growing number of employers who use independent contractors, in order to ensure that they continue to enjoy the benefits of independent contractor relationships without the spectre of liability for a damage award in lieu of reasonable notice.

Factual Background

The decision in *McKee* concerns the alleged wrongful dismissal of a 64 year old sales manager who, through her own incorporated business and "sub-agents," sold houses exclusively on behalf of the defendant, Reid's Heritage Homes. The main issue was whether McKee was an employee and entitled to damages for wrongful dismissal, or an independent contractor.

In 1987, McKee, on behalf of her corporation Nu Home Consulting Services, entered into a written sales and advertising agreement with Heritage Homes. The agreement provided that Heritage Homes would supply 69 homes for Nu Home to sell for a fixed commission. The agreement was terminable on 30 days' notice and provided that Heritage Homes would have the "exclusive use of [Nu Home's] services." After the 69 homes were sold, Heritage Homes continued to provide homes for Nu Home to sell although advertising was performed by another party. Heritage Homes gave McKee the title of "Sales Manager," allowed her to work out of a model home, and supplied all of the necessary stationery and forms. Heritage Homes paid Nu Home a commission for each home sold. Over time, as the business grew, McKee hired sub-agents to assist her. Nu Home paid these sub-agents a portion of the commission received from Heritage Homes.

In 2004, Heritage Homes hired a new Corporate Sales Manager who decided to restructure the salesforce so that all sales agents reported directly to him. McKee was told that she and her sub-agents would have to join Heritage Homes as employees. In the course of negotiating an employment contract, the owner of Heritage Homes guaranteed McKee 100 homes per year to sell and told McKee to work with the Corporate Sales Manager to put the agreement in writing. The Corporate Sales Manager repudiated the agreement and refused to guarantee McKee 100 homes per year. Instead, he offered McKee a standard employment contract, terminable upon 14 days' notice, that provided "first pick" of one phase of any construction project in Guelph. McKee rejected the offer and sued for wrongful dismissal.

The Trial Decision

The trial judge found that McKee was an employee of Heritage Homes and not an independent contractor. The trial judge emphasized the exclusivity of the relationship and the degree of McKee's integration into Heritage Homes. He noted that selling homes was the "most integral part" of Heritage Homes' business and as McKee was responsible for selling those homes, she was an integral part of its business. The trial judge rejected Heritage Homes' attempt to rely on the termination provision of the original sales and advertising agreement, holding that the agreement was "spent" once

the prescribed allotment of homes was sold. The trial judge concluded that McKee was an employee and entitled to reasonable notice of termination of her employment. In light of her age, the nature and character of her employment, and the prospect of finding comparable employment, the trial judge awarded McKee 18 months' notice, totaling over \$400,000.

Heritage Homes appealed.

The Court of Appeal's Decision

On appeal, Heritage Homes argued that McKee was a dependent contractor. The Court of Appeal accepted Heritage Homes' submission that the law recognizes dependent contractor as an intermediate status between employee and independent contractor. However, the Court held that in light of the near total exclusivity of their relationship and the concomitant economic dependence on their principal, dependent contractors are entitled to reasonable notice of termination.

The Court established the following two-step analysis to determine if an individual is an employee, dependent contractor, or an independent contractor:

1. Is the individual an employee or a contractor? The Court identified the following factors as relevant in answering this question:
 - a. Exclusivity - Is the individual limited exclusively to the service of the principal?
 - b. Control – Is the individual subject to the control of the principal, not only as to the product sold but also as to when, where, and how it is sold?
 - c. Ownership of Tools – Does the individual have an investment or interest in the "tools" relating to his or her service?
 - d. Risk of Loss/Chance of Profit – Does the individual undertake any risk in the business or have any expectation of profit associated with his or her service distinct from a commission?
 - e. Whose Business is It? – Is the individual's activity part of the principal's business organization – or in other words, "whose business is it?"
2. If the agent is not an employee but works exclusively for the principal and/or is economically dependent on the principal, the agent will be considered a dependent contractor and will be entitled to reasonable notice of termination.

In the first step of the analysis, exclusivity is a factor weighing in favour of a finding that an individual is an employee and not a contractor. In the second step, exclusivity is determinative of dependent contractor status as it demonstrates economic dependence on the principal.

Applying this analysis, the Court held that trial judge correctly found that McKee was an employee. The Court noted that McKee worked exclusively for Heritage Homes, which supplied all of the "tools" (*i.e.*, office space and stationery) for McKee to perform her work, and the company exercised significant control over the manner in which McKee advertised and sold homes. The measure of control that Heritage Homes exercised was particularly evident, the Court noted, in the fact that it removed and reassigned responsibility for advertising from McKee to another individual, much as it would have done with any employee. Further, McKee had no true risk of loss or chance of profit beyond her fixed commissions. Finally, the Court noted that McKee was a crucial element of Heritage Homes' sales department. The Court concluded that McKee was an employee of Heritage Homes and entitled to reasonable notice of termination. Accordingly, the Court dismissed the appeal.

What Does this Mean for Employers?

Following *McKee*, a dependent contractor relationship gives rise to a requirement to give reasonable notice of termination. Because the key to dependent contractor status is complete or near-complete exclusivity, employers are encouraged to re-examine their existing contractor relationships to identify contractors who work exclusively for them and may be found to be dependent contractors. Employers should also assess their exposure by determining how many of those contractors are operating pursuant to an expired contract or one without a valid termination provision.

Employers should also take steps to minimize future exposure by appropriately structuring new contractual relationships. To reduce the indicia of exclusivity and militate against a dependent contractor finding, employers should, wherever possible, consider selecting contractors who work with multiple principals. Employers should also ensure that contracts contain termination provisions which will displace any entitlement to reasonable notice if a contractor is found to be a dependent contractor. Finally, employers should ensure that a system is in place to renew or replace expired contracts in order to benefit from the protection and certainty of termination provisions in the future.

II. RESTRICTIVE COVENANTS AFTER *SHAFRON V. KRG*

Introduction

The Supreme Court of Canada's 2009 decision in *Shafron v. KRG*² reinforced Canadian courts' longstanding rejection of overly broad or ambiguous restrictive covenants contained in employment contracts. Since then, lower courts across Canada have had the opportunity to apply the Supreme Court's reasoning to employment disputes on the ground. These decisions suggest that employers seeking to enforce restrictive covenants face an increasingly uphill legal battle.

Shafron in Brief

As we reported in our 2009 Update, in *Shafron* the Supreme Court confirmed the presumption that restrictive covenants in employment contracts are *prima facie* unenforceable unless they prove reasonable in terms of activity, duration, and geographical scope. Further, in order for a court to determine the reasonableness of the covenant, its terms must be unambiguous.

The Supreme Court noted that two "severance" remedies had traditionally allowed courts to enforce otherwise ambiguous restrictive covenants: "blue-pencil" severance, where words in a contractual provision are crossed out; and "notional" severance, where a contractual provision is "read-down" so as to make it legal and enforceable. The Supreme Court determined that blue-pencil severance should rarely be used in the employment context, and only in cases where "the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant."

With respect to notional severance, the Supreme Court concluded that this doctrine is never applicable to restrictive covenants in employment agreements. This is because applying notional severance "simply amounts to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case." Also, it "invites the employer to impose an unreasonable restrictive covenant on the employee with the only sanction being that if the covenant is found to be unreasonable, the court will still enforce it to the extent of what might validly have been agreed to." This provides an incentive for employers to try to include unreasonable restrictive covenants in employment agreements and, as a result, increases an employee's vulnerability within the employment relationship.

Interpreting *Shafron*

Since the release of *Shafron*, lower courts have extended the Supreme Court's reasoning to further narrow an employer's ability to craft an enforceable restrictive covenant.

In *Bonazza v. Forensic Investigations Canada Inc.*,³ an Ontario Court addressed a "descending scope" restrictive covenant providing that the non-competition provisions were enforceable within the following geographic areas: the Province of Ontario; the Regional Municipalities of York, Durham, Halton and Peel and the City of Toronto; the City of Mississauga; or a five (5) kilometer radius from the employer's premises.

The Court determined that the restrictive covenant was not enforceable, holding that a descending scope geographic restriction is "by its very nature ambiguous, and therefore always unenforceable." It was simply no longer appropriate for an employer to try to insert a menu of geographic restriction options for the Court to choose from by applying the doctrine of notional severance. In short, for the Ontario Court in *Bonazza*, "*Shafron* sounds the death knell for descending scope restrictive covenants."

In *Altam Holding Ltd. v. Lazette*,⁴ an Alberta Court considered whether it was appropriate to use blue-pencil severance to enforce a non-solicitation clause in a restrictive covenant that also contained an unenforceable non-competition clause.

The Court determined that it was not appropriate to enforce a non-solicitation clause that was combined with an unenforceable non-competition clause. This was because the Court found that where a restrictive covenant contains multiple clauses that have "common self-contained definitions and a common objective," no part of the covenant could be considered "clearly severable, trivial and not part of the main purport of the covenant."

In this situation, because the non-competition and non-solicitation clauses worked in combination to prevent the employee from working in his chosen field of rig moving, blue-pencil severance could not be used to sever the unenforceable non-competition clause. As a result, the non-solicitation clause was necessarily unenforceable along with the rest of the restrictive covenant.

Finally, in *Steele v. Ingram*,⁵ an Ontario Court considered how the *Shafron* prohibition on notional severance applied to a restrictive covenant contained in a sale of business agreement.

The restrictive covenant at issue was a non-competition agreement negotiated in the context of the sale of an insurance brokerage. The restrictive covenant provided that the former owner would continue working for the sold brokerage for two years, and would not compete with the new brokerage for five years after the termination of his employment. The clause stated that it was enforceable "...within the City of Guelph...within the Province of Ontario...within Canada...and within the United States of America...".

Applying the Supreme Court's reasoning in *Shafron*, the Court found that as with employment agreements, notional severance would permit a court to improperly "rewrite" a sale of business agreement in a way that the court subjectively reasonable. Because "this observation seems as applicable to cases involving a sale of business as in cases involving employment contracts," notional severance may also now be dead in the sale of business context.

What Does this Mean for Employers?

These decisions reveal not only that lower courts across Canada have taken note of *Shafron*, but also that they are actively extending the Supreme Court's ruling to make it even more difficult for employers to enforce restrictive covenants in employment agreements and, potentially, in sale of business situations.

This reinforces the importance of carefully drafting restrictive covenants. Restrictive covenants that include descending scope clauses or overlapping non-competition and non-solicitation clauses likely will be unenforceable. As Canadian courts lean more heavily in favour of protecting an employee's ability to earn a living after termination of employment in spite of a contractual restrictive covenant, employers are well-advised to pay careful attention to legal developments in this area.

What Employers Must Know

- Courts will only enforce restrictive covenants that are reasonable in terms of activity, duration, and geographical scope.
- Courts will not read-down restrictive covenants to make them enforceable.
- Courts may remove a portion of a restrictive covenant to make the covenant enforceable if the part being removed is clearly severable, trivial and not part of the main purport of the covenant.
- Following *Shafroon*, some courts have found restrictive covenants with descending scope clauses or overlapping non-competition and non-solicitation clauses to be unenforceable.

What Employers Should Do

- Employers should seek legal advice to draft restrictive covenants that are reasonable in terms of activity, duration, and geographical scope.
- Employers should avoid using descending scope clauses or overlapping non-competition and non-solicitation clauses.
- Employers should consider renegotiating contracts that contain problematic restrictive covenants.

III. AQUAFOR – FIDUCIARIES HAVE LATITUDE TO COMPETE WITH A FORMER EMPLOYER

In *Aquafor Beech Ltd. v. Whyte*,⁶ the Ontario Superior Court of Justice clarified the types of competitive activities that a fiduciary may engage in after leaving his or her employer.

Factual Background

Aquafor was an engineering firm. The defendants, Whyte and Dainty, were professional engineers who worked for Aquafor for many years. Whyte and Dainty were primarily responsible for Aquafor's mining and land development work, and accounted for about 25% of Aquafor's business. Neither Whyte nor Dainty were bound by a non-compete agreement.

While still employed by Aquafor, Whyte and Dainty started planning to leave Aquafor to start their own engineering firm. During non-business hours, Whyte and Dainty took preliminary steps to set up their new business. They leased space for their new firm, constructed leasehold improvements, and prepared a business plan. However, they did not engage in any competitive activity while still employed with Aquafor.

Whyte and Dainty gave Aquafor five weeks' and four weeks' notice respectively, and assisted Aquafor with transition issues.

Prior to leaving Aquafor, Whyte told three of his clients that he was leaving Aquafor, and Dainty told one of his contacts that he was leaving.

Whyte and Dainty left their computers at Aquafor and did not take any company files or documents with them when they left.

Upon starting the new firm, Whyte and Dainty sent an announcement letter introducing the firm to a list of businesses obtained from the Caledon Chamber of Commerce website and a Government of Canada listing. Three of those companies had been clients of Aquafor.

Shortly after the new firm was established, a junior engineer who had worked with Whyte and Dainty at Aquafor applied for a position with the new firm without any solicitation from Whyte or Dainty, and was hired.

Several of Aquafor's clients began doing business with Whyte and Dainty's new firm.

Aquafor sued Whyte and Dainty, claiming they were fiduciaries who breached their duty in their manner of departure and in their subsequent business affairs. In particular, Aquafor alleged that Whyte and Dainty had breached their fiduciary duty by:

- a) secretly planning their departure;
- b) failing to give adequate notice of their departure;
- c) appropriating corporate opportunities; and
- d) using confidential information belonging to Aquafor to secure new business for their firm.

The Court's Decision

The Court agreed that Whyte and Dainty were fiduciaries based on the integral roles they played in the administration and management of Aquafor. They were primarily responsible for Aquafor's mining and land development work, they had autonomy in dealing with their clients, they wrote their own proposals and determined their own pricing, and they accounted for a significant portion of Aquafor's revenues. In short, they were the "face" of Aquafor to those clients.

However, the Court found that Whyte and Dainty did not breach any of their fiduciary duties. In particular, the Court made the following findings.

Notice of Resignation

- Whyte and Dainty had given Aquafor enough notice to deal with transition issues before they left, and there was no evidence to suggest that a longer period was required or would have made any difference.

Planning New Business

- Mere planning is not a breach of fiduciary duty. Whyte and Dainty were entitled to take the preliminary steps necessary to set up their business while still employed with Aquafor, so long as they did not compete with Aquafor before they left, did not use confidential information, and did so on their own time and not company time.

Competing After Departure

- Whyte and Dainty were entitled to compete with Aquafor after their departure so long as they did not do so unfairly. In particular, they could not solicit Aquafor's clients for a reasonable period after their departure, and they could not use confidential information of Aquafor to compete.
- The mere fact that Aquafor's clients became clients of Whyte and Dainty's new firm shortly after their departure was not sufficient to establish solicitation of those customers.
- While Whyte and Dainty told four clients that they were leaving Aquafor, the Court found that this communication was not a breach of fiduciary duty. The Court accepted the evidence of clients who testified that they followed Whyte and Dainty of their own volition, without any solicitation from Whyte and/or Dainty. Given that Whyte and Dainty were working closely with the clients at the time of their

departure, and in the context of their professional relationships, telling the clients of their departure without evidence that they asked the clients to come with them or tried to persuade them to leave Aquafor did not amount to solicitation.

- The new firm's letter of introduction was not solicitation, as the letter was general and sent out generally to Caledon businesses and mining companies in Northern Ontario.
- The new firm's participation in bids for new work from Aquafor clients was not improper given that Whyte and Dainty did not have any relationship with those particular clients when they worked at Aquafor.

Hiring Other Employees

- Whyte and Dainty did not breach their fiduciary duty by hiring employees of Aquafor because those individuals testified that they wanted to leave Aquafor, they were not solicited by Whyte or Dainty, and they applied for positions with the new firm of their own volition.

Appropriation of Business Opportunities

- Whyte and Dainty were entitled to accept work from former Aquafor clients, given that the clients followed of their own accord and there was no misuse of confidential information. Their acceptance of work from former Aquafor clients was not improper appropriation of business opportunities. Whyte and Dainty were professionals and, as such, their client relationships had a personal nature. The law recognizes the right of a client to choose which professional it will rely on for this expertise. If a client wanted Whyte or Dainty to complete a project because of their abilities or personal relationships, there was no reason (absent solicitation or misuse of confidential information) that the client should be precluded from doing so. The same was found to be true with respect to new phases of existing projects and new projects from the same clients.

What does this Mean for Employers?

Aquafor suggests that, in the absence of a non-compete agreement, fiduciaries have significant latitude to compete with a former employer, especially when those fiduciaries are professionals. Fiduciaries may continue to do business with their former employer's clients so long as they do not actively solicit the clients or use confidential information belonging to the former employer to compete unfairly. As such, it is advisable for employers to negotiate carefully crafted non-compete and/or non-solicitation agreements with fiduciaries (either at the time of hire or while they are still employed) to adequately protect their business interests.

Ontario Provincial Labour Law

I. LABOUR RELATIONS IN THE TRANSPORTATION SECTOR: THE SUPREME COURT TAKES ANOTHER LOOK AT FEDERAL AND PROVINCIAL JURISDICTION

In *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*,⁷ the Supreme Court of Canada took another look at the lengthy debate over which level of government is responsible for regulating freight forwarding businesses and their labour relations. The Court held that freight forwarding companies that do not themselves engage in interprovincial freight transport, but instead contract with interprovincial carriers, are subject to provincial jurisdiction.

Historical Background

The case involved Consolidated Fastfrate, a freight forwarding company with branches across Canada. Freight forwarding companies consolidate and deconsolidate freight, and contract with third-party rail and truck carriers to deliver shipments to warehouses across the country. At the warehouses, employees of the freight forwarding company “deconsolidate” the shipments and deliver them to their destinations.

In 2005, the Western Council of Teamsters applied to the Canadian Industrial Relations Board for certification as the regional bargaining agent for Fastfrate employees in Alberta, Saskatchewan and Manitoba. In response, the Consolidated Fastfrate Transport Employees’ Association of Calgary applied to the Alberta Labour Relations Board for a declaration on whether the labour relations of Fastfrate Calgary were subject to provincial or federal regulation. The ALRB found that Fastfrate’s national branch structure was centrally coordinated and that the services it offered – cross-Canada shipping – were interprovincial in nature. Accordingly, the ALRB concluded that Fastfrate Calgary’s operations were within federal jurisdiction and subject to the *Canada Labour Code*.

Fastfrate sought judicial review of the ALRB decision. On review, the Court of Queen’s Bench of Alberta quashed the ALRB decision. The Court held that Fastfrate Calgary’s labour relations were subject to provincial regulation, thus affirming the existing provincial certification order.

On appeal, the Court of Appeal of Alberta held that the lower court erred in law when it overturned the ALRB’s decision and affirmed the provincial certification order. The Court of Appeal ruled that Fastfrate operated an interprovincial freight collection and delivery service and was therefore subject to federal regulation.

The Decision of the Supreme Court of Canada

On further appeal, the Supreme Court of Canada held that employees of Fastfrate Calgary were subject to provincial jurisdiction. The Court’s decision finally settles the lengthy debate about which level of government is responsible for regulating freight forwarding businesses and their labour relations.

The Court held that the question of whether an undertaking, service or business is federally regulated depends on the nature of its operations. An undertaking that performs consolidation and deconsolidation and local pickup and delivery services does not become an interprovincial undertaking simply because it has an integrated national corporate structure and contracts with third-party interprovincial carriers. Fastfrate did not perform any interprovincial carriage itself and, as a result, the Court found no compelling reason to depart from the general rule that works and undertakings are regulated by the provinces.

The Court emphasized that provincial jurisdiction over labour relations is the norm and federal jurisdiction is the exception. Section 92(13) of the *Constitution Act, 1867* gives the provinces jurisdiction over “Property and Civil Rights,” which covers all employment relationships and labour relations. Federal jurisdiction, the Court held, “extends only to those classes of subjects expressly excepted from those provincial heads of power and those enterprises deemed to be integral to such federal works and undertakings.”

The Court concluded that Fastfrate’s operations were entirely intraprovincial. Neither Fastfrate’s employees nor its equipment were involved in actual interprovincial transport. Rather, any component of Fastfrate’s service involving transport of the freight across provincial boundaries was contracted to a third-party interprovincial road or rail carrier.

Finally, the Court held that it is the carriers who physically transport freight interprovincially who carry on federal transportation works and undertakings. In the Court’s view, there was no indication that contracting alone can make intraprovincial undertakings subject to federal jurisdiction. In short, in order to fall within federal jurisdiction the freight forwarding company would have to physically carry the goods across provincial borders. For Fastfrate, that was not the case.

This decision is important to all businesses operating in more than one province. The Court warns that the “dominant purpose” test, which examines the contractual service offered rather than the actual operations of the undertaking, is flawed as it has the potential to sweep under federal jurisdiction many enterprises that have previously been understood as being subject to provincial jurisdiction based on their actual operations. Determining whether a particular undertaking, business or service falls within federal or provincial jurisdiction instead turns on the nature of its operations.

II. EMPLOYER MISCONDUCT RESULTS IN AUTOMATIC CERTIFICATION DESPITE UNION LOSING A CERTIFICATION VOTE

Despite losing a certification vote, the Communications, Energy and Paperworkers Union of Canada (the “CEP”) recently persuaded the Ontario Labour Relations Board to certify the union to represent employees of Boehmer Box LP as a result of “unfair labour practices” committed by the employer. The decision has potentially far-reaching consequences for employers who are careless – or too clever – with their words.

In *Boehmer Box LP*,⁸ the Board found that a series of employer communications to employees during the organizing drive had the subtle effect of repeatedly linking threats to job security with unionization, even though the employer had not engaged in any improper terminations, layoffs, or *direct* threats to employees’ jobs.

The case arose from an organizing drive carried on by the CEP against Boehmer Box LP, a Kitchener-based manufacturer of cartons for businesses in the grocery industry. After a brief but overt organizing campaign, the union applied to the Board for certification. In the Board-ordered vote, the CEP received only 33% employee support - far less than the 50% + 1 required to be certified.

Despite its loss at the ballot box, the CEP continued to seek bargaining rights based on several unfair labour practice allegations, claiming that the employer’s actions during the campaign intimidated the employees and directly caused the CEP to lose the vote. The CEP pointed out that the majority of employees had signed union membership cards during the campaign, only to vote against unionization a few days later.

The Board agreed with the CEP. The decision hinged on four allegedly “anti-union” documents that were distributed during the organizing drive. Three of these were memoranda drafted by senior management and delivered to each employee’s home. The fourth document was a letter drafted by a concerned employee who claimed that he was acting without management’s knowledge.

The Board found that the content of the three memoranda written and distributed by management, when considered as a whole, had the subtle effect of causing employees to conclude that unionization threatened their jobs and the viability of the employer's business. They did this by making superficially inoffensive but repeated references to the importance of business competitiveness in connection with the closure of other unionized plants in the area.

The letter written by the plant employee made similar comments tying unionization at other businesses to job losses and plant closures. For example, the letter named a number of unionized Kitchener-area manufacturing facilities and noted that they had been forced to close even with "union protection."

Notably, while this letter was drafted by an employee without management's knowledge, the Board found that the employer encouraged and facilitated its distribution by failing to take active steps to stop its dissemination and distance itself from the letter's warnings.

Ultimately, looking at all of the communications together, the Board found that the employer was trying to suggest that the union was a threat to job security. The Board ruled that threats (even subtle or ambiguous threats) to job security will more readily result in automatic certification than other types of improper actions. In the Board's view, a lesser remedy would not alleviate employee anxiety about potential job losses, rendering other remedies, such as a second certification vote, ineffective.

More generally, the decision indicates that the Board will closely scrutinize employer communications and conduct that raise the issue of employee job security, even in a subtle or ambiguous manner or through a non-management employee. It is important to note that the employer in *Boehmer Box LP* never directly stated that employees could face job losses or an "uncertain future" if operations were unionized. The Board found that it was enough that the employer communications referred to other businesses that had closed after becoming unionized.

The decision demonstrates that the Board will not require egregious employer misconduct before granting automatic certification. Rather, the Board will look at the cumulative effect of an employer's behaviour to determine if a remedy short of certification would allow employees to express their true wishes about unionization. In other words, an accumulation of moderately improper actions can be just as dangerous as one or two very improper actions.

At its most basic level, *Boehmer Box LP* should serve as a warning to employers that clever, subtle or ambiguous statements from management about job security – and less subtle statements made by anti-union workers – can have dramatic consequences when made in the course of an organizing campaign.

Federal Labour Law

I. CANADA INDUSTRIAL RELATIONS BOARD UPDATE

In last year's federal sector update, we reported that the Canada Industrial Relations Board, under its Chair Elizabeth MacPherson, had been able to reduce its backlog of cases to the lowest level since 1985-86. This process has continued over the last year. In fact, over the first two years of Chair MacPherson's tenure, the average processing time for cases was reduced by 30 per cent and the backlog of cases was reduced by over one third as well.

One of the Board's major achievements was reducing the average processing time for cases from 311 days in 2008-2009 to 230 days in 2009-2010, largely the result of drastically reducing processing time for duty of fair representation cases. Duty of fair representation cases continue to represent the largest single share of the Board's workload, making up almost one quarter of the new cases filed with the Board.

In 2009, for the first time the Board conducted "e-votes" in representation votes where employees in the proposed bargaining unit were dispersed over large areas. In the e-votes system, employees are issued personal identification numbers and cast their ballot over the internet or by phone. The Board views this procedure as secure, cost-effective and expedient.

The Board is now seeking input on the *Canada Industrial Relations Board Regulations, 2001*, in order to examine ways to determine cases more effectively and efficiently. One focus will be the further use of information technology, such as e-filing. No schedule has yet been set for the consultations.

II. CASE LAW UPDATE

Arbitrator Orders \$500,000 in Damages Including Punitive, Mental Distress and Physical Suffering Damages in Termination of a Unionized Employee

In February 2010, Arbitrator Owen Shime issued a landmark arbitration decision in *Greater Toronto Airports Authority v. Public Service Alliance Canada, Local 0004 (C.B. Grievance)*.⁹ Arbitrator Shime ordered the Greater Toronto Airports Authority to pay a terminated employee over \$500,000 in damages. The monetary award included punitive damages and damages for past and future income loss, mental distress, and physical suffering. Arbitrator Shime also awarded atypical administrative remedies including a letter of reference with prescribed terms.

At the time of her termination, the grievor, represented by PSAC, had been employed with the GTAA for 23 years. She was a well-liked and respected employee. During her 23 years of employment, the grievor had never been disciplined and had a good attendance record.

Prior to her termination, the grievor had suffered an emotional breakdown due to physical and sexual abuse. The employer was aware of the grievor's situation and supported her.

In the fall of 2003, the grievor injured her knee at work. For a number of months following her injury she continued to work for the GTAA while attending physiotherapy. When the grievor's knee did not heal, she underwent arthroscopic surgery. The grievor's physician wanted her to remain off work for six weeks following the surgery but because the grievor was anxious to return to work, he validated her absence for only four weeks. During this four-week period the grievor was to attend physiotherapy.

Unbeknownst to the GTAA at the time, the grievor lived with Terry Townshend. Mr. Townshend had been terminated by the GTAA but later reinstated by an arbitration board. As part of his reinstatement award, Mr. Townshend received approximately \$100,000. During the grievor's recovery, Mr. Townshend was off work on sick leave. The GTAA had placed Mr. Townshend under video surveillance. Based on evidence obtained in its surveillance of Mr. Townshend, the GTAA terminated his employment.

After learning of the relationship between the grievor and Mr. Townshend, the GTAA engaged in covert video surveillance of the grievor on two days during her post-operative recovery period. On those days the grievor was observed attending a physiotherapy clinic and immediately thereafter running a few quick errands. The grievor spent the majority of each surveillance day inside at home.

Following the surveillance, the employer asked the grievor to submit a note from her physician explaining why she required four weeks off work and inquiring about whether she could return to work at an earlier date. Initially, the grievor was unable to obtain a note from her physician so she submitted one from her physiotherapist instead. The physiotherapist explained that while the grievor had been making good progress, she would benefit significantly from more time off work. The GTAA rejected the physiotherapist's note and insisted that the grievor submit a letter from her doctor. When the grievor asked her physician, he was angry that she was being pressured to return to work early. Ultimately, however, he agreed to clear the grievor to return to work earlier than scheduled because she stated that she was fearful that she may lose her job. The note which the grievor's physician wrote to the GTAA explained that the normal recovery time for arthroscopic surgery is six weeks, and that the grievor was still recuperating from her operation. The grievor returned to work on March 17, 2009, (*i.e.*, five days earlier than her scheduled return to work date) and performed her regular duties.

At the end of her shift on March 17, the grievor was seen walking with a pronounced limp, which had not been observed on the earlier video surveillance. GTAA management concluded that the grievor was faking her limp and that she had been malingering. The evidence presented at arbitration caused Arbitrator Shime to conclude otherwise.

The grievor testified that she felt better immediately after her physiotherapy appointments and for a short period thereafter was able to walk relatively pain free. The grievor testified that on the two surveillance days, she had taken pain killers which helped manage her pain, but that on March 17 she had not taken medication because she was concerned about her ability to work safely. The grievor further testified that while she was at home on the surveillance days she rested her knee.

On March 19, the grievor was summoned to a meeting with GTAA management during which she was confronted with the March 9 and 10 surveillance videos. The attending union representative described the meeting as an "interrogation session." Arbitrator Shime concluded that GTAA management entered this meeting with a predetermined view that the grievor had been malingering and failed to reasonably consider any explanation the grievor offered to the questions she was asked. At the conclusion of the meeting, the grievor was suspended. The GTAA terminated her employment five days later for dishonesty and abuse of sick leave.

In response to her termination, the grievor experienced anxiety and depression. She could not sleep and became uncharacteristically introverted and reclusive. Ultimately, the grievor was diagnosed with post-traumatic stress disorder. Although she attended psychotherapy, the grievor's mental state had still not returned to normal when she testified at the arbitration hearing.

Arbitrator Shime concluded that the grievor had not been dishonest. He was of the view that the grievor was a diligent employee who followed her doctor's instructions and at no time malingered or attempted to wrongfully obtain sick benefits. Arbitrator Shime concluded that the GTAA did not have cause for termination and that, in terminating her employment, had acted unreasonably and in bad faith.

The arbitrator was especially critical of GTAA management for drawing conclusions about the grievor's medical condition that they were unqualified to make and that were contrary to the medical documentation before them. He was also highly critical of the lack of a thorough and objective investigation into the grievor's suspected malingering. In his view, the grievor was unfairly judged because of her personal association with Mr. Townshend.

Arbitrator Shime held that the GTAA's bad faith dismissal of the grievor violated the *Canada Labour Code*. He found that the *Code* creates an implied obligation to administer collective agreements in good faith, that the GTAA had not done so, and that this breach could be remedied with extraordinary relief.

In addition to the usual remedy of damages for past income loss, Arbitrator Shime ordered remedies not typically seen in arbitration, including damages for future loss of income rather than reinstatement, damages for mental distress, damages to compensate for physical suffering and punitive damages. As well, Arbitrator Shime ordered the GTAA to write the grievor a letter of reference that referred to her "exemplary service in form and substance satisfactory to the Grievor and to the Union." He also precluded the GTAA and its employees from discussing the circumstances of the grievor's termination with others.

Arbitrator Shime held that rather than reinstatement, monetary damages to compensate for future loss of income were appropriate because the GTAA's conduct had caused the grievor to lose all trust and confidence in her employer. Here, Arbitrator Shime recognized that both employers and employees are obliged not to act in a manner that is likely to destroy the confidence and trust that must exist in the employment relationship. Arbitrator Shime stated:

An implied term of trust in the employment relationship is not confined to the employee. There are reciprocal duties on both the employer and employee.

....

[In] the GTAA's letter of March 24th, 2004, terminating the Grievor, the GTAA stated, that the Grievor's "...dishonesty has resulted in a loss of trust, which makes it impossible for the GTAA to continue any employment relationship with you." By the same token, the GTAA's conduct has so impacted the Grievor that she is unable and incapable of continuing her relationship with the GTAA. Breach of trust is not a one way street. It applies equally to both employers and employees.

I determine that the GTAA did not have cause to terminate the Grievor, that it did not act reasonably and has acted in bad faith and/or so seriously breached the implied terms of mutual trust and confidence that its conduct when viewed objectively has so damaged the relationship between the Grievor and the GTAA that she is entitled to a remedy in damages for loss caused to her future employment prospects rather than the usual remedy of reinstatement.

With respect to the mental distress award, Arbitrator Shime held that certain provisions of the collective agreement, such as payment of wages and benefits and protection against dismissal without just cause, give employees "mental security" and other psychological benefits. Where the collective agreement provides such benefits, it is within the union's and employer's reasonable contemplation that a violation of the agreement by the employer could cause an employee to suffer mental distress. Arbitrator Shime held that the grievor's traumatic reaction to her termination (depression, loss of self-esteem and post-traumatic stress disorder) was foreseeable given the employer's knowledge of the grievor's specific vulnerability, and was sufficiently serious to justify compensatory damages.

With respect to damages for physical pain, Arbitrator Shime found that after the grievor was terminated, she could not afford to attend physiotherapy to aid her physical recovery. Arbitrator Shime concluded that had the grievor not been terminated from employment, she would have continued to attend physiotherapy regularly and would have recovered from her surgery earlier. Arbitrator Shime ordered the employer to pay the grievor damages to compensate for the

extended period of time it took her to recover from her surgery as a direct result of ending the physiotherapy treatments prematurely.

Arbitrator Shime's decision in *Greater Toronto Airports Authority* is being judicially reviewed. The case should be watched carefully by employers, but in the interim it serves as a sobering reminder of the importance of conducting fulsome and objective investigations into suspected employee misconduct, particularly in the face of medical evidence which purports to substantiate an employee's conduct.

Can the Canadian Human Rights Tribunal Award Legal Costs?

On April 22, 2010, the Supreme Court of Canada granted leave to appeal the Federal Court of Appeal's decision in *Canada (Attorney General) v. Mowat*.¹⁰ In that decision, the Federal Court of Appeal held that the Canadian Human Rights Tribunal does not have the statutory authority to issue costs awards against unsuccessful respondent employers.

In *Donna Mowat v. Canadian Armed Forces*,¹¹ the Tribunal ordered a respondent to compensate the complainant for her legal costs in the amount of \$47,000 plus interest. The Tribunal concluded that it had the authority to make the costs award pursuant to section 53(2) of the *Canadian Human Rights Act*, which provides in part as follows:

If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

...

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

[emphasis added]

The Federal Court, Trial Division upheld the costs award on judicial review.

On appeal to the Federal Court of Appeal, the Trial Division's decision was overturned on the basis that the Tribunal has no statutory authority to issue costs awards. The Court reasoned that "costs" is a term of art with a specific and well-known meaning. In the Court's view, there was no explicit indication that Parliament intended the reference to "expenses" in section 53(2) of the *Act* to endow the Tribunal with the authority to issue legal costs awards. Justice Layden-Stevenson wrote:

... Parliament did not intend to grant, and did not grant, to the [Tribunal] the power to award costs. To conclude that the [Tribunal] may award legal costs under the guise of "expenses incurred by the victim as a result of the discriminatory practice" would be to introduce indirectly into the [Act] a power which Parliament did not intend it to have.

The matter has been appealed to the Supreme Court of Canada, which is scheduled to hear the appeal on December 13, 2010. Some Canadian jurisdictions have expressly permitted their human rights tribunals to order legal costs (e.g., Alberta, British Columbia, Newfoundland and Nova Scotia) and it is anticipated that the Supreme Court will clarify whether, absent a clear and explicit grant of that power, a human rights tribunal has the authority to issue awards requiring the payment of a successful opponent's legal fees.

Refusing to Cross Another Bargaining Unit's Picket Line Constitutes an Illegal Strike

On December 17, 2009, the Supreme Court of Canada refused to grant leave to appeal the Federal Court of Appeal's decision in *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operations' Assn.*¹² The Court of Appeal's decision, which now has the support of the Supreme Court of Canada, held that the refusal to cross another bargaining unit's picket line by unionized employees not themselves in a legal strike position will constitute an illegal strike contrary to the *Canada Labour Code*. In so holding, the Court of Appeal rejected assertions that the *Code's* prohibition against such conduct offends the *Charter's* freedom of expression guarantee. Importantly, the Court also found that employers and trade unions cannot agree otherwise in collective agreements. The Court of Appeal clearly favored predictability in mid-collective agreement labour relations, stating:

To permit parties to contract out of a fundamental principle of the federal labour relations scheme might well jeopardize the *Code's* statutory objectives, especially since the costs associated with unpredictable work stoppages are generally borne not only by the contracting parties, but also by the public.

Support for this conclusion is found in a decision by the [CIRB] in *Saskatchewan Wheat Pool*...where the [CIRB] held that the parties could not contract out of the statutory definition of a "strike":

Nor can the public purpose of "industrial peace" behind the no-strike provision be avoided by "contracting out" of the legal obligations of the *Code*.... Of course, the parties can negotiate an employee's individual right to refuse to work and these clauses will be applied in accordance with their given interpretation, subject to arbitration. However, the union or its members cannot use such a clause to circumvent the *Code* by giving employees the right to refuse collectively to work contrary to [the *Code*].

This is an important decision for federally regulated employers, particularly those with multiple bargaining units.

III. OVERTIME CLASS ACTIONS

Three class actions alleging failure to pay overtime have recently been launched against federally regulated employers. The lawsuits allege that employees were forced, through the culture and practice of the workplace or the application of the employer's policies, to work unpaid overtime when overtime pay should have been paid. The key issues in these cases have involved class certification – in particular, whether the issues in dispute are sufficiently common to the class participants and whether the enforcement mechanism under the *Code* is a preferred alternative to class action proceedings. The Courts' treatment of these issues conflict.

Two of the class actions, filed against the Bank of Nova Scotia and the Canadian Imperial Bank of Commerce, assert that the application of the employer's policies resulted in employees working unpaid overtime. The employers in those cases agreed that the employees would be entitled to overtime if they had actually worked approved overtime. The third case, filed against CN, asserts that the employer has misclassified front-line supervisors as managers, even though the employees are not truly managers under the *Code*, and thereby avoided paying overtime.

In the case against CIBC, which was not certified, the crux of the argument 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. The judge found that the overtime policy, which required overtime to be approved in advance by managers, was lawful in that it complied with the terms of the *Code*. Although the judge agreed that there may be issues in how the overtime policy is applied in individual cases, possibly resulting in unpaid overtime, she found that the issues were not sufficiently common between all employees, because each employee would have to show individually how their own managers had forced them to work unpaid overtime, and for how many hours, both of

which are unique to each individual. This decision was upheld by the Divisional Court in September 2010, although one judge dissented.¹³ Leave to appeal to the Court of Appeal is pending.

The other two cases were certified to proceed. In the case against the Bank of Nova Scotia¹⁴, the employer argued – as had CIBC – that there could be no “class” action, because the issues were unique to each individual employee. The Court found that there was evidence, albeit disputed, that the employees regularly worked overtime and that this practice was encouraged by the bank. This was not itself inappropriate, but the bank’s system put the onus on the employee to obtain prior authorization. The judge suggested that while an employer has the right to protect itself against unrequested overtime hours, the balance of power in the workplace may be such that protecting employees against working unpaid hours should be the paramount consideration. He concluded that the questions of whether the employer had a duty to put a protective overtime system in place and whether its pre-approval requirement fulfilled this duty were common to every class member. The Divisional Court granted leave to appeal the decision on May 5, 2010.¹⁵

The class action against CN was certified as well.¹⁶ Although there were a number of different front-line supervisor positions that the plaintiffs alleged had been misclassified, the judge found that there were common issues between the employees as to whether the group of duties each employee performed was sufficiently managerial to meet the test to be considered a manager for the purpose of the *Code* and thus exempt from the overtime provisions. Even though each individual manager may perform slightly different duties and have slightly different levels of responsibility, the Court held, a common examination could be made of the various different roles played by front-line supervisors at CN, and how those roles relate to the test for managerial status under the *Code*. Having performed that analysis, a test could be developed and applied to each member of the class to determine their status.

In both the *CIBC* and the *CN* cases, a key issue was whether an employee can seek to enforce the overtime provisions of the *Code* through a class action in the civil courts, rather than through the regulatory enforcement mechanism set out in the *Code*. On this question, the two cases are directly in opposition, with the judge in the *CN* case expressly declining to apply the finding in the earlier *CIBC* case that employees should enforce their *Code* rights through the regulatory regime. Justice Perell determined in the *CN* decision that the terms of the *Code* are incorporated into individual contracts of employment as implied terms. This represents a departure from earlier cases in which judges determined they did not have jurisdiction to award amounts payable under the *Code*, including a decision of the Nova Scotia Court of Appeal¹⁷ on a similar question.

None of these decisions has decided the merits of the case or whether the employer actually breached the *Code*. All of the decisions are under appeal or likely to be appealed, and these questions will have to be resolved by the higher courts.

IV. LEGISLATIVE UPDATE

The federal government recently announced its intention to review the federal employment equity requirements, which obligate large federally regulated employers, including the government, to take measures to increase the representation of certain groups in their employee body. The announcement was made in late July by Stockwell Day, president of the Treasury Board. Although it appears at this point that the review will apply only to the government’s application of its employment equity policy, no specific legislation has been proposed or tabled, and no details have been provided about the consultation process, if any. Despite this, the announcement remains noteworthy, given the history of employment equity in the federal sector and the detailed requirements placed on employers under the legislation.

This follows changes to the *Pay Equity Act* proposed by the government in 2009, which would require unionized employees in the federal public sector to seek to attain pay equity goals through the collective bargaining process rather than through complaints to the Canadian Human Rights Commission. Under the new regime, employees who feel that

their union and employer have not achieved pay equity through bargaining would be able to file individual complaints with the Public Service Labour Relations Board. The union would not be able to support employees in this type of complaint. Although the *Public Sector Equitable Compensation Act* setting out this regime was passed by Parliament in 2009, it has not yet been proclaimed in force.

V. BARGAINING UPDATE

Average bargained wage increases in the federal sector have seen a slight increase in 2010 from their lows in 2009. At an average increase of 1.8%, however, the increases are still below the 2007 and 2008 averages of 2.8% and 2.9% respectively. This compares with average annual increases of 2.2% in the private sector and 2.0% in the public sector as a whole in 2010 across the country. On a quarter-by-quarter basis, wage increases declined slightly from the last quarter of 2009 to the first quarter of 2010.

Human Rights Law

I. INTRODUCTION

Bill 107 significantly changed Ontario's human rights system when it took effect on June 30, 2008. Among other changes, Bill 107's amendments to the Ontario *Human Rights Code* modified the power of the Human Rights Tribunal of Ontario to award compensatory damages to complainants. Notably, the legislation amended the remedial provision that formerly enabled the Tribunal to award up to \$10,000 in damages for mental anguish in cases of a wilful or reckless infringement of the *Code*. The new remedial provisions give the Tribunal a broad power under section 45.2(1)1 to award damages for "injury to feelings, dignity, and self-respect" arising from infringement of the *Code*. No monetary cap on damages is specified.

In the two years since the *Code* amendments came into effect, the Tribunal has had the opportunity to interpret and exercise its revised power to award damages. Contrary to the expectations of many employers, the frequency and scale of damage awards has not increased dramatically; rather, the Tribunal's recent decisions reveal that it is taking a measured approach when awarding damages.

II. NATURE OF CODE DAMAGES

Ontario's Divisional Court has held that damages on account of an infringement of the *Code* can arise from a number of factors, including humiliation, hurt feelings, loss of self-respect, dignity and confidence of the complainant, experience of victimization, vulnerability of the complainant, and seriousness of the offensive treatment.¹⁸ This type of damages (also known as "general" damages) is awarded specifically in recognition of the fact that a respondent has infringed a human right protected by the *Code*, rather than as compensation for any monetary loss suffered by the complainant (also known as "special" damages). In the employment context, the Tribunal's guiding principle is to balance the applicant's subjective feeling of depreciated self-worth with the objective circumstances of the *Code* infringement.

III. PRE-EMPLOYMENT CODE VIOLATIONS: REVOKING EMPLOYMENT A GREATER AFFRONT TO HUMAN DIGNITY THAN DISCRIMINATORY HIRING

An employer's obligations under the *Code* begin prior to the formation of an employment relationship with a prospective employee. As a result, hiring processes, application forms, and similar pre-employment practices can expose employers to significant human rights liability.

If the Tribunal finds that a pre-employment infringement of the *Code* has occurred, the size of the damage award will be determined by balancing the factors mentioned above with the probability that the prospective employee would have been hired if the *Code* violation had not occurred.

For example, a nanny placement agency was ordered to pay \$3,000 in general damages because its job application form required candidates to disclose whether they had ever sought psychiatric care.¹⁹ In that case, although the applicant's lack of a valid driver's license precluded successful employment, the Tribunal held the stigma attached to the question was sufficiently invasive to warrant an award of general damages.

In contrast, where it can be shown that applicants would have obtained employment if the *Code* violation had not occurred, the applicant may be awarded general and compensatory damages. In one case, an employer was ordered to pay \$15,000 in general damages for revoking a job offer after learning the applicant had been convicted of, and received a pardon for, a criminal offence.²⁰ Even more significantly, the Tribunal awarded the applicant in this case \$24,375 on account of lost wages. Similarly, another applicant also received \$15,000 in general damages when she was terminated on her first day of work after disclosing that she was pregnant.²¹ In that case, the applicant was also awarded \$9,060 for loss of employment income *and* \$11,659 for loss of parental and maternity leave benefits. In these cases, the Tribunal measured general damages on a high scale because the facts left no doubt that the individual was denied employment because of a prohibited ground. For the Tribunal, this meant that the impact on human dignity was exacerbated, and greater damages were justified. Viewed in combination with the compensatory damages awarded to the respective applicants, it is clear that total awards under different heads of damages can add up very quickly.

IV. CODE VIOLATIONS DURING EMPLOYMENT: BALANCING THE APPLICANT'S VULNERABILITY AND DIGNITY AGAINST THE EMPLOYER'S INFRINGEMENT AND RESPONSE

To determine the scale of damages owed by the employer for *Code* violations that occur in the course of the employment relationship, the Tribunal will assess the applicant's vulnerability and the impact of the violation on human dignity. These factors, as well as the seriousness of the violation, will be balanced against the employer's attempts to remedy the improper situation, if any.

Applicant Vulnerability a Key Factor in Damage Awards

The Tribunal will place heavy emphasis on the applicant's vulnerability when arriving at the appropriate quantum of general damages. Although a complaint that intersects multiple prohibited grounds of discrimination will not necessarily entail greater damages, the Tribunal has considered this to be an important factor when ascertaining the applicant's vulnerability. For example, in *S.H. v. M[...] Painting*²² a single mother of aboriginal descent received \$40,000 in general damages for enduring a long term, unrelenting pattern of egregious physical sexual harassment. The Tribunal held that her social status exacerbated the misconduct because the applicant felt she had no choice but to acquiesce. A similar award was made in *McDonald v. Mid-Huron Roofing*,²³ although the infringement in that case concerned only the prohibited ground of family status. In *McDonald*, the applicant was fired for leaving work to take his newborn baby to a medical appointment. The Tribunal held the applicant was particularly vulnerable in light of his wife's illness and his duties as a new father. As a result, the Tribunal awarded the applicant \$20,000 in general damages. In both cases, relief was granted for action taken against a member of a vulnerable group, although in *S.H. v. M[...] Painting* the greater frequency and duration of the misconduct warranted a larger general damage award.

Damages for Human Dignity Proportionate to Nature of Offence, Not Necessarily the Impact on the Applicant

Two similar cases illustrate the balancing exercise the Tribunal undertakes when awarding damages. In *Saadi v. Audmax*²⁴ and *Nemati v. Women's Support Network of York Region*,²⁵ the applicants were new Canadians who experienced discrimination at work on the basis of ethnicity and place of origin. While the applicant in *Nemati* submitted medical evidence demonstrating the impact of the infringement on her health, she was awarded only \$10,000 in general damages, compared to the applicant in *Saadi* who submitted no such evidence and was awarded \$15,000. The results in the two cases hinged on the degree of institutionalization of the employer's misconduct. The employer in *Saadi*, despite being a non-profit organization dedicated to promoting diversity, had strict policies that implemented a "business" dress code precluding religious observances, banned the use of languages other than English in the workplace, and restricted microwave use to "non-odorous foods." Consequently, although evidence showed that the more subtle discrimination in *Nemati* had a greater impact on the applicant's health, the institutionalized nature of the infringement in *Saadi* carried greater weight and showed that the employer had a systemic misunderstanding of its Code responsibilities thus warranting a higher measure of damages.

Employer Response Will Mitigate or Aggravate Applicant's Damages

The seriousness of the infringement, its impact on dignity, and the applicant's particular vulnerability will be further aggravated or mitigated by the employer's response to a complaint. For example, an employer's delayed and flawed investigation into sexual misconduct that ultimately contributed to the applicant's suffering attracted \$30,000 in general damages.²⁶ Similarly, the Tribunal awarded \$20,000 in general damages against an employer for terminating and refusing to accommodate an employee recovering from a car accident.²⁷ These two cases contrast with situations where infringement has occurred notwithstanding an employer's attempt to address the issue. In one such case, the Tribunal awarded only \$5,000 in general damages when an employer attempted, but failed, to accommodate an employee with a back injury.²⁸ It appears that the rationale driving these different approaches is that an employee's self worth and sense of being do not suffer to the same extent when employers make *bona fide*, albeit unsuccessful, attempts to address discrimination.

V. POST-EMPLOYMENT CODE VIOLATIONS: REPRISAL CONSIDERED INDEPENDENT WRONG COMPENSABLE BY CODE DAMAGES

In addition to respecting prohibited grounds, employers also have a duty not to engage in reprisal against individuals who attempt to exercise their rights under the *Code*. This may serve as an aggravating factor leading to a higher quantum of damages. Alternatively, in some cases the Tribunal will treat it as a separate head of general damages distinct from the differential treatment on prohibited grounds. For example, in one case a \$15,000 award was made against a used car dealership that engaged in a particularly malicious reprisal against a former employee.²⁹ Not only did the employer make anonymous disparaging remarks to the applicant's prospective new employers, but it also pressed unsubstantiated criminal charges for theft purely out of spite.

However, employers need not act overtly against employees for the Tribunal to make a finding of reprisal deserving of general damages; reprisal will also be found when employer behaviour is covert or subtle. For example, in one case, a paralegal had her full-time hours reduced to part-time and then further reduced to "on call" status following her complaints of sexual harassment.³⁰ Although the employer argued it had valid reasons for doing so, the Tribunal did not hesitate to find that the reduction in hours effectively constituted a termination in reprisal for the complaint. As a result, \$25,000 in general damages were awarded.

VI. CONCLUSION

Since the *Code* was amended in the 2008, the Tribunal has exercised its power to award general damages frequently. Typically, awards in this category have ranged between \$3,000 and \$25,000 depending upon the seriousness of the *Code* infringement. However, Ontario employers should be aware that the Tribunal has seen fit to award upwards of \$50,000 in general damages to applicants in particularly egregious cases. In *Smith*, for example, the Tribunal awarded general damages of \$50,000 against two personal respondents and a corporate respondent for engaging in a pattern of overt sexual harassment and reprisal against the applicant. Considering that the Tribunal often sees fit to award both general and compensatory damages, employers are advised to keep abreast of their statutory human rights obligations if they want to limit financial liability under the *Code*.

Occupational Health & Safety and Workers' Compensation

I. ONTARIO DIVISIONAL COURT RULES THAT SAFETY OVERRIDES ACCOMMODATION

The decision of the Ontario Divisional Court in *Simcoe (County) v. O.P.S.E.U., Local 911*³¹ addresses the important issue of balancing a disabled employee's right to accommodation against the safety of patients and the public. The Court's message is clear: "Extending human rights protections to situations that will result in placing the lives of others at risk flies in the face of logic."

David Rogers had been employed with the County of Simcoe as a paramedic for 14 years. In 2002, he was diagnosed with a medical condition that affected his visual acuity. As a result of his medical condition, Mr. Rogers was unable to meet the minimum standards prescribed by the *Highway Traffic Act* Regulation to hold a Class F license, which is a requirement for a paramedic employed in a land ambulance service. Pursuant to an *Ambulance Act* Regulation, all ambulances in Ontario must be staffed by two paramedics who can drive the ambulance and attend to patients.

In September 2005, Mr. Rogers asked the Ministry of Transportation for permission to work as an attend-only paramedic, which would have relieved him from the requirement to hold a Class F license. The Ministry refused to waive the requirement. Mr. Rogers filed a grievance alleging that the County of Simcoe failed to provide him with appropriate workplace accommodation. Mr. Rogers and his union, the Ontario Public Service Union, Local 911, claimed he should be permitted to work as an attend-only paramedic. The County of Simcoe denied the grievance on the basis that given the Regulations, it could not employ him as an attend-only paramedic; furthermore, it had complied with its duty to accommodate under the Ontario *Human Rights Code* by placing Mr. Rogers in a non-paramedic role.

Arbitrator Gorsky found that: (a) the *Ambulance Act* Regulation requirement that a paramedic hold a Class F license was adopted for a purpose rationally connected to the performance of the job, since the safety of patients and the public could be affected by how ambulances are staffed; and (b) the requirement was adopted for good faith reasons (namely, to maintain a health and safety standard in the operation of a land ambulance service). However, Arbitrator Gorsky also found that the requirement that all paramedics be able to drive an ambulance was not reasonably necessary to achieve the goal of "reasonable safety," and that the accommodation sought by Mr. Rogers to work as an attend-only paramedic would not give rise to undue hardship. The arbitrator based his decision that the Class F license requirement was not necessary for the health and safety of patients and the public on the absence of evidence of actual harm in the approximately 18 years during which the *Ambulance Act* Regulation permitted volunteer paramedics to serve in an attend-only capacity. Arbitrator Gorsky disregarded the reason for allowing volunteer paramedics to serve in an attend-only capacity, which was to provide ambulance services to remote areas that otherwise would have no ambulance service at all.

Arbitrator Gorsky's award was overturned on judicial review. Applying the test established by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*,³² the Divisional Court confirmed that once a plaintiff has established that a workplace standard is *prima facie* discriminatory – which was conceded by the County of Simcoe – the onus shifts to the employer to prove on the balance of probabilities:

- That the employer adopted the standard for a purpose rationally connected to the performance of the job
- That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose

- That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer

The Court confirmed that the employer, or in this case the Ministry, was entitled to choose the purpose or goal of the workplace standard so long as that decision was made in good faith. Based on the evidence, the Ministry's requirement that all paramedics hold a Class F license was intended to ensure the highest level of health and safety to those who are served by ambulance paramedics. The Court ruled that once the arbitrator found that the requirement that all paramedics must be able to drive an ambulance was enacted in good faith to maintain the highest level of health and safety in the operation of the land ambulance service, and was rationally connected to the performance of the job of ambulance paramedic, he "was required to determine whether or not the standard was reasonably necessary to achieve the employer and the regulator's goal of providing the highest level of health and safety to those served by ambulance paramedics" – not "whether the standard was reasonably necessary to achieve the goal of reasonable safety."

In overturning Arbitrator Gorsky's decision as indefensible on either the facts or the law, the Court ruled that the County of Simcoe was required to unequivocally establish the existence of concerns relating to safety. It was not required to show actual harm.

The Divisional Court's decision attempts to balance the competing interests of human rights on one hand, and the health and safety of patients and the public on the other. The Court sent a clear message that an employee's human rights will not trump an employer's right to adopt a *prima facie* discriminatory job requirement that is directly related to the health and safety of workers and the general public when the employer can show that the job requirement is reasonably necessary to achieve the employer's health and safety purpose. While the employer is not required to show actual harm, it must unequivocally establish the existence of serious risks relating to health and safety.

II. ONTARIO LABOUR RELATIONS BOARD RECOGNIZES SANCTITY OF PRIVILEGED INTERNAL ACCIDENT INVESTIGATION REPORTS

In some Canadian jurisdictions, occupational health and safety regulators have increasingly sought to obtain internal investigation reports created by organizations after serious workplace accidents by either requesting or ordering disclosure of internal investigation reports. In two recent decisions involving applications to suspend such orders, the Ontario Labour Relations Board ruled that the production of an internal accident investigation report could cause serious prejudice to the employers' legal position, and the order were suspended.

In *Blue Mountain Resort Limited v. Ahrens*³³ the employer, Blue Mountain, appealed an Order issued by an OHS Inspector and applied to have the portion of the Order requiring production of a National Ski Area Report suspended on the basis that it was protected by litigation privilege.

The OLRB applied the three-pronged test used to assess the merits of a request to suspend an Inspector's order made under the Ontario *Occupational Health and Safety Act*:

- a) Whether the suspension of the order would endanger worker safety;
- b) Any prejudice accruing to the parties from the suspension or lack of suspension of the order; or
- c) Whether the applicant has made out a strong *prima facie* case for a successful appeal of the order.

The OLRB ruled that since the Order related to disclosure of the NSA Report in relation to an accident that had already occurred, any decision relating to the request for the suspension of the Order would not impact the ongoing safety of workers at Blue Mountain.

With respect to the second prong of the test, the OLRB acknowledged that the “disclosure of a report that is properly subject to litigation privilege could cause serious prejudice to Blue Mountain’s legal position.” Conversely, if the Order was upheld on appeal, there would be no harm to the Ministry of Labour’s legal position. Further, there was no evidence to contradict Blue Mountain’s assertion that the report was protected by litigation privilege.

Based on the three-pronged test, the OLRB granted Blue Mountain’s application to suspend the Order requiring the disclosure of the Report.

Similarly, in *Aecon Construction Group Inc. v. Cement Mason - Local 598, Jim Boniface, Inspector*,³⁴ Aecon Construction Group Inc. applied to the OLRB to suspend a similar Inspector’s Order relating to the disclosure of an incident investigation report.

The OLRB applied the three-pronged test outlined above and concluded that:

- (1) Suspension of the Order would not endanger workers’ health and safety since it pertained only to the production of a document which appeared to form part of Aecon’s internal investigation process; did not require Aecon to take any preventative measures to protect the health and safety of the workers; and the Inspector had allowed work to continue at the project despite the fact that he had not been provided with the Report;
- (2) Aecon would bear the full burden of the prejudice if it was compelled to disclose the Report to the Inspector before it had an opportunity to fully argue its appeal of the Order because once the Report, over which it asserted privilege, was given to the Inspector, the appeal would be moot;
- (3) The “concept of privilege, including both solicitor-client and litigation privilege, serves an important role within our legal system; namely, to allow parties to communicate freely and fully with counsel and to prepare for actual and/or anticipated litigation. Requiring production in the face of, but prior to determining, a claim of privilege would have a large negative effect upon, if not entirely eliminating, the very purposes that the concept of privilege was developed to protect and promote”;
- (4) In an application to suspend an order requiring the disclosure of a document, the OLRB is required to simply assess the relative strength of, rather than actually determine, the applicant’s case for its appeal. The OLRB found that Aecon had made an extremely forceful *prima facie* case for appeal;
- (5) Given that the issue to be determined in Aecon’s appeal (*i.e.*, whether or not the Report was privileged) was primarily legal in nature, rather than being directly related to the Inspector’s onsite observations and conclusions, “there is no compelling reason to extend any great deference to his decision concerning the production of this Report.”

The OLRB’s finding that employers should not be required to produce privileged documents to an Inspector is in line with the 2009 decision of the Ontario Court of Appeal in *R v. Bruce Power Inc.*³⁵ In that case, 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 is closely linked to the right to a fair trial.

In the aftermath of a serious workplace accident or critical OHS event, we encourage prompt, thorough, internal investigations into the circumstances to preserve details as a strategic defensive step. Ideally, an internal investigation will be prepared at the request of counsel and for the predominant purpose of ensuring that the organization obtains legal advice. In the absence of solicitor-client privilege, litigation privilege can also be claimed where the organization reasonably expects that OHS, civil or workers’ compensation litigation may arise from the incident.

Should a regulatory OHS inspector request the disclosure of an internal privileged report, it is essential for the employer to assert privilege. If an Inspector issues an order for the document alleged to be privileged, the employer should:

- (1) Appeal the order requiring production of the privileged document pursuant to relevant occupational health and safety legislative provisions; and
- (2) Along with the appeal, file an application to suspend the order requiring production of a privileged document. It is important to note that in most jurisdictions the filing of an appeal does not automatically suspend the order being appealed.

III. RECORD-SETTING FINE IMPOSED ON FORD MOTOR COMPANY OF CANADA

OHS penalties have been creeping steadily upwards across Canada. In May, 2010, a Canadian high water mark for OHS sentencing was reached when a penalty totalling over \$1,000,000 was ordered against Ford Canada.³⁶ The employer was fined a total of \$850,000, plus an automatic victim assistance surcharge of \$212,500, following two separate incidents in which workers were fatally injured.

The first fatality occurred on January 31, 2008, when a worker standing beside a forklift was fatally injured at Ford Canada's Oakville assembly plant after a colleague reversed his forklift and crushed the worker between the two forklifts. The Ministry of Labour investigation revealed that the forklift operator did not keep a clear view of the vehicle's path of travel while reversing.

The second fatality, which occurred on January 14, 2009, involved a worker driving a lift truck carrying an unsecured pallet at Ford Canada's Bramalea parts distribution centre. The pallet struck a storage rack and the worker was crushed between the pallet and the vehicle. The Ministry of Labour investigation found that Ford Canada's material movement policies and procedures were not adequate. Ford Canada pleaded guilty to two counts of failing to take all reasonable precautions in the circumstances to protect the safety of workers. It is noteworthy that the corporation had a prior conviction for a workplace fatality.

Prior to the Ford decision, the highest fine imposed by a Canadian court for a violation of OHS laws was \$750,000 plus surcharge. In that case, Inco Ltd. was fined for three violations of the Ontario *OHS*A resulting from the death of a worker, but the penalty was ultimately reduced on appeal to \$500,000 plus surcharge. While these penalties pale in comparison to multi-million dollar OSHA penalties in the United States, they signal an important upward trend in sentencing for serious workplace safety violations.

IV. CRIMINAL PROSECUTIONS FOR OHS ACCIDENTS POST BILL C-45

Criminal prosecution following a workplace accident remains rare despite the Bill C-45 amendments to the *Criminal Code of Canada* in 2004, which facilitate criminal prosecution of an organization for criminal negligence. Nevertheless, from time to time we continue to see charges against employers alleging criminal negligence arising from workplace accidents. The police will investigate criminal negligence charges as they deem appropriate and have done so in two cases currently before Ontario courts. Criminal negligence charges can be pursued concurrently with OHS regulatory proceedings. Further, one case before the courts in 2010 demonstrates that even a private prosecution for criminal negligence following a workplace accident may be commenced or backed by a trade union. Details of these three cases of interest follow.

In February, 2010, the Sault Ste. Marie Police Service charged 1531147 Ontario Limited, operating as Millennium Crane Rentals, an individual crane owner, and a crane operator with criminal negligence causing death. The accident occurred on April 16, 2009, while the City of Sault Ste. Marie's Public Works Department was performing sewer work in a City landfill excavation. The City contracted with Millennium Crane to provide a mobile crane and crane operator to help place concrete structures into the excavation. While all facts are not publicly known, it appears that the crane fell into the excavation while it was being repositioned. Two City employees were working in the excavation at the time. One employee was fatally injured, while the second was not hurt. Following a ten-month investigation, criminal negligence charges were commenced against Millennium Crane, the crane owner and the crane operator, marking the first time such charges have been made against an Ontario corporation since the Bill C-45 amendments to the *Criminal Code*. If convicted, Millennium Crane faces an unlimited fine and each individual charged faces a maximum sentence of life imprisonment. The Ministry of Labour has also filed five charges under the Ontario *OHS Act* against Millennium Crane, as well as against the crane operator for allegedly operating the crane in a manner that endangered himself and other workers. The cases are currently before the courts.

More recently, on October 13, 2010, Toronto Police charged Metron Construction Corporation and three individuals each with four counts of Criminal Negligence Causing Death and one count each of Criminal Negligence Causing Bodily Harm. The charges arise from a workplace accident that occurred on Christmas Eve 2009 in which four workers were killed and one seriously injured after falling from a work platform that collapsed. The charges are to be before the Ontario Court of Justice on October 13, 2010. The criminal charges follow charges under the Ontario *Occupational Health and Safety Act*, which were laid against Metron Construction and some of those now facing Criminal Code charges in August 2010. Those charges also remain before the courts.

In addition, a union is backing criminal negligence charges against an employer following a fatal workplace accident in British Columbia. In approximately June, 2010, the United Steelworkers commenced a private prosecution by filing an Information (a formal charge) in the Provincial Court of British Columbia against Weyerhaeuser, a forest products company. This is the first time a private prosecution has been commenced alleging criminal negligence by a corporation since Bill C-45 amended the *Criminal Code* in 2004. The Information filed by the United Steelworkers alleges that Weyerhaeuser was criminally negligent in the 2004 death of a sawmill worker who was smothered by wood debris in a hopper. The charge alleges that Weyerhaeuser management and the supervisor who assigned the task to the worker knew that the task was unsafe.

Following the accident, Weyerhaeuser was fined \$297,000 by WorkSafe BC for violating British Columbia's Occupational Health and Safety Regulation, but no criminal charges were filed. A private hearing will be held in October 2010 to allow a Provincial Court Judge or Justice of the Peace to hear all of the evidence against Weyerhaeuser and to determine if a summons should be issued against the company.

V. BILL 168 ADDS VIOLENCE AND HARASSMENT PROVISIONS TO ONTARIO *OCCUPATIONAL HEALTH AND SAFETY ACT*

In December, 2009, Ontario became the latest Canadian jurisdiction to add provisions requiring worker protection from violence and harassment into its OHS legislation. Ontario workplaces were given until June 15, 2010, to ensure their compliance with the new workplace violence and harassment provisions contained within the Bill 168 amendments to the Ontario *OHS Act*.

The amendments contain seven key areas of change.

First, Ontario employers with more than five workers regularly employed at the workplace are required to prepare and post both a workplace violence policy and a workplace harassment policy. Both workplace violence and harassment are now specifically defined in the Ontario *OHS*A.

Second, employers are required to develop and maintain programs to implement workplace violence and workplace harassment policies. The legislation sets out separate, specific elements for workplace violence programs and workplace harassment programs.

Third, workplace violence risk assessments are required, in consultation with Joint Health and Safety Committees or worker representatives.

Fourth, workers must receive information and training about workplace violence and workplace harassment policies. The obligation to provide training and information includes a new requirement to inform workers about a person with a history of violent behaviour who the worker may encounter during the course of his or her work.

A fifth new provision gives workers an express right to refuse work where they have reason to believe that they are likely to be endangered by workplace violence.

Sixth, the Bill 168 amendments require employers to take every precaution reasonable in the circumstances for protection of a worker if the employer becomes aware, or ought reasonably to be aware, that domestic violence would expose a worker to physical injury in the workplace.

Finally, the amendments require employers to prepare a notice under section 52 of the Ontario *OHS*A if a worker is disabled from performing his or her regular duties or requires medical attention as a result of workplace violence.

Existing Canadian OHS legislative schemes dealing with workplace violence and harassment vary significantly. Some jurisdictions include both violence and harassment within OHS statutes. Some include only violence, while a few others (New Brunswick, Northwest Territories, Nunavut and the Yukon) still do not include either subject matter within employer obligations or worker rights in OHS legislation. Canadian organizations with operations in multiple jurisdictions face an interesting and somewhat complex challenge when crafting workplace violence and harassment policies and programs given the varying breadth of provisions and definitions in different jurisdictions. However, it must always be remembered that occupational health and safety provisions establish minimum standards. Many progressive organizations have adopted violence and harassment policies and programs that draw from the best practices in all jurisdictions. Employers are well advised to keep in mind that workplace violence and harassment are complex, multifaceted human resources issues involving employer responsibilities and risks under OHS, workers' compensation and human rights legislation, and demanding attention due to common law requirements for respectful workplaces.

VI. ONTARIO COURT RULES ON LIMITATION FOR WORKPLACE SAFETY AND INSURANCE BOARD PROSECUTIONS

Section 149 of the Ontario *Workplace Safety and Insurance Act* permits prosecution of an organization or individual for knowingly making false or misleading statements to the Workplace Safety and Insurance Board, or for willfully failing to inform the WSIB of a material change in circumstances. Section 157.1 of the Ontario *WSIA* provides that there is no limitation period for prosecuting an offence under section 149. The general limitation period for a prosecution under the Ontario *WSIA* requires commencement of the prosecution not more than two years after the day on which the most recent act or omission upon which the prosecution is based comes to the knowledge of the WSIB. Prior to 2001, there was also an express two year limitation period for alleged offences under section 149.

In 2009, a Justice of the Peace held in *WSIB v. Commercial Spring and Tool Co.* that section 157.1, which states that “there is no limitation prosecution period for prosecuting an offence under section 149,” was the same as being silent on that subject. Accordingly, the general six month limitation period under the *Provincial Offences Act* of Ontario, which applies where no limitation period is prescribed in a provincial statute, governed. Since the prosecution had not commenced within the six month period, the Justice of the Peace quashed all of the charges.

The Ontario Superior Court of Justice overturned that decision.³⁷ The question, the Court stated, was whether the words “no limitation period for prosecuting” in fact prescribe a time limit, namely an infinite time for prosecution. The Court considered the context of the Ontario *WSIA*, and the WSIB’s statutory objective of providing compensation to injured workers and returning injured workers to work. The statutory scheme requires an employer to report a workplace accident in both a timely and truthful manner. If the employer’s report is false or misleading, then a key remedial purpose of the legislation is thwarted. Alleged contraventions of section 149, the Court held, go to the heart of the purpose of the legislation. The Court therefore ruled that there is no limitation period whatsoever for prosecuting an offence under section 149 of the Ontario *WSIA*. Accordingly, the decision of the Court below was quashed and the case was remitted for trial.

VII. UTILITY COMPANIES RULED EMPLOYERS UNDER THE ONTARIO OCCUPATIONAL HEALTH AND SAFETY ACT

On April 24, 2003, seven people were killed in an explosion and fire at a two-storey commercial plaza. The incident was the second largest fire death in Toronto’s history. The Fire Marshall’s Office concluded that the explosion occurred after a backhoe performing excavating work along a nearby roadway caused a three-quarter inch gas line to break. The break caused natural gas to leak into part of the basement of the commercial plaza, where it was ultimately ignited by an undetermined source.

As a result of the accident, Enbridge Gas Distribution Inc. (the owner of the gas service), Precision Utility Limited (the company contracted by Enbridge to locate and mark the gas service), and Warren Bithulithic Limited (the company performing the excavation work), were charged with offences under the Ontario *OHSA* and the *Technical Standards and Safety Act*. During the trial, Warren pleaded guilty to an offence under the *TSSA*. Enbridge and PUL continued to defend against the charges and, at the conclusion of the prosecution’s case, brought a motion for a directed verdict arguing, in part, that neither of them was an “employer” as defined by the Ontario *OHSA*. The trial court accepted that argument and dismissed all charges against Enbridge and PUL.

The prosecution appealed the dismissal of the charges to the Ontario Superior Court of Justice. On April 14, 2010, that Court allowed the appeal and ordered a new trial.³⁸ In allowing the appeal, the Court overturned the finding that neither Enbridge nor PUL was an employer as defined by the Ontario *OHSA*. The trial Court had concluded that neither was an employer within the meaning of the Ontario *OHSA* because they were on the project to perform a very discrete

function, the location of the gas utilities, and generally had nothing to do with the workplace nor control over it. The Superior Court found that the trial Court's conclusion was unnecessarily restrictive and not in keeping with established jurisprudence regarding the definition of "employer" and an employer's obligations under the Ontario *OHS*A. The Superior Court followed the Ontario Court of Appeal's decision in *R. v. Wyssen*,³⁹ and noted that the:

duties imposed on an "employer" [under the *OHS*A] are undeniably strict and, in my opinion, non-delegable. The legislature clearly intended to make an "employer" responsible for safety in the "workplace." The employer's duty under the Act and the Regulations cannot be evaded by contracting out performance of the work to independent contractors.

Ultimately, the Superior Court held that:

All employers working around the same project have the responsibility to ensure the safety not only of their own employees, but also of others who are working on the project. Their responsibility to exercise that due diligence should not be dependent on their contractual relationship to other companies, nor on whether workers on the project work directly for them or their subcontractor, nor on whether their function in a discrete one.

At this point, it is unclear if and when a new trial will begin. Enbridge and PUL have sought leave to appeal; however, the Superior Court's decision regarding the application of the term "employer" was not included in the grounds of appeal. The Court of Appeal heard the application for leave on August 26, 2010 and reserved its decision.

Although the Superior Court's decision does not represent a new or different approach to the definition of an "employer," it serves as a reminder that courts will interpret the term broadly and expect employers to discharge their duties as they apply to the circumstances. The nature and scope of the duties to be discharged will vary. For instance, an organization will not be expected to provide protective equipment to workers who are not its employees or contractors; however, the organization may be expected to ensure that protective measures or procedures, which could include information and instruction, are implemented if the work performed by the organization exposes other workers to a health and safety hazard. In assessing and indentifying the full scope of its obligations as an employer, an organization should consider:

- The health and safety hazards to its own workers arising from the work they will perform
- The health and safety hazards, to which its own workers are exposed, arising from the work performed by others
- The health and safety hazards to others arising in or from the work to be performed by its own workers, including any hazards that may remain after the organization's work is completed
- The nature of the supervision provided at the workplace by the organization or other organizations

Considering these factors should allow the organization to identify its scope of responsibility as an employer so that the steps necessary to protect workers can be carried out.

VIII. FEDERAL COURT RULES ACCIDENT INVESTIGATIONS NEED NOT BE "JOINT" INVESTIGATIONS

In November 2006, sudden moderate turbulence caused injuries to four flight attendants on a flight from Shanghai, China to Vancouver. The accident triggered Air Canada's obligation under the *Canada Labour Code* (the "Code") to investigate. The Code required the Work Place Committee ("WPC") to participate in the investigation. Accordingly, an individual from management and another represented by CUPE were appointed as the respective management and employee representatives of the WPC for the investigation.

Approximately two weeks after the accident, CUPE filed a complaint with Transport Canada alleging that Air Canada had failed to comply with paragraph 135(7)(e)⁴⁰ of the Code because the employer co-chair had refused to undertake a "joint" investigation of the accident. On March 2, 2007, Transport Canada issued a direction to Air Canada. The direction did not relate to section 135(7)(e) of the Code, but rather to sections 125(1)(c)⁴¹ and 135.1(8)(b)⁴² which, respectively, create the obligation to investigate the incident and to designate members to perform the functions of the committee.

On February 26, 2008, a Transport Canada Occupational Health and Safety Officer wrote to Air Canada for information about the actions taken since the March 2, 2007 direction. An Assurance of Voluntary Compliance was issued on March 19, 2008, which required the WPC to forward its report into the accident. Following a meeting of the WPC, the report was completed. However, the employee members of the WPC refused to sign off on the report as they maintained that the investigation had not been conducted jointly. Air Canada provided the report and on December 23, 2008, the Health and Safety Officer issued a decision relating to the December 5, 2006, complaint. In the decision the officer stated:

We have reviewed and investigated your complaint and have determined that it appears the employer has complied with the *Canada Labour Code*, Part II [...] by having the work place health and safety committee members participate in a joint hazardous occurrence investigation of Air Canada flight 038 incident, occurring on 19 November 2006, as provided in an email [from the employer representative of the WPC]. We consider this file closed.

CUPE applied to the Federal Court for judicial review of this decision.

In dismissing the judicial review application,⁴³ the Court noted that it was clear that section 125 of the Code and section 9.3 of the *Aviation Occupational Safety and Health Regulations*⁴⁴ obligated Air Canada to investigate the accident, and that pursuant to paragraph 135(7)(e) of the Code, the WPC was to participate in the investigation.

The Court also noted that following the accident, a number of investigatory steps were conducted with the WPC's participation. These steps included a meeting following the accident, interviews with witnesses, reviews of witness reports, and verification of weather patterns for the involved flight. Ultimately, the Court held that the WPC was to actively participate in accident investigations but that the investigation need not be conducted jointly, stating:

There is no requirement in the [Code] for a joint investigation. The obligation is the participation of the WPC. [...] [W]ords such as "joint" appear to have been adopted by people who work in this area. However, the adoption of such terms cannot oust the clear language of the statute nor give rise to substantive rights.

The decision is clear that while workplace committees in federally regulated workplaces must participate in investigations of workplace accidents and other hazardous occurrences, the manner in which the workplace committee participates will be decided by each committee. In this case, the Court did not put significant weight on having the workplace committee physically present at any investigation. This is not to say that the committee is not entitled to be physically present during an investigation; rather, it confirms that flexible protocols or practices can be developed and used to facilitate the participation of the workplace committee in an investigation.

IX. TRUCKING COMPANY NOT REQUIRED TO HAVE JOINT HEALTH AND SAFETY COMMITTEE

Under section 9(2) of the Ontario *OHS*A, a Joint Health and Safety Committee must be established at a workplace where 20 or more workers are regularly employed. Following a motor vehicle accident involving a truck driver working for United Independent Operators Limited, the Ontario Ministry of Labour charged United with breaching section 9(4) of the Ontario *OHS*A by failing, as an employer, to ensure that a joint health and safety committee was established and maintained at its workplace. The Ministry maintained that the truck drivers were "regularly employed" at United's head office – the sole workplace – and, as such, the 20 worker threshold was exceeded and a Joint Health and Safety Committee was required.

United carried on a business that primarily involved the trucking of aggregates between quarries, gravel pits and construction sites. It maintained a staff of approximately 11 people at its head office. The trucking of the aggregates was performed by independent operators engaged by United. The number of truck drivers working for United at any given time ranged from 30 to 140, depending on the season. The truck drivers would attend at the head office to be, among other things, screened to drive under United's banner, drop off paperwork, collect paycheques, and attend safety training. The truck drivers owned and operated their own trucks and were paid without any deductions for income tax, the Canada Pension Plan or health tax. The drivers were responsible for providing their own *Workplace Safety and Insurance Act* coverage and for all costs associated with the operation of their trucks. The drivers were free to turn down a work assignment or to drive for someone else.

United was acquitted after the trial Court found that the truck drivers were not "regularly employed" at the head office. The Crown appealed, arguing that the trial judge applied an overly narrow interpretation of the term "regularly employed." The Crown's appeal was dismissed.⁴⁵ The appeal Court upheld the decision that the truck drivers were not regularly employed at the head office because the relationship between United and the truck drivers was "too remote to permit a conclusion to be drawn that 20 or more workers were employed at the [...] workplace." The appeal Court held that "regularly employed" references a traditional employment relationship and does not mandate the establishment of a joint health and safety committee at a workplace where the truck drivers were not employed." In reaching this conclusion, the appeal Court accepted the analysis of the OLRB in *526093 Ontario Inc. (c.o.b. as Taxi Taxi)*,⁴⁶ where the OLRB held that the Legislature's use of the word "employed" in subsection 9(2) indicates an intention that a committee would be required where 20 or more individuals in an employment relationship with the employer, rather than a contractual relationship, were regularly employed at the workplace. In reaching its decision, the OLRB compared the language of subsection 9(2) to the definition of "employer" in the subsection 1(1) of the Ontario *OHS*A. In that section, "employer" is defined as a "person who employs one or more workers or contracts for the services of one or more workers." The OLRB concluded that the Legislature used the word "employ" when referencing a traditional employment relationship, and the phrase "contracts for services of" when referring to an independent contractor relationship.

The Ontario Court of Appeal granted the Crown leave to appeal on December 21, 2009, and will hear the appeal on November 4, 2010. This is the first time that the Court of Appeal will be ruling on the threshold requirement to establish a Joint Health and Safety Committee. The Court of Appeal's decision should provide useful guidance to employers who retain contractors. Employers with such workplaces are well advised to watch for the release of the Court of Appeal's decision in order to ensure that they are in compliance with the legal requirements respecting Joint Health and Safety Committees.

Pensions & Benefits

I. CASE LAW UPDATE

Pension Class Action Dismissed: Plan Improvements Not to the Detriment of Retirees (Please refer to our *Pension Pulse* dated October 15, 2009)

In *Lieberman v. Business Development Bank of Canada*,⁴⁷ the B.C. Supreme Court distinguished and clarified the roles and duties of an employer/plan sponsor on one hand, and a plan administrator on the other. In this class action law suit, a group of retirees alleged that the Bank breached its fiduciary duties toward the retirees by amending the pension plan solely for the benefit of active employees, taking contribution holidays, and paying expenses from the pension fund.

The Court held that the fact that an employer is both the administrator of a pension plan and trustee of the pension fund does not prevent it from amending or terminating the plan. When doing so, the employer is acting neither as administrator nor trustee, but as employer and a party to the contract of employment. Accordingly, insofar as a plan amendment affects employee compensation, there may be a general duty of good faith, but not a fiduciary duty, particularly toward retirees who are not affected by the amendments. Further, the Court found that the Bank had taken contribution holidays in accordance with the advice of its actuary and such contribution holidays did not constitute a form of diversion of the pension fund away from the plan members and for the Bank's benefit.

It is important for employers and pension committee members to properly distinguish between the roles of employer/plan sponsor and administrator. Pension committees frequently act in both capacities. Being mindful of the distinctions will affect what decisions are made, how they are made, and by whom in the operation of a pension plan.

Reduction in Retiree Benefits Sanctioned in British Columbia (Please refer to our *Pension Pulse* dated October 7, 2009)

The B.C. Supreme Court has held that the reduction in retiree benefits for a group of 27,000 government retirees did not constitute either a breach of contract or a breach of fiduciary duties toward the retirees.⁴⁸

The Court held that the reduction in retiree benefits did not constitute a breach of contract because the government did not offer lifelong premium-free retiree benefits in the initial offer of employment. Any subsequent written and verbal communications to employees did not alter the terms of employment because the employees did not give fresh consideration. Furthermore, the Lieutenant-Governor was given discretion in the legislation to set premium rates from time to time.

Nor were the retiree benefits vested in the retirees. The Court distinguished the Supreme Court of Canada's seminal decision on the subject of retiree benefits in *Dayco (Canada) Ltd. v. CAW*,⁴⁹ which held that in the circumstances of that case, retiree benefits negotiated as part of a collective agreement vested in the retirees at the point of retirement. The Court distinguished *Dayco* on the grounds that the retiree benefits in this case were not part of a collective agreement or employment agreement.

The Court held that the government did not have a fiduciary duty to provide lifelong premium-free retiree benefits because the retirees did not have a reasonable expectation that the government would always act exclusively in their best interests, potentially at the expense of the public interest. If the government had such a duty, it would cause a problem with "inter-generational equity," such that these retirees would have the benefit of lifetime premium-free status and later retirees would not enjoy similar benefits.

While this decision involved government retirees covered by a statutory regime, it is of interest to private sector employers, in particular the discussion of what the “contract” is between an employer and employees *vis-à-vis* retiree benefits. The Court discounted the legally binding nature of employee and retiree communications. The Court’s discussion of fiduciary duties and whether employees could reasonably expect to have premium-free retiree benefits for life is also of interest. Employers wishing to modify retiree benefits must always tread carefully.

Age-Based Early Retirement Program Upheld (Please refer to our *Pension Pulse* dated February 22, 2010)

In *Kovacs v. Arcelor Mittal Montreal*,⁵⁰ the Human Rights Tribunal of Ontario held that employers in Ontario may establish early retirement windows and other incentives in pension plans without running afoul of prohibitions against age discrimination in the Ontario *Human Rights Code*.

The employer, Arcelor Mittal Montreal, acquired a company that was in financial difficulty. Arcelor decided to close one of the acquired company’s Ontario facilities and entered into a memorandum of agreement with the United Steelworkers, the bargaining agent of the facility’s employees, in respect of the closure. Part of the agreement involved an early retirement program which provided enhanced pension benefits for employees who satisfied one of the following criteria:

- 30 or more years of service
- At least age 55 with 15 or more years of service
- At least age 52 with 25 or more years of service

The applicant was 47 years old with 27 years of service. But for the fact that he had not attained age 52 when the program was introduced, the applicant would have qualified for the enhancements. He alleged that his ineligibility for enhanced pension benefits constituted unlawful discrimination contrary to the *Code*.

The applicable law in this area is somewhat circuitous. Section 5 of the *Code* states that every person has a right to equal treatment with respect to employment without discrimination on certain grounds, including age. Section 25(2.1) of the *Code* provides an exception for pension and benefit plans that comply with the Ontario *Employment Standards Act, 2000* and its regulations.

Section 44(1) of the *ESA* prohibits discrimination by reason of age, sex or marital status in the provision of benefit plans for employees, except as prescribed. Section 4(3) of Regulation 286/01 under the *ESA* states that the prohibition against age discrimination in section 44(1) does not apply to the establishment of normal retirement or voluntary early retirement dates under a pension plan, provided the pension plan complies with the Ontario *Pension Benefits Act*.

The *PBA* contains minimum standards for pension plans. It requires pension plans to have a normal retirement date of no later than age 66 and an early retirement date within ten years of the normal retirement date. The *PBA* does not prohibit earlier normal or early retirement dates. For example, a pension plan may lawfully have a normal retirement date of 62 and an early retirement date of 52.

The net result of these provisions of the *Code*, the *ESA* and the *PBA* is that employers in Ontario may establish early retirement windows and other incentives in pension plans without running afoul of prohibitions against age discrimination. The Tribunal therefore dismissed the complaint.

Plain and Obvious: Court Cannot Compel Employer to Wind Up Its Pension Plan (Please refer to our *Pension Pulse* dated March 31, 2010)

In *Lomas v. Rio Algom Limited*⁵¹ the Ontario Court of Appeal ruled that the Court does not have jurisdiction to make an order compelling an employer to commence proceedings to wind up its pension plan.

The Court confirmed that there is only one scheme for pension plan wind-ups in Ontario, the statutory scheme. There is no concurrent scheme in which plan members can make court applications for plan wind-ups outside the legislation's scope. For a court to order a plan wind-up in this manner would "violate the legislative scheme and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal."

What is an Actuarially Unreduced Pension Benefit? (Please refer to our *Pension Pulse* dated July 22, 2010)

As a result of a plant closure, an employer and union negotiated generous benefits for affected employees, including special early retirement provisions, supplementary bridge benefits and an early retirement allowance. However, the parties disagreed on whether employees who retired on pension were entitled to severance pay under the *ESA*.

A regulation made under the *ESA* provides that a severed employee who "retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have earned in the normal course of events for purposes of the pension plan" is not entitled to severance pay. An "actuarially unreduced pension benefit" is not defined in the *ESA* or the *PBA*.

In *C.A.W. v. Kitchener Frame Ltd.*,⁵² the Divisional Court upheld an arbitration award, which had held that:

- The wording in the regulation that refers to service credits that the employee would have expected to earn in the normal course refers to the value of benefits under the pension plan and whether a plant closure might prejudice the overall value of an employee's pension benefits by cutting short the opportunity to earn service credits
- The mere fact that an employee has lost the opportunity to earn further credited service to the normal retirement date does not constitute a reduction in pension benefits
- The determination of whether a pension benefit is actuarially unreduced takes into account bridge benefits and other ancillary benefits
- The commuted value of the pension benefits, including the value of any bridge benefits, early retirement enhancements and other ancillary benefits, is used in comparing pension benefits earned upon plant closure and those earned in the normal course (*i.e.*, if the plant had not closed)

The Divisional Court upheld the arbitrator's conclusion that the benefits upon plant closure were actuarially unreduced and therefore the employees were not entitled to severance pay under the *ESA*.

While employers may be relieved that the decision confirms that the mere loss of the opportunity to earn further credited service in a pension plan does not automatically entitle an employee to severance pay under the *ESA*, the converse is also true: an employee is not automatically disentitled to statutory severance pay just because he or she will retire early on pension that does not apply any reduction prior to the normal retirement date. The *ESA* regulation requires that any loss in service credits be taken into account in determining whether an employee's pension benefits have been prejudiced.

In determining whether severance pay is properly payable under the *ESA* for employees retiring on pension, employers, unions and arbitrators will be required to compare the value of pension benefits earned in the normal course with those provided upon termination of employment. The absence of an early retirement reduction applied to a pension for commencement prior to the normal retirement date may not be sufficient to avoid the *ESA* severance pay obligations.

II. PENSION REFORM

2010 has been the busiest year for pension reform in over 20 years. This section provides a snapshot of major pension reforms in various jurisdictions.

British Columbia and Alberta

In late 2008, B.C. and Alberta released a joint report entitled "Getting Our Acts Together: Pension Reform in Alberta and British Columbia." In early 2010, B.C. and Alberta released very similar consultation papers drawing upon some of the feedback received from the 2008 report. The papers focused on four broad categories of pension reform:

- Expansion of the Canada Pension Plan
- Creation of a voluntary defined contribution supplement to the CPP
- Modernization of pension standards to improve flexibility in plan design
- Reform of the *Income Tax Act* to promote tax-effective retirement savings
- Reform legislation in these two provinces is intended to be harmonized; however, no legislation has yet been introduced

Manitoba

The Manitoba government substantially amended its Pension Benefits Act, with most changes effective May 31, 2010. The most significant changes are:

- Immediate full vesting and locking-in for all service on or after July 1, 1976
- Provision for phased retirement benefits
- Harmonization of participation requirements for non-full-time members with most other provinces
- Limits on contribution holidays
- Requirements for pension committees for certain pension plans

Ontario (Please refer to our *Pension Pulses* dated June 24, 2010, and August 26, 2010)

Bill 236, *An Act to amend the Pension Benefits Act*, received Royal Assent in May, 2010. This sweeping pension reform bill followed many of the recommendations of the Expert Commission on Pensions released late last year. The main features are:

- Immediate vesting of pension benefits
- Extension of grow-in provisions to all terminations of employment for members who meet the 55-points requirement, except for termination for cause, with or without a plan wind-up
- Introduction of limited phased retirement measures
- Removal of partial wind-ups from the legislation

These changes will take effect on a date to be proclaimed.

On August 25, 2010, the Ontario government released a backgrounder outlining a second phase of its pension reform agenda. The proposals in the backgrounder will be introduced in the form of draft regulations. The main proposals are:

- Substantially increased premiums payable to the Pension Benefits Guarantee Fund, but no increase in level of benefits
- Recognition of irrevocable letters of credit to fund up to 15% of a pension plan's solvency liabilities
- Introduction of rules concerning contribution holidays and surplus entitlement
- Limitations on asset and liability smoothing
- Changes to investment rules, consistent with federal rules
- Exempting target benefit multi-employer plans and jointly sponsored pension plans from solvency funding requirements
- Easing of solvency funding requirements for pension plans in the broader public sector

Quebec

Pension reforms under Bill 30, the Quebec government's most aggressive and far-reaching pension reform package since 1990, generally came into effect on of January 1, 2010 and are as follows:

- Plan sponsors are entitled to use letters of credit to fund up to 15% of a plan's solvency liabilities in accordance with prescribed conditions.
- Each pension plan will be required to establish a contingency reserve provision for "adverse deviations."
- Annual partial or full actuarial valuations are required. Full valuations are required to be filed at least every three years.
- If an amendment reduces the plan's solvency ratio below 90%, the plan sponsor must fund the lesser of the cost of the amendment and the amount required to restore a 90% solvency ratio.
- Surplus assets may be "appropriated" to fund plan amendments, subject to certain conditions. Surplus assets may only be used to pay for plan amendments in a manner that is equitable as between active plan members and inactive plan members and beneficiaries

Nova Scotia

In March, 2010, the Nova Scotia government released a discussion paper on pensions. The most significant aspects of the paper include the following recommendations:

- Jointly Sponsored Pension Plans should be eligible for registration and regulation as a distinct type of plan.
- All plans should have an amortization period for deficits over a maximum of ten years. A "collar" of 5% should be provided.
- Ancillary benefits should be treated like all other benefits.
- The current requirements for partial wind-ups and elimination of surplus distribution on termination of individuals or groups should be eliminated.
- The current *Pension Benefit Act* provisions for "grow-in" benefits should be removed and plan terms alone should determine whether or not terminating employees are entitled to be eligible for early retirement subsidies

Federal Jurisdiction (Please refer to our *Pension Pulses* dated May 4, 2010, and July 2, 2010)

In June, 2010, the Department of Finance released the final amendments to the federal *Pension Benefits Standards Act, 1985* regulations concerning solvency funding requirements and quantitative investment limits. The changes are effective July 1, 2010, and apply to actuarial valuation reports for pension plan years ending on or after December 31, 2009.

III. INCOME TAX ACT

In July 2010, the federal government made a number of significant changes to the *Income Tax Act* that affect all registered pension plans in Canada. These changes increased the permitted surplus threshold for all pension plans in Canada from 10% to 25% for periods of pensionable service after 2009. The Canada Revenue Agency has stated that an actuarial valuation report with an effective date of December 31, 2009, or later may be used to reflect the increased threshold, even though the amendments had not yet come into effect at that time.

IV. FUTURE DIRECTIONS

CIA Releases Report on Canada's Pension System (Please refer to our *Pension Pulse* dated November 12, 2009)

In November, 2009, the Canadian Institute of Actuaries ("CIA") released a report entitled: "Retooling Canada's Ailing Pension System Now, for the Future: Canada's Actuaries Advocate Change." The report contains ten recommendations, described below (with our comments):

1. "Pensions should be included on the national agenda." Pensions are definitely on the national and provincial agendas: see the section entitled "Pension Reform."
2. "Regulators should develop a principles-based approach to the supervision and monitoring of pension plans." Pension legislation is, by its nature, public policy legislation and regulators already have a clear mandate to administer the legislation in keeping with the policy objectives.
3. "Disincentives to working past a fixed age in our current retirement system should be examined and rectified. We support facilitating innovative employment models that allow Canadians to work part time while collecting partial retirement benefits." Phased retirement is a good idea. Income tax rules and pension legislation in the federal sector, Quebec, B.C., Alberta and Manitoba have already been changed to allow and accommodate phased retirement. Pension legislation in every jurisdiction should follow suit.
4. "More information should be made available to Canadians, so they can clearly understand the risk factors associated with retirement. Plan sponsors should be encouraged to present information to their plan members that effectively addresses this need. Access to independent financial advice would also be beneficial. We also support the development of tools..." With regard to defined benefit pension plans, employers are already required to provide detailed disclosure with regard to any plans they sponsor. Any requirement to provide information outside the boundaries of an employer's plans could unnecessarily open the door to potential liability.
5. "Introduce legislation that allows employers to set up 100% employer-funded Pension Security Trusts (PST) that would be separate from, but complementary to, the regular defined benefit pension funds." While the concept in theory is salutary, it would introduce yet another layer of complexity for defined benefit pension plans. This could further detract from the viability of the defined benefit plan from the perspectives of private sector employers.
6. The Report states that, assuming the above PST concept is adopted, legislation should be introduced requiring sponsors of defined benefit pension plans to "establish a Target Solvency Margin related to the risks in the plan's assets and liabilities and be funded by a Pension Security Trust, a letter of credit or the regular pension fund." The introduction of solvency funding has resulted in undue complexity, cost and burden in the funding of defined benefit pension plans, particularly in the current low-interest environment. Plan-specific Target Solvency Margins would add more complexity. This concept, similar to the PST, while well intentioned may not be workable in practice.
7. "The establishment of a task force with representation from the CIA and pension regulators to develop guidance on the required levels of Target Solvency Margins." Instead of focusing on ways to patch up the current solvency funding requirements, it may be preferable to propose simpler funding rules, permitting greater flexibility for employers.
8. "Changes to the tax rules, which would allow defined benefit plan sponsors to make contributions to develop surpluses that are the greater of two times the Target Solvency Margin or 25% of the going concern liability." Mr. Flaherty, the Federal Minister of Finance, has already announced very similar changes.

9. "Legislation to protect underfunded pension benefits, possibly by providing them with treatment similar to that of unpaid salaries in bankruptcy and restructuring proceedings." The federal *Bankruptcy and Insolvency Act* and the *Companies Creditors Arrangement Act* were amended in 2008 and 2009 respectively to provide a super priority for employee contributions and employer current service contributions. These changes to bankruptcy and insolvency legislation were the result of lengthy consultations and debate. Any further changes to the legislation would have to re-address the competing interests of employers, employees, retirees, lending institutions and other creditors.
10. "Legislation should be modified to better handle the determination of benefits when the underfunded plan of a bankrupt employer is wound up." Better procedures are required for all pension plan wind-ups, whether underfunded or fully funded, and whether or not the plan sponsor is bankrupt.

Canada's Pension Pillars in Need of Repair: Report of Provincial Finance Ministers (Please refer to our *Pension Pulses* dated January 25, 2010, and March 25, 2010)

The steering committee of provincial finance ministers has published its report on retirement income adequacy in Canada and its proposals for improving pension plan coverage. The committee found that while the income needs of current retirees are fairly adequate, this will not be the case in future. The difference is largely attributable to declining pension plan coverage, inadequate personal retirement savings, and the inadequacy of the CPP/QPP. The picture is bleak and does not portend well for the future generation of retirees without significant change to the retirement system.

The committee proposed two models to buttress the retirement savings system, having regard to where the current problems exist and what solutions are most likely to be effective. The two proposed models are: (i) a "Canada Supplementary Pension Plan," which would be a defined contribution top-up plan adjoined to the CPP/QPP, and (ii) an expansion of the CPP/QPP defined benefits. The two models are not presented as mutually exclusive.

There appears to be a growing impetus behind some form of "super-plan" model to shore up the retirement savings system. The expert commission reports in Ontario, Nova Scotia and Alberta/British Columbia have all recommended supplementing the current system through the use of large province-wide or national plans. The Ontario government enacted legislation last year to permit the Ontario Teachers' Pension Plan and the Ontario Municipal Employees Retirement System to administer smaller pension plans.

Clearly, the level of benefits provided by the CPP/QPP is inadequate. Supplementing the CPP/QPP in some fashion would provide a quick fix to at least some of the retirement plan coverage issues in Canada. Participation rates in employer-sponsored plans are likely to continue to decline in future and certainly not increase. The regulation of such plans will continue to be complex, thereby discouraging the creation of new plans. A national solution that takes advantage of efficiencies is needed.

The above proposed solutions, whether the CSPP or the expanded CPP/QPP, will involve significant cost, both to employers and to employees. This should come as no surprise. There is also a large number of technical issues requiring further study, time and effort prior to implementation.

A lengthy transition period would likely be necessary to permit successful adoption of either of the proposals outlined in the report. Any changes of this nature to the CPP/QPP will also involve legislative action requiring the support of two-thirds of the provinces representing two thirds of the population. While the proposals of the committee are salutary, the devil will be in the details.

Workplace Privacy

Workplace privacy law continues to develop in Canada. Proposed amendments to the *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”), if enacted, will introduce significant changes for federally-regulated employers related to the collection, use and disclosure of employees’ personal information. In addition, over the past year cases have been decided in connection with privacy rights related to employment-related background checks, the introduction of documents and surveillance evidence at arbitration hearings and court proceedings, and the use of GPS devices in company vehicles.

I. PROPOSED AMENDMENTS TO THE *PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT*

The federal government introduced Bill C-29 to amend *PIPEDA* in May 2010, and the Bill continues to sit at the first reading stage. Of interest to federally regulated employers, some of the Bill C-29 amendments respond to calls to better address consent in the context of the employment relationships and business transactions.

New section 4.01 would exclude business contact information from the consent requirement where this information is collected, used or disclosed by an organization “solely for the purpose of communicating or facilitating communication with the individual in relation to their employment, business or profession.”

New section 7.2 would allow a federally regulated employer to collect, use and disclose personal information without the consent of the individual if “the collection, use or disclosure is necessary to establish, manage or terminate an employment relationship,” and the organization “has informed the individual that the personal information will be or may be collected, used and disclosed for those purposes.”

New section 7.3 would permit an organization to use and disclose employee personal information without consent for purposes other than those for which it was collected, in the context of a business transaction, provided that the information is: (i) used and disclosed solely for purposes related to the transaction; (ii) protected by appropriate security safeguards; and (iii) returned or destroyed if the transaction does not proceed. A “business transaction” is defined very broadly and would include a sale of all or part of an employer’s business.

II. USING A THIRD PARTY TO CONDUCT AN EMPLOYMENT-RELATED CRIMINAL RECORD CHECK

In November 2009, the Deputy Commissioner, RCMP Policing Support Services issued a directive to all heads of police agencies authorized to access the National Criminal Records repository maintained by the RCMP Canadian Police Information Centre database. The directive was issued in response to breaches of CPIC policies and related federal legislation as a result of certain practices undertaken by police agencies engaged with third party companies for the purposes of conducting name-based criminal record verifications.

Subsequently, CPIC issued an interim policy entitled “Dissemination of Criminal Record Information,” which applies to police agencies engaged with third-party companies conducting name-based criminal record verifications. The issues that the interim policy addresses include proper identity verification and obtaining informed consent of individuals undergoing named-based criminal record verifications. Also, pursuant to the interim policy, police service agencies engaged with third-party companies for the purpose of conducting name-based criminal record verifications are not permitted to perform criminal record name checks for “vulnerable sector” and “young person” purposes on behalf of the third party.

Identity Verification

The interim policy requires an individual undergoing a name-based criminal record verification (an “Applicant”) to provide the third party company (an “Agent”) with two pieces of identification, one of which must be government-issued and include the Applicant’s name, date of birth, signature and photograph. Copies of the identification documents must be provided with a signed “informed consent” form. Photocopies of the identification must be certified by the Agent, who must also confirm that the Applicant signing the informed consent is the individual on the government-issued photo identification. The agent verifying the identity of the Applicant must compare the signature on the government-issued identification to the signature on the informed consent. The interim policy also requires an Applicant to also provide all Applicant names, including: given names; surname; maiden name (if applicable); and any names that were changed in accordance with a legal name change (if applicable).

Informed Consent

The interim policy contains detailed requirements for obtaining an Applicant’s consent to a name-based criminal record verification. The following minimum criteria must be included on an informed consent form:

Identification of the Applicant: surname; given name(s); sex; date of birth; place of birth; current address; previous addresses, if any, within the last five (5) years.

Reason for the Consent: purpose of the criminal record verification; description of position; name of person or organization requiring the criminal record verification.

Signature of Applicant: When signing the informed consent, applicants should clearly indicate that they understand and sign to the purpose and intent of the name-based criminal record verification.

The consent information must expressly indicate that a search of the National Criminal Records repository maintained by the RCMP will be conducted based on the name(s) and date of birth provided by the Applicant.

The RCMP has facilitated a Working Group comprised of police service and public safety representatives from across Canada to help develop solutions with respect to the dissemination of criminal record information. The Working Group met on January 19-21, 2010, and has published a synopsis of its recommendations; however, a detailed report has not yet been issued. CPIC has stated its intention to update the interim policy based on the Working Group’s recommendations. In the meantime the interim policy continues to be in effect.

III. COURT UPHOLDS RESTRICTION ON MID-EMPLOYMENT CRIMINAL RECORD CHECKS

The City of Ottawa’s latest bid to defend its mid-employment criminal record check policy has been defeated by the Divisional Court.⁵³ This case arose out of a policy implemented by the City in 2002 that employees in designated positions (including firefighters) would be subject to a criminal record check every three years. All designated staff were required to provide the City with forms consenting to the criminal record check. If a check determined that an employee had acquired a criminal record, the City would perform an investigation and recommend a course of action.

The Ottawa Professional Firefighters Association grieved, arguing that requiring existing employees to submit to periodic criminal record checks was an unwarranted invasion of privacy. The Association did not challenge the aspects of the City’s policy that required new applicants to consent to a criminal record check as a precondition of being hired, or the requirement that on a case by case basis, firefighters could be required to consent to a criminal record check where justified on reasonable grounds.

In 2007, an arbitrator struck down the mid-employment aspect of the policy, finding that it constituted an unwarranted interference with the privacy rights of individual employees and went beyond the legitimate scope of the City's management rights under its collective agreement. The arbitrator rejected the City's argument that the particular duties and responsibilities of firefighters justified the policy and held that the duties of firefighters were similar to tradespersons or professionals who attend at a variety of premises.

The City of Ottawa's judicial review application seeking to quash the arbitrator's decision was dismissed. The Divisional Court ruled that it was reasonable for the arbitrator to decide that the mid-employment aspect of the policy was invalid. However, the Court went further and questioned whether, in light of the protection of privacy rights afforded by the Ontario *Municipal Freedom of Information and Protection of Privacy Act*, the City of Ottawa could ever compel an employee to consent to a criminal record check, and even whether the City of Ottawa and the Association could agree to such a requirement in their collective agreement. Since these issues were not dealt with by the arbitrator or counsel on judicial review, the Court recorded its reservations but left the issues to be decided in another case where they are actually raised and argued.

IV. EMPLOYMENT-RELATED CREDIT CHECKS MUST BE DIRECTLY RELATED TO THE DUTIES AND RESPONSIBILITIES OF THE POSITION

In *Mark's Work Wearhouse Ltd.*,⁵⁴ the Alberta Information and Privacy Commissioner found that a pre-employment credit check was not reasonably required to assess a candidate's ability to perform his prospective job responsibilities or to assess whether the candidate was prone to theft or fraud. As part of an application for a sales position, the candidate signed a consent for a "security clearance check" and a "credit check." However, after the prospective employer asked for an explanation of his credit history, the candidate filed a complaint with the AIPC that the collection of personal information related to his credit history was not reasonable given the job requirements and, therefore, violated the Alberta *Personal Information Protection Act*.

The investigator for the AIPC agreed and concluded that under the Alberta *Act*, it is not reasonable to collect credit information about a candidate unless that information is directly relevant to the duties and responsibilities of the position being sought. In this case, there was no relationship between the Mark's Work Wearhouse sales position and the credit check. Moreover, the candidate's credit information was unrelated to any tendency to engage in theft or fraud, and was not indicative of his ability to handle the financial responsibilities of the position. The investigator also concluded that there were less intrusive means available to the Mark's Work Wearhouse to achieve theft and fraud reduction. For example, the company had instituted a number of policies and procedures to reduce in-store theft or fraud, including policies and procedures ensuring minimal access to cash and stock-room merchandise, requiring management supervision of all cash register "cash-outs," and limiting the amount of cash in cash terminals.

V. FORENSIC HANDWRITING REPORT ADMITTED AT ARBITRATION HEARING

In *Amalgamated Transit Union v. Greater Toronto Transit Authority*,⁵⁵ the employer introduced a forensic handwriting report in an attempt to prove that the grievor had written inappropriate comments on a co-worker's sympathy card. The handwriting report compared the handwritten comments on the card to the grievor's writing on a "Request for Time-Off" and "Notification Report" that he had submitted to the employer, GO Transit. The union sought to exclude a forensic handwriting report from the arbitration proceeding, arguing that by submitting the grievor's handwriting samples from business documents, GO Transit had violated the grievor's privacy rights under the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"). GO Transit took the position that the documents were exempt from the application of *FIPPA* as they related to labour relations.

The arbitrator agreed with GO Transit, given that the documents used to conduct the handwriting analysis related directly to the grievor's employment, were used in furtherance of the employer's labour relations, and the employer reasonably anticipated labour relations proceedings from its allegations against the grievor. Further, the arbitrator accepted that GO Transit had been engaged in "meetings, consultations, discussions or communications" about the allegations against the grievor and used the employment-related records to fully investigate the allegations before disciplining the grievor.

For these reasons, the arbitrator found that *FIPPA* did not apply to the documents and, therefore, that GO Transit was not prohibited from disclosing them to the handwriting analyst. Accordingly, the arbitrator admitted the handwriting sample.

VI. INVESTIGATION PERFORMED FOR DEFENCE OF CIVIL ACTION IS NOT A "COMMERCIAL ACTIVITY" UNDER THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

In *State Farm v. Privacy Commissioner of Canada*,⁵⁶ the Federal Court provided guidance regarding the scope of "commercial activity" under *PIPEDA* and closed the door to litigants using *PIPEDA* to prevent surveillance or overcome privilege claims to obtain disclosure of surveillance evidence.

State Farm retained a private investigator to conduct surveillance on a plaintiff who alleged he was seriously injured in a motor vehicle accident with a State Farm-insured driver. State Farm claimed solicitor-client and litigation privilege over the resulting surveillance video and report, and did not disclose that material as part of the civil action. In response to the plaintiff's disclosure request under *PIPEDA*, State Farm took the position that *PIPEDA* did not apply to the surveillance because it was not collected in the course of "commercial activity."

The plaintiff filed a complaint with the Privacy Commissioner alleging that the surveillance and State Farm's refusal to disclose the video and report violated *PIPEDA*.

The key issue argued before the Federal Court was whether State Farm's gathering of evidence while acting for an insured driver in the defence of a third-party tort action was "commercial activity" within the meaning of *PIPEDA*. "Commercial activity" is defined in *PIPEDA* as "a particular transaction, act or conduct that is of a commercial character."

The Privacy Commissioner argued that State Farm's surveillance of the plaintiff, conducted by a third-party investigator, was done in furtherance of the insurance contract, which was part of State Farm's commercial business, so *PIPEDA* should apply. State Farm submitted that the defence of civil litigation, including the activities of a third-party investigator, did not fall within the commercial activity scope of *PIPEDA*.

In accepting State Farm's position, the Court recognized that *PIPEDA* must be interpreted and applied with flexibility, common sense and pragmatism. Since the primary activity, in this case the collection of evidence on a plaintiff by an individual defendant to mount their civil defence, was not a commercial activity under *PIPEDA*, then that activity remained exempt from *PIPEDA* when the defendant retained third parties (*i.e.*, State Farm and the private investigator) to carry out that activity on its behalf. In the Court's view, the primary activity was the dominant factor in the assessment of the application of the legislation, not the incidental relationship between the defendant and State Farm or State Farm and the private investigator.

Therefore, the Court concluded that the surveillance video and report prepared for State Farm to defend its insured were not subject to *PIPEDA* at all.

VII. GPS DEVICES DO NOT VIOLATE TRANSIT DRIVERS' OR CLIENTS' PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT RIGHTS

A transit driver filed a complaint with the Privacy Commissioner of Canada objecting to the installation of a GPS device in municipal transit vehicles available to mobility-reduced individuals.⁵⁷ He alleged that by tracking his daily movements, his employer was collecting his personal information without consent contrary to *PIPEDA*. He also alleged that the organization was improperly collecting clients' personal information because the GPS system made each client's name, address and pick-up/drop-off location fully viewable to a driver or any other person.

The Assistant Commissioner investigating the complaint found that the GPS device was not particularly privacy invasive. In fact, the information it collected was not substantially different from the type and quantity of information collected under the manual system that had previously been in place. The information in dispute was used for appropriate purposes, specifically to improve efficiency and increase the quality of service. Further, there was no evidence that the employer used the information from the GPS device to manage the employee's performance or for any other secondary purpose.

The Assistant Commissioner also concluded that it was reasonable for the employer to assume it had the drivers' implied consent because they continued to provide their services after the GPS devices were installed. Likewise, it was reasonable to assume that it had implied consent from clients, given that clients must be aware that their name, pick-up address and drop-off location were required in order to provide the service.

Endnotes

- ¹ 2009 ONCA 916 [“McKee”].
- ² 2009 SCC 6 [“Shafron”].
- ³ [2009] O.J. No. 2626 (S.C.J.) (QL) [“Bonazza”].
- ⁴ 2009 ABQB 458.
- ⁵ [2009] O.J. No. 3665 (S.C.J.) (QL).
- ⁶ 2010 ONSC 2733 [“Aquafor”].
- ⁷ 2009 SCC 53 [“Fastfrate”].
- ⁸ [2010] OLRB Rep. March/April 237 [“Boehmer Box LP”].
- ⁹ (2010), 109 L.A.C. (4th) 277 (O.B. Shime) [“Greater Toronto Airports Authority”].
- ¹⁰ 2009 FCA 309.
- ¹¹ 2006 CHRT 49.
- ¹² 2009 FCA 201.
- ¹³ *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.), upheld [2010] O.J. No. 3762 (Div. Ct.) [“CIBC”].
- ¹⁴ *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148.
- ¹⁵ *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 2645.
- ¹⁶ *McCracken v. Canadian National Railway Co.*, 2010 ONSC 4520 [“CN”].
- ¹⁷ *Adams v. Cusack* (2006), 264 D.L.R. (4th) 692 (N.S.C.A.).
- ¹⁸ *ADGA Group Consultants Inc. v. Lane*, [2008] O.J. No. 3076 (Div. Ct.).
- ¹⁹ *Thompson v. Selective Personnel Ltd.*, 2009 HRTO 1224.
- ²⁰ *Dubé v. CTS Canadian Career College Inc.*, 2010 HRTO 713.
- ²¹ *Maciel v. Fashion Coiffures Ltd.*, 2009 HRTO 1804.
- ²² 2009 HRTO 595.
- ²³ 2009 HRTO 1306, [“McDonald”].
- ²⁴ 2009 HRTO 1627 [“Saadi”].
- ²⁵ 2010 HRTO 327 [“Nemati”].
- ²⁶ *Harriott v. National Money Mart Co.*, 2010 HRTO 353.
- ²⁷ *Lopetegui v. 680247 Ontario Ltd. (c.o.b. Beldaire Hotel Toronto)*, 2009 HRTO 1248.
- ²⁸ *Chen v. Ingenierie Electro-Optique Exfo Inc.*, 2009 HRTO 1641.
- ²⁹ *Smith v. Menzies Chrysler*, 2009 HRTO 1936 [“Smith”].
- ³⁰ *Ratneiya v. Daniel & Krumeh*, 2009 HRTO 1824.
- ³¹ (2009), 314 D.L.R. (4th) 756 [“Simcoe”].
- ³² [1999] 3 S.C.R. 3.
- ³³ 2010 CanLII 14448 (ON L.R.B.) [“Blue Mountain”].
- ³⁴ 2009, CanLII 34021 (ON L.R.B.) [“Aecon”].
- ³⁵ (2009), 245 C.C.C. (3d) 315 (Ont. C.A.).
- ³⁶ *R. v. Ford Motor Company of Canada Limited* (May 25, 2010), Burlington (Ont. C.J.) [unreported].
- ³⁷ [2009] O.J. No. 2839 (S.C.J.) (QL).
- ³⁸ *R. v. Enbridge Gas Distribution Inc.*, 2010 ONSC 2013.
- ³⁹ (1992), 10 O.R. (3d) 193 [“Wyssen”], at p. 198.
- ⁴⁰ Section 135(7)(c) provides that “[a] work place committee, in respect of the work place for which it is established, shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters.”
- ⁴¹ Section 125(1)(c) provides that “[w]ithout restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer.”
- ⁴² Section 135.1(8)(b) provides that “[t]he chairpersons of a committee shall jointly designate members of the committee to perform the functions of the committee under this Part as follows:
 - (a) if two or more members are designated, at least half of the members shall be employee members; or
 - (b) if one member is designated, the member shall be an employee member.”
- ⁴³ *C.U.P.E., Air Canada Component v. Air Canada*, 2010 FC 103.

⁴⁴ SOR 87/182. The regulation provides:

“Where an employer is aware of an accident, occupational disease or other hazardous occurrence affecting any of the employees in the course of employment on an aircraft, the employer shall, as soon as possible,

(a) take necessary measures to prevent a recurrence of the hazardous occurrence;

(b) appoint a qualified person to carry out an investigation of the hazardous occurrence; and

(c) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the qualified person appointed to investigate it.”

⁴⁵ *R. v. United Independent Operators Limited*, Newmarket, 4911 999 05-2100, at para. 51 (O.C.J.).

⁴⁶ [2000] O.O.H.S.A.D. No. 98.

⁴⁷ 2009 BCSC 1312.

⁴⁸ *Bennett v. British Columbia*, 2009 BCSC 1358.

⁴⁹ [1993] 2 SCR 230.

⁵⁰ 2010 HRTO 303.

⁵¹ 2010 ONCA 175.

⁵² 2010 ONSC 3890.

⁵³ *Ottawa (City) v. Ottawa Professional Firefighters Assn.*, [2009] O.J. No. 2914 (Div. Ct) (QL).

⁵⁴ Investigation Report P2010-IR-001 (February 16, 2010).

⁵⁵ *Amalgamated Transit Union v. Ontario (Greater Toronto Transit Authority – GO Transit) (Keaney Grievance)*, [2010] O.G.S.B.A. No. 157 (Harris) [“Go Transit”].

⁵⁶ *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736.

⁵⁷ PIPEDA Case Summary #2009-011, 2009 CanLII 74728 (P.C.C.).

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