Employment Perspectives at the Dawn of a New Decade

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Employment Perspectives at the Dawn of a New Decade

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Sarah Hemmingsen, Stikeman Elliott
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Bruce Pollock, Stikeman Elliott
Rosanne Angotti, Chief Counsel, Kraft Canada Inc.
Laura Knuckle, Senior Counsel, RBC Royal Bank

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FIRM PROFILE About Stikeman Elliott and our Employment, Labour & Pension Group
Employment Perspectives at the Dawn of a New Decade

PROFILES OF TODAY’S SPEAKERS

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Law Practice
Gary Nachshen is a partner in the Employment, Labour and Pension Group in the Toronto office of Stikeman Elliott and heads up the firm’s national Pension and Benefits Practice Group. He specializes in the areas of pension plan governance, pension plan restructurings, pension fund investments, executive compensation and employee benefit programmes.

Mr. Nachshen is listed and recognized in the following publications:
> The Best Lawyers in Canada 2010 in the area of Employee Benefits Law.
> The Canadian Legal Lexpert Directory 2009, as a “consistently recommended” practitioner in the Pensions and Employee Benefits sector.
> The 2009 PLC Which Lawyer? as recommended for Employee Benefits and Pensions.
> He is BV® Distinguished Peer Review Rated according to Martindale-Hubbell.

Professional Activities
Mr. Nachshen is past chairman of the Financial Services Commission of Ontario Legal Advisory Committee (Pensions) and a former member of the Ontario Bar Association Pensions & Benefits Section Executive. He belongs to the Quebec Pension Board Legal Advisory Committee, Northwind Professional Institute Pension Fund Invitational Forum Steering Committee, Canadian Tax Foundation, Association of Canadian Pension Management, and International Pension and Employee Benefit Lawyers Association. He is also a member of the Canadian Bar Association.

Publications

Education
McGill University (B.C.L., LL.B. 1987), Woodrow Wilson School of Public and International Affairs (East Asian Studies) at Princeton University (B.A. 1982).

Bar Admission
Law Practice
Sarah Hemmingsen is an associate practising in the Employment, Labour and Pension Group of Stikeman Elliott’s Toronto office.

Professional Activities
Ms. Hemmingsen is a member of the Law Society of Upper Canada.

Education
University of Western Ontario (LL.B. 2006), Queen’s University (B.A. (Hons.) 2003).

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Law Practice
Lorna Cuthbert is a partner and head of the Employment, Labour and Pension Group of the Toronto office. She is also the chair of the Toronto office’s Diversity Committee.

Her practice encompasses all matters relating to employment and labour law, with a particular focus on the human resources aspects of commercial matters. She has advised on the employment and labour ramifications on numerous mergers and acquisitions, restructurings, outsourcing and insolvency mandates.

She also regularly provides advice to clients regarding employment standards, human rights, wrongful dismissal, employment and consulting contracts and related documentation, compensation and benefits matters, and business immigration issues.

Professional Activities
Ms. Cuthbert is a member of the Law Society of Upper Canada and the Canadian Bar Association. She regularly provides presentations and training to firm clients on all matters relating to human resources.

Education
University of Western Ontario (LL.B. 1990), University of South Florida (B.A. magna cum laude 1987).

Bar Admission
Law Practice
Bruce Pollock is a partner in Stikeman Elliott’s Toronto office, a member of the Employment, Labour and Pension Group and past Head (1998-2008) of the Group. He has been involved in advising clients on all aspects of the employment relationship in both unionized and non-unionized environments. He has also been involved in providing advice in respect of the employment impact of various commercial transactions.

Mr. Pollock has been extensively involved in representing clients’ interests in litigation arising out of employment relationships including wrongful dismissal litigation, occupational health and safety litigation, pension litigation, class actions, arbitration hearings, labour board proceedings, alternative dispute resolution mechanisms, and judicial review of administrative actions.

Mr. Pollock also has extensive advocacy experience outside of the employment, labour and pension area, having appeared before all levels of court in Ontario, the Federal Court of Appeal and the Supreme Court of Canada and before numerous administrative tribunals including the Ontario Labour Relations Board and the Financial Services Tribunal.

Professional Activities
Mr. Pollock is a member of the Metropolitan Toronto Lawyers Association. He has frequently given seminars, lectures and speeches on a variety of employment law matters including occupational health and safety and alternative dispute resolution. Mr. Pollock is an Associate Editor of Canadian Cases on Pensions and Benefits and a member of the Financial Services Commission’s Legal Advisory Committee and the Financial Services Tribunal’s Legal Advisory Committee.

Publications
Mr. Pollock’s publications include:


> “Municipal Downloading – Is Subcontracting an Answer” – Municipal World, August, 1998; and


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University of Toronto (LL.B. 1978), Queen’s University (B.Comm. Hons. 1975).

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Before joining Kraft in 1996, Ms. Angotti was an Associate Lawyer with the law firm of Fraser & Beatty (now Fraser Milner Casgrain). She was called to the Ontario Bar in 1992 after receiving her B.Sc. (1986) from the University of Toronto and her LL.B. (1990) from Osgoode Hall Law School. She is a member of the CBA, ACC and has been a speaker at numerous seminars and legal information sessions.
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Laura Knuckle heads the Employment Litigation, Pension and Benefits team at RBC’s Law Group in Toronto. Her and her team provide advice on employment matters to RBC’s managers and Corporate HR across the globe, and manage litigation arising from employment related issues in Canada and internationally. Laura has been at RBC for 10 years; she practiced in Borden Ladner Gervais’ employment group in Toronto prior to joining RBC.
Employment Perspectives at the Dawn of a New Decade

PRESENTATION SLIDES
A Year in Review
2009 Developments

Sarah Hemmingsen
STIKEMAN ELLIOTT LLP
A Year in Review – 2009 Developments

Part 1: Violence and Harassment
Bill 168 – Occupational Health and Safety Amendment Act
Piresferreira v. Ayotte and Bell Mobility Inc.

Part 2: Drug and Alcohol Testing
Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900

Part 3: Accommodating Family Status
Day v. Wal-Mart

Part 4: Overtime Class Actions
Fresco v. Canadian Imperial Bank of Commerce

Part 5: Enforceability of Restrictive Covenants
Shafron v. KRG Insurance Brokers (Western) Inc.

Part 6: Pension and Benefits
Nolan v. Kerry (Canada) Inc.
Bill 168 – *Occupational Health and Safety Amendment Act* (Violence and Harassment in the Workplace)

“workplace harassment”

...engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome...

“workplace violence”

a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker...

b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker.
Employers must prepare policies with respect to workplace violence and workplace harassment.

Employers must develop and maintain programs to implement these policies.

Employers must assess the risk of workplace violence.
Part 1: Violence and Harassment

_Piresferreira v. Ayotte and Bell Mobility Inc._

**FACTS**

- MP worked directly for RA, who had an “aggressive” management style
- RA publicly berated MP, and pushed MP into a filing cabinet
- RA failed to apologize, and placed MP on a Performance Improvement Plan (PIP)
- MP filed a complaint with HR, and HR failed to interview MP and took limited disciplinary action against RA; HR and RA also continued to impose the PIP
Part 1: Violence and Harassment

_Piresferreira_ (continued)

**DECISION**
- RA liable assault and battery; Bell Mobility vicariously liable
- RA liable for intentional and negligent infliction of emotional distress;
- Bell Mobility vicariously liable for intentional infliction of emotional distress, and liable for negligent infliction of emotional distress
- Bell Mobility liable for constructive dismissal
- Damages Award: $500,955 (plus $200,000 in costs)

**NOTES**
- Ensure managers/supervisors understand their obligations
- Address and respond to abusive management styles/practices
- Respond to complaints pro-actively and thoroughly
Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900

FACTS

- In 2003, Imperial re-introduced random drug testing to drug/alcohol policy
- Imperial began random drug testing (using saliva samples) for safety sensitive positions
- CEP grieved, challenging the drug/alcohol policy
Imperial Oil (continued)

**DECISION**
- Arbitration Board held random drug testing violated respect/dignity provisions of CBA
- Divisional Court upheld decision of Arbitration Board
- Ontario Court of Appeal agreed that random drug testing violated CBA

**NOTES**
- “Slams door” on random drug testing in unionized workplaces in Ontario
- Consider other types of drug/alcohol testing
- Carefully draft and review drug/alcohol policies; negotiate revised collective agreements
Day v. Wal-Mart Canada Corp.

**FACTS**
- CD requested revised shift schedule to care for grandson; granted for 7 years
- Eventually, advised by Manager that schedule would change
- CD’s hours reduced, eventually would fail to meet threshold for FT status (and would lose benefits entitlements)
Day (continued)

DECISION
- Arguable case for discrimination in employment, based on family status
- Wal-Mart failed to adduce evidence regarding inconvenience suffered
- Interim remedy granted, pending outcome of application

NOTES
- Law is not well settled regarding accommodation of family status
- Duty to accommodate may be triggered by change in policy/practice/rule, or by change in employee’s personal circumstances
- Be flexible; however, determine if accommodation would involve undue hardship
Fresco v. Canadian Imperial Bank of Commerce

**FACTS**
- DF commenced a $500M class action lawsuit against CIBC for unpaid overtime
- “Off-the-Clock” vs. “Misclassification” case
- DF also alleged CIBC’s overtime policy violated the Canada Labour Code
  - The overtime policy required pre-approval; and
  - The overtime policy provided for choice of time off in lieu of overtime pay
**Fresco** (continued)

**DECISION**
- Pre-approval policy not illegal
- Choice of time off in lieu of overtime pay constituted greater right or benefit
- No common issues; application for certification dismissed
  - No systemic practice of failing to pay overtime pay
  - Individual issues “front and centre”

**NOTES**
- “Off-the-clock” vs. “Misclassification” cases – suitability for class proceedings?
- Obligation to pay for overtime “required or permitted” to be worked
- Be proactive – review overtime policies and practices
Shafron v. KRG Insurance Brokers (Western) Inc.

**FACTS**

- MS subject to non-competition provision, which prohibited him from competing against KRG within the "Metropolitan City of Vancouver"
- MS resigned from his employment with KRG
- MS commenced employment with competing insurance agency in Richmond, B.C.
### Shafron (continued)

**DECISION**

- B.C. Supreme Court held that term was not clear, certain or reasonable
- B.C. Court of Appeal overturned decision, upheld restrictive covenant
  - “Metropolitan City of Vancouver” ambiguous; however, term was “read down”
- Supreme Court of Canada restored judgement of B.C. Supreme Court
  - “Blue Pencil” vs. “Notional” severance
  - “Metropolitan City of Vancouver” ambiguous; no evidence demonstrating the mutual understanding of the parties at the time they entered into the contract

**NOTES**

- Drafting restrictive covenants requires individualized approach
- Use clear and precise language, ensure no ambiguities
Nolan v. Kerry (Canada) Inc.

NOTES

- Where the plan documents do not forbid it, DB surplus may be used to fund (i.e. to “cross-subsidize”) employer’s DC obligations
- Where the plan documents do not forbid it (or powers of amendment otherwise allow an amendment to the plan), reasonable and bona fide plan administration expenses may be paid out of the plan fund
- No distinction between in-house and third-party expenses
The Changing Employment Relationship  
(A Non-traditional Workforce)  

Lorna A. Cuthbert  
STIKEMAN ELLIOTT LLP
“While hiring has picked up, gone is the era of full-time positions with bonuses, sweet severance clauses and no probation”

THE GLOBE AND MAIL
SEPTEMBER 21, 2009
PART 1: Termination
- Wrongful dismissal claims on the rise?
- Speedy judicial determination (increase to claim value)
- Binding termination provisions

PART 2: Fixed Term Employment
- Statutory Considerations
- Common Law Considerations
- Relevant Case Law

PART 3: Use of Independent Contractors
- Independent Contractor or Employee
- Dependent Contractor or Employee

PART 4: Utilizing Foreign Workers
- Labour Market Applications (Minimum Recruitment Requirement)
- Exemptions to Labour Market Opinions

PART 5: Temporary Help Agencies
Wrongful Dismissal Claims on the Rise?

- Basic common law principle – entitled to be made whole during the notice period
- Are notice periods increased in an economic downturn?
- Terminated Employees (and their counsel) pushing for extended notice periods and full compensation
- Quick to litigate
Part 1: Termination

Litigation

1. Simplified Procedure (January 1, 2010)
   – Monetary jurisdiction will increase from $50,000 to $100,000 (plus interest plus costs)
   – Two hour oral examinations for discovery will be permitted
   – Actions commenced before January 1, 2010 cannot be amended

2. Small Claims Court Proceedings (January 1, 2010)
   – Monetary jurisdiction will increase from $10,000 to $25,000 (plus interest plus costs)
   – Discretion to Court to permit amendments to pre January 1, 2010 Claims
3. Summary Judgement Motions
   - Historically, difficult for plaintiff to bring in a wrongful dismissal action
   - Simplified Rules monetary increase will invite more motions

**Adjemian v. Brook Crompton North America**
- “focal point under the simplified procedure is whether, even if there is a genuine issue for trial, the court can fairly and justly decide the action on the motion and without a trial”
- Wrongful dismissal claim determined by motion – 16 month notice period confirmed
Part 1: Termination

Binding Termination Provisions

- Make use of contracts to limit severance
  - Can’t contract out of statutory requirements
  - Employee must accept severance terms before commencing employment
  - Severance provision must be clear and unambiguous
- Clarke v. Insight Components (Canada) Inc.
  - Court of Appeal upholds statutory minimums in executive contract
  - 9 year employee earning in excess of $200,000 per year rejects “enhanced” severance offer
  - Employer relies on contractual termination provision:
    “Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation”
Part 2: Fixed Term Employment

“Employers should not be able to evade the traditional protections of the Employment Standards Act and the common law by resorting to the label of “fixed term contract” when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship”

Ceccol v. Ontario Gymnastics Federation
(Ontario Court of Appeal – 2001)
Part 2: Fixed Term Employment

**Employment Standards Act (Ontario)**

- Exempt from statutory notice requirements if employment is to terminate on the expiry of a definite term
- Must have exact date that the contract is going to end (put it in writing)

**BUT**

- Not a defined term contract if:
  - The employment terminates before the expiry of the term; or
  - The term expires more than 12 months after the employment commences; or
  - The employment continues for 3 months or more after the expiry of the term
Part 2: Fixed Term Employment

Common Law

- Use defined term contracts for legitimate short term engagements
  - If terminate early could be required to make employee whole for duration of fixed term
  - If terminate after duration of fixed term then obligated to pay common law damages

- Monjushko v. Century College Ltd.
  - 9 years of teaching at college on basis of 40 appointment letters for each semester
  - Interruption of employment between semesters
  - Terminated without notice, Record of Employment indicated first day worked 1996 last day 2005
  - No negotiation of contracts and Record of Employment evidence that intent of parties was continuous employment relationship
Part 2: Fixed Term Employment

Common Law

- *Fletcher v. Chippewas of Kettle & Stony Point First Nation*
  - June 1, 2007 advised services not required for school year commencing September 2007
  - Contract required notice of termination to be given by May 31, 2007
  - Contract had a term to August 17, 2007, employer argues:
    i. no damages by being one day late;
    ii. fixed term contract and gave reasonable notice
  - Court found fixed term contract but notice had to be given by May 31 of non renewal (any uncertainty construed against the writer/employer)
  - Concept of reasonable notice not applicable to fixed term contract
  - Damages assessed for entire renewal term
Part 3: Use Of Independent Contractors

Distinction Between Independent Contractors and Employees

- Benefits to employer and employee
- Consequences of incorrect classification
  - CRA
  - WSIB
  - Termination (*Braiden v. La-Z-Boy*)
- Factors to look at:
  - Control over worker
  - Exclusive relationship (non-compete)
  - Location at which services are performed
  - Financial risk to worker
  - Whether worker can use others to assist with services
  - Who provides the tools/equipment
Part 3: Use Of Independent Contractors

**37112 Ontario Ltd. v. Sagaz Industries Canada Inc.**
- “The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account”

**Royal Winnipeg Ballet v. The Minister of National Revenue**
- Parties intention as evidenced by written agreement was a factor to be considered

**Dependent Contractor (Hybrid)**
- Not quite employment, not quite commercial
- Often seen in distributionship arrangements – sole proprietor reliance on one client for significant income
- Issue is whether reasonable notice is less than or equal to employment law notice?
Part 3: Use Of Independent Contractors

_Fassland Delivery Services Ltd. v. Purolator Courier Ltd._

- Delivery services by one person operation
- Owned vehicles, hired other employees, responsible for vehicle costs and insurance
- Thirteen year relationship
- Relationship falls in “Intermediate” category
- Dependency on, control by and permanence of relationship with Purolator equals 6 months notice
Part 4: Utilizing Foreign Workers

Labour Market Opinion
– Minimum Recruitment Standards

- All occupations are subject to minimum advertising requirements
- If you don’t follow the recruitment rules your LMO application will be denied
- NOC O and A Occupations
  - Advertise on national Job Bank for a minimum of 14 calendar days; OR
  - Conduct similar recruitment activities consistent with the practice within the occupation
  - Must be carried out during the three (3) months prior to applying for the LMO
- LMO application must show results of efforts to recruit Canadian citizens or permanent residents
- Same general rules with some variation for NOC B, C, D Occupations
Part 4: Utilizing Foreign Workers

- LMO Renewals
  - Renewal Application Form no longer in use
  - Advertising requirements apply to renewal applications
- Timing
  - Ontario 6 – 8 weeks to process LMO some provinces faster/slower
  - If no visa required can process at Port Of Entry
  - If visa required then often medical required – can really be a long time to hire your candidate
- Exemption to LMO
  - Try to find an exemption
    - Intra Corporate Transfer
    - NAFTA: Professionals
Bill 139, the Employment Standards Amendment Act (Temporary Help Agencies), 2008
  – Will come into effect November 6, 2009
Imposes obligations on temporary help agencies and their clients to create protection for temporary workers

Key Definitions
- **Temporary Help Agency**: Employer that employs persons for the purpose of assigning them to perform work on a temporary basis for its Clients
- **Assignment Employees**: Persons employed by a Temporary Help Agency for the purpose of being assigned to perform work on a temporary basis for the agency’s Clients
- **Client**: A person or entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its Assignment Employees to perform work for the person or entity on a temporary basis
Part 5: Temporary Help Agencies

- Specific information to be disclosed to Assignment Employees
- Prohibitions against Permanent Employment
  - Cannot restrict Assignment Employees from entering into employment relationships with Clients of Agency
  - Cannot restrict Clients from entering into employment relationship with Assignment Employees (can charge fee if relationship commences within 6 months of the first day of the placement with the Client)
- Questions for Consideration
  - Does it change analysis of “who is the employer” from statutory/common law perspective?
  - Does it extend to non-traditional temp agencies – interfere with restrictive covenants?
DISCUSSION WITH PANELISTS
What Matters to You
(Questions you Want Answered)

Bruce Pollock
STIKEMAN ELLIOTT LLP
Can hands free legislation affect my workplace?

- Prohibition on operating a motor vehicle while holding or using a handheld wireless communication device capable of receiving/transmitting communications or data
- Does not apply to such devices in hands free mode
- Can affect employers - may be vicariously liable for the actions of their employees
- If Company expects or knows employees use such devices while driving on Company business, need to address the situation
  - Provide the appropriate hands free technology
  - Written policy to address use of such devices consistent with legislation
  - Training on the proper and safe use of such devices
How should a Company complete an ROE?

- EI is not an experience rated program – Employer costs are not affected by whether an employee collects or not
- In terminations – most significant issue is whether individual lost employment due to their misconduct or left voluntarily without cause
- Generally speaking - should be completed honestly and in good faith
What are the trends under the new Ontario Human Rights Regime?

- No longer any gatekeeper for filing of complaints
- Our clients have seen:
  - An increase in the number of complaints, including from existing employees
  - Increased claims for compensation
- Many claimants self-represented, certainly at the early stages of application
- Increase in claims filed by people who have already signed releases or termination agreements
If clients require criminal records check for anyone with access to their information or that enters their premises, can an employer regularly require its employees to have criminal background checks?

- In Ontario, criminal offences are not a protected characteristic under human rights legislation. Federal legislation protects a conviction for which a pardon has been granted
- Privacy legislation - prudence dictates you get consent
- May make it a condition of employment that on set regular basis Company has consent to check
- For existing employees may be more delicate because terms and conditions already set. May have to make certain assignments conditional on such checks being successfully performed
Unionized employees can pose additional issues
   – City of Ottawa case – policy mandating periodic background checks may constitute unreasonable invasion of employees privacy
   – This was case to which Ontario privacy laws applied
What are some of the considerations applicable in the case of H1N1 pandemic?

- Various pieces of legislation can come into play
  - Occupational Health & Safety Act
  - Employment Standards Act
  - Workplace Safety and Insurance Act

- Policies as to how to deal with the matter
  - Communications/call in
  - Responsibilities while away
  - Up to date contact info

- Ensure policies are in compliance with applicable laws and known to employees
- Provide training and instructions for employees on ways to avoid it
- Encourage vaccinations when available – probably can’t require one
- Provide sanitizers and cleaning products
- Reduce situation where numerous people are together at the same time
- Prepare for the inevitable increases in absenteeism
Employment Perspectives at the Dawn of a New Decade

RESOURCES SECTION A

“What’s New”

Introduction
Part 1 - Violence and Harassment In The Workplace
Part 2 - Drug and Alcohol Testing In The Workplace
Part 3 - Duty to Accommodate Family Status in the Workplace
Part 4 - Overtime Class Actions
Part 5 - Enforceability of Restrictive Covenants
Part 6 - Pension and Benefits

Bill 168

Appendix re: Violence in the Workplace:
Federal and Provincial Legislation
“WHAT’S NEW”

INTRODUCTION

The objective of this paper is to provide a review of certain legislative developments and decisions rendered by our courts during the last twelve months that are of interest to employers, and will hopefully assist them in carrying out best practices within their operations.

The first part of this paper deals with the recent introduction of proposed amendments to the Occupational Health and Safety Act (Ontario), which (if passed) would impose new obligations on employers with respect to workplace violence and workplace harassment. We have also reviewed a recent decision of the Ontario Superior Court in Piresferreira v. Ayotte and Bell Mobility Inc., in which an employer was found to be vicariously liable for a supervisor’s abusive conduct towards an employee in the workplace.

The second part of this paper considers the recent decisions of the Ontario Court of Appeal in Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900, and of the Alberta Court of Appeal in United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., which address drug and alcohol testing policies and programs in the workplace. In the third part, we consider recent developments regarding an employer’s duty to accommodate an employee, when his or her needs relating to “family status” conflict with workplace requirements.

In the fourth part of this paper, we examine the decision of the Ontario Superior Court in Fresco v. Canadian Imperial Bank of Commerce, which served to dismiss the first contested certification motion in a series of proposed class action claims for unpaid overtime. In the fifth part, we discuss the recent decision of the Supreme Court of Canada in Shafron v. KRG Insurance Brokers (Western) Inc., in which the Court clarified that ambiguous restrictive covenants are not reasonable, and that employers cannot rely on courts to “fix” restrictive covenants where they are not drafted properly.

Lastly, we review the much anticipated decision of the Supreme Court of Canada in Elaine Nolan et al. v. Kerry (Canada) Inc., which provides important guidance to plan administrators, sponsors and their advisers on the use of a pension plan’s assets and surplus to take contribution holidays, and on the payment of pension plan expenses incurred in administering the plan.

We hope that you will find these materials helpful, and of interest. If you have any questions, we would encourage you to contact any member of our Employment, Labour and Pension Group. We would also again like to remind you that the issues decided in the cases we have cited have been decided on their specific facts. Therefore, employers should be careful when assessing their own particular situation against the outcome of any one particular case.
PART 1:
VIOLENCE AND HARASSMENT IN THE WORKPLACE

BILL 168: Occupational Health and Safety Amendment Act
(Violence and Harassment in the Workplace), 2009

Summary of Proposed Legislation
On April 20, 2009, the Ontario Minister of Labour introduced Bill 168, the Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009. If passed, Bill 168 would amend parts of the Ontario Occupational Health and Safety Act (“OHSA”), and would impose significant and new obligations on employers in Ontario. In particular, the amendments would require employers to create and maintain workplace violence and workplace harassment policies and programs, to perform assessments to identify and measure the risk of violence in the workplace, and to provide information to workers where a person has a history of violence.

Definitions of Workplace Violence and Workplace Harassment
Bill 168 proposes to add the following definitions to the Ontario Occupational Health and Safety Act:

“workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome;

“workplace violence” means:

(a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker.

It is important to note that the definition of “workplace harassment” goes beyond what constitutes harassment under the Ontario Human Rights Code. Under the Code, harassment must be based on a prohibited ground; however, pursuant to Bill 168, “workplace harassment” may occur, even if it is not related to a ground protected by the Code. In addition, the definition of “workplace violence” refers to the exercise of physical force by a “person”, which may include employees, customers, or members of the general public.

Workplace Violence and Workplace Harassment Policies, Programs and Assessments
Bill 168 requires that employers develop workplace violence and harassment policies, which are to be posted in the workplace and reviewed annually. In addition, employers must develop programs to implement these policies, and must include measures and procedures to:

(a) control identified risks in the workplace;

(b) summon immediate assistance when workplace violence occurs, or is likely to occur, or when a threat of workplace violence is made;
(c) report incidents or threats of workplace violence to the employer or supervisor; and
(d) investigate and deal with incidents, complaints or threats of workplace violence.

An employer must also assess the risk of workplace violence that may arise from the nature of the workplace, the type of work, or the conditions of work, taking into account circumstances that would be common to similar workplaces, and circumstances specific to the workplace. This assessment must be conducted as “often as is necessary” to ensure that workers are continually protected from workplace violence.

A copy of the risk assessment and its results must be provided to the joint health and safety committee or the health and safety representative. However, if there is no such committee or representative, Bill 168 provides that the employer must advise employees of the results of the assessment directly.

**Domestic Violence**

A unique and significant feature of Bill 168 is that it requires an employer to take every reasonable precaution in the circumstances to protect a worker, where it becomes aware (or ought reasonably be aware) that domestic violence is likely to expose the worker to physical injury in the workplace. However, it is unclear what constitutes “domestic violence”, and what actions would be required for an employer to have taken “every reasonable precaution in the circumstances.”

**Provision of Information**

Bill 168 also requires employers and supervisors to provide information (including personal information) to a worker about a person with a history of violent behaviour. This obligation arises where a worker can be expected to encounter that person in the course of his or her work, and the risk of workplace violence is likely to expose the worker to physical injury. Bill 168 provides that employers and supervisors must not disclose more information than is reasonably necessary to protect the worker from physical injury; however, it provides no further guidelines in this regard. We note that this obligation could give rise to privacy and human rights concerns.

**Right to Refuse Work**

Lastly, Bill 168 permits a worker to refuse to work or perform particular work where he or she has reason to believe that workplace violence is likely to endanger the worker. If the worker refuses to work, or do particular work, the worker will still be required to promptly report the circumstances of the refusal. However, Bill 168 now requires the worker to remain in a safe place that is “as near as reasonably possible to his or her work station”, and available to the employer or supervisor for the purposes of an investigation.

The OHSA currently prohibits certain workers from refusing to work when an unsafe condition is inherent in the worker’s work, is a normal condition of the worker’s employment, or when the worker’s refusal to work would directly endanger the life, health or safety of another person. These prohibitions will continue to apply; however, Bill 168 also allows for the enactment of regulations that would determine when workplace violence is considered to be inherent in a worker’s work or is a normal condition of employment.
Our Views

Bill 168 is currently on its first reading, and (to our knowledge) the second reading of the Bill has not been announced. Nevertheless, it is anticipated that Bill 168 (or a version of Bill 168) will come into force in the near future, and will impose significant and new obligations on employers with respect to workplace violence and harassment. Ontario would therefore join certain other jurisdictions in Canada, including the federal jurisdiction, in enacting legislation which addresses violence and harassment in the workplace. Please see the attached chart, which summarizes the relevant legislation in each of the provinces and territories in Canada.

Employers are encouraged to take an active approach, and to review their current policies and procedures, particularly as they relate to workplace violence and harassment, if any. In particular, employers should determine what amendments, if any, would be needed in order to comply with the new proposed legislation (and any existing legislation in Canada), and should ensure that employees are trained accordingly.
Piresferreira v. Ayotte

Background
Marta Piresferreira ("Piresferreira") joined Bell Mobility in 1996 as an account manager, selling cellular phones, pagers and other data transmission capabilities to the federal government and other large institutions. In 1997, she came under the supervision of Richard Ayotte ("Ayotte"). During most of her years at Bell Mobility, she received excellent performance reviews, and exceeded her targets, and was rewarded with bonuses and trips. In 2004, however, Piresferreira experienced difficulties in meeting her financial objectives determined to be due to environmental factors beyond her control, and Ayotte became increasingly frustrated and disappointed with her.

Ayotte was well-known in the office for being intimidating and verbally abusive towards his employees. He was frequently heard raising his voice and swearing at his employees, including Piresferreira. For example, when Piresferreira’s performance faltered, he began yelling at her further and questioning her competence.

On May 12, 2005, Piresferreira was berated by Ayotte in front of a senior marketing executive for failing to arrange for an appointment between Industry Canada and representatives from RIM. Ayotte yelled and swore at her, stating that she was not doing her job. Piresferreira apologized and left the office. When she encountered Ayotte later that day, he began yelling at her again. He also pushed her one foot into a filing cabinet, when she attempted to show him an email on her BlackBerry, indicating that she had done everything she could to schedule the appointment.

Immediately following this incident, Ayotte threatened to issue a performance improvement plan (PIP) for Piresferreira, notwithstanding that he had never warned her that her performance was such as to warrant issuing a PIP. In addition, when she eventually returned to the office, Ayotte failed to apologize for the incident and presented her with the PIP, which would require her to report in person to Ayotte twice weekly. Piresferreira refused to sign it, and filed a complaint with Human Resources. She subsequently went on sick leave due to stress, and eventually long-term disability leave, due to the depression and anxiety that she was experiencing.

Bell Mobility failed to contact Piresferreira to hear her account of the events, and took limited disciplinary action against Ayotte. In addition, Bell Mobility indicated to Piresferreira that it would be proceeding with the PIP. Bell Mobility also failed to apologize to Piresferreira for Ayotte’s actions, and did not canvass her potential return to work.

Piresferreira’s emotional state further deteriorated, and it was determined that she was unable to return to Bell Mobility, or to perform the duties of any occupation for which she was or could be qualified. After commencing litigation against Ayotte and Bell Mobility, Piresferreira indicated that she would not return to a “poisoned” environment, and that she was (in any event) incapable of returning to work. Accordingly, Bell Mobility considered her to have resigned effective September 19, 2006.

Superior Court of Justice
Piresferreira sued for assault and battery, negligence, loss of past and future income, breach of contract, intentional or negligent infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability, and special damages. She also sought damages against Bell Mobility for constructive dismissal.
**Assault and Battery**
The Ontario Superior Court of Justice found Ayotte liable for assault and battery. There was no dispute that Ayotte pushed or shoved Piresferreira. Further, had the assault not occurred, Piresferreira would not have developed anxiety and depression, which prevented her from pursuing gainful employment and from carrying on her personal life as she had done in the past. It is important to note that even though Piresferreira was found to be particularly vulnerable for a number of reasons, the Court held that “tortfeasor must take his victim as he finds her.”

Bell Mobility was also found vicariously liable for Ayotte’s assault and battery. According to the Court, it had placed Ayotte in a supervisory role, whereby he was solely responsible for the account managers in his office. In addition, certain employees of Bell Mobility, including Ayotte’s supervisor, were well aware of Ayotte’s aggressive management style. In entrusting a high level of control to Ayotte, and permitting Ayotte to set the “tone and environment” within the office, Bell Mobility was obligated to assume responsibility for how Ayotte managed the office.

**Intentional and Negligent Infliction of Emotional Distress**
Ayotte’s conduct towards Piresferreira, including his threat of placing Piresferreira on probation or on a PIP immediately after he had assaulted her and then his delivering a PIP to her the first time she returned to the office (without first having assumed responsibility for his abusive behaviour) was “flagrant and outrageous”. In addition, Ayotte’s yelling and swearing at Piresferreira, his assaulting her, his threatening her with (and placing her on) a PIP, and his failing to apologize for his actions, was found by the Court to have been “calculated to produce harm”. Ayotte was found to have shown a reckless disregard for Piresferreira’s emotional well-being, and that his actions caused her certain emotional distress. Accordingly, Ayotte was found liable for intentionally inflicting emotional distress on Piresferreira. In addition, Bell Mobility was found to be vicariously liable for Ayotte’s actions.

The Court also concluded that Ayotte and Bell Mobility were both liable for negligent infliction of emotional distress and harm, as they breached the duty of care they each owed to Piresferreira. In particular, the Court found that they both owed a duty of care to Piresferreira (and to other employees) to ensure that the workplace was safe and free from harassment, and without verbal abuse, intimidation or physical assault, in accordance with Bell Mobility’s Code of Business Conduct. For example, by berating Piresferreira in public, physically assaulting her, failing to apologize for his behaviour, and by issuing a PIP, Ayotte failed to meet the duty of care he owed to Piresferreira. As well, Bell Mobility failed to properly supervise Ayotte, or to properly respond to his assault on Piresferreira and, following the incident, Bell Mobility moved forward to implement the PIP, which caused Piresferreira further distress.

**Damages Award**
The Court awarded general damages to Piresferreira in the amount of $50,000, for the torts of assault and battery, and the intentional and negligent infliction of emotional distress. In addition, Piresferreira was awarded damages for the loss of past and future income based on the amounts she would have earned between 2005 and 2009, the year she would turn 65, in the amount of $500,924. Taking into account certain contingencies, however, these amounts were reduced by 10%. Piresferreira was also awarded $5,122 for special damages for the cost of psychotherapy sessions and medications. Lastly, under the Ontario Family Law Act, the Court awarded Piresferreira’s partner damages in the amount of $15,000 for the loss of “guidance, care and companionship” of Piresferreira during her time of suffering.
It is also important to note that the Court found that Piresferreira was constructively dismissed, as “Bell Mobility was not living up to the implied term of any employment relationship that the employer will treat the employee with civility, decency, respect and dignity.” However, it did not award damages for wrongful dismissal as “[t]o have damages payable under both the contract and tort claims would amount to double recovery.”

**Our Views**

We understand that Bell Mobility is currently appealing this decision. However, it is nevertheless important for employers to ensure that their managers and supervisors understand their obligations to maintain a safe and harassment-free workplace, and that they will be subject to disciplinary action if they fail to satisfy these obligations. As well, employers should take an active approach to address and respond to aggressive and/or abusive management styles and practices in the workplace.

Employers should also ensure that they respond to, and investigate, complaints of harassment pro-actively and thoroughly, including interviewing all parties and witnesses involved, and ensure that appropriate disciplinary action is taken in the circumstances.
PART 2: DRUG AND ALCOHOL TESTING IN THE WORKPLACE

Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900

Background
In 1992, Imperial Oil introduced a policy that provided for random drug and alcohol testing of employees in safety sensitive positions. The policy was challenged under human rights legislation, and eventually reached the Ontario Court of Appeal. The Court of Appeal held that random drug testing was not reasonably necessary to maintain a safe working environment, due to the fact that urinalysis could not measure on-the-job impairment. Therefore, the random drug testing provisions of the policy were deemed in violation of the Human Rights Code provisions that prohibit discrimination based on handicap. However, random breathalyser tests to detect alcohol levels in employees occupying safety sensitive positions were found to be reasonably necessary to achieve a safe working environment.

Following the decision, Imperial Oil removed random drug testing from its policy. However, in 2003, Imperial Oil revised its drug and alcohol testing policy to incorporate new technology, which detected cannabis by way of saliva samples. Once again, Imperial Oil began random drug testing of employees in safety sensitive positions, and the Union filed a grievance challenging the entire policy.

Arbitral Decision
As the whole policy was grieved, the issue of breathalyzer testing was revisited. The Arbitration Board found that the union had waited nearly seven years to file a grievance concerning the breathalyzer alcohol testing, and had thereby effectively accepted it. Regarding the drug testing provisions, the Board upheld three scenarios: (i) for-cause, (ii) rehabilitative, and (iii) post-incident drug testing. However, the Board found that the provisions permitting random drug testing without reasonable cause were in violation of the respect and dignity provisions of the collective agreement. Imperial Oil appealed this ruling to the Divisional Court.

Ontario Divisional Court – Dismisses Appeal, Upholds Decision
The Divisional Court held that there was nothing unreasonable in the Board’s approach, analysis and ultimate conclusion on the issue. The Board had applied the terms of the collective agreement to the facts, and had considered all relevant evidence. As the appropriate standard of review was patent unreasonableness, the Court felt the threshold was not met, and dismissed the appeal. Imperial Oil appealed this ruling to the Ontario Court of Appeal.

Ontario Court of Appeal – Dismisses Appeal, Upholds Decision
In its decision dated May 22, 2009, the Ontario Court of Appeal dismissed the appeal and awarded costs to the Union. The Court held that the Board had properly applied the relevant jurisprudence, often called the “Canadian Model” for alcohol and drug testing in safety sensitive workplaces, to the facts. The Court agreed that random drug testing offended the collective agreement in that: (i) the method of testing did not permit the immediate detection of impairment; and (ii) Imperial Oil had an obligation to respect employee’s expectation of
privacy, absent consent or reasonable cause. The Court found that the Board’s approach to the interpretation of the collective agreement was reasonable, such that Imperial Oil’s obligation to treat its employees with dignity and respect was not limited to the grounds set out under the Human Rights Code.

At this time, it is not known whether Imperial Oil will seek leave to appeal this decision.
2009 ABCA 84

Background

Bantrel Constructors Co. ("Bantrel") contracted with Petro-Canada to conduct certain construction work at one of Petro-Canada's existing refineries, a hazardous worksite. The contract between Bantrel and Petro-Canada provided that Bantrel was required to comply with Petro-Canada's drug and alcohol policy.

Bantrel began working at the Petro-Canada site in early 2004 and, shortly thereafter, Petro-Canada raised the possibility of drug and alcohol testing of employees working on the site. Bantrel attempted to exempt existing employees from this requirement; however, it was unsuccessful in this regard. Effective November 15, 2004, Petro-Canada adopted a pre-site access drug and alcohol testing policy for most workers at the site. A failure to adhere to this policy could cause Petro-Canada to terminate the contract. Bantrel therefore adopted the requirements of the drug and alcohol testing policy without negotiating these requirements with the unions.

On December 24, 2004, three of eight unions working at the Petro-Canada site for Bantrel filed a grievance alleging that Bantrel violated their collective agreements. Each collective agreement incorporated the “2001 Canadian Model for Providing a Safe Workplace, Alcohol and Drug Guideline and Work Rules”, an industry standard published by the Construction Owners Association of Alberta ("Guideline"). The Guideline permits testing for cause. The Guideline does not require any pre-employment or general pre-site access testing; however, it contemplates that some employers may require a higher or alternate standard based on the specific nature of their operations.

Arbitration Panel and Court of Queen’s Bench – Dismisses Grievance

The majority of the Arbitration Panel ultimately decided in favour of Bantrel, finding that the Guideline was not a complete code, because it contemplated employer-specific needs and testing as a condition of employment in some circumstances, and did not preclude pre-access testing of current employees. Therefore, there was no violation of the collective agreements in the circumstances. Further, the Panel concluded that the proposed drug and alcohol policy was justifiable in the context of the work site and its history, and was not unreasonable.

The unions applied to the Alberta Court of Queen’s Bench for judicial review; however, the decision of the Panel was upheld.

Court of Appeal – Overturns Lower Decisions

The Alberta Court of Appeal concluded that the Panel had erred in its interpretation of the Guideline. Specifically, the Court found that the Panel’s interpretation of the term “condition of employment” as governing current employees who wish to access a job site was incorrect. Instead, the Court held that the term referred only to a pre-employment condition, and not a condition that applied to existing employees that would govern access to a worksite. Accordingly, the Court of Appeal concluded that pre-access testing was not permitted by the collective agreements, or required by the Guideline.

Further, the Court of Appeal disagreed with Bantrel’s argument that a clause in one of the collective agreements, which provides that the “parties will cooperate with clients who
institute pre-access drug and alcohol testing,” was helpful to their position. The Court of Appeal noted that the word “cooperate” meant “negotiate”, and that it did not diminish the union’s right to negotiate the terms and conditions of such testing.

Our Views

As the cases above illustrate, the issue of drug and alcohol testing is both complex and contentious and the law in the area is not yet fully settled. In United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co., the Alberta Court of Appeal has now emphasized that employers must abide by the express terms of their collective agreements, when seeking to impose new policies on employees. Although an employer may have legitimate safety concerns, the introduction of certain policies must be permissible under the collective agreements. Employers must therefore ensure that the language of any collective agreement permits all relevant drug and alcohol testing in the workplace. Where amendments to the collective agreements are necessary, consultation with the union must take place.

In Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900, the Ontario Court of Appeal has effectively “slammed the door” on the use of random drug testing in unionized workplaces in Ontario, unless such a requirement is negotiated into a collective agreement and satisfies the minimum requirements under the Human Rights Code.

In light of the foregoing, it is important to note the following:

• Collective agreements that incorporate policies about employee drug and alcohol testing could prevent an employer from imposing stricter testing requirements on existing employees;
• Unionized employers that wish to conduct random mandatory testing may need to negotiate explicit authority to do so into their collective agreements;
• Where collective agreements clearly provide for an employee’s right to “respect and dignity” in the workplace, unionized employers must be very cautious with respect to random drug and alcohol testing; and
• Saliva swab drug testing does not provide a complete answer to the concerns posed in the Entrop decision, as the courts do not view this type of testing as a sufficient solution for the problems with urinalysis testing.
PART 3:
DUTY TO ACCOMMODATE FAMILY STATUS IN THE WORKPLACE

Day v. Wal-Mart Canada Corp.

Background
Over the course of seven years, Carol Day ("Day"), a cashier at Wal-Mart in Hamilton, Ontario, requested (and was granted) accommodation in the form of a revised work schedule. In particular, Day was permitted to work Monday to Thursday, 9:00 a.m. to 5:00 p.m. so that she could care for her 13-year old grandson after work, as he has significant disabilities, and so that she could attend medical appointments on Fridays.

On February 23, 2009, however, Day was advised by her store manager, Donna Cardinal ("Cardinal") that in eight weeks she would be required to work evenings and weekends, and that her 9:00 a.m. to 5:00 p.m. shifts would no longer be in place. From and after April 4, 2009, therefore, Day worked primarily Monday to Thursday, 9:30 a.m. to 3:30 p.m., and was consistently given less than twenty-eight hours of work per week (which is the threshold number of hours required in order to maintain full-time status with Wal-Mart). Without full-time status, Day would become disentitled to medical benefits, which she relies on to pay for her grandson's expensive medications.

On May 19, 2009, Day filed an application with the Human Rights Tribunal, alleging discrimination on the basis of family status in employment. Day also requested an interim remedy on May 29, 2009, that she be scheduled on the Monday to Thursday, 9:00 a.m. to 5:00 p.m. shift, pending the outcome of the application.

Ontario Human Rights Tribunal – Interim Remedy
The Ontario Human Rights Tribunal found that Day had put forward an arguable case for discrimination in employment based on family status, as it was plausible that she would be able to show that the change to her scheduled hours of work had a discriminatory effect on her regarding her family obligations. In particular, it was accepted that Day's grandson has significant disabilities, and that she is his sole source of support. Accordingly, the Tribunal accepted that Day must care for her grandson after work, in the evenings and on Fridays. The Tribunal also noted that Wal-Mart provided little evidence regarding the inconvenience that it would suffer if the request for the interim remedy was granted. In particular, it was significant that Wal-Mart was able to accommodate Day's schedule for seven years.

In light of the foregoing, the Tribunal determined Wal-Mart was required to continue to treat Day as a full-time employee for the purposes of her entitlement to benefits, and to maintain her former work schedule, pending the outcome of the application.
Johnstone v. Canada (Attorney General)
2008 FCA 101

Background
Fiona Johnstone (“Johnstone”), has been employed as a Customs Inspector with the Canada Border Services Agency (“CBSA”) since 1998 at Pearson International Airport (“Pearson” or the “Airport”) in Toronto, Ontario. Her husband also works at Pearson as a Customs Superintendent. Both Johnstone and her husband worked 37.5 hours per week on a rotating shift schedule, which provides 24 hour coverage per day at the Airport.

In January 2003, Johnstone took maternity leave. When she returned to work, she found it extremely difficult to find a childcare provider with availability that would match the differing shift schedules worked by Johnstone and her husband. In light of her difficulties, Johnstone requested an accommodation from CBSA in the form of three fixed 12-hour shifts per week. However, CBSA denied her request, as it had an accommodation policy for employees whose childcare responsibilities conflict with the rotating shift schedule. In particular, the policy required Johnstone to accept part-time employment in exchange for a fixed-shift schedule and, as such, she would only be permitted to work to a maximum of 34 hours per week.

Accordingly, Johnstone started working three 10-hour shifts each week, and filed a complaint with the Canadian Human Rights Commission, arguing that the CBSA policy discriminated against her on the basis of family status.

Canadian Human Rights Commission
The Investigator appointed to review the circumstances of the case recommended that the Commission appoint a conciliator to pursue settlement of Johnstone’s complaint and, failing settlement, that the Human Rights Tribunal be appointed to adjudicate the matter. In particular, the Investigator concluded that the CBSA policy indirectly discriminated against Johnstone, as she was “forced” to work part-time to accommodate her family situation. The Investigator also noted that the CBSA policy may have an adverse impact on female employees because requests for “family status accommodations” are more often made by women than by men.

In addition, the Investigator noted the potential importance of Johnstone’s case for resolving similar future cases through the development of jurisprudence “surrounding the issue of accommodation based on family status”.

Notwithstanding the recommendations of the Investigator, the Commission dismissed Johnstone’s complaint. The Commission stated that it was satisfied that the CBSA had accommodated Johnstone’s request for a static shift to meet her childcare obligations, and that Johnstone had accepted the scheduling arrangement in the circumstances. In addition, the Commission stated that it was not convinced that the effect of the CBSA’s policy constituted a “serious interference” with Johnstone’s duty as a parent, or that it had a discriminatory impact on her on the basis of family status.

Johnstone applied to the Federal Court for judicial review.

Federal Court and Federal Court of Appeal – Remits Matter to Commission
The Federal Court concluded that the Commission erred in dismissing Johnstone’s complaint. The Court determined that the Commission’s decision to reject the Investigator’s findings, and its conclusion that Johnstone voluntarily accepted the CBSA’s accommodation terms (notwithstanding the substantial body of evidence otherwise), was unreasonable.
As well, the Federal Court concluded that the Commission further erred in electing to use the “serious interference” test to establish a prima facie case of discrimination based on family status, which was applied by the British Columbia Court of Appeal in Campbell River & North Island Transition Society v. Health Sciences Assn. of British Columbia. In Campbell River, the British Columbia Court of Appeal described the employer’s legal obligations in dealing with a family status accommodation as follows:

If the term “family status” is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to prima facie discrimination on the basis of family status will depend on the circumstances of each case. In the usual case, where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation, it would be difficult to make out a prima facie case [emphasis added].

According to the British Columbia Court of Appeal, the parameters of family status as a prohibited ground should not be drawn too broadly, or it would have the potential to cause “disruption and great mischief” in the workplace.

Notwithstanding the foregoing, the Federal Court noted that the Campbell River decision has been subject to certain criticism. For example, the British Columbia Court of Appeal has been accused of conflating the issue of prima facie discrimination with the requirement to demonstrate that a particular standard is not discriminatory, and constitutes a bona fide occupational requirement. It was suggested that concerns regarding “workplace disruption” and “great mischief” should instead be considered when determining whether a particular accommodation is possible in the circumstances.

The Federal Court also concluded that there was no reason to apply a higher standard of proof to demonstrate prima facie discrimination in the context of “family status” complaints, than for other grounds of discrimination. Further, limiting complaints based on “family status” to situations where the employer has changed a term or condition of employment was found to be unduly restrictive, as the operative change typically arises within the family and not in the workplace (e.g. the birth of a child, a family illness, etc.).

Accordingly, the Federal Court concluded that the Commission’s decision to dismiss Johnstone’s complaint could not be sustained, and it remitted the matter back to the Commission for a redetermination. CBSA appealed this decision; however, the appeal was dismissed by the Federal Court of Appeal. Currently, the case is before the Canadian Human Rights Tribunal.

Our Views
It is important to note that the Federal Court in Johnstone v. Canada (Attorney General) indicated that the law is not well settled with respect to the balancing of competing workplace interests insofar as family status accommodation is concerned. It is hoped that future cases (including Day v. Wal-Mart and Johnstone v. Canada (Attorney General)) will provide further

direction to employers in this regard. This will be particularly important, as it is anticipated that employers will increasingly face issues regarding the accommodation of “family status” while families struggle to balance their work and personal responsibilities.

Notwithstanding that this is a growing and changing area of law, it is important for employers to note the following:

- The concept of “family status” may not be limited to an employee parent-child relationship. For example, the Ontario Human Rights Commission has indicated that the protection extends to include care relationships between adult children and those who stand in parental relation to them, and may even extend to circumstances where there are no blood- or adoptive-ties.

- The duty to accommodate may be triggered by a change in a workplace policy, practice or rule (e.g., relating to absenteeism, hours of work, travel requirements, or access to benefits), or through a change in an employee’s personal circumstances. In such circumstances, employers could consider implementing the following: flexible hours programs, compressed work weeks, reduced work hours, job sharing, leaves of absence (whether paid or unpaid), and/or tele-working.

- It is recognized that certain employers may have difficulties implementing the above noted accommodations. Therefore, even if a *prima facie* case of discrimination on the basis of family status is made, employers may wish to consider whether they could argue that a change or decision was based on a *bona fide* occupational requirement, and/or that it would be impossible to accommodate an employee short of undue hardship.
PART 4: 
OVERTIME CLASS ACTIONS

Fresco v. Canadian Imperial Bank of Commerce 

Background:
In June 2007, Dara Fresco (“Fresco”) filed a class action lawsuit against Canadian Imperial Bank of Commerce (“CIBC”), seeking to represent all current and former front-line customer service employees at retail branches of CIBC. Fresco claimed $500 million in general damages, and $100 million in punitive, aggravated and exemplary damages.

In particular, Fresco claimed breach of contract, breach of the Canada Labour Code, and unjust enrichment on behalf of members of the proposed class, based on CIBC’s alleged failure to pay overtime pay to employees for excess hours that these members were required or permitted to work. Accordingly, her claim was characterized as an “off-the-clock” case, rather than a “misclassification” case. CIBC agreed that the proposed class was entitled to be compensated for overtime pursuant to statute, but denied that it had failed to pay overtime pay in the circumstances.

The primary basis of Fresco’s claim was that CIBC’s overtime policy (the “Policy”) was unlawful, and resulted in a systemic practice of creating unpaid overtime. More specifically, the Policy required employees to obtain approval from a manager in advance in order to be compensated for overtime hours worked, unless there were extenuating circumstances. The Policy also provided for paid time off at the rate of time and a half in lieu of overtime pay at the option of the employee. Fresco alleged that both of these requirements violated the Canada Labour Code.

Superior Court of Justice
The Superior Court of Justice held that CIBC’s Policy, which required employees to obtain pre-approval from a manager in order to be compensated for overtime hours worked, was not illegal. The Court noted that it is an employer’s fundamental right to control its business, including employees’ schedules, hours of work and overtime hours. In addition, it was found that the Canada Labour Code contemplates an employer’s right to pre-approve overtime as a way to ensure that an employer complies with its obligations under the Canada Labour Code, such that employees do not work in excess of the weekly maximum hours of work. However, an employer cannot avoid its statutory obligations by knowingly permitting employees to work overtime and then later taking the position the overtime was not authorized.

The Court also found that providing employees with a choice between receiving overtime pay and time off in lieu was a greater right or benefit than that provided in the Canada Labour Code. Therefore, the Policy’s provisions in this regard were determined to be lawful in the circumstances.

As to the certification motion, the certification requirements for a class action are set out in the Class Proceedings Act. Pursuant to the Class Proceedings Act, there are five separate elements that must be present in order to certify a class action, including that the claims of the class members raise common issues, and that the resolution of the common issues would be necessary to the resolution of each class member’s claim.
In considering the five elements required for certification, the Superior Court of Justice found that Fresco’s claim failed to raise common issues to advance the claims of the proposed class members. According to the Court, the individual issues in the case were “front and centre”, and “it would be virtually impossible to embark on a trial of the common issues without engaging in an individual examination of the specific circumstances that underline each member’s claim.” For example, Fresco’s claim depended on whether or not the accommodation that she was given for breast-pumping breaks is properly included as hours worked in the calculation of her entitlement to overtime. Similarly, the claim of another class member depended on disputed evidence as to the length of her smoking breaks, and whether this is to be included as “time worked” for the purposes of calculating overtime entitlement.

In contrast to “misclassification” cases, where commonality arises based on the particular job duties of the class of employees the employer alleges is exempt from overtime pay, the Court determined that Fresco was required to demonstrate that there was a systemic breach of duty on the part of CIBC to compensate eligible employees for overtime hours worked. Although Fresco asserted that the “common issues” arose from the illegality of the Policy, the Court determined that the Policy was not illegal. However, even if the Policy was found to be illegal, it was concluded that the wrongs alleged were caused not by the Policy itself, but by its application. As Fresco was unable to demonstrate that such a systemic practice was in effect, the individual nature of the claims negated any benefit to a class action. Therefore, the Ontario Superior Court of Justice dismissed the class action.

It is our understanding that Fresco intends to appeal this decision to the Ontario Divisional Court.

**Our Views**

The decision of the Superior Court of Justice to dismiss the class action suggests that “off-the-clock” claims may not be suitable for class action proceedings. However, it is important to note that it has yet to be determined whether this is also true for “misclassification” claims, where an employer is alleged to have improperly classified employees as exempt from overtime pay.

In addition, this decision does not alter the obligation of employers to pay employees for overtime which they were “required or permitted to work”. Although pre-approval requirements contained in overtime policies appear to be permissible, they must be strictly applied and enforced. Otherwise, an employer may be liable for unpaid overtime in this regard.

- Accordingly, employers are again reminded to be proactive, and to take the following action:
  - To conduct an audit of current overtime policies, including an analysis of the eligibility requirements for overtime under such policies;
  - To create a comprehensive list of employee positions and/or classifications that are (and are not) eligible to receive overtime, with special attention to the core duties and responsibilities of such positions and/or classifications;
  - To determine the number of hours that must be worked before employees in each position and/or classification are eligible to receive overtime and the rate of overtime pay for each hour of overtime worked by such employees;
• To determine the number of hours of work actually performed by employees in a given work week, with reference to the jurisprudence as to when “work” is deemed to be performed;

• To ensure that proper records of all hours worked by employees, including the number of overtime hours worked, and the amount of overtime pay paid to, such employees, are maintained in accordance with applicable employment standards legislation; and

• To continue to revisit and review all overtime policies and practices to ensure ongoing compliance with applicable employment standards legislation.

2 Among other things, the Monsanto decision determined that the Tribunal was not endowed with any particular expertise in the interpretation of the Pension Benefits Act. As such, the SCC held in Monsanto that as a matter of administrative law, the Tribunal’s decisions were to be reviewed on the higher “correctness” standard as opposed to a more deferential “reasonableness” standard.
PART 5: ENFORCEABILITY OF RESTRICTIVE COVENANTS


Background
In 1987, Morley Shafron (“Shafron”) sold the shares he owned in his small insurance agency business, to KRG Insurance Brokers Inc. (“KRG Insurance”). Following the sale, Shafron continued to be employed by KRG Insurance as its only salesperson. In early 1988, Shafron signed an employment agreement that contained a non-competition provision, which prohibited him from competing against KRG within the “Metropolitan City of Vancouver” for three years following the termination of his employment. Over the course of his employment with KRG Insurance (and successor employers) (“KRG”) Shafron entered into several employment agreements, which contained essentially identical non-competition provisions. It is important to note that the term “Metropolitan City of Vancouver” has no proper definition.

In December 2000, Shafron resigned from his employment with KRG, and in January 2001 he began working as an insurance salesman for another insurance agency in Richmond, British Columbia. KRG therefore commenced an action in the Supreme Court of British Columbia claiming that Shafron was wrongly competing with KRG, in breach of the non-competition provision in his employment agreement.

British Columbia Supreme Court – Dismisses Claim
At trial, the British Columbia Supreme Court dismissed KRG’s claim. In particular, the Court found that the term “Metropolitan City of Vancouver” was not clear, certain or reasonable. The Court further stated that even if the geographic restriction had been clear, it was far wider than necessary to protect KRG’s legitimate interests.

British Columbia Court of Appeal – Reverses Decision
The Court of Appeal overturned the decision of the British Columbia Supreme Court. Although the Court agreed that the term “Metropolitan City of Vancouver” was ambiguous, it chose to apply the doctrine of “notional” severance to construe the term as applying to “the City of Vancouver and the municipalities contiguous to it”. In essence, this meant that the covenant would cover the City of Vancouver, the University of British Columbia Endowment Lands, Richmond, and Burnaby.

Supreme Court of Canada – Upholds Trial Decision
In its decision, the Supreme Court of Canada first summarized the law of restrictive covenants, explaining that they are essentially a restraint of trade and contrary to public policy. However, if a restrictive covenant is “reasonable”, it will be upheld. In determining whether a restrictive covenant is reasonable, the Supreme Court of Canada distinguished between restrictive covenants in the context of a contract for a sale of a business, and those found in employment agreements. The Court concluded that a more rigorous scrutiny of restrictive covenants is justified in the context of employment contracts, as there is no payment for goodwill in the circumstances, and there is generally an imbalance of bargaining power between employers and employees. As the Court determined that the last of the contracts entered into by Shafron was an employment agreement, the reasonableness of the restrictive covenant at issue was therefore subject to the more rigorous test applicable to employment agreements.
As a general rule, the Court determined that the geographic coverage of the restrictive covenant, the period of time in which it is effective, and the extent of the activity sought to be prohibited are relevant in determining whether a restrictive covenant is reasonable. In addition, the terms of the restrictive covenant must be unambiguous. As the geographic scope of the restrictive covenant governing Shafron was found to be ambiguous, the Court considered whether it could be “severed” in some way, so as to make it enforceable.

The Court distinguished between two types of severance: “blue pencil” severance and “notional” severance. According to the Court, “blue-pencil” severance involves striking out portions of a contract without affecting the meaning of the part remaining, and should only be used only where “the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant.” However, the Court still stated that “the general rule must still be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable”.

In contrast, “notional” severance involves “reading down” or re-writing a provision that is excessively broad, in order to give effect to the intention of the parties when they entered into the contract. The Court determined that this type of severance had “no place in the construction of restrictive covenants in employment agreements”. In particular, the Court noted that there was no bright line test for reasonableness, and it would also invite employers to impose unreasonable restrictive covenants on employees, with the hope that the court will “read-down” the provision accordingly.

In light of the foregoing, the Supreme Court of Canada determined that the British Columbia Court of Appeal erred in re-writing the geographic scope of the non-competition provision in Shafron’s employment contract. The Court found that “notional” severance does not permit a court to rewrite a restrictive covenant in an employment contract in order to reflect its own view of what the parties’ intentions might have been when drafting the contract, or what the court thinks is reasonable in the circumstances. The Court also found that “blue pencil” severance should not apply, as the removal of the word “Metropolitan” would leave behind only “City of Vancouver”. As the British Columbia Court of Appeal concluded, the parties had intended the geographic restriction to include territory outside the City of Vancouver. There was no evidence that the parties would have agreed to remove the word “Metropolitan”, without varying any other terms of the contract or otherwise changing their bargain.

The Supreme Court of Canada therefore allowed the appeal, and restored the judgment of the British Columbia Supreme Court. In particular, the Court noted that the term “Metropolitan City of Vancouver” was ambiguous, and that there was no context or other evidence demonstrating the mutual understanding of the parties at the time they entered into the contract as to what geographic area it covered.

Our Views
The decision of the Supreme Court of Canada in Shafron v. KRG Insurance Brokers (Western) Inc. re-emphasizes that employers must be careful to use clear and precise language when drafting restrictive covenants so that there are no ambiguities. In particular, the Supreme Court of Canada has stated that the courts will not assist the employers by fixing any defects in such covenants.

As well, it is important to remember that when drafting restrictive covenants, employers must take an individualized approach to each employee in order to determine what is reasonable and necessary in the circumstances, and to determine what is truly needed to protect their business interests. If a restrictive covenant is too broad, either as to time, place or scope, it will not be enforced.
PART 6:  
PENSION AND BENEFITS

Nolan v. Kerry (Canada) Inc.  

Background
Kerry (Canada) Inc. (the “Company”) sponsored a defined benefit (“DB”) pension plan (the “Plan”) established by a predecessor corporation in 1954. The original plan trust provided that contributions to the Plan were to be used for the “exclusive benefit” of Plan members and, other than to specify that trustee fees must be paid by the employer was silent on the payment of plan expenses. In 1975, the Plan text was amended to allow for third-party plan expenses to be paid from the pension fund, although it was not until 1985 that the Company actually started paying such expenses out of the fund. In 1985, the Company also began taking contribution holidays as the Plan had accumulated a substantial surplus.

In 2000, the Company amended the Plan, introducing a defined contribution (“DC”) provision. When the DC provision was introduced, existing members were given the option of converting their defined benefits to the DC provision or remaining in the DB provision of the Plan. The DB component was closed off to new members, all of whom were steered into the DC component. The 2000 amendment to the Plan creating the DC provision established a new funding vehicle for the latter, which was seemingly separate from the DB trust.

Following the amendment in 2000, a group of former employees and current plan members asked the Superintendent to invalidate the contribution holidays that the Company had taken since 1985, the Company’s use of pension fund assets to pay plan expenses, and its use of the surplus from the DB provision to fund the DC provision.

Tribunal Decisions
The case went to the Financial Services Tribunal (the “Tribunal”), which delivered decisions on the expenses and cross-subsidization issues, and also addressed whether the members’ litigation costs were payable out of the Plan’s assets. On the expenses issue, the Tribunal essentially said that the “exclusive benefit” language in the Plan’s original 1954 trust permitted expenses incurred for the primary benefit of members to be payable from the Plan’s assets and that a pension plan’s administrative expenses are incurred for the primary benefit of its members. On the cross-subsidization issue, the Tribunal approved the practice of using DB surplus to fund DC contributions in principle, but required the Company either to retroactively amend the Plan to make DC members beneficiaries of the DB trust or to repay the contribution holiday it had enjoyed through cross-subsidization. The Company chose the retroactive-amendment approach. On costs, the Tribunal ruled that it did not have the authority to order costs be paid from the Plan fund.

Divisional Court – Overturns Tribunal
At the Divisional Court, where the hearing took place immediately following the Supreme Court of Canada’s 2004 decision in the Monsanto2 case, the Court determined that the Tribunal’s decisions were to be reviewed on a correctness standard and that the Tribunal was wrong on the cross-subsidization and expenses issues. The Company was ordered to repay

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2 Among other things, the Monsanto decision determined that the Tribunal was not endowed with any particular expertise in the interpretation of the Pension Benefits Act. As such, the SCC held in Monsanto that as a matter of administrative law, the Tribunal’s decisions were to be reviewed on the higher “correctness” standard as opposed to a more deferential “reasonableness” standard.
an amount equal to all the expenses it had paid out of the fund since 1985, and the 2000 amendment adding the DC provision was held to be invalid. The Divisional Court did hold, however, that the parties’ legal costs were not payable from the Plan.

**Court of Appeal – Endorses Tribunal’s Decisions**

In 2007, at the Ontario Court of Appeal, the Company won on all material points. The Court distinguished *Monsanto* and determined that the Tribunal’s original decisions needed only to be reasonable and not correct. It endorsed the Tribunal’s decisions on the payment of expenses and cross-subsidization. Laying down very broad principles that could be made applicable to many pension plans, the Court determined that there is nothing inherently wrong with using DB surplus to fund DC contributions where the plan text and trust agreement in question do not prohibit it. On the expenses issue, the Court also concluded that unless explicitly prohibited by a pension plan text, expenses that are reasonable and appropriate in the administration of a plan may be paid out of the Plan fund to third-party service providers, though not to the employer/administrator itself.

The Supreme Court of Canada granted the members leave to appeal.

**The Supreme Court of Canada – Endorses Decisions of the Tribunal and Court of Appeal**

**Cross-subsidization**

The majority of the Supreme Court of Canada held that surplus accumulated in the DB provision of the Plan could be used to satisfy employer contributions to the DC provision of the Plan (i.e. cross-subsidization), provided that DC members were also beneficiaries of the original DB trust. On this latter requirement, the initial 2000 Plan amendment that added the DC provision was unclear. However, the majority of the Court upheld the Tribunal’s decision that a retroactive amendment to the Plan clarifying that DC members were beneficiaries of the DB trust, thus enabling the cross-subsidization, was not prohibited by the *Pension Benefits Act*.

Ultimately, the majority found that, with the retroactive amendments, there was one plan and one trust fund and that the use of the trust funds for the benefit of the DC members did not infringe the exclusive benefit provisions.

**Plan Expenses**

On the issue of whether administrative expenses are properly payable from the Plan fund, the Supreme Court agreed with the Court of Appeal and the Tribunal that reasonable plan expenses are payable out of a pension plan’s assets unless the plan documents explicitly prohibit the practice. The Court reasoned that the legitimacy and reasonableness of the costs incurred are the key issues when determining whether plan expenses can be paid from a pension fund and thus, where plan expenses are *bona fide* expenses necessary for the administration of the pension plan, such expenses can be paid out of the fund. The Court, however, went further than the Tribunal or Court of Appeal, and was more generous than to sponsors than any previous court, calling the distinction between expenses charged by a third-party service provider and those incurred in-house by the employer as “artificial.” The Court essentially reasoned that what must be considered when determining if plan expenses can be paid from a plan fund is the legitimacy and reasonableness of the costs incurred, not to whom the amount is owed.

**Contribution Holidays**

The Supreme Court of Canada has provided further clarity to the law with respect to plan sponsors using DB surplus to take contribution holidays. Finding the Tribunal’s decision
reasonable, the Court stated that where plan documents provide that funding requirements will be determined by actuarial practice, an employer may take a contribution holiday unless it is prohibited by the wording of the plan or legislation. Provided that a plan text requires the exercise of actuarial discretion, contribution holidays should not be precluded.

**Costs in Pension Litigation**
The Supreme Court of Canada also laid down some broad principles as to when legal costs might be payable from a pension fund and, in the end, determined that the members’ costs in relation to the present litigation were not payable from the Plan. The Court agreed with the Court of Appeal in finding that where litigation is not solely about determining how to properly administer a pension fund, but is adversarial in nature, no costs are payable from the fund. Further, it was recognized that consideration must be given to the significant economic fact that when an employer settles a pension trust it will often continue to have contribution obligations to the trust fund. In that case, awarding costs out of the pension fund could detrimentally impact the employer, as such a cost award would reduce the surplus and thereby accelerate the recommencement of employer contributions.

**Standard of Review**
On the issue of the deference to be afforded the Tribunal, the Court distinguished *Monsanto* and ruled that the Tribunal’s decision on the issue of plan interpretation needed only be reasonable and not correct.

**Our Views**
The *Kerry* decision is very broad and based upon principles that should be widely applicable to plan sponsors. The decision indicates that provided plan documentation permits it, plan sponsors no longer need to question the permissibility of using DB surplus to cross-subsidize DC contribution obligations. Further, the Supreme Court of Canada clearly stated that where plan documents do not prohibit it, *bona fide* expenses necessary for the administration of the plan may be paid out of the plan assets. In fact, if expenses may be paid from the plan, plan sponsors should henceforth be able to recoup from the pension fund the cost of reasonable and necessary administrative services provided to administer the pension plan in-house. Finally, there will now be some leeway afforded to plan sponsors by way of retroactive amendment where plan documents have not been perfectly drafted.

Some commentators may argue that *Kerry* will further erode the security net for employees participating in pension plans with both DB and DC components. Ultimately, however, the *Kerry* case may prove to encourage the continuation of more DB and/or DC pension plans since, with this decision, they may be more feasible for many plan sponsors.
Bill 168

An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters

The Hon. P. Fonseca
Minister of Labour

Government Bill

1st Reading  April 20, 2009
2nd Reading
3rd Reading
Royal Assent

Projet de loi 168

Loi modifiant la Loi sur la santé et la sécurité au travail en ce qui concerne la violence et le harcèlement au travail et d’autres questions

L’honorable P. Fonseca
Ministre du Travail

Projet de loi du gouvernement

1re lecture 20 avril 2009
2e lecture
3e lecture
Sanction royale
The Bill adds Part III.0.1 (Violence and Harassment) to the Occupational Health and Safety Act. Subsection 1 (1) of the Act is amended to include definitions of workplace violence and workplace harassment.

Section 32.0.1 of the Act requires an employer to prepare policies with respect to workplace violence and workplace harassment, and to review the policies at least annually.

Section 32.0.2 of the Act requires an employer to develop a program to implement the workplace violence policy. The program must include measures to control risks of workplace violence identified in the risk assessment that is required under section 32.0.3, to summon immediate assistance when workplace violence occurs, and for workers to report incidents or threats of workplace violence. The program must also set out how the employer will deal with incidents, complaints and threats of workplace violence.

Section 32.0.3 of the Act requires an employer to assess the risk of workplace violence and to report the results of the assessment to the joint health and safety committee or to a health and safety representative. If there is no committee or representative, the results must be reported to the workers. The risk must be reassessed as often as is necessary to protect workers from workplace violence.

Under section 32.0.4 of the Act, if an employer is aware or ought to be aware that domestic violence that is likely to expose a worker to physical injury may occur in the workplace, the employer must take every reasonable precaution to protect the worker.

Section 32.0.5 of the Act clarifies that the employer duties in section 25, the supervisor duties in section 27 and the worker duties in section 28 apply, as appropriate, with respect to workplace violence. Section 32.0.5 also requires an employer to provide a worker with information and instruction on the contents of the workplace violence policy and program.

Section 32.0.6 of the Act requires an employer to develop a program to implement the workplace harassment policy. The program must include measures for workers to report incidents of workplace harassment and set out how the employer will deal with incidents and complaints of workplace harassment. Section 32.0.7 requires an employer to provide a worker with information and instruction on the contents of the workplace harassment policy and program.

The Bill amends section 43 of the Act, which deals with a worker’s right to refuse work in various circumstances where health or safety is in danger, to include the right to refuse work if workplace violence is likely to endanger the worker.

The Bill provides for authority to make regulations, including the following:

1. Requiring an employer to designate a workplace coordinator with respect to workplace violence and workplace harassment.

2. In the case of workers with a limited right to refuse work under section 43 of the Act, specifying situations in which a danger to health or safety is inherent in the workers’ work or a normal condition of employment.

The project of law adds Part III.0.1 (Violence and Harassment) to the Loi sur la santé et la sécurité au travail. Le paragraphe 1 (1) de la Loi est modifié pour inclure les définitions de «violence au travail» et de «harcèlement au travail».

L’article 32.0.1 de la Loi exige que l’employeur formule des politiques concernant respectivement la violence au travail et le harcèlement au travail et examine celles-ci au moins une fois l’an.

L’article 32.0.2 de la Loi exige que l’employeur élabore un programme de mise en œuvre de la politique concernant la violence au travail. Ce programme doit comprendre les mesures à prendre pour contrôler les risques de violence au travail indiqués dans l’évaluation du risque exigée à l’article 32.0.3 et pour obtenir une aide immédiate lorsqu’il se produit de la violence au travail, ainsi que celles que les travailleurs doivent prendre pour signaler les incidents ou les menaces de violence au travail. Il doit également indiquer la manière dont l’employeur compte faire face aux incidents, aux plaintes et aux menaces de violence au travail.

L’article 32.0.3 de la Loi exige que l’employeur évalue le risque de violence au travail et informe le comité ou un délégué à la santé et à la sécurité des résultats de l’évaluation. En l’absence de comité ou de délégué, il faut en informer les travailleurs eux-mêmes. Le risque doit être réévalué aussi souvent que cela est nécessaire pour protéger les travailleurs contre la violence au travail.

Selon l’article 32.0.4 de la Loi, si un employeur a connaissance, ou devrait raisonnablement avoir connaissance, du fait qu’il peut se produire, dans le lieu de travail, de la violence familiale susceptible d’exposer un travailleur à un préjudice corporel, il doit prendre toutes les précautions raisonnables pour le protéger.

L’article 32.0.5 de la Loi précise que les devoirs de l’employeur prévus à l’article 25, ceux du superviseur prévus à l’article 27 et ceux du travailleur prévus à l’article 28 s’appliquent, s’il y a lieu, à l’égard de la violence au travail. Il exige également que les employeurs fournissent aux travailleurs des renseignements et des directives sur le contenu de la politique et du programme concernant la violence au travail.

L’article 32.0.6 de la Loi exige que l’employeur élabore un programme de mise en œuvre de la politique concernant le harcèlement au travail. Ce programme doit comprendre les mesures que les travailleurs doivent prendre pour signaler les incidents de harcèlement au travail et enconcer la manière dont l’employeur compte faire face aux incidents et aux plaintes de harcèlement au travail. L’article 32.0.7 exige que l’employeur fournisse aux travailleurs des renseignements et des directives sur le contenu de la politique et du programme concernant le harcèlement au travail.

Le projet de loi modifie l’article 43 de la Loi, lequel porte sur le droit d’un travailleur de refuser de travailler dans des circonstances susceptibles de mettre sa santé ou sa sécurité en danger, pour inclure le droit de refuser de travailler si de la violence au travail est susceptible de le mettre en danger.

Le projet de loi prévoit des pouvoirs réglementaires, notamment :

1. Exiger qu’un employeur désigne un coordonnateur du lieu de travail à l’égard de la violence au travail et du harcèlement au travail.

2. Dans le cas des travailleurs qui ont, en vertu l’article 43 de la Loi, un droit limité de refuser de travailler, préciser les cas où un danger pour la santé ou la sécurité est inhérent au travail d’un travailleur ou constitue une condition normale de son emploi.
3. Varying or supplementing subsections 43 (4) to (13) of the Act with respect to workers with a limited right to refuse under section 43 and workers to whom section 43 applies by reason of a regulation made for the purposes of subsection 3 (3) of the Act.

4. Governing the application of the duties and rights set out in Part III.0.1 to the taxi industry.
An Act to amend the
Occupational Health and Safety Act
with respect to violence and
harassment in the workplace
and other matters

Note: This Act amends the Occupational Health and Safety Act. For the legislative history of the Act, see the Table of Consolidated Public Statutes – Detailed Legislative History on www.e-Laws.gov.on.ca.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Subsection 1 (1) of the Occupational Health and Safety Act is amended by adding the following definitions:

“workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome; (“harcèlement au travail”)

“workplace violence” means,
(a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker,
(b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker. (“violence au travail”)

2. Section 25 of the Act is amended by adding the following subsection:

Same

(3.1) Any explanatory material referred to under clause (2) (i) may be published as part of the poster required under section 2 of the Employment Standards Act, 2000.

3. The Act is amended by adding the following Part:

PART III.0.1
VIOLENCE AND HARASSMENT

Policies, violence and harassment

32.0.1 (1) An employer shall,
(a) prepare a policy with respect to workplace violence;
(b) prepare a policy with respect to workplace harassment; and

Projet de loi 168
Loi sur la santé et la sécurité au travail
en ce qui concerne la violence
et le harcèlement au travail
et d’autres questions


Sa Majesté, sur l’avis et avec le consentement de l’Assemblée législative de la province de l’Ontario, édicte : 

1. Le paragraphe 1 (1) de la Loi sur la santé et la sécurité au travail est modifié par adjonction des définitions suivantes :

«harcèlement au travail» Fait pour une personne d’adopter une ligne de conduite caractérisée par des remarques ou des gestes vexatoires contre un travailleur dans un lieu de travail lorsqu’elle sait ou devrait raisonnablement savoir que ces remarques ou ces gestes sont importuns. («workplace harassment»)

«violence au travail» Selon le cas :

a) emploi par une personne contre un travailleur, dans un lieu de travail, d’une force physique qui lui cause ou pourrait lui causer un préjudice corporel;

b) tentative ou menace d’employer contre un travailleur, dans un lieu de travail, une force physique qui pourrait lui causer un préjudice corporel. («workplace violence»)

2. L’article 25 de la Loi est modifié par adjonction du paragraphe suivant :

Idem

(3.1) Tout document explicatif visé à l’alinéa (2) i) peut faire partie de l’affiche publiée en application de l’article 2 de la Loi de 2000 sur les normes d’emploi.

3. La Loi est modifiée par adjonction de la partie suivante :

PARTIE III.0.1
VIOLENCE ET HARCÈLEMENT

Politiques : violence et harcèlement

32.0.1 (1) L’employeur :

a) formule une politique concernant la violence au travail;

b) formule une politique concernant le harcèlement au travail;
(c) review the policies as often as is necessary, but at least annually.

Written form, posting

(2) The policies shall be in written form and shall be posted at a conspicuous place in the workplace.

Exception

(3) Subsection (2) does not apply if the number of employees regularly employed at the workplace is five or fewer, unless an inspector orders otherwise.

Program, violence

32.0.2 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace violence required under clause 32.0.1 (1) (a).

Contents

(2) Without limiting the generality of subsection (1), the program shall,

(a) include measures and procedures to control the risks identified in the assessment required under subsection 32.0.3 (1) as likely to expose a worker to physical injury;

(b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur, or when a threat of workplace violence is made;

(c) include measures and procedures for workers to report incidents or threats of workplace violence to the employer or supervisor;

(d) set out how the employer will investigate and deal with incidents, complaints or threats of workplace violence; and

(e) include any prescribed elements.

Assessment of risk of violence

32.0.3 (1) An employer shall assess the risk of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.

Considerations

(2) The assessment shall take into account,

(a) circumstances that would be common to similar workplaces;

(b) circumstances specific to the workplace; and

(c) any other prescribed elements.

Results

(3) An employer shall,

(a) advise the committee or a health and safety representative, if any, of the results of the assessment, and provide a copy if the assessment is in writing; and

(c) examine les politiques aussi souvent que nécessaire, mais au moins une fois par année.

Formulation par écrit, affichage

(2) Les politiques sont formulées par écrit et sont affichées dans un endroit bien en vue du lieu de travail.

Exception

(3) Le paragraphe (2) ne s’applique pas si le nombre de personnes employées régulièrement dans le lieu de travail est égal ou inférieur à cinq, sauf ordre contraire d’un inspecteur.

Programme : violence

32.0.2 (1) L’employeur élabore et maintient un programme de mise en œuvre de la politique concernant la violence au travail exigée à l’alinéa 32.0.1 (1) a).

Contenu

(2) Sans préjudice de la portée générale du paragraphe (1), le programme :

a) inclut les mesures à prendre et les méthodes à suivre pour contrôler les risques indiqués dans l’évaluation exigée aux termes du paragraphe 32.0.3 (1) comme étant susceptibles d’exposer un travailleur à un préjudice corporel;

b) inclut les mesures à prendre et les méthodes à suivre pour obtenir une aide immédiate lorsqu’il se produit ou qu’il est susceptible de se produire de la violence au travail ou qu’il est proféré une menace de violence au travail;

c) inclut les mesures que les travailleurs doivent prendre et les méthodes qu’ils doivent suivre pour signaler les incidents ou les menaces de violence au travail à l’employeur ou au superviseur;

d) énonce la manière dont l’employeur enquêtera sur les incidents, les plaintes ou les menaces de violence au travail et dont il compte y faire face;

e) inclut les éléments prescrits.

Évaluation du risque de violence

32.0.3 (1) L’employeur évalue le risque de violence au travail qui peut découler de la nature du lieu de travail, du genre de travail ou des conditions de travail.

Facteurs à prendre en considération

(2) L’évaluation tient compte des facteurs suivants :

a) les circonstances qu’auraient en commun des lieux de travail semblables;

b) les circonstances propres au lieu de travail;

c) les autres éléments prescrits.

Résultats

(3) L’employeur :

a) informe le comité ou un délégué à la santé et à la sécurité, s’il y en a un, des résultats de l’évaluation et lui en remet une copie, dans le cas d’une évaluation écrite;
(b) if there is no committee or health and safety representative, advise the workers of the results of the assessment and, if the assessment is in writing, provide copies on request or advise the workers how to obtain copies.

Reassessment

(4) An employer shall reassess the risk of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence.

Same

(5) Subsection (3) also applies with respect to the results of the reassessment.

Domestic violence

32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

Duties re violence

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence.

Information

(2) An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and

(b) any other prescribed information or instruction.

Provision of information

(3) An employer’s duty to provide information to a worker under clause 25 (2) (a) and a supervisor’s duty to advise a worker under clause 27 (2) (a) include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if,

(a) the worker can be expected to encounter that person in the course of his or her work; and

(b) the risk of workplace violence is likely to expose the worker to physical injury.

Limit on disclosure

(4) No employer or supervisor shall disclose more personal information in the circumstances described in subsection (3) than is reasonably necessary to protect the worker from physical injury.

b) informe les travailleurs des résultats de l’évaluation et, dans le cas d’une évaluation écrite, leur en fournit une copie sur demande ou leur indique comment en obtenir des copies, s’il n’y a ni comité ni délégué à la santé et à la sécurité.

Réévaluation

(4) L’employeur réévalue le risque de violence au travail aussi souvent que cela est nécessaire pour que la politique afférente visée à l’alinéa 32.0.1 (1) a) et le programme afférent visé au paragraphe 32.0.2 (1) continuent de protéger les travailleurs contre la violence au travail.

Idem

(5) Le paragraphe (3) s’applique également à l’égard des résultats de la réévaluation.

Violence familiale

32.0.4 L’employeur qui prend connaissance, ou devrait raisonnablement avoir connaissance, du fait qu’il peut se produire, dans le lieu de travail, de la violence familiale susceptible d’exposer un travailleur à un préjudice corporel prend toutes les précautions raisonnables dans les circonstances pour le protéger.

Devoirs concernant la violence

32.0.5 (1) Il est entendu que les devoirs de l’employeur énoncés à l’article 25, les devoirs du superviseur énoncés à l’article 27 et les devoirs du travailleur énoncés à l’article 28 s’appliquent, selon le cas, à l’égard de la violence au travail.

Renseignements

(2) L’employeur fournit ce qui suit au travailleur :

a) des renseignements et des directives adaptés au travailleur sur le contenu de la politique et du programme concernant la violence au travail; et

b) les autres renseignements ou directives prescrits.

Fourniture de renseignements

(3) Le devoir de l’employeur de fournir des renseignements au travailleur conformément à l’alinéa 25 (2) a) et le devoir du superviseur d’informer un travailleur conformément à l’alinéa 27 (2) a) s’entendent notamment du devoir de fournir des renseignements, y compris des renseignements personnels, relatifs au risque de violence au travail de la part d’une personne qui a des antécédents de comportement violent, si les conditions suivantes sont réunies :

a) selon toute attente, le travailleur rencontrera cette personne dans le cadre de son travail; et

b) le risque de violence au travail est susceptible d’exposer le travailleur à un préjudice corporel.

Restriction de la divulgation

(4) Ni l’employeur ni le superviseur ne doit divulguer, dans les circonstances visées au paragraphe (3), plus de renseignements personnels que raisonnablement nécessaire pour protéger le travailleur d’un préjudice corporel.
Program, harassment

32.0.6 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

Contents

(2) Without limiting the generality of subsection (1), the program shall,

(a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;

(b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and

(c) include any prescribed elements.

Information and instruction, harassment

32.0.7 An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and

(b) any other prescribed information.

4. (1) Clause 43 (1) (a) of the Act is amended by striking out “clause (3) (a), (b) or (c)” and substituting “clause (3) (a), (b), (b.1) or (c)”.

(2) Subsection 43 (3) of the Act is amended by striking out “or” at the end of clause (b) and by adding the following clause:

(b.1) workplace violence is likely to endanger himself or herself; or

(3) Subsection 43 (5) of the Act is repealed and the following substituted:

Worker to remain in safe place and available for investigation

(5) Until the investigation is completed, the worker shall remain,

(a) in a safe place that is as near as reasonably possible to his or her work station; and

(b) available to the employer or supervisor for the purposes of the investigation.

(4) Subsection 43 (6) of the Act is amended by striking out “or” at the end of clause (b) and by adding the following clause:

(b.1) workplace violence continues to be likely to endanger himself or herself; or

(5) Subsection 43 (8) of the Act is repealed and the following substituted:

Decision of inspector

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether a circumstance described in clause (6) (a), (b), (b.1) or (c) is likely to endanger the worker or another person.

Programme : harcèlement

32.0.6 (1) L’employeur élabore et maintient un programme de mise en œuvre de la politique concernant le harcèlement au travail exigée à l’alinéa 32.0.1 (1) b).

Contenu

(2) Sans préjudice de la portée générale du paragraphe (1), le programme :

a) inclut les mesures que les travailleurs doivent prendre et les méthodes qu’ils doivent suivre pour signaler les incidents de harcèlement au travail à l’employeur ou au superviseur;

b) énonce la manière dont l’employeur enquêtera sur les incidents et les plaintes de harcèlement au travail et dont il compte y faire face;

c) inclut les éléments prescrits.

Renseignements et directives : harcèlement

32.0.7 L’employeur fournit ce qui suit au travailleur :

a) des renseignements et des directives adaptés au travailleur sur le contenu de la politique et du programme concernant le harcèlement au travail;

b) les autres renseignements prescrits.

4. (1) L’alinéa 43 (1) a) de la Loi est modifié par substitution de «l’alinéa (3) a), b), b.1) ou c)» à «l’alinéa (3) a), b) ou c)».

(2) Le paragraphe 43 (3) de la Loi est modifié par adjonction de l’alinéa suivant :

b.1) que de la violence au travail est susceptible de le mettre en danger;

(3) Le paragraphe 43 (5) de la Loi est abrogé et remplacé par ce qui suit :

Obligations du travailleur de demeurer dans un lieu sûr et de rester disponible aux fins de l’enquête

(5) Tant que l’enquête n’est pas terminée, le travailleur :

a) d’une part, demeure dans un lieu sûr aussi près que raisonnablement possible de son poste de travail;

b) d’autre part, reste à la disposition de l’employeur ou du superviseur aux fins de l’enquête.

(4) Le paragraphe 43 (6) de la Loi est modifié par adjonction de l’alinéa suivant :

b.1) que de la violence au travail est toujours susceptible de le mettre en danger;

(5) Le paragraphe 43 (8) de la Loi est abrogé et remplacé par ce qui suit :

Décision de l’inspecteur

(8) À la suite de l’enquête visée au paragraphe (7), l’inspecteur décide si une circonstance visée à l’alinéa (6) a), b), b.1) ou c) est susceptible de mettre le travailleur ou une autre personne en danger.
(6) Subsection 43 (10) of the Act is repealed and the following substituted:

Worker to remain in safe place and available for investigation

(10) Pending the investigation and decision of the inspector, the worker shall remain, during the worker’s normal working hours, in a safe place that is as near as reasonably possible to his or her work station and available to the inspector for the purposes of the investigation.

Exception

(10.1) Subsection (10) does not apply if the employer, subject to the provisions of a collective agreement, if any,

(a) assigns the worker reasonable alternative work during the worker’s normal working hours; or

(b) subject to section 50, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

5. Subsection 52 (1) of the Act is amended by striking out “or fire” in the portion before paragraph 1 and substituting “fire or incident of workplace violence”.

6. The Act is amended by adding the following section:

Order for written policies

55.1 In the case of a workplace at which the number of employees regularly employed is five or fewer, an inspector may in writing order that the policies with respect to workplace violence and workplace harassment required under section 32.0.1 be in written form and posted at a conspicuous place in the workplace.

7. Subsection 70 (2) of the Act is amended by adding the following paragraphs:

15. prescribing elements that any policy required under this Act must contain;

33. prescribing restrictions, prohibitions or conditions with respect to workers or workplaces relating to the risk of workplace violence;

50. requiring an employer to designate a person in a workplace to act as a workplace co-ordinator with respect to workplace violence and workplace harassment, and prescribing the functions and duties of the co-ordinator;

51. in the case of a worker described in subsection 43 (2), specifying situations in which a circumstance described in clause 43 (3) (a), (b), (b.1) or (c) shall be considered, for the purposes of clause 43 (1) (a), to be inherent in the worker’s work or a normal condition of employment;

(6) Le paragraphe 43 (10) de la Loi est abrogé et remplacé par ce qui suit :

Obligation du travailleur de demeurer dans un lieu sûr et de rester à la disposition de l’enquêteur

(10) Tant que l’enquête n’a pas eu lieu et tant que l’inspecteur n’a pas rendu sa décision, le travailleur demeure, pendant ses heures normales de travail, dans un lieu sûr aussi près que raisonnablement possible de son poste de travail et reste à la disposition de l’inspecteur aux fins de l’enquête.

Exception

(10.1) Le paragraphe (10) ne s’applique pas si l’employeur, sous réserve des dispositions de la convention collective, le cas échéant :

a) donne au travailleur un autre travail raisonnable pendant ses heures normales de travail;

b) sous réserve de l’article 50, donne au travailleur d’autres directives s’il est impossible de lui donner un autre travail raisonnable.

5. Le paragraphe 52 (1) de la Loi est modifié par substitution de «, d’un incendie ou d’un incident de violence au travail» à «ou d’un incendie» dans le passage qui précède la disposition 1.

6. La Loi est modifiée par adjonction de l’article suivant :

Ordre : politiques écrites

55.1 Dans le cas d’un lieu de travail où le nombre de personnes régulièrement employées est égal ou inférieur à cinq, un inspecteur peut ordonner par écrit que les politiques concernant la violence au travail et le harcèlement au travail exigées aux termes de l’article 32.0.1 soient formulées par écrit et affichées dans un endroit bien en vue du lieu de travail.

7. Le paragraphe 70 (2) de la Loi est modifié par adjonction des dispositions suivantes :

15. prescrire les éléments que doivent comprendre les politiques exigées par la présente loi;

33. prescrire des restrictions, des interdictions ou des conditions à l’égard des travailleurs ou des lieux de travail relativement au risque de violence au travail;

50. exiger qu’un employeur désigne une personne dans un lieu de travail pour agir à titre de coordonnateur du lieu de travail à l’égard de la violence au travail et du harcèlement au travail et prescrire les fonctions et les obligations du coordonnateur;

51. dans le cas d’un travailleur décrit au paragraphe 43 (2), préciser les cas où une circonstance visée à l’alinéa 43 (3) a), b), b.1) ou c) doit être considérée, pour l’application de l’alinéa 43 (1) a), comme étant inhérente au travail d’un travailleur ou comme une condition normale de son emploi;
52. varying or supplementing subsections 43 (4) to (13) with respect to the following workers, in circumstances when section 43 applies to them:

i. workers to whom section 43 applies by reason of a regulation made for the purposes of subsection 3 (3), and

ii. workers described in subsection 43 (2).

8. The Act is amended by adding the following section:

Regulations, taxi industry

71. (1) The Lieutenant Governor in Council may make regulations governing the application of the duties and rights set out in Part III.0.1 to the taxi industry.

Same

(2) Without limiting the generality of subsection (1), the Lieutenant Governor in Council may make regulations,

(a) specifying that all or any of the duties set out in Part III.0.1 apply for the purposes of the regulations, with such modifications as may be necessary in the circumstances;

(b) specifying who shall be considered an employer for the purposes of the regulations and requiring that person to carry out the specified duties;

(c) specifying who shall be considered a worker for the purposes of the regulations;

(d) specifying what shall be considered a workplace for the purposes of the regulations.

Commencement

9. This Act comes into force six months after the day it receives Royal Assent.

Short title

10. The short title of this Act is the Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009.
The Ontario government recently introduced amendments to the *Occupational Health and Safety Act* (OHSA) to address workplace violence and harassment. Bill 168, *An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace*, endeavors to place a number of new obligations on employers. The employer will be required to assess the risk of workplace violence and develop policies and procedures to address and prevent violence and harassment in the workplace. Other jurisdictions have enacted legislation that is similar in spirit to Bill 168. However, certain jurisdictions cover only workplace violence and do not discuss workplace harassment, such as Nova Scotia, Prince Edward Island, Alberta, British Columbia and Federal legislation. Those jurisdictions that contemplate both workplace violence and harassment are Saskatchewan and Manitoba. Quebec does not specify workplace harassment nor workplace violence, but does regulate psychological harassment.

Section 32.05(3) is one of the more controversial provisions of Bill 168, as it sets out the employers responsibility to provide information, including personal information, of an employee with a history of violent behavior to a fellow employee that can be expected to encounter that person in the course of their work, or if the risk is likely to expose the employee to physical injury. Similar provisions can be found in the legislation of Manitoba, British Columbia, Prince Edward Island, and Nova Scotia.

<table>
<thead>
<tr>
<th>Province</th>
<th>Statute</th>
<th>Section</th>
<th>Text</th>
</tr>
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<tbody>
<tr>
<td>Federal</td>
<td><em>Canada Labour Code</em>, Part II R.S.C. 1985, c. L-2</td>
<td>124</td>
<td>Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.¹</td>
</tr>
<tr>
<td>Federal</td>
<td><em>Canada Occupational Health and Safety Regulations</em>, SOR/86-304</td>
<td>20.1</td>
<td>The employer shall carry out its obligations under this Part in consultation with and the participation of the policy committee or, if there is no policy committee, the workplace committee or the health and safety representative.</td>
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<td>20.2</td>
<td>In this Part, “workplace violence” constitutes any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee.</td>
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<td>20.3</td>
<td>The employer shall develop and post at a place accessible to all employees a workplace violence prevention policy setting out, among other things, the following obligations of the</td>
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</table>

¹See also section 125, specifying particular duties of employer
20.3 employer:
   (a) to provide a safe, healthy and violence-free work place;
   (b) to dedicate sufficient attention, resources and time to address factors that contribute to work place violence including, but not limited to, bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it;
   (c) to communicate to its employees information in its possession about factors contributing to work place violence; and
   (d) to assist employees who have been exposed to work place violence.

20.4 The employer shall identify all factors that contribute to work place violence, by taking into account, at a minimum, the following:
   (a) its experience in dealing with those factors and with work place violence;
   (b) the experience of employers in dealing with those factors and with violence in similar work places;
   (c) the location and circumstances in which the work activities take place;
   (d) the employees' reports of work place violence or the risk of work place violence;
   (e) the employer’s investigation of work place violence or the risk of work place violence; and
   (f) the measures that are already in place to prevent and protect against work place violence.

20.5 (1) The employer shall assess the potential for work place violence, using the factors identified under section 20.4, by taking into account, at a minimum, the following:
   (a) the nature of the work activities;
   (b) the working conditions;
   (c) the design of the work activities and surrounding environment;
20.5 (d) the frequency of situations that present a risk of workplace violence;

(e) the severity of the adverse consequences to the employee exposed to a risk of workplace violence;

(f) the observations and recommendations of the policy committee or, if there is no policy committee, the workplace committee or the health and safety representative, and of the employees; and

(g) the measures that are already in place to prevent and protect against workplace violence.

(2) The employer, when consulting with the policy committee or, if there is no policy committee, the workplace committee or the health and safety representative, shall not disclose information whose disclosure is prohibited by law or could reasonably be expected to threaten the safety of individuals.

20.6 (1) Once an assessment of the potential for workplace violence has been carried out under section 20.5, the employer shall develop and implement systematic controls to eliminate or minimize workplace violence or a risk of workplace violence to the extent reasonably practicable.

(2) The controls shall be developed and implemented as soon as practicable, but not later than 90 days after the day on which the risk of workplace violence has been assessed.

(3) Once controls referred to in subsection (1) are implemented, the employer shall establish procedures for appropriate follow-up maintenance and corrective measures, including measures to promptly respond to unforeseen risks of workplace violence.

(4) Any controls established to eliminate or minimize workplace violence shall not create or increase the risk of workplace violence.

20.7 (1) The employer shall review the effectiveness of the workplace violence prevention measures set out in sections 20.3 to 20.6 and update them whenever there is a change that compromises the effectiveness of those measures, but at least every three years.

(2) The review shall include consideration of the following:
20.7 (a) work place conditions and work locations and activities;

(b) work place inspection reports;

(c) the employees’ reports and the employer’s records of investigations into work place violence or the risk of work place violence;

(d) work place health and safety evaluations;

(e) data on work place violence or the risk of work place violence in the employees’ work place or in similar work places;

(f) the observations of the policy committee, or if there is no policy committee, the work place committee or the health and safety representative; and

(g) other relevant information.

(3) The employer shall keep, for a period of three years, a written or electronic record of findings following the review of the work place violence prevention measures, and make it readily available for examination by a health and safety officer.

20.8 (1) The employer shall develop in writing and implement emergency notification procedures to summon assistance where immediate assistance is required, in response to work place violence.

(2) The employer shall ensure that employees are made aware of the emergency notification procedures applicable to them and that the text of those procedures is posted at a location readily accessible to those employees.

(3) In the development and implementation of emergency notification procedures, the employer’s decision of whether or not to notify the police shall take into account the nature of the work place violence and the concerns of employees who experienced the work place violence.

(4) If the police are investigating a violent occurrence, the work place committee or the health and safety representative shall be notified of their investigation, unless notification is prohibited by law.

(5) The employer shall develop and implement measures to assist employees who have
<table>
<thead>
<tr>
<th>20.8</th>
<th>experienced work place violence.</th>
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<tbody>
<tr>
<td>20.9</td>
<td>(1) In this section, “competent person” means a person who</td>
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<td></td>
<td>(a) is impartial and is seen by the parties to be impartial;</td>
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<td></td>
<td>(b) has knowledge, training and experience in issues relating to work place violence; and</td>
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<td></td>
<td>(c) has knowledge of relevant legislation.</td>
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<td>(2) If an employer becomes aware of work place violence or alleged work place violence, the employer shall try to resolve the matter with the employee as soon as possible.</td>
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<td>(3) If the matter is unresolved, the employer shall appoint a competent person to investigate the work place violence and provide that person with any relevant information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent.</td>
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<td>(4) The competent person shall investigate the work place violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.</td>
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<td>(5) The employer shall, on completion of the investigation into the work place violence,</td>
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<td></td>
<td>(a) keep a record of the report from the competent person;</td>
</tr>
<tr>
<td></td>
<td>(b) provide the work place committee or the health and safety representative, as the case may be, with the report of the competent person, providing information whose disclosure is not prohibited by law and that would not reveal the identity of persons involved without their consent; and</td>
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<tr>
<td></td>
<td>(c) adapt or implement, as the case may be, controls referred to in subsection 20.6(1) to prevent a recurrence of the work place violence.</td>
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<td>(6) Subsections (3) to (5) do not apply if:</td>
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<td></td>
<td>(a) the work place violence was caused by a person other than an employee;</td>
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</table>
20.9 (b) it is reasonable to consider that engaging in the violent situation is a normal condition of employment; and
(c) the employer has effective procedures and controls in place, involving employees to address workplace violence.

20.10 (1) The employer shall provide information, instruction and training on the factors that contribute to workplace violence that are appropriate to the workplace of each employee exposed to workplace violence or a risk of workplace violence.

(2) The employer shall provide information, instruction and training
(a) before assigning to an employee any new activity for which a risk of workplace violence has been identified;
(b) when new information on workplace violence becomes available; and
(c) at least every three years.

(3) The information, instruction and training shall include the following:
(a) the nature and extent of workplace violence and how employees may be exposed to it;
(b) the communication system established by the employer to inform employees about workplace violence;
(c) information on what constitutes workplace violence and on the means of identifying the factors that contribute to workplace violence;
(d) the workplace violence prevention measures that have been developed under sections 20.3 to 20.6; and
(e) the employer’s procedures for reporting on workplace violence or the risk of workplace violence.

(4) At least once every three years and in either of the following circumstances, the employer
shall review and update, if necessary, the information, instruction and training provided:

(a) when there is a change in respect of the risk of workplace violence; or

(b) when new information on the risk of workplace violence becomes available.

(5) The employer shall maintain signed records, in paper or electronic form, on the information, instruction and training provided to each employee for a period of two years after the date on which an employee ceases to perform an activity that has a risk of workplace violence associated with it.

| 1(1) | “workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome; (“harcèlement au travail”)

“workplace violence” means,

(a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker. (“violence au travail”)

| 25 | (3.1) Any explanatory material referred to under clause (2)(i) may be published as part of the poster required under section 2 of the Employment Standards Act, 2000

| 32.0.1 | (1) An employer shall:

(a) prepare a policy with respect to workplace violence;

(b) prepare a policy with respect to workplace harassment

(c) review the policies as often as necessary, but at least annually

(2) The policies shall be in written form and shall be posted at a conspicuous place in the

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\(^2\) Also contains regulations for the taxi industry not specified in this document.
32.0.1 (3) Subsection (2) does not apply if the number of employees regularly employed at the workplace is five or fewer, unless an inspector orders otherwise.

32.0.2 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace violence required under clause 32.0.1(a).

(2) Without limiting the generality of subsection (1), the program shall:

   a) include measures and procedures to control the risks identified in the assessment required under subsection 32.0.3(1) as likely to expose a worker to physical injury;

   b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur, or when a threat of workplace violence is made;

   c) include measures and procedures for workers to report incidents or threats of workplace violence to the employer or supervisor;

   d) set out how the employer will investigate and deal with incidents, complaints or threats of workplace violence; and

   e) include any prescribed elements.

32.0.3 (1) An employer shall assess the risk of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.

(2) The assessment shall take into account,

   a) circumstances that would be common to similar workplaces;

   b) circumstances specific to the workplace; and

   c) any other prescribed elements.

(3) An employer shall,
(a) advise the committee or a health and safety representative, if any, of the results of the assessment, and provide a copy if the assessment is in writing; and

(b) if there is no committee or health and safety representative, advise the workers of the results of the assessment and, if the assessment is in writing, provide copies on request or advise the workers how to obtain copies.

(4) An employer shall reassess the risk of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence.

(5) Subsection (3) also applies with respect to the results of the reassessment.

<table>
<thead>
<tr>
<th>32.0.4</th>
<th>If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.</th>
</tr>
</thead>
</table>

| 32.05  | (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence.

(2) An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and

(b) any other prescribed information or instruction.

(3) An employer’s duty to provide information to a worker under clause 25 (2) (a) and a supervisor’s duty to advise a worker under clause 27 (2) (a) include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if,

(a) the worker can be expected to encounter that person in the course of his or her work; and

(b) the risk of workplace violence is likely to expose the worker to physical injury. |
(4) No employer or supervisor shall disclose more personal information in the circumstances described in sub-section (3) than is reasonably necessary to protect the worker from physical injury.

| 32.06 | (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

(2) Without limiting the generality of subsection (1), the program shall,

(a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;

(b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and

(c) include any prescribed elements.

| 32.07 | An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and

(b) any other prescribed information.

| 43 | (1) Clause 43 (1) (a) of the Act is amended by striking out "clause (3) (a), (b) or (c)" and substituting "clause (3) (a), (b), (b.1) or (c)".

(2) Subsection 43 (3) of the Act is amended by striking out “or” at the end of clause (b) and by adding the following clause:

(b.1) workplace violence is likely to endanger himself or herself; or

(3) Subsection 43 (5) of the Act is repealed and the following substituted:

(5) Until the investigation is completed, the worker shall remain,

(a) in a safe place that is as near as reasonably possible to his or her work
(b) available to the employer or supervisor for the purposes of the investigation.

(4) Subsection 43 (6) of the Act is amended by striking out “or” at the end of clause (b) and by adding the following clause:

(b.1) workplace violence continues to be likely to endanger himself or herself: or

(5) Subsection 43 (8) of the Act is repealed and the following substituted:

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether a circumstance described in clause (6) (a), (b), (b.1) or (c) is likely to endanger the worker or another person.

(6) Subsection 43 (10) of the Act is repealed and the following substituted:

(10) Pending the investigation and decision of the inspector, the worker shall remain, during the worker’s normal working hours, in a safe place that is as near as reasonably possible to his or her work station and available to the inspector for the purposes of the investigation.

(10.1) Subsection (10) does not apply if the employer, subject to the provisions of the collective agreement, if any,

(a) assigns the worker reasonable alternative work during the worker’s normal working hours, or

(b) subject to section 50, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

52 Subsection 52(1) of the Act is amended by striking out “or fire” in the portion before paragraph 1 and substituting “fire or incident of workplace violence”.

55.1 In the case of a workplace at which the number of employees regularly employed is five or fewer, and inspector may in writing order that the policies with respect to workplace violence and workplace harassment required under section 32.0.1 be in written form and posted at a
conspicuous place in the workplace.

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
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<tbody>
<tr>
<td>70.2</td>
<td>Subsection 70(2) of the Act is amended by adding the following paragraphs:</td>
</tr>
<tr>
<td></td>
<td>15. prescribing elements that any policy required under this Act must contain;</td>
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<td></td>
<td>33. prescribing restrictions, prohibitions or conditions with respect to workers or workplaces relating the risk of workplace violence;</td>
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<td></td>
<td>50. requiring an employer to designate a person in a workplace to act as a workplace co-ordinator with respect to workplace violence and workplace harassment, and prescribing the functions and duties of the co-ordinator;</td>
</tr>
<tr>
<td></td>
<td>51. in the case of a worker described in subsection 43(2), specifying situations in which circumstances described in clause 43 (3)(a), (b), (b.1) or (c) shall be considered, for the purposes of clause 43(1)(a), to be inherent in the worker’s work or a normal condition of employment;</td>
</tr>
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<td>52. varying or supplementing subsections 43(4) to (13) with respect to the following workers, in circumstances when section 43 applies to them:</td>
</tr>
<tr>
<td></td>
<td>i. workers to whom section 43 applies by reason of a regulation made for the purposes of subsection 3(3), and</td>
</tr>
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<td>ii. workers described in subsection 43(2).</td>
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<thead>
<tr>
<th>Alberta</th>
<th>Occupation Health and Safety Code, 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>389</td>
<td>Workplace violence is considered a hazard for the purposes of Part 2.</td>
</tr>
<tr>
<td>390</td>
<td>An employer must develop a policy and procedures respecting potential workplace violence.</td>
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<td>391</td>
<td>An employer must ensure that workers are instructed in:</td>
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<td></td>
<td>1. how to recognize workplace violence;</td>
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<td>2. the policy, procedures and workplace arrangements that effectively minimize or eliminate workplace violence;</td>
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<td></td>
<td>3. the appropriate response to workplace violence, including how to obtain assistance; and</td>
</tr>
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<td></td>
<td>4. procedures for reporting, investigating and documenting incidents of workplace violence.</td>
</tr>
<tr>
<td>Section</td>
<td>Text</td>
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</tr>
<tr>
<td>392</td>
<td>Sections 18(3) to (6) and 19 of the Act apply to an incident of workplace violence.</td>
</tr>
</tbody>
</table>
| 4.24 | In sections 4.25 and 4.26 improper activity or behaviour includes:  
1. the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury, and  
2. horseplay, practical jokes, unnecessary running or jumping or similar conduct. |
| 4.25 | A person must not engage in any improper activity or behaviour at a workplace that might create or constitute a hazard to themselves or to any other person. |
| 4.26 | Improper activity or behaviour must be reported and investigated as required by Part 3 (Rights and Responsibilities). |
| 4.27 | In sections 4.28 to 4.31, violence means the attempted or actual exercise by a person, other than a worker, of any physical force so as to cause injury to a worker, and includes any threatening statement or behaviour which gives a worker reasonable cause to believe that he or she is at risk of injury. |
| 4.28 | 1) A risk assessment must be performed in any workplace in which a risk of injury to workers from violence arising out of their employment may be present.  
2) The risk assessment must include the consideration of  
(a) previous experience in that workplace,  
(b) occupational experience in similar workplaces, and  
(c) the location and circumstances in which work will take place. |
| 4.29 | If a risk of injury to workers from violence is identified by an assessment performed under section 4.28 the employer must:  
a) establish procedures, policies and work environment arrangements to eliminate the risk to workers from violence, and  
b) if elimination of the risk to workers is not possible, establish procedures, policies and work environment arrangements to minimize the risk to workers. |
| 4.30 | (1) An employer must inform workers who may be exposed to the risk of violence of the nature and extent of the risk.  

(2) The duty to inform workers in subsection (1) includes a duty to provide information related to the risk of violence from persons who have a history of violent behaviour and whom workers are likely to encounter in the course of their work.  

(3) The employer must instruct workers who may be exposed to the risk of violence in  
   (a) the means for recognition of the potential for violence,  
   (b) the procedures, policies and work environment arrangements which have been developed to minimize or effectively control the risk to workers from violence,  
   (c) the appropriate response to incidents of violence, including how to obtain assistance, and  
   (d) procedures for reporting, investigating and documenting incidents of violence.  

| 4.31 | (1) and (2) Repealed. [B.C. Reg. 312/2003, App. D, s. 2 (a).]  

(3) The employer must ensure that a worker reporting an injury or adverse symptom as a result of an incident of violence is advised to consult a physician of the worker’s choice for treatment or referral.  

| Manitoba | Workplace Safety and Health Act,  
Workplace Safety and Health Regulation,  
Part 10 & 11 | 10.1 | 10.1(1) An employer must  
   (a) develop and implement a written policy to prevent harassment in the workplace; and  
   (b) ensure that workers comply with the harassment prevention policy.  

10.1(2) The harassment prevention policy must be developed in consultation with:  
   (a) the committee at the workplace;  
   (b) the representative at the workplace; or  
   (c) the client or customer of the workplace.
(c) when there is no committee or representative, the workers at the workplace.

10.2 10.2(1) The harassment prevention policy must include the following statements:

(a) every worker is entitled to work free of harassment;

(b) the employer must ensure, so far as is reasonably practicable, that no worker is subjected to harassment in the workplace;

(c) the employer will take corrective action respecting any person under the employer's direction who subjects a worker to harassment;

(d) the employer will not disclose the name of a complainant or alleged harasser or the circumstances related to the complaint to any person except where disclosure is:

   (i) necessary to investigate the complaint or take corrective action with respect to the complaint; or

   (ii) required by law.

10.2(2) The harassment prevention policy must provide information on the following procedures under the policy:

(a) how to make a harassment complaint;

(b) how a harassment complaint will be investigated;

(c) how the complainant and alleged harasser will be informed of the results of the investigation.

10.3 An employer must post a copy of the harassment prevention policy in a conspicuous place at the workplace.

11.1 11.1(1) An employer must identify and assess the risk of violence in the workplace in consultation with:

(a) a committee at the workplace;
(b) the representative at the workplace; or
(c) when there is no committee or representative, the workers at the workplace.

11.1(2) When a risk of violence in the workplace is identified, an employer must:

(a) develop and implement a violence prevention policy in consultation with the same persons that conducted the assessment of the risk of violence under subsection (1);
(b) train workers in the violence prevention policy; and
(c) ensure that workers comply with the violence prevention policy.

11.1(3) The violence prevention policy must include the following statements:

(a) the employer must ensure, so far as is reasonably practicable, that no worker is subjected to violence in the workplace;

(b) the employer will take corrective action respecting any person under the employer’s direction who subjects a worker to violence;

(c) the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is:

(i) necessary in order to investigate the complaint;

(ii) required in order to take corrective action in response to the complaint; or

(iii) required by law

(d) the violence prevention policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

11.1(4) The violence prevention policy must provide information on the following matters:

(a) how to eliminate the risk of violence to a worker;
(b) where elimination of the risk of violence to a worker is not possible, how to
<table>
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<th>Nova Scotia</th>
<th><strong>5</strong></th>
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</table>
| *Violence in the Workplace Regulations, N.S. Reg. 209/2007* | (1) An employer must conduct a violence risk assessment for each of their workplaces in accordance with this Section to determine if there is a risk of violence in the workplace and prepare a written report concerning the violence risk assessment detailing the extent and nature of any risk identified by the assessment.  
(2) In conducting a violence risk assessment, an employer must take all of the following into consideration:  
(a) violence that has occurred in the workplace in the past;  
(b) violence that is known to occur in similar workplaces;  
(c) the circumstances in which work takes place; |

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3 See also: Violence in the Workplace Regulations for the Retail Gas Industry; Violence in the Workplace Regulations for the Taxi Industry; Violence in the Workplace Regulations for Convenience and Small Retail.
(d) the interactions that occur in the course of performing work;
(e) the physical location and layout of the workplace.

(3) An employer must consult with any committee established at the workplace when conducting a violence risk assessment and must provide the committee with a copy of the written report of the assessment.

(4) An employer must consult with any representative selected at the workplace when conducting a violence risk assessment and must provide the representative with a copy of the written report of the assessment.

| 6 | (1) An employer must conduct a new violence risk assessment for a workplace in any of the following circumstances:
   |   | (a) the employer becomes aware of a type of violence occurring in similar workplaces that was not taken into consideration when the previous violence risk assessment was conducted;
   |   | (b) there is a significant change in any of the following:
   |   | (i) the circumstances in which work takes place,
   |   | (ii) the interactions that occur in the course of performing work,
   |   | (iii) the physical location or layout of the workplace;
   |   | (c) the employer plans to construct a new facility or renovate an existing facility;
   |   | (d) the employer is ordered to do so by an officer.
   |   | (2) An employer must conduct a new violence risk assessment for each of their workplaces at least every 5 years. |

| 7 | (1) An employer must establish and implement a workplace violence prevention plan for each workplace for which a significant risk of violence is identified through a violence risk assessment or that an officer orders a plan for. |
(2) As part of a workplace violence prevention plan, an employer must do all of the following:

(a) prepare a written workplace violence prevention statement;

(b) either:

(i) take and document reasonable measures to minimize and, to the extent possible, eliminate the risk of violence in the workplace, or

(ii) adopt a code of practice on violence in the workplace published by the Director governing the primary business conducted at the employer’s workplace;

(c) establish and document procedures for providing employees with the information and training required by Sections 10 and 11;

(d) establish and document procedures for reporting, documenting and investigating incidents of violence as required by Sections 12 and 13.

(3) An employer must consult with any committee established at the workplace when establishing, reviewing or revising a workplace violence prevention plan.

(4) An employer must consult with any representative selected at the workplace when establishing, reviewing or revising a workplace violence prevention plan.

(5) An employer must make a copy of the workplace violence prevention plan available for examination at the workplace by any employer, contractor, constructor, supplier, employee, owner or self-employed person in that workplace.

(1) If a new violence risk assessment indicates a significant change to the extent and nature of the risk of violence, an employer who is required to establish and implement a workplace violence prevention plan must ensure that the plan is reviewed and, if necessary, revised.

(2) At least every 5 years, an employer who is required to establish and implement a workplace violence prevention plan must ensure that the plan is reviewed and, if necessary, revised.

(1) An employer must prepare a workplace violence prevention statement that includes all of
(a) a statement of the employer’s recognition that violence is an occupational health and safety hazard at the workplace;

(b) a statement of the employer’s recognition of the physical and emotional harm resulting from violence;

(c) a statement of the employer’s recognition that any form of violence in the workplace is unacceptable;

(d) a statement of the employer’s commitment to minimize and, to the extent possible, eliminate the risk of violence in the workplace.

(2) An employer must post a copy of their workplace violence prevention statement in a prominent place or places in each of their workplaces so it can be easily accessed by employees, and must ensure that it remains posted.

10 (1) An employer must provide an employee who is exposed to a significant risk of violence in a workplace with information on the nature and extent of the risk and on any factors that may increase or decrease the extent of the risk.

(2) Except as prohibited by law, the duty to provide information to an employee under subsection (1) includes a duty to provide information related to a risk of violence from a person who has a history of violent behaviour if that person is likely to be encountered by the employee.

11 (1) In accordance with the procedure in an employer’s workplace violence prevention plan, an employer must provide adequate training on all of the following for any employee who is exposed to a significant risk of violence:

(a) the rights and responsibilities of employees under the Act;

(b) the workplace violence prevention statement;

(c) the measures taken by the employer to minimize or eliminate the risk of violence;

(d) how to recognize a situation in which there is a potential for violence and how to
respond appropriately;

(e) how to respond to an incident of violence, including how to obtain assistance;

(f) how to report, document and investigate incidents of violence.

(2) An employer must provide any employee who is required by the employer to perform a function under the workplace violence prevention plan with training on the plan generally and on the particular function to be performed by the employee.

| 12 | An employer, contractor, constructor, supplier, employee, owner or self-employed person in the workplace has a duty to report all incidents of violence in a workplace to the employer. |
| 13 | (1) An employer must ensure that incidents of violence in a workplace are documented and promptly investigated to determine their causes and the actions needed to prevent reoccurrence in accordance with the procedures established under clause 7(2)(d).

(2) An employer must ensure that notice of the actions taken to prevent reoccurrence of an incident of violence are given to all of the following:

(a) any employee affected by the incident of violence;

(b) any committee established at the workplace;

(c) any representative selected at the workplace. |
| 14 | An employer must provide an employee who has been exposed to or affected by violence at the workplace with an appropriate debriefing and must advise the employee to consult a health professional of the employee’s choice for treatment or counseling. |
| 15 | Despite anything in these regulations, an employer who has employees performing work at multiple temporary workplaces is not required to conduct a violence risk assessment or prepare a workplace violence prevention plan for each individual workplace if the employer conducts a violence risk assessment and prepares a workplace violence prevention plan that covers similar workplaces collectively and takes into account the circumstances and interactions that an employee is likely to encounter in the performance of their work. |
| 16 | (1) Despite anything in these regulations, 2 or more employers may enter into a written |
agreement to collectively provide and maintain the statements, plans and services required under these regulations.

(2) A copy of any agreement made under subsection (1) must be kept by each of the employers and must be provided to any of the following, engaged at the workplace of 1 of the employers, who request a copy:

(i) an employee;
(ii) a contractor;
(iii) a constructor;
(iv) a supplier;
(v) an owner or self-employed person;
(vi) an officer.

52.1 In this Part, “violence” means the threatened, attempted or actual exercise of any physical force by a person other than a worker that can cause, or that causes, injury to a worker, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that he or she is at risk of injury.

52.2 (1) An employer shall conduct a risk assessment of the workplace to determine whether or not a risk of injury to workers from violence arising out of their employment may be present.
(2) A risk assessment under subsection (1) shall include a consideration of:
(a) previous experience of violence in that workplace;
(b) occupational experience of violence in similar workplaces; and
(c) the location and circumstances in which the work will take place.

52.3 If a risk of injury to a worker from violence in a workplace is identified by an assessment under section 52.2, the employer shall establish procedures, policies and work environment arrangements

(a) to either:

(i) eliminate the risk of violence to workers in that workplace, or
(ii) if elimination of the risk is not possible, minimize the risk of violence to workers in that workplace; and 

(b) to provide for reporting, investigating and documenting incidents of violence in that workplace.

| 52.4 | 1) An employer shall inform workers who may be exposed to the risk of violence in the workplace of the nature and extent of the risk. 

(2) Unless otherwise prohibited by law, the duty to inform workers under subsection (1) includes a duty to provide information related to the risk of violence from persons who have a history of violent behaviour and who may be encountered by a worker in the course of his or her work. 

(3) An employer shall instruct workers who may be exposed to the risk of violence in 

(a) the means of recognition of the potential for violence; 

(b) the procedures, policies and work environment arrangements developed under section 52.3; and 

(c) the appropriate response to incidents of violence in the workplace, including how to obtain assistance. |

| 52.5 | An employer shall ensure that a worker who reports an injury or adverse symptom resulting from workplace violence is advised to consult a physician of the worker’s choice for treatment or a referral. |

| Quebec | Act Respecting Labour Standards, R.S.Q., c. N-1.1 | 81.18 | For the purposes of this Act, “psychological harassment” means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee. 

A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment. |

| | | 81.19 | Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it. |
The provisions of sections 81.18, 81.19, 123.7, 123.15 and 123.16, with the necessary modifications, are deemed to be an integral part of every collective agreement. An employee covered by such an agreement must exercise the recourses provided for in the agreement, insofar as any such recourse is available to employees under the agreement.

At any time before the case is taken under advisement, a joint application may be made by the parties to such an agreement to the Minister for the appointment of a person to act as a mediator.

The provisions referred to in the first paragraph are deemed to form part of the conditions of employment of every employee appointed under the Public Service Act (chapter F-3.1.1) who is not governed by a collective agreement. Such an employee must exercise the applicable recourse before the Commission de la fonction publique according to the rules of procedure established pursuant to that Act. The Commission de la fonction publique exercises for that purpose the powers provided for in sections 123.15 and 123.16 of this Act.

The third paragraph also applies to the members and officers of bodies.

<table>
<thead>
<tr>
<th>Section</th>
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<tbody>
<tr>
<td>81.20</td>
<td>The provisions of sections 81.18, 81.19, 123.7, 123.15 and 123.16, with the necessary modifications, are deemed to be an integral part of every collective agreement. An employee covered by such an agreement must exercise the recourses provided for in the agreement, insofar as any such recourse is available to employees under the agreement. At any time before the case is taken under advisement, a joint application may be made by the parties to such an agreement to the Minister for the appointment of a person to act as a mediator. The provisions referred to in the first paragraph are deemed to form part of the conditions of employment of every employee appointed under the Public Service Act (chapter F-3.1.1) who is not governed by a collective agreement. Such an employee must exercise the applicable recourse before the Commission de la fonction publique according to the rules of procedure established pursuant to that Act. The Commission de la fonction publique exercises for that purpose the powers provided for in sections 123.15 and 123.16 of this Act. The third paragraph also applies to the members and officers of bodies.</td>
</tr>
<tr>
<td>123.6</td>
<td>An employee who believes he has been the victim of psychological harassment may file a complaint in writing with the Commission. Such a complaint may also be filed by a non-profit organization dedicated to the defence of employees' rights on behalf of one or more employees who consent thereto in writing.</td>
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<td>123.7</td>
<td>Any complaint concerning psychological harassment must be filed within 90 days of the last incidence of the offending behaviour.</td>
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<tr>
<td>123.8</td>
<td>On receipt of a complaint, the Commission shall make an inquiry with due dispatch. Sections 103 to 110 shall apply to the inquiry, with the necessary modifications.</td>
</tr>
<tr>
<td>123.9</td>
<td>If the Commission refuses to take action following a complaint, the employee or, if applicable, the organization with the employee's written consent, may within 30 days of the Commission's decision under section 107 or 107.1, make a written request to the Commission for the referral of the complaint to the Commission des relations du travail.</td>
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<td>123.10</td>
<td>The Commission may, at any time, during the inquiry and with the agreement of the parties, request the Minister to appoint a person to act as a mediator. The Commission may, at the</td>
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<td>Section</td>
<td>Description</td>
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<tr>
<td>123.11</td>
<td>If the employee is still bound to the employer by a contract of employment, the employee is deemed to be at work during mediation sessions.</td>
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<tr>
<td>123.12</td>
<td>At the end of the inquiry, if no settlement is reached between the parties and the Commission agrees to pursue the complaint, it shall refer the complaint without delay to the Commission des relations du travail.</td>
</tr>
<tr>
<td>123.13</td>
<td>The Commission des normes du travail may represent an employee in a proceeding under this division before the Commission des relations du travail.</td>
</tr>
<tr>
<td>123.14</td>
<td>The provisions of the Labour Code (chapter C-27) relating to the Commission des relations du travail, its commissioners, their decisions and the exercise of their jurisdiction, except sections 15 to 19, as well as section 100.12 of that Code apply, with the necessary modifications.</td>
</tr>
<tr>
<td>123.15</td>
<td>If the Commission des relations du travail considers that the employee has been the victim of psychological harassment and that the employer has failed to fulfill the obligations imposed on employers under section 81.19, it may render any decision it believes fair and reasonable, taking into account all the circumstances of the matter, including:</td>
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<td>(1) ordering the employer to reinstate the employee;</td>
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<td>(2) ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;</td>
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<td>(3) ordering the employer to take reasonable action to put a stop to the harassment;</td>
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<td>(4) ordering the employer to pay punitive and moral damages to the employee;</td>
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<td>(5) ordering the employer to pay the employee an indemnity for loss of employment;</td>
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<td></td>
<td>(6) ordering the employer to pay for the psychological support needed by the employee for a reasonable period of time determined by the Commission;</td>
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<td></td>
<td>(7) ordering the modification of the disciplinary record of the employee.</td>
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</tbody>
</table>
| 123.16  | Paragraphs 2, 4 and 6 of section 123.15 do not apply to a period during which the employee is
|--------------|--------------------------------------------------------------------------------|
| **36**  | 36(1) An employer, in consultation with the committee, shall develop a policy in writing to prevent harassment that includes:
   (a) a definition of harassment that includes the definition in the Act;
   (b) a statement that every worker is entitled to employment free of harassment;
   (c) a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment;
   (d) a commitment that the employer will take corrective action respecting any person under the employer's direction who subjects any worker to harassment;
   (e) an explanation of how complaints of harassment may be brought to the attention of the employer;
   (f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:  |
| **14**  | An employer at a prescribed place of employment where violent situations have occurred or may reasonably be expected to occur shall develop and implement a policy statement to deal with potentially violent situations after consultation with:
   (a) the occupational health committee;
   (b) the occupational health and safety representative; or
   (c) the workers, where there is no occupational health committee and no occupational health and safety representative.

(2) A policy statement required by subsection (1) shall include any provisions prescribed in the regulations.  |
(i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or

(ii) required by law;

(g) a reference to the provisions of the Act respecting harassment and the worker's right to request the assistance of an occupational health officer to resolve a complaint of harassment;

(h) a reference to the provisions of The Saskatchewan Human Rights respecting discriminatory practices and the worker's right to file a complaint with the Saskatchewan Human Rights Commission;

(i) a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and

(j) a statement that the employer's harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

(2) An employer shall:

(a) implement the policy developed pursuant to subsection (1); and

(b) post a copy of the policy in a conspicuous place that is readily available for reference by workers.

37(1) In this section, "violence" means the attempted, threatened or actual conduct of a person that causes or is likely to cause injury, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that the worker is at risk of injury.

(2) On and after January 1, 1997, places of employment that provide the following services or activities are prescribed for the purposes of subsection 14(1) of the Act:

(a) services provided by health care facilities mentioned in sub-clauses 468(b)(i) to (v) and (xii);

(b) pharmaceutical-dispensing services;
(c) education services;
(d) police services;
(e) corrections services;
(f) other law enforcement services;
(g) security services;
(h) crisis counseling and intervention services;
(i) retail sales in establishments that are open between the hours of 11:00 p.m. and 6:00 a.m.;
(j) financial services;
(k) the sale of alcoholic beverages or the provision of premises for the consumption of alcoholic beverages;
(l) taxi services;
(m) transit services.

(3) A policy statement required by subsection 14(1) of the Act must be in writing and must include:

(a) the employer's commitment to minimize or eliminate the risk;

(b) the identification of the worksite or worksites where violent situations have occurred or may

(c) the identification of any staff positions at the place of employment that have been, or may reasonably be expected to be, exposed to violent situations;

(d) the procedure to be followed by the employer to inform workers of the nature and extent of risk from violence, including, except where the disclosure is prohibited by law, any information in the employer's possession related to the risk of violence from
persons who have a history of violent behaviour and whom workers are likely to encounter in the course of their work;

e) the actions the employer will take to minimize or eliminate the risk, including the use of personal protective equipment, administrative arrangements and engineering controls;

f) the procedure to be followed by a worker who has been exposed to a violent incident to report the incident to the employer;

g) the procedure the employer will follow to document and investigate a violent incident reported pursuant to clause (f);

h) a recommendation that any worker who has been exposed to a violent incident consult the worker's physician for treatment or referral for post-incident counseling; and

i) the employer's commitment to provide a training program for workers that includes:

   (i) the means to recognize potentially violent situations;

   (ii) procedures, work practices, administrative arrangements and engineering controls that have been developed to minimize or eliminate the risk to workers;

   (iii) the appropriate responses of workers to incidents of violence, including how to obtain assistance; and

   (iv) procedures for reporting violent incidents.

(4) Where a worker receives treatment or counseling mentioned in clause (3)(h) or attends a training program mentioned in clause (3)(i), an employer shall credit the worker's attendance as time at work and ensure that the worker loses no pay or other benefits.

(5) An employer shall make readily available for reference by workers a copy of the policy statement required by subsection 14(1) of the Act.

(6) An employer shall ensure that the policy statement required by sub-section 14(1) of the Act is reviewed and, where necessary, revised every three years and whenever there is a change of
circumstances that may affect the health or safety of workers.
Employment Perspectives at the Dawn of a New Decade

RESOURCES SECTION B

“The Changing Employment Relationship (The Non-Traditional Workforce)
  Introduction
  Part 1 - Termination
  Part 2 - Fixed Term Employment
  Part 3 - Use of Independent Contractors
  Part 4 - Utilizing Foreign Workers
  Part 5 - Temporary Help Agencies
The Changing Employment Relationship
(The Non-Traditional Workforce)

A Collection of Reference Materials

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INTRODUCTION

The CAW reported in May, 2009 that approximately 37 per cent of Ontario workers are
employed in non-standard part-time or contract positions. They reported that there were
700,000 temporary agency worker employed in Ontario.

The employer/employee relationship is clearly changing. Employers want flexibility; employees want security. Employers want to limit their costs through fixed term
arrangements, independent contractor relationships, use of temp agencies to provide workers, and by limiting their severance obligations. In addition, employers are continuing
to look to engage foreign workers.

Employees are, in our experience, becoming more likely to litigate over severance and human rights issues. More claims are being seen at the new Human Rights Tribunal and changes to certain Rules of Procedure relating to the civil litigation process make it likely that we will see
an increase to wrongful dismissal claims in the future.

The reference materials that follow compliment the speaking slides on this topic and are
broken down into the same five Parts:

1 – Termination
2 – Fixed Term Employment
3 – Use of Independent Contractors
4 – Utilizing Foreign Workers
5 – Temporary Help Agencies

Please contact any member of our group for further information on any of the topics covered by this presentation, or any other issues that arise in your workplace.
PART 1: TERMINATION

Adjemian v. Brook Crompton North America

Background:
Ms. Adjemian (“Adjemian”) was an employee of Brook Crompton (“Crompton”) for 22.5 years, and was dismissed without cause on January 24, 2008. At the time of her dismissal, Adjemian was an information and technology administrator, accounts payable clerk, and inventory receiving clerk. Her position was not considered managerial nor supervisory, and she reported directly to the Operations Manager. Adjemian was dismissed due to a difficult economic climate and the consequent downsizing of Crompton’s personnel. Upon dismissal, Adjemian was offered four (4) months’ salary as payment in lieu of notice. Adjemian commenced an action for wrongful dismissal under the simplified procedure rules, and moved for summary judgment.

Judgment:
During its discussion of summary judgment, the Court noted that the test for summary judgment under the simplified procedure rules is less stringent than if the motion were proceeding under a normal action. In a normal action, the test is whether there is a genuine issue for trial. Under the rules of simplified procedure, the test is whether, even if there is a genuine issue for trial, the Court can fairly and justly decide the action on the motion and without a trial.

Crompton opposed the motion for summary judgment, stating that there were three issues worthy of a trial: (i) the adequacy of Ms. Adjemian’s efforts to mitigate; (ii) the characterization or nature of her employment; and (iii) the assessment of her damages.

The trial judge found no genuine issues for trial, as: (i) there was sufficient evidence demonstrating that Adjemian had made considerable efforts to mitigate her loss; (ii) the Court could accept Crompton’s characterization of her employment; and (iii) once the two issues are resolved, the Court can then move to decide the appropriate notice period for employment. The motion for summary judgment was granted against Crompton. A notice period of sixteen (16) months was determined for Adjemian.
Clarke v. Insight Components (Canada) Inc.
[2008] O.J. No. 5025 (C.A.)

Background:

The appellant, Robert Clarke ("Clarke") commenced employment with the respondent, Insight Components ("Insight") in 1995, and was dismissed without cause on September 10, 2004 as part of a reorganization. Upon termination, Insight relied on the termination provision contained in Clarke’s contract to limit his notice to the amount applicable under the Employment Standards Act. The clause is reproduced as follows:

Termination of Employment - Your employment may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts shall be due and payable to you whether under statute or common law.

When presented with his severance offer, Clarke immediately rejected it, claiming the termination provision was invalid. Clarke then brought an action before the Superior Court for wrongful dismissal.

Superior Court:

At trial, Clarke alleged the termination provision was invalid for two reasons: (i) the first contract containing this particular provision was not signed until two weeks after commencing the position and was therefore invalid for lack of consideration; and (ii) the clause itself was ambiguous.

The Court held that: (i) the termination provision was supported by consideration given at the time that Clarke was promoted, such consideration being improvements to Clarke’s remuneration; and (ii) the termination provision was unambiguous. Therefore, the Court limited Clark’s entitlement to the minimum required pursuant to the Employment Standards Act. Clarke sought leave to appeal.

Court of Appeal:

The Court upheld the determination of the trial judge, and held that: (i) the clause was unambiguous in stating that the appellant was entitled to reasonable notice of termination equal to the requirements of the applicable employment standards legislation; and (ii) the fact that two weeks passed between appellant accepting his promotion and signing the employment contract did not lead to the conclusion that the termination provision was not supported by consideration.
PART 2: FIXED TERM EMPLOYMENT

Employment Standards Act 2000
Ontario Regulation 288/01
Termination and Severance Of Employment

Material from Service Ontario e-Laws www.e-laws.gov.on.ca

Consolidation Period: From December 12, 2006 to the e-Laws currency date.
Last amendment: O. Reg. 492/06

This is the English version of a bilingual regulation.

Definitions
1. In this Regulation,
   “construction employee” has the same meaning as in Ontario Regulation 285/01
   (Exemptions, Special Rules and Establishment of Minimum Wage). O. Reg. 288/01, s. 1; O. Reg. 492/06, s. 1.

TERMINATION OF EMPLOYMENT

Employees not entitled to notice of termination or termination pay

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

   1. Subject to subsection (2), an employee who is hired on the basis that his or her employment is to terminate on the expiry of a definite term or the completion of a specific task.
   3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.
   4. An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.
   5. An employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer.
   6. An employee whose employment is terminated after refusing alternative employment made available through a seniority system.
   7. An employee who is on a temporary lay-off and does not return to work within a reasonable time after having been requested by his or her employer to do so.
   8. An employee whose employment is terminated during or as a result of a strike or lock-out at the place of employment.
   10. An employee who is employed under an arrangement whereby he or she may elect to work or not to work when requested to do so.
   11. An employee whose employment is terminated when he or she reaches the age of retirement in accordance with the employer’s established practice, but only if the termination would not contravene the Human Rights Code.
12. An employee,
   i. whose employer is engaged in the building, alteration or repair of a ship or
      vessel with a gross tonnage of over ten tons designed for or used in commercial
      navigation,
   ii. to whom a legitimate supplementary unemployment benefit plan agreed on
      by the employee or his or her agent applies, and
   iii. who agrees or whose agent agrees to the application of this exemption. O.
      Reg. 288/01, s. 2 (1); O. Reg. 549/05, s. 1 (1); O. Reg. 492/06, s. 2.

(2) Paragraph 1 of subsection (1) does not apply if,
   (a) the employment terminates before the expiry of the term or the completion of
       the task;
   (b) the term expires or the task is not yet completed more than 12 months after the
       employment commences; or
   (c) the employment continues for three months or more after the expiry of the
       term or the completion of the task. O. Reg. 288/01, s. 2 (2).

(3) Paragraph 4 of subsection (1) does not apply if the impossibility or frustration is the
     result of an illness or injury suffered by the employee. O. Reg. 549/05, s. 1 (2).

Notice, 50 or more employees

3. (1) The following periods are prescribed for the purposes of subsection 58 (1) of the Act:
   1. Notice shall be given at least eight weeks before termination if the number of
      employees whose employment is terminated is 50 or more but fewer than 200.
   2. Notice shall be given at least 12 weeks before termination if the number of
      employees whose employment is terminated is 200 or more but fewer than 500.
   3. Notice shall be given at least 16 weeks before termination, if the number of
      employees whose employment is terminated is 500 or more. O. Reg. 288/01, s.
      3 (1).

(2) The following information is prescribed as the information to be provided to the
     Director under clause 58 (2) (a) of the Act and to be posted under clause 58 (2) (b)
     of the Act:
   1. The employer’s name and mailing address.
   2. The location or locations where the employees whose employment is being
      terminated work.
   3. The number of employees working at each location who are paid,
      i. on an hourly basis,
      ii. on a salaried basis, and
      iii. on some other basis.
   4. The number of employees whose employment is being terminated at each
      location who are paid,
      i. on an hourly basis,
      ii. on a salaried basis, and
      iii. on some other basis.
   5. The date or dates on which it is anticipated that the employment of the
      employees referred to in paragraph 4 will be terminated.
   6. The name of any trade union local representing any of the employees whose
      employment is being terminated.
7. The economic circumstances surrounding the terminations.
8. The name, title and telephone number of the individual who completed the form on behalf of the employer. O. Reg. 288/01, s. 3 (2).

(3) The employer shall provide the information referred to in subsection (2) to the Director by setting it out in the form approved by the Director under clause 58 (2) (a) of the Act and delivering the form to the Employment Practices Branch of the Ministry of Labour between 9 a.m. and 5 p.m. on any day other than a Saturday, Sunday or other day on which the offices of the Branch are closed. O. Reg. 288/01, s. 3 (3).

(4) Section 58 of the Act does not apply to the employer and employees if,
(a) the number of employees whose employment is terminated at the establishment is not more than 10 per cent of the number of employees who have been employed there for at least three months; and
(b) the terminations were not caused by the permanent discontinuance of part of the employer’s business at the establishment. O. Reg. 288/01, s. 3 (4).

Manner of giving notice
4. (1) Subject to section 5, a notice of termination shall be,
(a) given in writing;
(b) addressed to the employee whose employment is to be terminated; and
(c) served personally or in accordance with section 95 of the Act. O. Reg. 288/01, s. 4 (1).

(2) If an employer bound by a collective agreement is or will be laying off an employee for a period that will or may be longer than a temporary lay-off and the employer would be or might be in breach of the collective agreement if the employer advised the employee that his or her employment was to be terminated, the employer may provide the employee with a written notice of indefinite lay-off and the employer shall be deemed as of the date on which that notice was given to have provided the employee with a notice of termination. O. Reg. 288/01, s. 4 (2).

Notice of termination where seniority rights apply
5. (1) This section applies with respect to employees whose employment contracts provide seniority rights by which an employee who is to be laid off or whose employment is to be terminated may displace another employee. O. Reg. 288/01, s. 5 (1).

(2) If an employer who proposes to terminate the employment of an employee described in subsection (1) posts a notice in a conspicuous part of the workplace setting out the name, seniority, job classification and proposed lay-off or termination date of the employee, the notice shall constitute notice of termination as of the day of posting to any employee whom the employee named in the notice displaces. O. Reg. 288/01, s. 5 (2).

(3) Clause 60 (1) (a) of the Act does not apply to an employee who displaces another employee in the circumstances described in this section. O. Reg. 288/01, s. 5 (3).

Temporary work, 13-week period
6. (1) An employer who has given an employee notice of termination in accordance with the Act and the regulations may provide temporary work to the employee without providing a further notice of termination in respect of the day on which the
employee’s employment is finally terminated if that day occurs not later than 13 weeks after the termination date specified in the original notice. O. Reg. 288/01, s. 6 (1).

(2) The provision of temporary work to an employee in the circumstances described in subsection (1) does not affect the termination date as specified in the notice or the employee’s period of employment. O. Reg. 288/01, s. 6 (2).

Inclusion of vacation time in notice period
7. The period of a notice of termination given to an employee shall not include any vacation time unless the employee, after receiving the notice, agrees to the inclusion of the vacation time in the notice period of the notice. O. Reg. 288/01, s. 7.

Period of employment
8. (1) For the purposes of this Regulation and sections 54 to 62 of the Act, an employee’s period of employment is the period beginning on the day he or she most recently commenced employment and ending on,
   (a) if notice of termination is given in accordance with Part XV of the Act, the day it is given; and
   (b) if notice of termination is not given in accordance with Part XV of the Act, the day the employee’s employment is terminated. O. Reg. 288/01, s. 8 (1).

(2) For the purposes of subsection (1), two successive periods of employment that are not more than 13 weeks apart shall be added together and treated as one period of employment. O. Reg. 288/01, s. 8 (2).

SEVERANCE OF EMPLOYMENT
Employees not entitled to severance pay
9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:
   1. An employee whose employment is severed as a result of a permanent discontinuance of all or part of the employer’s business that the employer establishes was caused by the economic consequences of a strike.
   2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.
   3. An employee who, on having his or her employment severed, 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.
   4. An employee whose employment is severed after refusing an offer of reasonable alternative employment with the employer.
   5. An employee whose employment is severed after refusing reasonable alternative employment made available through a seniority system.
   6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.
   7. A construction employee.
   8. An employee engaged in the on-site maintenance of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works.
9. An employee who is employed under an arrangement whereby he or she may elect to work or not to work when requested to do so. O. Reg. 288/01, s. 9 (1); O. Reg. 492/06, s. 3.

(2) Paragraph 2 of subsection (1) does not apply if,
   (a) the impossibility or frustration is the result of,
         (i) a permanent discontinuance of all or part of the employer’s business because of a fortuitous or unforeseen event,
         (ii) the employer’s death, or
         (iii) the employee’s death, if the employee received a notice of termination before his or her death; or
   (b) the impossibility or frustration is the result of an illness or injury suffered by the employee. O. Reg. 288/01, s. 9 (2); O. Reg. 549/05, s. 2.

10. Omitted (revokes other Regulations). O. Reg. 288/01, s. 10.

11. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 288/01, s. 11.

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**Monjushko v. Century College Ltd.**


**Background:**

The plaintiff, Dr. Monjushko ("Monjushko") was a Ukrainian mechanical engineer who worked as an instructor and associate professor at the defendant’s campus, Century College Ltd ("Century") for approximately nine years. At the start of each term, Monjushko would receive an appointment letter setting out the details of his employment as well as the exact start and end dates of the semester. From the commencement of his employment in 1996 until 2004, Monjushko received a total of forty (40) appointment letters, each identical save the start and end dates. In return, Monjushko would invoice Century under his company name, AVM Computing. In 2004, the Canada Customs and Revenue Agency ("CCRA") considered whether Monjushko was an independent contractor or an employee of Century, and determined he was indeed an employee under a contract of service. Century did not appeal the CCRA ruling.

At the end of October 2004, Century learned that a partner university that provided it with 70% of its students would not be renewing its partnership agreement after June 2005. Monjushko was issued his last appointment letter, running from January 10, 2005 until April 22, 2005. He was given notice in April 2005 that his employment would be terminated at the end of the semester. Century issued Monjushko his only record of employment ("ROE"), which noted that his first day worked was January 2, 1996 and his last day paid as April 22, 2005. Monjushko took action against Century, claiming that he was entitled to damages in lieu of reasonable notice for his nine years of employment. Century argued that Monjushko was an employee hired under a fixed-term contract and therefore not entitled to notice.

**Judgment:**

The Court found the facts of the case irreconcilable with Century’s assertion that each of the 40 appointments were separate fixed-term contracts. One of the factors indicating continuous employment were the start and end dates set out in the ROE. Further, the fact that Century did not appeal the CCRA ruling that Monjushko was an employee and not an independent
contractor led the Court to conclude that, in reality, Monjushko was considered by both parties to be continuously employed from January 2, 1996 until April 22, 2005.

The judgment discussed Ceccol v. Ontario Gymnastics Federation, and adopted the stance that employers should not attempt to evade the protections of the Employment Standards Act and the common law by designating an employee as fixed-term, when the underlying nature of the employment relationship is that of continuous employment. The Court did not find grounds for Wallace damages, but did award Monjushko a reasonable notice period of fifteen (15) months.

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**Fletcher v. Chippewas of Kettle & Stony Point First Nation**

**Background:**

The plaintiff, Sydney Fletcher (“Fletcher”) was a 66-year-old teacher. After retiring from a public school board, he was hired by the defendant, Chippewas of Kettle & Stony Point First Nation (“Chippewas”) to teach at an elementary school pursuant to a written contract. The contract was for a fixed term of one year and contained a termination clause which provided that Fletcher’s position could be terminated upon the giving of written notice on or before the last teaching day of May. Fletcher taught at the school beginning January 2004 and on June 1, 2007, he was advised that his services would not be required for the 2007-2008 school year. Chippewas continued to pay Fletcher’s salary to the end of August 2007 (the term of the contract). Fletcher commenced an action for damages, stating the Chippewas breached his contract by not giving notice within the stated timeframes of the fixed-term contract.

**Judgment:**

At trial, Fletcher argued that his employment was not terminated on or before May 31, 2007, as required by the contract, and therefore his contract was automatically renewed for the following year. Chippewas conceded that it breached Fletcher’s contract, but argued that it was a technical breach and that Fletcher did not suffer any damages.

The Court found that Fletcher was employed under a fixed-term contract of employment which provided for implied renewal unless notice of termination was given by either party on or before the last day of May. Since the fixed-term contract had a termination date that was agreed to by the parties, reasonable notice did not apply. Furthermore, since Chippewas did not give notice of termination in accordance with the contract, the contract was renewed. Fletcher was awarded his salary for the 2007-2008 school year, which amounted to $56,200.
PART 3:
USE OF INDEPENDENT CONTRACTORS

Braiden v. La-Z-Boy Canada Ltd.

In another of a series of cases that review that illusive line between employee and independent contractor, in June, 2008, the Ontario Court of Appeal released a decision that reviews the factors to be looked at in determining such characterization and reminds employers that when engaging an independent contractor an employer would be wise to carefully review the termination provisions of the contract to ensure enforceability (in the event the contractor is found to be an employee).

Background

In August 1981, Gordon Braiden ("Mr. Braiden") began working for La-Z-Boy as a customer service manager. His duties were to respond to sales staff and retail dealers who sold La-Z-Boy furniture. In June 1986, Mr. Braiden became a sales representative trainee with La-Z-Boy. As a trainee Mr. Braiden received a salary and commission. In addition, he: a) worked from a home office, b) reported to the National Sales Manager, c) sold products at prices established by La-Z-Boy, d) was given sales targets by La-Z-Boy, e) paid for his own expenses, f) serviced a geographic territory established by La-Z-Boy, and g) was provided with training materials, tools and catalogues by La-Z-Boy.

On August 7, 1987 Mr. Braiden was advised that his training period would end and effective August 30, 1987 he would become a commission sales representative for La-Z-Boy ("Sales Agent"). As a result, La-Z-Boy ceased paying him a salary and commission and instead he was paid by commission alone. All other aspects of his employment contract including those set out above remained the same.

In 1995, La-Z-Boy required all of its sales agents to enter into annual written agreements. The first agreement that Mr. Braiden signed, dated January 1, 1996 contained a notice provision under which either party could terminate the agreement, without cause, upon sixty (60) days written notice. Mr. Braiden testified that he felt he had to sign the agreement in order to keep his job, and Mr. Douglas, Mr. Braiden’s manager at the time confirmed that Mr. Braiden had to sign the agreement or lose his job. Significantly, the agreement made no changes to Mr. Braiden’s job responsibilities but it stated that as an "Independent Sales and Marketing Consultant" he was not an agent or employee. The evidence at trial showed that the agreement was a response to audits of La-Z-Boy with respect to the Employer Health Tax ("EHT") and Workplace Safety ("WSIB"). The audit had resulted in a finding that the Sales Agents were La-Z-Boy employees and La-Z-Boy was required to make EHT and WSIB premium contributions.

In 1997, La-Z-Boy required Mr. Braiden to incorporate a company and to pay his own EHT and WSIB premiums. As a result Mr. Braiden established Sales Inc., and the annual agreements from that point on were between La-Z-Boy and Sales Inc. Again, Mr. Braiden understood that failure to comply with this requirement to incorporate would result in the loss of his position. La-Z-Boy also urged Mr. Braiden to share office facilities and staff with two other Sales Agents in the area, he agreed to do so, stopped working from home and began paying his share of associated expenses.

Under these annual agreements, Mr. Braiden was obliged to personally engage on a full-time basis in such sales promotional activities as La-Z-Boy in its sole discretion determined advisable. Mr. Braiden agreed to service a territory established by La-Z-Boy, to exclusively sell
La-Z-Boy furniture and was precluded from selling any competing or non-competing product without La-Z-Boy’s consent. He was paid at a commission rate determined by the Company. In 2003, La-Z-Boy, relying on the termination provisions in the agreement, terminated Mr. Braiden’s contract on sixty (60) days notice.

**Trial Judgement**

The trial judge recognized two issues to be determined when deciding whether or not Mr. Braiden was entitled to reasonable notice: (i) what was the nature of the relationship that existed between the parties at the time of termination?; and (ii) what were the consequences of Mr. Braiden providing his services through an incorporated entity?

On the first issue the trial judge concluded that the relationship between Mr. Braiden and La-Z-Boy was that of an employee and an employer. On the second issue the trial judge refused to attach significance to what he viewed as the “technical structure” of the arrangement. He found that Sales Inc. was used at La-Z-Boy’s insistence simply as a vehicle to transfer financial obligations from La-Z-Boy to Mr. Braiden and to attempt to create the status of independent contractor. The trial judge found that given the control held and exercised by La-Z-Boy regarding the functions and activities of Mr. Braiden, the annual agreements, even though they purported to reflect that of an independent contractor, represented an employment relationship either directly or through the corporation. The trial judge found the reasonable notice period to be 20 months.

**Court of Appeal – Upholds Trial Judge**

The Court of Appeal (the “Court”) reviewed two issues: (i) was the relationship between La-Z-Boy and Mr. Braiden that of employer and employee?; and (ii) was La-Z-Boy entitled to terminate the agreement on sixty (60) days notice?

The Court found that where an individual is providing services pursuant to an agreement, the fact that the individual is paid through a corporation is not determinative of whether or not an employment relationship exists with the individual. The Court, in examining the traditional factors used to determine employee or independent contractor (control, exclusivity, ownership of tools, chance of profit), found that the question of “whose business is it – lies at the heart of the matter”. The Court framed the question to be asked as “was the individual carrying on the business for himself or carrying on the business of an organization from which he is receiving compensation?” The Court found that the answer to that question could only be that Mr. Braiden was carrying on the business of La-Z-Boy and that Mr. Braiden worked full time for La-Z-Boy, was subject to La-Z-Boy’s control, not only as to the products sold but also to the territory in which they were sold and the promotional methods used to make the sales.

**The Notice Provision**

The trial judge held that the notice provision in the contract between Mr. Braiden and La-Z-Boy was void because it was less than the statutory minimum. This finding was incorrect as the statutory notice was 56 days as against the 60 day contractual notice period but the contract was silent as to statutory severance pay. The Court found that the notice provision was not enforceable as the agreement failed for want of consideration (and did not decide whether the notice period would fail because the agreement failed to meet the minimum standards under the Employment Standards Act). The Court commented that this was a novel and important point of law better left to a case in which the matter has been squarely raised and fully argued between the parties.

The Court found that there was no indication that Mr. Braiden received any consideration for giving up his right to reasonable notice at common law which right had existed prior to his corporation entering into the fixed term contracts. The Court also found that a change to the
notice period is a significant modification to the employment agreement that requires consideration beyond mere continued employment. The Court commented that it would not have been impossible for La-Z-Boy to have entered into a fresh agreement with Mr. Braiden with a valid notice provision. However, in order to discharge the burden of establishing a new agreement La-Z-Boy would have to point to evidence that it clearly communicated the changes in the agreement that governed the relationship with Mr. Braiden, and that Mr. Braiden appreciated that he was giving up his legal rights and that consideration flowed from his forfeiture of those rights. The Court found that the notice provision was unenforceable and that La-Z-Boy was not entitled to rely on it when it ended the employment relationship. As such, Mr. Braiden was entitled to reasonable notice of termination.

Our Views

This case again illustrates the adage that as it relates to the employee/independent contractor line of cases if “it walks like a duck it must be a duck”. Employers would be wise to consider their relationship with sales agents and if you insist on characterizing them as independent contractors give consideration as to how you can negotiate a valid severance provision in the contract..

37112 Ontario Ltd. v. Sagaz Industries Canada Inc.

Background:

The numbered company, then known as Design Dynamics (“Design”), had supplied Canadian Tire with car-seat covers for 30 years, but lost the business when Canadian Tire switched its business to Sagaz Industries Canada Inc. (“Sagaz”). Sagaz had retained Mr. Landow, and his company American Independent Marketing (“AIM”), to market its business. It was later discovered that Canadian Tire’s purchasing agent had awarded Sagaz the contract after having been bribed by Mr. Landow. The president of Sagaz maintained that he was unaware of Mr. Landow’s bribery scheme.

Design sued Sagaz, Canadian Tire, AIM and several others for damages resulting from the loss of the supply contract with Canadian Tire. At trial, the Court found that Mr. Landow and AIM were liable to the plaintiff for unlawful interference with economic relations; however, the claim against Sagaz was dismissed on the basis that it was not a participant in the bribery and it was not vicariously liable for the acts of Landow and AIM who were independent contractors.

Design appealed the trial judge’s finding that Sagaz was not vicariously liable for the actions of its independent contractor. Ultimately the appeal made its way before the Supreme Court of Canada. At issue before the Court was whether Sagaz was vicariously liable for the actions of AIM and Mr. Landow.

Judgment:

The Court reviewed the policy considerations relevant to a finding of vicarious liability. In general, the Courts have recognized that there are advantages to society and to victims if the employer is made to bear the risk created by its business and by the employees it hires. The Court acknowledged that the most common relationship that attracts vicarious liability it that between employee and employer. This is distinguished from the relationship of an employer and independent contractor which, subject to limited exceptions, typically does not give rise
to a claim for vicarious liability.

In reviewing the policy considerations for such distinction, the Court noted that if the employer does not control the activities of the worker, as is the case with an independent contractor, the policy justifications for vicarious liability are not satisfied. As a result, it was critical to the Court’s analysis to determine whether AIM and its staff were independent contractors or employees of Sagaz.

The Court noted that various tests have been proposed and used by the courts to distinguish between independent contractors and employees:

- The organization test: someone is an employee where his or her work is integral to the business in the sense that the business could not function without him or her.
- Focus on the person performing the services, asking whether he or she is in business on his or her own account.
- The enterprise test: an economic justification of vicarious liability, focusing on control if someone working for a company is under its control, then the company should bear the risk created by that person (since it gets the benefit of his or her work and is best positioned to reduce risk of loss).

The Court concluded that there was no one conclusive test which can be universally applied as the exact test will always be case specific. The Court did, however, state that the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor.

Other factors critical to making this determination are, whether the worker provides his or her own equipment; whether the worker hires his or her own helpers; the degree of financial risk taken by the worker; the degree of responsibility for investment and management taken by the worker; and the worker’s opportunity for profit from the performance of his or her tasks.

In this case, the Court considered whether AIM had been in business for its own account. Ultimately, the Court found that the majority of factors suggested that it had been as AIM hired its own people, it took on risk and responsibility, it was a separate legal entity with offices thousands of miles from Sagaz and it carried on other business unrelated to Sagaz. As a result, the Court accordingly found that Sagaz was not vicariously liable for the actions of AIM and Mr. Landow.

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**Royal Winnipeg Ballet v. M.N.R.**
2006 F.C.A. 87

**Background:**

At issue in this case was whether three dancers of the Royal Winnipeg Ballet (the “Ballet”) were employees or independent contractors for the purpose of determining whether the Ballet was required to pay Canada Pension Plan (“CPP”) and Employment Insurance (“EI”) premiums in respect of the dancers. The dancers were engaged by the Ballet on the basis of the Canadian Ballet Agreement on the terms and conditions in effect from time to time. The agreement was silent on the characterization of the relationship; however, it was the common understanding of both parties that the dancers were self-employed.

The dancers were engaged from season to season and registered for GST purposes. The Ballet
paid for pointe shoes and costumes and withheld no tax from the dancers’ remuneration unless requested to do so by the dancer. The dancers were not promised that they would be taken on for subsequent seasons and had the freedom to accept outside engagements, subject to certain conditions.

The Ballet had requested the Minister of National Revenue (“MNR”) to provide a ruling as to determine its legal obligations to the dancers with respect to CPP and EI. The MNR concluded that the dancers were employees of the Ballet, and as such, CPP and EI deductions were required. The Ballet, together with three dancers, appealed this decision.

**Tax Court:**

The decision of the MNR was first appealed to the Tax Court. In determining whether the dancers were employees, the Tax Court looked at the total relationship between the parties, including, whether the person performing the services is performing them as a person in business or on his own account, who bears the risk of loss, who stands to make profit and who has control over the work. It ultimately concluded the dancers were employees. In reaching its conclusion, however, it disregarded the intention of the parties that the dancers were independent contractors, holding that their intention was irrelevant and only to be taken into account where the relevant legal tests did not yield a definitive result. The decision of the Tax Court was appealed to the Federal Court of Canada.

**Federal Court:**

The Federal Court disagreed with the Tax Court’s interpretation and concluded that it was appropriate to consider the parties’ intentions. In this case, the Ballet and the dancers all believed that the dancers were self-employed, and although the contract did not specifically classify their relationship as such, their mutual understanding was borne out by a correlation between their common understanding, their actions and the terms of their contract.

The Federal Court concluded that based on an analysis of all the facts, including the parties’ intention, the dancers were not employees. The Federal Court primarily focused on the control factor and stated that while the degree of control exercised by the Ballet over the dancers was extensive, it was equivalent to the control exerted over a guest artist (who would be an independent contractor). The Federal Court reasoned that if it is accepted (as it was), that a guest artist can accept a role with the Ballet without becoming an employee, then the elements of control exercised by the Ballet could not reasonably be considered to be inconsistent with the parties’ understanding that the dancers were independent contractors. As a result, the Federal Court found that the dancers were not employees and the Ballet was not obligated to remit CPP and EI premiums on their behalf.

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**Fasslane Delivery Services Ltd. v. Purolator Courier Ltd.**

2007 CarswellBC 3096 (B.C.S.C.)

**Background:**

Since 1988, Dean Culchesky was a delivery driver who worked for Purolator Courier Ltd. (“Purolator”). He did so using his limited company, Fasslane Delivery Services Ltd. (“Fasslane”). Initially, Fasslane and Purolator’s relationship was governed by an owner-operator contract with Purolator, which provided that either party could terminate the agreement on seven (7) days’ written notice; however, the terms of their relationship were modified by verbal agreements.
Fasslane operated a delivery route for Purolator between the south airport in Richmond, BC and Seattle, WA. In 1996, Purolator indicated to Mr. Culchesky that its business was increasing and requested that Fasslane purchase a larger truck and begin operating a second route. Fasslane agreed to these requests and as a result, Fasslane’s business grew such that it had two vehicles, an office and increased operating costs, including paying the wages of a second driver hired by Fasslane to operate the new route.

In 2001, Purolator informed Mr. Culchesky that Fasslane would no longer be able to continue operating both of the delivery routes and that it had to decide which route it would keep. In addition, Mr. Culchesky was informed that he would have to upgrade his truck in order to continue to operate the delivery route. Mr. Culchesky was given a choice of which route he wished to accept, as well as the alternatives of “bumping” a more junior owner-operator on a different route or accepting a “lay-off”.

Mr. Culchesky was upset by the new arrangement demanded by Purolator as he stood to earn significantly less than he had been earning before. As a result, Mr. Culchesky opted to accept a “lay-off” and did not return to work again with Purolator. Mr. Culchesky ultimately brought an action against Purolator seeking damages for terminating the agreement without cause and without reasonable notice.

**Judgment:**

The Court considered a number of issues in this case including the nature of the relationship between Fasslane and Purolator. Purolator argued that its relationship with Fasslane was that of independent contractor and, therefore, it had no duty to provide Fasslane with notice of its decision to terminate their agreement.

In support of its position Purolator noted that Fasslane was responsible for all its vehicle costs, that it owned its vehicles, hired employees and determined their rate of pay, it had its own cargo insurance and its own operating authority for its vehicles in the State of Washington. Purolator also noted that Fasslane earned additional income from customers other than Purolator.

Although Fasslane agreed that it was not an employee of Purolator, it argued that it was not an independent contractor, but rather that it fell into a special “intermediate” category between that of an employee and an ordinary independent contractor. The Court accepted that such “intermediate” category existed and that in such circumstances it is implied that the contract must be terminated upon providing reasonable notice. The Court agreed that in determining the nature of the relationship between a worker and an employer, it must look at the duration/permanency of the relationship, the degree of reliance/closeness of the relationship and the degree of exclusivity.

In this case, given the nature of their relationship, the Court concluded that the arrangement between Fasslane and Purolator fell into the “intermediate” category as their relationship was one in which there was such dependency on and control by Purolator. As a result, the Court concluded that it was appropriate for the law to provide some protection to Fasslane by way of requiring Purolator to provide reasonable notice to terminate the relationship.

In determining the amount of notice required, the Court stated that the closer the relationship resembles an employment relationship, the more similar the notice should be to that which an employee would receive. In this case, the Court found that Fasslane’s relationship with Purolator was closer to that of an employee. Fasslane was entirely dependent on Purolator for its work and was under Purolator’s control with respect to how it operated its routes. The Court concluded that the duration, permanence, reliance and closeness of the relationship all made it one closer to that of an employee and employer. As such, the Court considered the character of Mr. Culchesky’s work, his length of service, his age and the availability of similar employment when determining that six (6) months was the appropriate notice period.
PART 4: UTILIZING FOREIGN WORKERS

Temporary Foreign Worker Program

Material from Human Resources and Skills Development Canada www.hrsc.gc.ca

Minimum Advertising Requirements

On January 1, 2009, the occupations under pressure list initiative was replaced by new national advertising requirements.

All occupations are subject to the same minimum advertisement requirements based on the National Occupational Classification (NOC) system, skills levels O, A, B, C and D. Failure to comply with the requirements outlined below will result in the application for a Labour Market Opinion (LMO) being denied.

NOC O and A Occupations

You will have conducted the minimum advertising efforts required if you:

- Conduct similar recruitment activities consistent with the practice within the occupation (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations); or
- Advertise on the national Job Bank or the equivalent in Saskatchewan or the Northwest Territories for a minimum of fourteen (14) calendar days, during the three (3) months prior to applying for a LMO.

You are also encouraged to conduct ongoing recruitment efforts, including communities that face barriers to employment (e.g., Aboriginal Peoples, older workers, immigrants/newcomers, people with disabilities and youth). Advertisement could be on recognized Internet job sites, in local and regional newspapers, at community resource centres and local regional employment centres.

Advertisement criteria vary slightly in the province of Quebec. For further information, consult Hiring Temporary Foreign Workers in Quebec.

NOC B Occupations

You will have conducted the minimum advertising efforts required if you:

- Advertise on the national Job Bank (or the equivalent in Saskatchewan or the Northwest Territories) for a minimum of fourteen (14) calendar days during the three (3) months prior to applying for a LMO; and
- Conduct similar recruitment activities consistent with the practice within the occupation (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations).

The advertisement must include the company operating name, business address, wage range (i.e. an accurate range of wages being offered to Canadians and permanent residents) and reference to benefits packages being offered. The wage range must always include the prevailing wage for the position.

You are also encouraged to conduct ongoing recruitment efforts, including communities that face barriers to employment (e.g., Aboriginal Peoples, older workers, immigrants/newcomers, people with disabilities and youth). Advertisement could be on
recognized Internet job sites, in local and regional newspapers, at community resource centres and local regional employment centres.

Advertisement criteria vary slightly in the province of Quebec. For further information, consult Hiring Temporary Foreign Workers in Quebec.

**NOC C and D Occupations (including seasonal agricultural workers)**

You will have conducted the **minimum advertising efforts** required if you:

- Advertise for a minimum of 14 days on the national Job Bank (or the equivalent in Saskatchewan or the Northwest Territories) during the three (3) months prior to applying for a LMO; and
- Conduct recruitment activities consistent with the practice in the occupation. The employer should advertise for the equivalent of 14 days, choosing one or more of the following options:
  - advertise in newspapers, e.g., a weekly ad during two-three weeks in journals, newsletters, national/regional newspapers, ethnic newspapers/newsletters or free local newspapers;
  - advertise in the community, e.g., posting ads for two-three weeks in local stores, community resource centres, churches, or local regional employment centres;
  - advertise on Internet sites e.g., posting during 14 days/two weeks on recognized Internet job sites (union, community resource centres or ethnic sites).

The advertisement must include the company operating name, business address, wage range (i.e. an accurate range of wages being offered to Canadians and permanent residents) and reference to benefits packages being offered. The wage range must always include the prevailing wage for the position.

You are also encouraged to conduct ongoing recruitment efforts, including communities that face barriers to employment (e.g., Aboriginal Peoples, older workers, immigrants/newcomers, people with disabilities and youth). Advertisement could be on recognized Internet job sites, in local and regional newspapers, at community resource centres and local regional employment centres.

Advertisement criteria for live-in caregivers and occupations in the province of Quebec vary slightly.

**Wage Rate**

The wage range identified in the advertisement must represent an accurate range of wages being offered to Canadians and permanent residents, working in the same occupation and geographical area, and include reference to benefits packages being offered. The wage range must always include the prevailing wage for the position. For purposes of the Temporary Foreign Worker Program, the prevailing wage is identified as the average hourly wage for the requested occupation in the specified geographical area.

For a unionized position, the wage rate must be consistent with the wage rate established under the collective bargaining agreement.

These requirements apply to the regular LMO process and the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D). They do not apply to the Expedited Labour Market Opinion Pilot Project. Employers wishing to offer the collective agreement wage must apply under the regular LMO process.
In addition, benefits provided to Canadian workers or permanent residents must be extended to temporary foreign workers.

In order to address unique circumstances, HRSDC/Service Canada maintains the discretion to set the prevailing wage rate that an employer must offer, whether or not the position is covered by a collective agreement.

**Variations to the Minimum Advertising Requirements**

Variations to the minimum advertising requirements may apply in certain cases.

**Additional Advertisement Efforts**

HRSDC/Service Canada reserves the right to require alternative or additional recruitment efforts (i.e., increased duration [length of time] or broader advertisement [whether local, regional, or national]) if, it believes that additional efforts would yield qualified Canadian citizens or permanent residents who are available to work in the occupation and region. For all occupations, contact your Service Canada Centre.

**Proof of Advertisement**

You must be prepared to demonstrate that you meet the advertising requirements by providing proof of advertisement and the results of your efforts to recruit Canadians or permanent residents as part of the LMO process (e.g., information on the qualifications of Canadian applicants and why they were rejected). Records of your efforts should be kept for a minimum of six (6) years, as stipulated in certain provincial and federal legislations, such as the *Income Tax Act*.

For additional information on minimum advertising requirements, contact your Service Canada Centre.
Excerpt from Citizen and Immigration Canada
Foreign Worker Manual

Note: A foreign tour bus operator may be admitted as a business visitor for a tour of one or several
Canadian locations as long as the trip originates and/or terminates in the United States or
Mexico. While passengers may be boarded or dropped at a location in Canada, no individuals may
both join and leave the bus while it is in Canada.

Note: If a tour originates in Canada (i.e., a bus enters Canada to pick up passengers), the predominant
portion of the tour must then take place in the United States or Mexico in order to preserve the
international nature of the tour. Passengers may be returned to Canada following the tour which has
taken place predominantly in the U.S. or Mexico.

Note: Tours that originate in Canada and take place predominantly in Canada, with a minimum time
spent in the U.S. or Mexico, do not qualify under NAFTA even if the bus crosses the international
boundary during the course of the tour. Operators of such a tour would not be admissible as
“business visitors”.

Note: As well, foreign tour bus operators and transportation operators are still prohibited from
conducting “point to point” service (i.e., “chepotage”) within Canada - e.g., they cannot pick up
passengers in Canada when the final destination of those passengers is another location in Canada.
For instance, while an American tour bus operator is allowed to pick up from and return passengers
to Canada, specifically for a tour which will take place predominantly in the U.S., the tour bus operator
cannot pick up and drop off additional passengers in Canada on his way to the U.S. or when returning
from the U.S. following the tour.

Note: Relay drivers (drivers who drive a portion or portions of a route) are also covered by this
provision. A relay tour bus driver need not enter Canada on the tour bus. A relay driver may enter
Canada within a reasonable time before or after the tour bus enters.

- Translators or interpreters performing services as employees of an enterprise located in the
  United States or Mexico.

3 PROFESSIONALS

3.1 What requirements apply to professionals?
The following requirements apply:
- citizenship of the United States or Mexico;
- NAFTA PROFESSIONALS 603.D.1;
- qualification to work in that profession;
- provided employment with a Canadian employer;
- provision of professional level services in the field of qualification as indicated in the
  Appendix; and
- compliance with existing immigration requirements for temporary entry.

3.2 What is Appendix 1603.D.1?
Appendix 1603.D.1, a list of over 80 occupations, is the mechanism by which selected
professionals can enter Canada to provide their services.

The Appendix is a complete list and cannot be interpreted. Generally, if an occupation does
not appear on the list, it is not a profession as defined by Appendix 1603.D.1. However, officers
should allow for alternative job titles in instances where the job duties are interchangeable. This
can be confirmed by referring to the National Occupational Classification (NOC) at

The footnotes contained in Appendix 1603.D.1 form part of the Appendix as it appears in the
NAFTA. Notes in italics were added to assist officers in understanding the requirements for the
Professionals category generally and some individual professions (e.g., management consultant).
The Minimum Education Requirements and Alternative Credentials indicated for each profession are minimum criteria for entry and do not necessarily reflect the educational requirements, accreditation or licensing necessary to practice a profession in Canada.

Professionals can also be admitted as business visitors (General Service provision of Appendix 1603.A.1) when they are not seeking to enter the labour market (most criteria applicable to business visitors) but will be performing activities such as soliciting business, consulting, providing advice and meeting clients.

3.3 Where can a professional apply for a work permit?

Facilitated entry under the NAFTA allows a Professional to apply at a POE. An application can also be made at a visa office before departing for Canada.

United States and Mexican citizens can also apply for Professional status in Canada, having been admitted as temporary residents R199.

3.4 What documentation must a professional present to support an application?

A professional must present the following documentation:

- proof of American or Mexican citizenship;
- confirmation of pre-arranged employment provided by:
  - a signed contract with a Canadian enterprise, or
  - evidence of an offer of employment from a Canadian employer, or
  - a letter from the American or Mexican employer on whose behalf the service will be provided to the Canadian enterprise;
- documentation which provides the following information:
  - the proposed employer in Canada;
  - the profession for which entry is sought;
  - details of the position (title, duties, duration of employment, arrangements as to payment; and
  - the educational qualifications or alternative credentials required for the position; and
- evidence that the person has at least the Minimum Education Requirements and Alternative Credentials listed in Appendix 1603.D.1 (copies of degrees, diplomas, professional licences, accreditation or registration, etc).

Employment in the Professionals category must be pre-arranged with the Canadian employer. In this context, the Canadian employer may be an enterprise as defined in section 1.10 or an individual. The following are examples of pre-arranged services and do not preclude other arrangements as long as the professional is not self-employed in Canada:

- an employee-employer relationship with a Canadian enterprise; or
- a contract between the professional and a Canadian enterprise; or
- a contract between the professional’s American or Mexican employer and a Canadian enterprise.

The Professionals category does not allow self-employment in Canada (i.e., “hanging-out a shingle” to solicit business in the Canadian labour market). A person who wishes to be self-employed in Canada should consider making an application under another category such as Trader or Investor. However, an American or Mexican citizen who is self-employed outside Canada is not barred from the Professional category, provided the services to be rendered in Canada are pre-arranged with a Canadian employer.

The Canadian employer must be separate from the applicant seeking entry as a Professional. This means that if the Canadian enterprise offering a contract or employment to the applicant is a sole proprietorship operated by that applicant, then entry cannot be granted under the Professionals category; further, if the Canadian enterprise is legally distinct from the applicant (i.e., a corporation with a separate legal entity) but is substantially controlled by the applicant, entry as a Professional must also be refused.
In order to determine if an enterprise is substantially controlled, the following factors must be taken into account:

- whether the applicant has established the business;
- whether the applicant has primary, sole, or de facto control of the business;
- whether the applicant is the primary, sole, or de facto owner of the business;
- whether the applicant is the primary, sole, or de facto recipient of income of the business.

When a professional applies for a renewal of a work permit, the following activities may indicate that the individual has been self-employed in Canada:

- incorporation of a company in Canada expressly for the purpose of the business person being self-employed (incorporating does not automatically signify self-employment; the motives for incorporation need to be examined before making a determination);
- initiation of communications (e.g., job hunting by direct mail or by advertising);
- responding to advertisements for the purpose of obtaining employment or contracts; or
- establishing an office which serves as a way to advertise (i.e., a "sign or a shingle" outside the door).

The following activities do not constitute self-employment:

- responding to unsolicited inquiries about service which the professional may be able to perform; or
- establishing an office from which to deliver pre-arranged service to clients.

A professional must be entering Canada to provide professional level services in the field of qualification. That is, the professional must be entering to work in an occupation described in Appendix 1603.D.1, for which they are qualified. In making this determination, both the qualification of the individual and the position in Canada must be considered.

The duties of the profession that the business person intends to practice in Canada must conform to the job duties of the profession. For instance, an accountant must be seeking to enter Canada as an accountant and not as a bookkeeper, which is not an occupation covered in Appendix 1603.D.1. Alternatively, a bookkeeper cannot be admitted to work as an accountant unless the applicant is also qualified as an accountant as indicated in the Minimum Education Requirements and Alternative Credentials of Appendix 1603.D.1. Additionally, an engineer entering Canada to be a corporate executive cannot be admitted under the Professionals category as an engineer, because they are not coming to work in their field of qualification (i.e., engineering).

The applicant must meet the qualifications indicated in the Minimum Education Requirements and Alternative Credentials of Appendix 1603.D.1. These qualifications represent only a minimum to permit entry and do not necessarily indicate the level of qualification required to actually work in that profession in Canada.

It is not the role of immigration to determine whether or not the applicant has the necessary license or registration to practice a profession in Canada. The employer in Canada and the professional are responsible to ensure that such requirements are met before employment commences.

In the case of nurses, however, they are required to hold the appropriate provincial license before they can be granted Professional status. Officers may facilitate their entry (e.g., as a business visitor) to permit them to obtain the appropriate licence, providing they can demonstrate that they have initiated steps towards achieving that objective.

In instances where a baccalaureate degree is required, the degree must be in the specific field or in a closely related field. Baccalaureate degrees (or licenciatura) need not have been obtained in colleges or universities in the United States, Mexico or Canada, whereas post secondary diplomas or certificates should have been earned in one of the three NAFTA countries.

It is possible for a professional to be working in Canada on more than one contract at a time. Information on each employer must be included on the work permit.
3.5 What training functions are permitted for professionals?
Professionals can enter Canada to provide training related to their profession, including conducting seminars.

The training session must be pre-arranged with a Canadian employer and the subject matter must be at the professional level. Entry does not allow seminar leaders to engage in training that is not pre-arranged with a Canadian employer.

The training must form part of the professional training or development of the participants and must be related to their job duties.

3.6 What documents are issued?
Persons who qualify in the Professionals category may be issued a work permit pursuant to R204, CEC T23.

3.7 How long can a work permit be issued and can it be extended?
On initial entry, the professional should be given status for a maximum of one year.

Extensions can also be issued for a duration of up to one year providing the individual continues to comply with the requirements for professionals.

There is no time "cap" on extensions but officers must be satisfied that the employment is still "temporary" and that the applicant is not using NAFTA entry as a means of circumventing normal immigration procedures.

3.8 Appendix 1603.D.1 - Professionals (Amended)
Amended to include interpretative notes - the official text of Appendix 1603.D.1 is available at: http://www.cfla-naep.or.ca/nafta-alena/decree-e.asp

<table>
<thead>
<tr>
<th>Profession</th>
<th>Minimum education requirements and alternative credentials</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A. or C.M.A.</td>
</tr>
<tr>
<td>Architect</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial licence. (&quot;State/provincial licence&quot; and &quot;state/provincial/federal licence&quot; mean any document issued by a state, provincial or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.)</td>
</tr>
<tr>
<td>Computer Systems Analyst</td>
<td>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years’ experience.</td>
</tr>
</tbody>
</table>

Note: "Post-Secondary Diploma" means a credential issued, on completion of two or more years of post-secondary education, by an accredited academic institution in Canada or the United States.

Note: "Post-Secondary Certificate" means a certificate issued, on completion of two or more years of post-secondary education at an academic institution, by the federal
<table>
<thead>
<tr>
<th>Role</th>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disaster Relief Insurance Claims Adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)</td>
<td>Baccalaureate or Licenciatura Degree, and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims</td>
</tr>
<tr>
<td>Note:  For the purposes of this provision, a disaster shall be an event so declared by the Insurance Bureau of Canada or sub-committee thereof through activating the Insurance Emergency Response Plan.</td>
<td></td>
</tr>
<tr>
<td>Economist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Engineer</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial licence</td>
</tr>
<tr>
<td>Forester</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial licence</td>
</tr>
<tr>
<td>Graphic Designer</td>
<td>Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</td>
</tr>
<tr>
<td>Hotel Manager (See note below for further details.)</td>
<td>Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management, and three years experience in hotel/restaurant management</td>
</tr>
<tr>
<td>Note:  This provision refers to a management position to which other managers report, e.g., general manager, director. It also refers to specialty managers, e.g., food and beverage managers, convention services managers within a hotel.</td>
<td></td>
</tr>
<tr>
<td>Industrial Designer</td>
<td>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</td>
</tr>
<tr>
<td>Interior Designer</td>
<td>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</td>
</tr>
<tr>
<td>Land Surveyor</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial/federal licence</td>
</tr>
<tr>
<td>Landscape Architect</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Lawyer (including Notary in the Province of Quebec)</td>
<td>L.L.B., J.D., L.L., B.C.L., or Licenciatura Degree (five years); or membership in a state/provincial bar</td>
</tr>
<tr>
<td>Librarian (See note below for the requirements of a librarian.)</td>
<td>M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)</td>
</tr>
<tr>
<td>Note:  A librarian must have either: 1. a Master of Library Science degree; or 2. a Bachelor of Library Science and another baccalaureate degree which was necessary to enter the B.L.S. program.</td>
<td></td>
</tr>
<tr>
<td>Management Consultant (See notes below for further details.)</td>
<td>Baccalaureate or Licenciatura Degree, or equivalent professional experience as established by statement or professional credential attesting to five years experience as a</td>
</tr>
</tbody>
</table>
Notes:

1. A management consultant provides services which are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems. The management consultant does not take part in the company's production but seeks to improve the client's goals, objectives, policies, strategies, administration, organization, and operation. Generally a management consultant is hired on contract to do project work to deal with specific issues or problems.

2. A management consultant may provide the following range of services:
   - conduct a comprehensive examination of the client's business to isolate and define problems;
   - prepare a presentation and report all findings to the client;
   - work with the client to design and implement in-depth working solutions.

3. Management consultants assist and advise in implementing recommendations but do not perform functional/operational work for clients or take part in the company's production.

4. Any training or familiarization that is provided to management and personnel on an individual or group basis:
   - must be incidental to the implementation of new systems and procedures which were recommended in the management consulting report;
   - must be performed by permanent (indeterminate) employees of the recommending American or Mexican management consulting firm.

5. Typically, a management consultant is an independent contractor or an employee of a consulting firm under contract to a Canadian client. A management consultant can also occupy a permanent position on a temporary basis with a Canadian management consulting firm.

<table>
<thead>
<tr>
<th>Professional Role</th>
<th>Education or Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mathematician (including Statistician and Actuary)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Range Manager/Range Conservationist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Research Assistant (working in a post-secondary educational institution)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Scientific Technician/Technologist (See below for further details.)</td>
<td>Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.</td>
</tr>
</tbody>
</table>

Notes:

1. A baccalaureate degree is not normally held by a scientific technician/technologist; therefore, an applicant must possess the skills noted above.

2. Basic research is theoretical or conceptual and is not conducted with a specific purpose or result in mind. Applied research is conducted with a practical or problem solving purpose in mind.

Additional guidance (as agreed to by all parties of the Working Group, Dec. 2001):
Individuals for whom STTs wish to provide direct support must qualify as a professional in their own right in one of the following fields: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics.

A general offer of employment by such a professional is not sufficient, by itself, to qualify for admission as a Scientific Technician of Technologist. The offer must demonstrate that the work of the STT will be intertwined with that of the supervisory professional. That is, the work of the STT must be managed, coordinated and reviewed by the professional supervisor, and must also provide input to the supervisory professional's own work.

The STT's theoretical knowledge should generally have been acquired through the successful completion of at least two years of training in a relevant educational program. Such training may be documented by presentation of a diploma, a certificate, or a transcript accompanied by evidence of relevant work experience.

Use the National Occupational Classification (NOC) in order to establish whether proposed job functions are consistent with those of a scientific or engineering technician or technologist.

Not admissible as STTs are persons intending to do work that is normally done by the construction trades (welders, boiler makers, carpenters, electricians, etc.), even where these trades are specialized to a particular industry (e.g., aircraft, power distribution).

<table>
<thead>
<tr>
<th>Social Worker</th>
<th>Baccalaureate or Licenciatura Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sylviculturist (including Forestry Specialist)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Technical Publications Writer</td>
<td>Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience</td>
</tr>
<tr>
<td>Urban Planner (including Geographer)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Vocational Counselor</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Medical/Allied Professional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dentist</td>
</tr>
<tr>
<td>Dietitian</td>
</tr>
<tr>
<td>Medical Laboratory Technologist (Canada) / Medical Technologist (Mexico and the United States) (See note below for further details.)</td>
</tr>
</tbody>
</table>

**Note:** A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment or prevention of disease.

<table>
<thead>
<tr>
<th>Nutritionist</th>
<th>Baccalaureate or Licenciatura Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupational Therapist</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Pharmacist</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Physician (teaching or research only) (See note below for further details.)</td>
<td>M.D., or Doctor en Medicina; or state/provincial license</td>
</tr>
</tbody>
</table>

**Note:** Physicians may not enter for the purpose of providing direct patient care. Patient care incidental to teaching and/or research is permissible.

<p>| Physiotherapist/Physical      | Baccalaureate or Licenciatura Degree; or state/provincial license |</p>
<table>
<thead>
<tr>
<th>Profession</th>
<th>Required Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Therapist</td>
<td>State/provincial license; or Licenciatura Degree</td>
</tr>
<tr>
<td>Psychologist</td>
<td>State/provincial license; or Licenciatura Degree</td>
</tr>
<tr>
<td>Recreational Therapist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Registered Nurse</td>
<td>State/provincial license; or Licenciatura Degree</td>
</tr>
</tbody>
</table>

Note: To be admitted as a registered nurse, a licence issued by the province of destination is necessary.

<table>
<thead>
<tr>
<th>Scientist</th>
<th>Required Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Veterinarian</td>
<td>D.V.M., D.M.V. or Doctor en Veterinaria; or state/provincial license</td>
</tr>
<tr>
<td>Agronomist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Animal Breeder</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Animal Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Apiarist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Astronomer</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Biochemist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Biologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Chemist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Dairy Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Entomologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Epidemiologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geochemist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geophysicist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Horticulturist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Meteorologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Pharmacologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Physicist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Oceanoographer (in Canada)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Plant Breeder</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Poultry Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Soil Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Sociologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Teacher</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>College</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Seminary</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>University</td>
<td>Baccalaureate or Licenciatura Degree</td>
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</tbody>
</table>

4 INTRA-COMPANY TRANSFEREES

4.1 What requirements apply to intra-company transferees?

The following requirements apply:
- citizenship of the United States or Mexico;
- employment in an executive or managerial capacity or one involving "specialized knowledge";
- enterprises in the United States or Mexico and in Canada have a parent, branch, subsidiary or affiliate relationship;
• continuous employment, in a similar position outside Canada, for one year in the previous three-year period; and
• compliance with existing immigration requirements for temporary entry.

4.2 Where can an intra-company transferee apply for a work permit?
Facilitated entry under the NAFTA allows an intra-company transferee to make an application at the POE. An application can also be made at a visa office before departing for Canada.
United States and Mexican citizens can also apply for intra-company transferee status in Canada, having been admitted to Canada as visitors (R199).

4.3 What documentation must an intra-company transferee present to support an application?
An intra-company transferee must present:
• proof of American or Mexican citizenship;
• confirmation that the person has been employed continuously by the enterprise for one year within the three-year period immediately preceding the date of application;
• outline of the applicant's current position in an executive, or managerial capacity or one involving specialized knowledge, i.e., position, title, place in the organization, job description;
• in the case of "specialized knowledge," evidence that the person has such knowledge and that the position in Canada requires such knowledge;
• outline of the position in Canada, i.e., position, title, place in the organization, job description;
• indication of intended duration of stay; and
• description of the relationship between the enterprise in Canada and the enterprise in the United States or Mexico.

Officers may request tangible proof to establish the relationship between the Canadian and American or Mexican organizations.

In order to qualify in the intra-company transferee category, a business enterprise "is or will be doing business" in both Canada and the business person's home country, the United States or Mexico.

Note: "Doing business" means regularly, systematically, and continuously providing goods and/or services by a parent, branch, subsidiary, or affiliate in Canada and the United States, or Mexico, as the case may be. It does not include the mere presence of an agent or office in Canada or in the United States or Mexico. For instance, a company with no employees which exists in name only and is established for the express purpose of facilitating the entry of intra-company transferees would not qualify.

An applicant seeking entry to open a new office on behalf of the American or Mexican enterprise may also qualify, having established that the enterprise in Canada is expected to support a managerial or executive position or, in the case of specialized knowledge, is expected to be doing business. Factors such as the ownership or control of the enterprise, the premises of the enterprise, the investment committed, the organizational structure, the goods or services to be provided and the viability of the American or Mexican operation should be considered.

Intra-company transferees may be admitted for short term assignments and may divide work between Canada and the U.S. or Mexico.

In assessing an application as an intra-company transferee under the NAFTA, the general provisions which deal with intra-company transferees (R205(a), CEC C12) may also be considered.

4.4 What is an affiliate, a branch, an enterprise, a parent and a subsidiary?
Affiliate means:
• one of two subsidiaries, both of which are owned and controlled by the same parent or individual; or
one of two legal entities, owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each company.

Branch is an operating division or office of the same organization housed in a different location.

Enterprise is “any entity constituted or organized under applicable law, whether or not for profit and whether privately or publicly owned including any corporation trust, partnership, sole proprietorship, joint venture or other association”.

Parent means a firm, corporation or other legal entity which has subsidiaries.

Subsidiary refers to a firm, a corporation, or other legal entity of which a parent owns:
- directly or indirectly, half or more than half of the entity and controls the entity; or
- owns, directly or indirectly, 50% of a 50-50 joint venture and has equal control and veto power over the entity; or
- owns directly or indirectly, less than half of the entity, but in fact controls the entity.

4.5. What is “executive capacity”?  
“Executive capacity” refers to a position in which the employee primarily:
- directs the management of the organization or a major component or function of the organization;
- establishes the goals and policies of the organization, component, or function;
- exercises wide latitude in discretionary decision-making; and
- receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

An executive does not generally perform duties necessary in the production of a product or in the delivery of a service.

In smaller businesses, the title of the position may not be sufficient to establish that a position is managerial or executive. For example, an architect who incorporates a business and hires a secretary and a draughtsman is not automatically considered to be holding an executive or managerial position. In order to qualify as a manager or executive as described in the intra-company transferee category, the architect must be engaging in managerial or executive duties rather than purely architectural ones.

4.6. What is “managerial capacity”?  
“Managerial capacity” refers to a position in which the employee primarily:
- manages the organization, or a department, subdivision, function, or component of the organization;
- supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- has the authority to hire and fire or recommend those, as well as other, personnel actions (such as promotion and leave authorization); if no other employee is directly supervised, functions at a senior level within the organization hierarchy or with respect to the function managed; and
- exercises discretion over the day-to-day operations of the activity or function for which the employee has the authority.

A first-line supervisor is not considered to be acting in a managerial capacity unless the employees supervised are professional.

A manager does not primarily perform tasks required in production of a product or in the delivery of a service.

In smaller businesses, the title of the position may not be sufficient to establish that a position is managerial or executive (refer to section 4.5, What is “executive capacity”?).
4.7. What is “specialized knowledge”?  
“Specialized knowledge” means special knowledge an individual has of a company’s product or service and its application in international markets or an advanced level of knowledge or expertise in the organization’s processes and procedures. (Product, process and service can include research, equipment, techniques, management, or other interests.)  
Special knowledge is unusual and different from that found in a particular industry. The knowledge need not be proprietary or unique but uncommon. As a general guide, special knowledge may involve a person’s familiarity with a product or service which their company makes. Advanced knowledge is complex - again, not necessarily unique or known only by a few individuals (proprietary), but advanced. An assessment of whether such knowledge exists in Canada is not relevant as the test is whether the applicant possesses such knowledge.

Example: A person who possesses specialized knowledge would usually be in a position critical to the well-being of the enterprise. As well, this knowledge has normally been gained by experience with the organization and used by the individual to contribute significantly to the employer’s productivity or well-being. Evidence of such knowledge must be submitted by the company.

The use of the term “specialized knowledge” applicable to the after-sales service personnel of the business visitor category (Appendix 1603.A.1) differs. For after-sales service, specialized knowledge reflects special training which raises the level of expertise beyond hands-on building and construction work.

4.8 What documents are issued?

- Persons who qualify as intra-company transferees are to be issued a work permit pursuant to R204, CEC T24.

4.9 How long can a work permit be issued and can it be extended?

A work permit issued at the time of entry can have a maximum duration of three years. However, individuals admitted to Canada to open an office or to be employed in a new office should be issued an initial permit for a maximum period of one year.

Extensions can be granted for a duration of up to two years if the person continues to comply with the requirements for intra-company transferees.

The category of intra-company transferees is the only NAFTA category to have a “capi” imposed on the total duration of employment. The total period of stay for a person employed in an executive or managerial capacity may not exceed seven years. The total period of stay for a person employed in a position requiring specialized knowledge may not exceed five years.

Note: For these cases, a minimum period of one year must pass after the time cap before applicants are eligible to be issued a new work permit in these categories.

Intra-company transferees are not necessarily required to relocate to Canada, however, they are expected to actually occupy a position within the Canadian branch of the company. There should be a clear employer-employee relationship with the Canadian company, and the Canadian company should be directing the day-to-day activities of the foreign worker. This is especially important for workers working at client sites and not at the parent, branch, affiliate, or subsidiary. Alternatively, officers should examine whether the applicant might better be classified as a business visitor, which includes provision of after-sales service. (See Business visitors, section 2 of this Appendix.)

Issuance of short-term work permits for specific projects is permissible, whether the project is taking place at the company premises in Canada or at a client site (generally seen as applicable for persons the company needs to transfer for their specialized knowledge). Long-term work permits in the intra-company transferee category should not be issued for service personnel living outside Canada whom the company wishes to parachute into a client site of the international company on an as-needed basis.
TRADERS AND INVESTORS
Sections 5 and 6 deal with the traders and investors category. An applicant can be granted trader or investor status, but not both. If an applicant is unsure as to the applicable status or wishes to be considered under both, all sections of the application form must be completed. (Refer to sections 5.2 and 6.2 for information concerning the application form.)

5. TRADERS

5.1. What requirements apply to traders?
The following requirements apply:
- applicant has American or Mexican citizenship;
- enterprise has American or Mexican nationality;
- activities involve substantial trade in goods or services;
- trade is principally between either the United States or Mexico, and Canada;
- position is supervisory or executive, or involves essential skills; and
- compliance with existing immigration requirements for temporary entry.

5.2. Where can a trader apply for a work permit?
An application should be submitted at a visa office.
The Regulations allow a citizen of the United States or Mexico to apply for a work permit either at a POE (R198) or at a visa office. However, due to the complexity of the application and for reasons of client service, program consistency and reciprocity, an application for a work permit for entry as a trader should be submitted at a visa office. Because of reciprocal treatment offered to Canadians, Mexican citizens who are granted temporary resident status can also apply for trader status from within Canada (R199).

A person who wishes to submit an application at a POE is to be counselled to submit the application at a visa office. Upon receiving a request for extension, the file from the issuing office should be requested to compare the original information and documentation with that presented in support of the extension request.

Persons applying for trader status must complete an Application for Trader/Investor Status (IMM 5321) in addition to the application for a work permit.

5.3. What criteria must be met?
The applicant is an American or a Mexican citizen and the enterprise or firm to which the applicant is coming has American or Mexican nationality.

The applicant may be trading on their own behalf or as an agent of a person or an organization engaged in trade principally between Canada and the United States or Mexico. (The applicant may also be an employee of a person or corporation maintaining Trader status in Canada - see section 5.4)

Note: American or Mexican nationality means that the individual or corporate persons who own at least 50 percent interest (directly or by stock) in the entity established in Canada must hold American or Mexican citizenship. Joint ventures and partnerships are limited to two parties.

In parent-subsidiary situations, the nationality of the corporate entity established in Canada should be looked at.

A letter attesting to ownership from a corporate secretary or a company lawyer may be used in determining nationality.

The place of incorporation of an enterprise is not an indicator of nationality. Nationality is indicated by ownership.
PART 5:
TEMPORARY HELP AGENCIES
Bill 139

(Chapter 9
Statutes of Ontario, 2009)

An Act to amend the
Employment Standards Act, 2000
in relation to temporary help agencies
and certain other matters

The Hon. P. Fonseca
Minister of Labour

Printed by the Legislative Assembly of Ontario

1st Reading December 9, 2008
2nd Reading March 2, 2009
3rd Reading May 4, 2009
Royal Assent May 6, 2009

Projet de loi 139

(Chapitre 9
Lois de l’Ontario de 2009)

Loi modifiant la
Loi de 2000 sur les normes d’emploi
en ce qui concerne les agences
de placement temporaire
et certaines autres questions

L’honorable P. Fonseca
Ministre du Travail

Imprimé par l’Assemblée législative de l’Ontario

1re lecture 9 décembre 2008
2e lecture 2 mars 2009
3e lecture 4 mai 2009
Sanction royale 6 mai 2009
EXPLANATORY NOTE

This Explanatory Note was written as a reader's aid to Bill 139 and does not form part of the law. Bill 139 has been enacted as Chapter 9 of the Statutes of Ontario, 2009.

Section 3 of the Bill adds Part XVIII.1 (Temporary Help Agencies) to the Employment Standards Act, 2000. Part XVIII.1 adds sections 74.1 to 74.17 to the Act.

Sections 74.1 to 74.4 of the Act provide for the interpretation and application of Part XVIII.1. Section 74.1 defines temporary help agency (an agency that employs persons for the purpose of assigning them to perform work on a temporary basis for its clients) and assignment employee (persons employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for the agency’s clients). Section 74.2 provides that the Part does not apply to certain kinds of work assignments made under certain contracts with community care access corporations. Sections 74.3 and 74.4 elaborate on the nature of the employment relationship between temporary help agencies and assignment employees.

Sections 74.5 to 74.11 of the Act set out obligations and prohibitions relating to temporary help agencies. Sections 74.5, 74.6 and 74.7 require a temporary help agency to provide its assignment employees with information about the agency, about work assignments, and about the rights of assignment employees under the Act. Section 74.8 restricts the fees that temporary help agencies may charge its assignment employees and, subject to limited exceptions, prohibits a temporary help agency from restricting its assignment employees from entering into employment relationships with clients of the agency. Section 74.9 provides that a provision in an agreement with a temporary help agency that is inconsistent with section 74.8 is void. Section 74.10 clarifies an aspect of assignment employees’ entitlement to public holiday pay. Section 74.11 clarifies how termination and severance rights under the Act apply to assignment employees.

Section 74.12 of the Act prohibits a client of a temporary help agency from taking reprisals against assignment employees on a variety of grounds, such as asking the client or the temporary help agency to comply with the Act.

Sections 74.13 to 74.17 of the Act relate to enforcement of the new Part, including provisions for recovery of fees charged in contravention of the Part and compensation for loss incurred as a result of a contravention of the Part.

Other sections of the Bill deal with consequential and housekeeping matters. Section 1 of the Bill amends section 8 of the Act with respect to service of certain notices on the Director of Employment Standards. Section 2 of the Bill amends section 68 of the Act, which deals with rights respecting lie detector tests, to include a reference to the new section 74.12 of the Act. Section 4 of the Bill remakes section 95 of the Act, respecting service of documents under the Act. Section 5 of the Bill amends section 102 of the Act to allow for use of technology to facilitate the holding of meetings required by employment standards officers. Sections 6 to 29 of the Bill make consequential and housekeeping amendments to various sections of the Act, in the main to permit enforcement of the new Part XVIII.1.

Section 30 of the Bill provides that the Act comes into force six months after the day it receives Royal Assent.

NOTE EXPLICATIVE

La note explicative, rédigée à titre de service aux lecteurs du projet de loi 139, ne fait pas partie de la loi. Le projet de loi 139 a été édité et constitue maintenant le chapitre 9 des Lois de l’Ontario de 2009.

L’article 3 du projet de loi ajoute la partie XVIII.1 (Agences de placement temporaire) à la Loi de 2000 sur les normes d’emploi. Cette nouvelle partie comprend les articles 74.1 à 74.17 de la Loi.

Les articles 74.1 à 74.4 de la Loi prévoient l’interprétation et le champ d’application de la partie XVIII.1. L’article 74.1 définit l’agence de placement temporaire comme étant une agence qui emploie des personnes afin de les affecter à l’exécution d’un travail à titre temporaire pour ses clients et l’emploie ponctuel comme étant une personne qu’une agence de placement temporaire emploie afin de l’affecter à l’exécution d’un travail à titre temporaire pour des clients de l’agence. L’article 74.2 prévoit que cette partie ne s’applique pas à certaines affectations faites aux termes de contrats conclus avec des sociétés d’accès aux soins communautaires. Les articles 74.3 et 74.4 précisent la nature de la relation d’emploi entre les agences de placement temporaire et les employés ponctuels.

Les articles 74.5 à 74.11 de la Loi prévoient les obligations et les interdictions s’appliquant aux agences de placement temporaire. Les articles 74.5, 74.6 et 74.7 exigent que l’agence de placement temporaire fournisse à ses employés ponctuels des renseignements sur l’agence, les affectations de travail et les droits des employés ponctuels selon la Loi. L’article 74.8 limite les frais que l’agence de placement temporaire peut demander à ses employés ponctuels et, sous réserve de certaines exceptions, interdit à l’agence d’imposer à ceux-ci des restrictions visant à les empêcher d’établir des relations d’emploi avec ses clients. L’article 74.9 prévoit la nullité des dispositions d’une entente conclue avec une agence de placement temporaire qui sont incompatibles avec l’article 74.8. L’article 74.10 clarifie un aspect du droit des employés ponctuels à un salaire pour jour férié. L’article 74.11 précise la manière dont les droits relatifs au licenciement et à la cessation d’emploi prévus par la Loi s’appliquent aux employés ponctuels.

L’article 74.12 de la Loi interdit au client d’une agence de placement temporaire d’exercer des représailles contre des employés ponctuels pour divers motifs, par exemple pour avoir demandé au client ou à l’agence de se conformer à la Loi.

Les articles 74.13 à 74.17 de la Loi portent sur l’exécution de la nouvelle partie et comprennent notamment des dispositions prévoyant le recouvrement des frais demandés en contravention à cette partie et l’indemnisation pour perte subie par suite d’une contravention à cette partie.

D’autres articles du projet de loi apportent des modifications corrélatives et de forme. L’article 1 du projet de loi modifie l’article 8 de la Loi à l’égard de la signature de certains avis au directeur des normes d’emploi. L’article 2 du projet de loi modifie l’article 68 de la Loi, qui porte sur les droits relatifs aux tests du détecteur de mensonges, pour inclure un renvoi au nouvel article 74.12 de la Loi. L’article 4 du projet de loi réédite l’article 95 de la Loi qui porte sur la signification de documents dans le cadre de la Loi. L’article 5 du projet de loi modifie l’article 102 de la Loi pour permettre l’utilisation de moyens technologiques facilitant la tenue des réunions exigées par les agents des normes d’emploi. Les articles 6 à 29 du projet de loi modifient divers articles de la Loi, principalement pour autoriser l’exécution de la nouvelle partie XVIII.1.

L’article 30 du projet de loi prévoit l’entrée en vigueur de la Loi six mois après le jour où elle reçoit la sanction royale.
An Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies and certain other matters

Note: This Act amends the Employment Standards Act, 2000. For the legislative history of the Act, see the Table of Consolidated Public Statutes – Detailed Legislative History on www.e-Laws.gov.on.ca.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 8 of the Employment Standards Act, 2000 is amended by adding the following subsections:

Service of notice

(3) The notice shall be served on the Director,

(a) by being delivered to the Director's office on a day and at a time when it is open;

(b) by being mailed to the Director's office using a method of mail delivery that allows delivery to be verified; or

(c) by being sent to the Director's office by fax or email.

When service effective

(4) Service under subsection (3) shall be deemed to be effected,

(a) in the case of service under clause (3) (a), on the day shown on a receipt or acknowledgment provided to the employee by the Director or his or her representative;

(b) in the case of service under clause (3) (b), on the day shown in the verification;

(c) in the case of service under clause (3) (c), on the day on which the fax or email is sent, subject to subsection (5).

Same

(5) Service shall be deemed to be effected on the next day on which the Director's office is not closed, if the fax or email is sent,

Loi modifiant la Loi de 2000 sur les normes d’emploi en ce qui concerne les agences de placement temporaire et certaines autres questions


Sa Majesté, sur l’avis et avec le consentement de l’Assemblée législative de la province de l’Ontario, édicte :

1. L’article 8 de la Loi de 2000 sur les normes d’emploi est modifié par adjonction des paragraphes suivants :

Signification de l’avis

(3) L’avis est signifié au directeur de l’une des manières suivantes :

a) il est livré au bureau du directeur pendant ses jours et heures d’ouverture;

b) il est envoyé par courrier au bureau du directeur par un mode de livraison du courrier qui permet la vérification de la livraison;

c) il est envoyé au bureau du directeur par télecopie ou par courrier électronique.

Prise d’effet de la signification

(4) La signification faite en application du paragraphe (3) est réputée l’être :

a) à la date figurant sur le récépissé ou l’accusé de réception remis à l’employé par le directeur ou son représentant, dans le cas de la signification faite en application de l’alinéa (3) a);

b) à la date figurant dans la vérification, dans le cas de la signification faite en application de l’alinéa (3) b);

c) à la date d’envoi de la télecopie ou du courrier électronique, sous réserve du paragraphe (5), dans le cas de la signification faite en application de l’alinéa (3) c).

Idem

(5) La signification est réputée être faite le premier jour d’ouverture du bureau du directeur qui suit si la télecopie ou le courrier électronique est envoyé :
(a) on a day on which the Director’s office is closed; or
(b) after 5 p.m. on any day.

2. Section 68 of the Act is amended by striking out “Part XVIII (Reprisal), Part XXI (Who Enforces this Act and What They Can Do)” in the portion before the definitions and substituting “Part XVIII (Reprisal), section 74.12, Part XXI (Who Enforces this Act and What They Can Do)”.

3. The Act is amended by adding the following Part:

**PART XVIII.1**
TEMPORARY HELP AGENCIES

**INTERPRETATION AND APPLICATION**

**Interpretation**

74.1 (1) In this Part,

“assignment employee” means an employee employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency; (“employé ponctuel”)

“client”, in relation to a temporary help agency, means a person or entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its assignment employees to perform work for the person or entity on a temporary basis; (“client”)

“temporary help agency” means an employer that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer. (“agence de placement temporaire”)

**Same**

(2) An assignment employee is assigned to perform work for a client of a temporary help agency if the employee is assigned to receive training from the client for the purpose of performing the work for the client.

**Application**

74.2 This Part does not apply in relation to an individual who is an assignment employee assigned to provide professional services, personal support services or homemaking services as defined in the *Long-Term Care Act, 1994* if the assignment is made under a contract between,

(a) the individual and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*; or

(b) an employer of the individual and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*.

**a)** un jour où le bureau du directeur est fermé;

(b) après 17 heures n’importe quel jour.

2. L’article 68 de la Loi est modifié par substitution de «de la partie XVIII (Reprisailles), de l’article 74.12 et des parties XXI (Application de la présente loi — ses responsables et leurs pouvoirs),» à «des parties XVIII (Reprisailles), XXI (Application de la présente loi — ses responsables et leurs pouvoirs),» dans le passage qui précède les définitions.

3. La Loi est modifiée par adjonction de la partie suivante :

**PARTIE XVIII.1**
AGENCES DE PLACEMENT TEMPORAIRE

**INTERPRÉTATION ET CHAMP D’APPLICATION**

**Interprétation**

74.1 (1) Les définitions qui suivent s’appliquent à la présente partie.

«agence de placement temporaire» Employeur qui emploie des personnes afin de les affecter à l’exécution d’un travail à titre temporaire pour ses clients. («tempo-

rary help agency»)

«client» Relativement à une agence de placement temporaire, s’entend d’une personne ou d’une entité qui conclut avec l’agence un arrangement aux termes duquel l’agence convient d’affecter ou de tenter d’affecter un ou plusieurs de ses employés ponctuels à l’exécu-

tion d’un travail pour la personne ou l’entité à titre temporaire. («client»)

«employé ponctuel» Employé qu’une agence de placement temporaire emploie afin de l’affecter à l’exécution d’un travail à titre temporaire pour des clients de l’agence. («assignment employee»)

**Idem**

(2) Un employé ponctuel est affecté à l’exécution d’un travail pour un client de l’agence de placement temporaire s’il est affecté à une formation qu’il doit recevoir du client afin d’exécuter ce travail.

**Champ d’application**

74.2 La présente partie ne s’applique pas à l’égard d’un particulier qui est un employé ponctuel affecté à la fourniture de services professionnels, de services de soutien personnel ou de services d’aides familiales au sens de la *Loi de 1994 sur les soins de longue durée* si l’affectation est effectuée aux termes d’un contrat conclu entre :

(a) soit le particulier et une société d’accès aux soins communautaires au sens de la *Loi de 2001 sur les sociétés d’accès aux soins communautaires*;

(b) soit un employeur du particulier et une société d’accès aux soins communautaires au sens de la *Loi de 2001 sur les sociétés d’accès aux soins communautaires*. 
Employment relationship

74.3 Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency, (a) the temporary help agency is the person’s employer; (b) the person is an employee of the temporary help agency.

Work assignment

74.4 (1) An assignment employee of a temporary help agency is assigned to perform work for a client if the agency arranges for the employee to perform work for a client on a temporary basis and the employee performs such work for the client.

Same

(2) Where an assignment employee is assigned by a temporary help agency to perform work for a client of the agency, the assignment begins on the first day on which the assignment employee performs work under the assignment and ends at the end of the term of the assignment or when the assignment is ended by the agency, the employee or the client.

Same

(3) An assignment employee of a temporary help agency does not cease to be the agency’s assignment employee because, (a) he or she is assigned by the agency to perform work for a client on a temporary basis; or (b) he or she is not assigned by the agency to perform work for a client on a temporary basis.

Same

(4) An assignment employee of a temporary help agency is not assigned to perform work for a client because the agency has, (a) provided the client with the employee’s resume; (b) arranged for the client to interview the employee; or (c) otherwise introduced the employee to the client.

OBLIGATIONS AND PROHIBITIONS

Information re agency

74.5 (1) As soon as possible after a person becomes an assignment employee of a temporary help agency, the agency shall provide the following information, in writing, to the employee: 1. The legal name of the agency, as well as any operating or business name of the agency if different from the legal name. 2. Contact information for the agency, including address, telephone number and one or more contact names.

Relation d’emploi

74.3 Si une agence de placement temporaire et une personne conviennent, par écrit ou non, que l’agence affectera ou tentera d’affecter la personne à l’exécution d’un travail à titre temporaire pour des clients ou des clients potentiels de l’agence : (a) l’agence de placement temporaire est l’employeur de la personne; (b) la personne est un employé de l’agence de placement temporaire.

Affectation

74.4 (1) L’employé ponctuel d’une agence de placement temporaire est affecté à l’exécution d’un travail pour un client si l’agence prend des arrangements pour que l’employé exécute un travail pour un client à titre temporaire et qu’il exécute ce travail pour le client.

Idem

(2) Lorsqu’un employé ponctuel est affecté par une agence de placement temporaire à l’exécution d’un travail pour un client de l’agence, l’affectation commence le premier jour où l’employé ponctuel exécute du travail dans le cadre de l’affectation et se termine à la fin de la durée de l’affectation ou lorsque l’agence, l’employé ou le client y met fin.

Idem

(3) L’employé ponctuel d’une agence de placement temporaire ne cesse pas d’être un employé ponctuel de cette dernière du fait que, selon le cas : (a) il est affecté par l’agence à l’exécution d’un travail pour un client à titre temporaire; (b) il n’est pas affecté par l’agence à l’exécution d’un travail pour un client à titre temporaire.

Idem

(4) L’employé ponctuel d’une agence de placement temporaire n’est pas affecté à l’exécution d’un travail pour un client du fait que l’agence a, selon le cas : (a) fourni le curriculum vitae de l’employé au client; (b) pris des arrangements pour que le client fasse passer une entrevue à l’employé; (c) présenté l’employé au client d’une autre façon.

OBLIGATIONS ET INTERDICTIONS

Renseignements relatifs à l’agence

74.5 (1) Dès que possible après qu’une personne devient un employé ponctuel d’une agence de placement temporaire, cette dernière lui fournit par écrit les renseignements suivants : 1. Le nom officiel de l’agence, ainsi que son nom commercial s’il est différent. 2. Les coordonnées de l’agence, y compris l’adresse, le numéro de téléphone et le nom d’une ou de plusieurs personnes-ressources.
Transition

(2) Where a person is an assignment employee of a temporary help agency on the day this section comes into force, the agency shall, as soon as possible after that day, provide the information required by subsection (1), in writing, to the employee.

Information re assignment

74.6 (1) A temporary help agency shall provide the following information when offering a work assignment with a client to an assignment employee:

1. The legal name of the client, as well as any operating or business name of the client if different from the legal name.

2. Contact information for the client, including address, telephone number and one or more contact names.

3. The hourly or other wage rate or commission, as applicable, and benefits associated with the assignment.

4. The hours of work associated with the assignment.

5. A general description of the work to be performed on the assignment.

6. The pay period and pay day established by the agency in accordance with subsection 11 (1).

7. The estimated term of the assignment, if the information is available at the time of the offer.

Same

(2) If information required by subsection (1) is provided orally to the assignment employee, the temporary help agency shall also provide the information to the assignment employee in writing, as soon as possible after offering the work assignment.

Transition

(3) Where an assignment employee is on a work assignment with a client of a temporary help agency or has been offered such an assignment on the day this section comes into force, the agency shall, as soon as possible after that day, provide the information required by subsection (1), in writing, to the employee.

Information, rights under this Act

74.7 (1) The Director shall prepare and publish a document providing such information about the rights and obligations of assignment employees, temporary help agencies and clients under this Part as the Director considers appropriate.

Same

(2) If the Director believes that a document prepared under subsection (1) has become out of date, the Director shall prepare and publish a new document.

Same

(3) As soon as possible after a person becomes an assignment employee of a temporary help agency, the agency

Disposition transitoire

(2) Si une personne est un employé ponctuel d’une agence de placement temporaire le jour de l’entrée en vigueur du présent article, l’agence lui fournit par écrit, dès que possible après ce jour, les renseignements exigés par le paragraphe (1).

Renseignements relatifs à l’affectation

74.6 (1) Lorsqu’elle offre une affectation de travail chez un client à un employé ponctuel, l’agence de placement temporaire lui fournit les renseignements suivants :

1. Le nom officiel du client, ainsi que son nom commercial s’il est différent.

2. Les coordonnées du client, y compris l’adresse, le numéro de téléphone et le nom d’une ou de plusieurs personnes-ressources.

3. Le taux horaire ou autre taux de salaire ou la commission, selon le cas, et les avantages sociaux attachés à l’affectation.

4. Les heures de travail rattachées à l’affectation.

5. Une description générale du travail à effectuer dans le cadre de l’affectation.

6. La période de paie et la journée de paie établies par l’agence conformément au paragraphe 11 (1).

7. La durée estimative de l’affectation, si ce renseignement est disponible au moment de l’offre.

Ident

(2) Si les renseignements exigés par le paragraphe (1) sont fournis de vive voix à l’employé ponctuel, l’agence de placement temporaire lui fournit aussi ces renseignements par écrit, dès que possible après lui avoir offert l’affectation de travail.

Disposition transitoire

(3) Si un employé ponctuel est déjà affecté chez un client d’une agence de placement temporaire ou qu’une affectation lui a été offerte le jour de l’entrée en vigueur du présent article, l’agence lui fournit par écrit, dès que possible après ce jour, les renseignements exigés par le paragraphe (1).

Renseignements : droits prévus par la Loi

74.7 (1) Le directeur prépare et publie un document qui fournit les renseignements qu’il estime appropriés sur les droits et les obligations, prévus à la présente partie, des employés ponctuels, des agences de placement temporaire et des clients.

Ident

(2) S’il croit qu’un document préparé en application du paragraphe (1) n’est plus à jour, le directeur en prépare et en publie un nouveau.

Ident

(3) Dès que possible après qu’une personne devient un employé ponctuel d’une agence de placement temporaire,
shall provide a copy of the most recent document published by the Director under this section to the employee.

Same

(4) If the language of an assignment employee is a language other than English, the temporary help agency shall make enquiries as to whether the Director has prepared a translation of the document into that language and, if the Director has done so, the agency shall also provide a copy of the translation to the employee.

Prohibitions

74.8 (1) A temporary help agency is prohibited from doing any of the following:

1. Charging a fee to an assignment employee in connection with him or her becoming an assignment employee of the agency.

2. Charging a fee to an assignment employee in connection with the agency assigning or attempting to assign him or her to perform work on a temporary basis for clients or potential clients of the agency.

3. Charging a fee to an assignment employee of the agency in connection with assisting or instructing him or her on preparing resumes or preparing for job interviews.

4. Restricting an assignment employee of the agency from entering into an employment relationship with a client.

5. Charging a fee to an assignment employee of the agency in connection with a client of the agency entering into an employment relationship with him or her.

6. Restricting a client from providing references in respect of an assignment employee of the agency.

7. Restricting a client from entering into an employment relationship with an assignment employee.

8. Charging a fee to a client in connection with the client entering into an employment relationship with an assignment employee, except as permitted by subsection (2).

9. Charging a fee that is prescribed as prohibited.

10. Imposing a restriction that is prescribed as prohibited.

Exception, par. 8 of subs. (1)

(2) Where an assignment employee has been assigned by a temporary help agency to perform work on a temporary help agency term, the employer shall provide a copy of the most recent document published by the Director under this section to the employee.

Idem

(4) Si la langue d’un employé ponctuel n’est pas l’anglais, l’agence de placement temporaire s’informe pour savoir si le directeur a préparé une traduction du document dans cette autre langue et, si tel est le cas, fournit également une copie de la traduction à l’employé.

Disposition transitoire

(5) Si une personne est un employé ponctuel d’une agence de placement temporaire le jour de l’entrée en vigueur du présent article, l’agence lui fournit, dès que possible après ce jour, le document exigé par le paragraphe (3) et, s’il y a lieu, par le paragraphe (4).

Interdictions

74.8 (1) Il est interdit à l’agence de placement temporaire de faire ce qui suit :

1. Demander des frais à un employé ponctuel relativement à son engagement par l’agence.

2. Demander des frais à un employé ponctuel relativement à son affectation par l’agence à l’exécution d’un travail à titre temporaire pour des clients ou des clients potentiels de l’agence ou à une tentative de l’agence en vue d’une telle affectation.

3. Demander des frais à un employé ponctuel de l’agence relativement à l’aide ou aux instructions qu’elle lui donne pour rédiger des curriculums vitae ou se préparer à des entrevues d’emploi.


5. Demander des frais à un employé ponctuel de l’agence relativement à l’établissement d’une relation d’emploi entre celui-ci et un client de l’agence.


7. Imposer à un client des restrictions visant à l’empêcher d’établir une relation d’emploi avec un employé ponctuel.

8. Demander des frais à un client relativement à l’établissement d’une relation d’emploi entre celui-ci et un employé ponctuel, sauf dans la mesure permise par le paragraphe (2).

9. Demander des frais qui sont prescrits comme étant interdits.

10. Imposer une restriction qui est prescrite comme étant interdite.

Exception : disp. 8 du par. (1)

(2) Si un employé ponctuel a été affecté par une agence de placement temporaire à l’exécution d’un travail
rary basis for a client and the employee has begun to perform the work, the agency may charge a fee to the client in the event that the client enters into an employment relationship with the employee, but only during the six-month period beginning on the day on which the employee first began to perform work for the client of the agency.

Same

(3) For the purposes of subsection (2), the six-month period runs regardless of the duration of the assignment or assignments by the agency of the assignment employee to work for the client and regardless of the amount or timing of work performed by the assignment employee.

Interpretation

(4) In this section, “assignment employee” includes a prospective assignment employee.

Void provisions

74.9 (1) A provision in an agreement between a temporary help agency and an assignment employee of the agency that is inconsistent with section 74.8 is void.

Same

(2) A provision in an agreement between a temporary help agency and a client that is inconsistent with section 74.8 is void.

Transition

(3) Subsections (1) and (2) apply to provisions regardless of whether the agreement was entered into before or after the date on which section 74.8 comes into force.

Interpretation

(4) In this section, “assignment employee” includes a prospective assignment employee.

Public holiday pay

74.10 (1) For the purposes of determining entitlement to public holiday pay under subsection 29 (2.1), an assignment employee of a temporary help agency is on a layoff on a public holiday if the public holiday falls on a day on which the employee is not assigned by the agency to perform work for a client of the agency.

Same

(2) For the purposes of subsection 29 (2.2), the period of a temporary lay-off of an assignment employee by a temporary help agency shall be determined in accordance with section 56 as modified by section 74.11 for the purposes of Part XV.

Termination and severance

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

1. A temporary help agency lays off an assignment employee for a week if the employee is not assigned by the agency to perform work for a client of the agency during the week.

à titre temporaire pour un client et qu’il a commencé à exécuter ce travail, l’agence peut demander des frais au client dans le cas où celui-ci établit une relation d’emploi avec l’employé, mais seulement pendant la période de six mois qui commence le jour où l’employé a commencé à exécuter un travail pour le client de l’agence.

Idem

(3) Pour l’application du paragraphe (2), la période de six mois court sans égard à la durée des affectations de l’employé ponctuel par l’agence à l’exécution d’un travail pour le client et sans égard à la quantité de travail exécuté par l’employé ponctuel ni au moment où le travail a été exécuté.

Interprétation

(4) Dans le présent article, «employé ponctuel» s’entend en outre d’un employé ponctuel éventuel.

Dispositions nulles

74.9 (1) Les dispositions d’une entente entre une agence de placement temporaire et un employé ponctuel de l’agence qui sont incompatibles avec l’article 74.8 sont nulles.

Idem

(2) Les dispositions d’une entente entre une agence de placement temporaire et un client qui sont incompatibles avec l’article 74.8 sont nulles.

Disposition transitoire

(3) Les paragraphes (1) et (2) s’appliquent aux dispositions, que l’entente ait été conclue avant ou après la date de l’entrée en vigueur de l’article 74.8.

Interprétation

(4) Dans le présent article, «employé ponctuel» s’entend en outre d’un employé ponctuel éventuel.

Salaire pour jour férié

74.10 (1) Pour l’établissement du droit au salaire pour jour férié aux termes du paragraphe 29 (2.1), un employé ponctuel d’une agence de placement temporaire fait l’objet d’une mise à pied un jour férié si le jour férié tombe un jour où il n’est pas affecté par l’agence à l’exécution d’un travail pour un client de l’agence.

Idem

(2) Pour l’application du paragraphe 29 (2.2), la période de mise à pied temporaire d’un employé ponctuel par une agence de placement temporaire est calculée conformément à l’article 56, tel qu’il est adapté par l’article 74.11 pour l’application de la partie XV.

Licenciement et cessation d’emploi

74.11 Pour l’application de la partie XV aux agences de placement temporaire et à leurs employés ponctuels, les adaptations suivantes s’appliquent :

1. L’agence de placement temporaire met à pied un employé ponctuel pendant une semaine s’il n’est pas affecté par l’agence à l’exécution d’un travail pour un client pendant la semaine.
2. For the purposes of paragraphs 3 and 10, “excluded week” means a week during which, for one or more days, the assignment employee is not able to work, is not available for work, refuses an offer by the agency that would not constitute constructive dismissal of the employee by the agency, is subject to a disciplinary suspension or is not assigned to perform work for a client of the agency because of a strike or lock-out occurring at the agency.

3. An excluded week shall not be counted as part of the 13 or 35 weeks referred to in subsection 56 (2) but shall be counted as part of the 20 or 52 consecutive week periods referred to in subsection 56 (2).

4. Subsections 56 (3) to (3.6) do not apply to temporary help agencies and their assignment employees.

5. A temporary help agency shall, in addition to meeting the posting requirements set out in clause 58 (2) (b) and subsection 58 (5), provide the information required to be provided to the Director under clause 58 (2) (a) to each of its assignment employees on the first day of the notice period or as soon after that as is reasonably possible.

6. Clauses 60 (1) (a) and (b) and subsection 60 (2) do not apply to temporary help agencies and their assignment employees.

7. A temporary help agency that gives notice of termination to an assignment employee in accordance with section 57 or 58 shall, during each week of the notice period, pay the assignment employee the wages he or she is entitled to receive, which in no case shall be less than,

i. in the case of any termination other than under clause 56 (1) (c), the total amount of the wages earned by the assignment employee for work performed for clients of the agency during the 12-week period ending on the last day on which the employee performed work for a client of the agency, divided by 12, or

ii. in the case of a termination under clause 56 (1) (c), the total amount of wages earned by the assignment employee for work performed for clients of the agency during the 12-week period immediately preceding the deemed termination date, divided by 12.

8. The lump sum that an assignment employee is entitled to be paid under clause 61 (1) (a) is a lump sum equal to the amount the employee would have been entitled to receive under paragraph 7 had notice been given in accordance with section 57 or 58.

9. Subsection 61 (1.1) does not apply to temporary help agencies and their assignment employees.

2. Pour l’application des dispositions 3 et 10, «semaine exclue» s’entend d’une semaine au cours de laquelle, pendant un ou plusieurs jours, l’employé ponctuel n’est pas capable de travailler, n’est pas disponible pour travailler, refuse une offre de l’agence qui ne constituait pas son congédiement implicite par l’agence, est suspendu pour des raisons disciplinaires ou n’est pas affecté à l’exécution d’un travail pour un client de l’agence en raison d’une grève ou d’un lock-out survenu à l’agence.

3. Une semaine exclue ne doit pas entrer dans le calcul de la période de 13 ou de 35 semaines visée au paragraphe 56 (2), mais elle entre dans le calcul de la période de 20 ou de 52 semaines consécutives visée au paragraphe 56 (2).

4. Les paragraphes 56 (3) à (3.6) ne s’appliquent pas aux agences de placement temporaire et à leurs employés ponctuels.

5. L’agence de placement temporaire fournit les renseignements qu’elle est tenue de fournir au directeur aux termes de l’alinéa 58 (2) a) à chacun de ses employés ponctuels le premier jour du délai de préavis ou dès qu’il est raisonnablement possible de le faire par la suite, cette obligation s’ajoutant aux exigences relatives à l’affichage énoncées à l’alinéa 58 (2) b) et au paragraphe 58 (5).

6. Les alinéas 60 (1) a) et b) et le paragraphe 60 (2) ne s’appliquent pas aux agences de placement temporaire et à leurs employés ponctuels.

7. L’agence de placement temporaire qui donne un préavis de licenciement à un employé ponctuel conformément à l’article 57 ou 58 lui verse, chaque semaine du délai de préavis, le salaire auquel il a droit, lequel ne doit en aucun cas être inférieur à ce qui suit :

i. dans le cas d’un licenciement autre qu’un licenciement visé à l’alinéa 56 (1) c), le quotient de la division par 12 du salaire total gagné par l’employé ponctuel pour le travail qu’il a exécuté pour des clients de l’agence pendant la période de 12 semaines qui se termine le dernier jour où l’employé a exécuté un travail pour un client de l’agence,

ii. dans le cas d’un licenciement visé à l’alinéa 56 (1) c), le quotient de la division par 12 du salaire total gagné par l’employé ponctuel pour le travail qu’il a exécuté pour des clients de l’agence pendant la période de 12 semaines qui précède immédiatement la date réputée la date de licenciement.

8. La somme forfaitaire à laquelle a droit un employé ponctuel aux termes de l’alinéa 61 (1) a) est égale à la somme à laquelle il aurait eu droit aux termes de la disposition 7 si un préavis avait été donné conformément à l’article 57 ou 58.

9. Le paragraphe 61 (1.1) ne s’applique pas aux agences de placement temporaire et à leurs employés.
10. An excluded week shall not be counted as part of the 35 weeks referred to in clause 63 (1) (c) but shall be counted as part of the 52 consecutive week period referred to in clause 63 (1) (c).

11. Subsections 63 (2) to (2.4) do not apply to temporary help agencies and their assignment employees.

12. Subsections 65 (1), (5) and (6) do not apply to temporary help agencies and their assignment employees.

13. If a temporary help agency severs the employment of an assignment employee under clause 63 (1) (a), (b), (d) or (e), severance pay shall be calculated by,

i. dividing the total amount of wages earned by the assignment employee for work performed for clients of the agency during the 12-week period ending on the last day on which the employee performed work for a client of the agency by 12, and

ii. multiplying the result obtained under subparagraph i by the lesser of 26 and the sum of,

A. the number of years of employment the employee has completed, and

B. the number of months of employment not included in sub-subparagraph A that the employee has completed, divided by 12.

14. If a temporary help agency severs the employment of an assignment employee under clause 63 (1) (c), severance pay shall be calculated by,

i. dividing the total amount of wages earned by the assignment employee for work performed for clients of the agency during the 12-week period immediately preceding the first day of the lay-off by 12, and

ii. multiplying the result obtained under subparagraph i by the lesser of 26 and the sum of,

A. the number of years of employment the employee has completed, and

B. the number of months of employment not included in sub-subparagraph A that the employee has completed, divided by 12.

REPRISAL BY CLIENT

Reprisal by client prohibited

74.12 (1) No client of a temporary help agency or person acting on behalf of a client of a temporary help agency shall intimidate an assignment employee, refuse to have an

pontuels.

10. Une semaine exclue ne doit pas entrer dans le calcul de la période de 35 semaines visée à l’alinéa 63 (1) c), mais elle entre dans le calcul de la période de 52 semaines consécutives visée à l’alinéa 63 (1) c).

11. Les paragraphes 63 (2) à (2.4) ne s’appliquent pas aux agences de placement temporaire et à leurs employés pontuels.

12. Les paragraphes 65 (1), (5) et (6) ne s’appliquent pas aux agences de placement temporaire et à leurs employés pontuels.

13. Si l’agence de placement temporaire met fin à l’emploi d’un employé pontuel aux termes de l’alinéa 63 (1) a), b), d) ou e), l’indemnité de cessation d’emploi est calculée comme suit :

i. diviser par 12 le salaire total gagné par l’employé pontuel pour le travail qu’il a exécuté pour des clients de l’agence pendant la période de 12 semaines qui se termine le dernier jour où il a exécuté un travail pour un client de l’agence,

ii. multiplier le résultat obtenu aux termes de la sous-disposition i par le moindre de 26 et de la somme de ce qui suit :

A. le nombre d’années complètes d’emploi de l’employé,

B. le quotient de la division par 12 du nombre de mois complets d’emploi de l’employé qui ne sont pas pris en compte à la sous-sous-disposition A.

14. Si l’agence de placement temporaire met fin à l’emploi d’un employé pontuel aux termes de l’alinéa 63 (1) c), l’indemnité de cessation d’emploi est calculée comme suit :

i. diviser par 12 le salaire total gagné par l’employé pontuel pour le travail qu’il a exécuté pour des clients de l’agence pendant la période de 12 semaines qui précède immédiatement le premier jour de la mise à pied,

ii. multiplier le résultat obtenu aux termes de la sous-disposition i par le moindre de 26 et de la somme des nombres suivants :

A. le nombre d’années complètes d’emploi de l’employé,

B. le quotient de la division par 12 du nombre de mois complets d’emploi de l’employé qui ne sont pas pris en compte à la sous-sous-disposition A.

Reprisal by client prohibited

74.12 (1) Nul client d’une agence de placement temporaire ni quiconque agissant pour le compte du client ne doit pénaliser un employé pontuel, notamment en l’inti-
assignment employee perform work for the client, terminate the assignment of an assignment employee, or otherwise penalize an assignment employee or threaten to do so,

(a) because the assignment employee,

(i) asks the client or the temporary help agency to comply with their respective obligations under this Act and the regulations,

(ii) makes inquiries about his or her rights under this Act,

(iii) files a complaint with the Ministry under this Act,

(iv) exercises or attempts to exercise a right under this Act,

(v) gives information to an employment standards officer,

(vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

(vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,

(viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the client or temporary help agency is or may be required, because of a court order or garnishment, to pay to a third party an amount owing to the assignment employee.

Onus of proof

(2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that a client did not contravene a provision set out in this section lies upon the client.

ENFORCEMENT

Meeting under s. 102

74.13 For the purposes of the application of section 102 in respect of this Part, the following modifications apply:

1. In addition to the circumstances set out in subsection 102 (1), the following are circumstances in which an employment standards officer may require persons to attend a meeting under that subsection:

   i. The officer is investigating a complaint against a client.

   ii. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that a client has contravened this Act or the regulations with respect to an assignment employee.

midant, en refusant de lui faire exécuter un travail pour le client ou en mettant fin à son affectation, ni menacer de le faire :

a) soit pour le motif que l’employé ponctuel, selon le cas :

   (i) demande au client ou à l’agence de placement temporaire de se conformer à leurs obligations respectives prévues par la présente loi et les règlements,

   (ii) s’infore des droits que lui confère la présente loi,

   (iii) dépose une plainte auprès du ministère en vertu de la présente loi,

   (iv) exerce ou tente d’exercer un droit que lui confère la présente loi,

   (v) donne des renseignements à un agent des normes d’emploi,

   (vi) témoigne ou est tenu de témoigner dans une instance prévue par la présente loi ou y participe ou y participera d’une autre façon,

   (vii) participe à des instances concernant un règlement municipal ou un projet de règlement municipal visé à l’article 4 de la Loi sur les jours fériés dans le commerce de détail,

   (viii) a ou aura le droit de prendre un congé, a l’intention d’en prendre un ou en prendre un en vertu de la partie XIV;

b) soit pour le motif que le client ou l’agence de placement temporaire est ou peut être tenu, aux termes d’une ordonnance d’un tribunal ou d’une saisie-arrêt, de verser à un tiers une somme due à l’employé ponctuel.

Fardeau de la preuve

(2) Sous réserve du paragraphe 122 (4), dans toute instance introduite en vertu de la présente loi, c’est au client qu’il incombe de prouver qu’il n’a pas contrevenu à une disposition du présent article.

EXÉCUTION

Réunion prévue à l’art. 102

74.13 Pour l’application de l’article 102 à l’égard de la présente partie, les adaptations suivantes s’appliquent :

1. Outre celles prévues au paragraphe 102 (1), les circonstances suivantes sont des circonstances dans lesquelles un agent des normes d’emploi peut exiger que des personnes assistent à une réunion prévue à ce paragraphe :

   i. Il fait enquête sur une plainte déposée contre un client.

   ii. Dans le cadre d’une inspection prévue à l’article 91 ou 92, il en vient à avoir des motifs raisonnables de croire qu’un client a contrevenu à la présente loi ou aux règlements à l’égard d’un employé ponctuel.
2. In addition to the persons referred to in subsection 102 (2), the following persons may be required to attend the meeting:
   i. The client.
   ii. If the client is a corporation, a director or employee of the corporation.
   iii. An assignment employee or prospective assignment employee.

Order to recover fees

74.14 (1) If an employment standards officer finds that a temporary help agency charged a fee to an assignment employee or prospective assignment employee in contravention of paragraph 1, 2, 3, 5 or 9 of subsection 74.8 (1), the officer may,

(a) arrange with the agency that it repay the amount of the fee directly to the assignment employee or prospective assignment employee; or

(b) order the agency to pay the amount of the fee to the Director in trust.

Administrative costs

(2) An order issued under clause (1) (b) shall also require the temporary help agency to pay to the Director in trust an amount for administrative costs equal to the greater of $100 and 10 per cent of the amount owing.

Contents of order

(3) The order shall state the paragraph of subsection 74.8 (1) that was contravened and the amount to be paid.

Application of s. 103 (3) and (6) to (9)

(4) Subsections 103 (3) and (6) to (9) apply with respect to an order issued under this section with necessary modifications and for the purpose, without limiting the generality of the foregoing, a reference to an employee is a reference to an assignment employee or prospective assignment employee.

Application of s. 105

(5) Section 105 applies with respect to repayment of fees by a temporary help agency to an assignment employee or prospective assignment employee with necessary modifications, including but not limited to the following:

1. The reference to clause 103 (1) (a) in subsection 105 (1) is a reference to clause (1) (a) of this section.

2. A reference to an employee is a reference to an assignment employee or prospective assignment employee to whom a fee is to be paid.

Recovery of prohibited fees by client

74.15 If a temporary help agency charges a fee to a client in contravention of paragraph 8 or 9 of subsection 74.8 (1), the client may recover the amount of the fee in a court of competent jurisdiction.

2. Outre les personnes visées au paragraphe 102 (2), les personnes suivantes peuvent être tenues d’assister à la réunion :
   i. Le client.
   ii. Si le client est une personne morale, un de ses administrateurs ou employés.
   iii. Un employé ponctuel ou un employé ponctuel éventuel.

Ordonnance de remboursement des frais

74.14 (1) L’agent des normes d’emploi qui conclut qu’une agence de placement temporaire a demandé des frais à un employé ponctuel ou à un employé ponctuel éventuel en contravention à la disposition 1, 2, 3, 5 ou 9 du paragraphe 74.8 (1) peut, selon le cas :

a) prendre des arrangements avec l’agence pour que celle-ci rembourse directement le montant des frais à l’employé ponctuel ou à l’employé ponctuel éventuel;

b) ordonner à l’agence de verser au directeur, en fiducie, le montant des frais.

Frais d’administration

(2) L’ordonnance prise en vertu de l’alinéa (1) b) exige également que l’agence de placement temporaire verse au directeur, en fiducie, au titre des frais d’administration, 100 $ ou, si elle est plus élevée, une somme égale à 10 pour cent du montant dû.

Contenu de l’ordonnance

(3) L’ordonnance indique la disposition du paragraphe 74.8 (1) à laquelle il a été contrevenu et le montant à verser.

Application des par. 103 (3) et (6) à (9)

(4) Les paragraphes 103 (3) et (6) à (9) s’appliquent, avec les adaptations nécessaires, à l’égard d’une ordonnance prise en vertu du présent article et notamment, à cette fin, la mention d’un employé vaut mention d’un employé ponctuel ou d’un employé ponctuel éventuel.

Application de l’art. 105

(5) L’article 105 s’applique, avec les adaptations nécessaires, à l’égard du remboursement de frais à un employé ponctuel ou à un employé ponctuel éventuel par une agence de placement temporaire et notamment :

1. Au paragraphe 105 (1), le renvoi à l’alinéa 103 (1) a) vaut renvoi à l’alinéa (1) a) du présent article.

2. La mention d’un employé vaut mention d’un employé ponctuel ou d’un employé ponctuel éventuel à qui des frais doivent être payés.

Recouvrement par le client de frais interdits

74.15 Le client auquel une agence de placement temporaire a demandé des frais en contravention à la disposition 8 ou 9 du paragraphe 74.8 (1) peut recouvrer le montant de ces frais devant un tribunal compétent.
Order for compensation, temporary help agency

74.16 (1) If an employment standards officer finds that a temporary help agency has contravened paragraph 4, 6, 7 or 10 of subsection 74.8 (1), the officer may order that the assignment employee or prospective assignment employee be compensated for any loss he or she incurred as a result of the contravention.

Terms of orders

(2) If an order issued under this section requires a temporary help agency to compensate an assignment employee or prospective assignment employee, it shall also require the agency to pay to the Director in trust,

(a) the amount of the compensation; and

(b) an amount for administration costs equal to the greater of $100 and 10 per cent of the amount of compensation.

Contents of order

(3) The order shall state the paragraph of subsection 74.8 (1) that was contravened and the amount to be paid.

Application of s. 103 (3) and (6) to (9)

(4) Subsections 103 (3) and (6) to (9) apply with respect to orders issued under this section with necessary modifications and for the purpose, without limiting the generality of the foregoing, a reference to an employee is a reference to an assignment employee or prospective assignment employee.

Order re client reprisal

74.17 (1) If an employment standards officer finds that section 74.12 has been contravened with respect to an assignment employee, the officer may order that the employee be compensated for any loss he or she incurred as a result of the contravention or that he or she be reinstated in the assignment or that he or she be both compensated and reinstated.

Terms of orders

(2) If an order issued under this section requires the client to compensate an assignment employee, it shall also require the client to pay to the Director in trust,

(a) the amount of the compensation; and

(b) an amount for administration costs equal to the greater of $100 and 10 per cent of the amount of compensation.

Application of s. 103 (3) and (5) to (9)

(3) Subsections 103 (3) and (5) to (9) apply with respect to orders issued under this section with necessary modifications, including but not limited to the following:

1. A reference to an employer is a reference to a client.

Ordonnance de versement d’une indemnité : agence de placement temporaire

74.16 (1) L’agent des normes d’emploi qui conclut qu’une agence de placement temporaire a contrevenu à la disposition 4, 6, 7 ou 10 du paragraphe 74.8 (1) peut ordonner que l’employé ponctuel ou l’employé ponctuel éventuel soit indemnisé pour toute perte qu’il a subie par suite de la contravention.

Conditions des ordonnances

(2) Toute ordonnance prise en vertu du présent article qui exige qu’une agence de placement temporaire indemnise un employé ponctuel ou un employé ponctuel éventuel exige également que l’agence verse au directeur, en fiducie :

a) d’une part, le montant de l’indemnité;

b) d’autre part, au titre des frais d’administration, 100 $ ou, si elle est plus élevée, une somme égale à 10 pour cent du montant de l’indemnité.

Contenu de l’ordonnance

(3) L’ordonnance indique la disposition du paragraphe 74.8 (1) à laquelle il a été contrevenu et le montant à verser.

Application des par. 103 (3) et (6) à (9)

(4) Les paragraphes 103 (3) et (6) à (9) s’appliquent, avec les adaptations nécessaires, aux ordonnances prises en vertu du présent article et notamment, à cette fin, la mention d’un employé vaut mention d’un employé ponctuel ou d’un employé ponctuel éventuel.

Ordonnance : représailles du client

74.17 (1) L’agent des normes d’emploi qui conclut qu’il a été contrevenu à l’article 74.12 à l’égard d’un employé ponctuel peut ordonner que l’employé soit indemnisé pour toute perte qu’il a subie par suite de la contravention ou qu’il soit réintégré dans son affectation, ou les deux.

Conditions des ordonnances

(2) Toute ordonnance prise en vertu du présent article qui exige que le client indemnise un employé ponctuel exige également que le client verse au directeur, en fiducie :

a) d’une part, le montant de l’indemnité;

b) d’autre part, au titre des frais d’administration, 100 $ ou, si elle est plus élevée, une somme égale à 10 pour cent du montant de l’indemnité.

Application des par. 103 (3) et (5) à (9)

(3) Les paragraphes 103 (3) et (5) à (9) s’appliquent, avec les adaptations nécessaires, aux ordonnances prises en vertu du présent article et notamment :

1. La mention d’un employeur vaut mention d’un client.
2. A reference to an employee is a reference to an assignment employee.

Agency obligation

(4) If an order is issued under this section requiring a client to reinstate an assignment employee in the assignment, the temporary help agency shall do whatever it can reasonably do in order to enable compliance by the client with the order.

4. Section 95 of the Act is repealed and the following substituted:

Service of documents

95. (1) Except as otherwise provided in sections 8, 17.1 and 22.1, where service of a document on a person is required or permitted under this Act, it may be served,

(a) in the case of service on an individual, personally, by leaving a copy of the document with the individual;

(b) in the case of service on a corporation, personally, by leaving a copy of the document with an officer, director or agent of the corporation, or with an individual at any place of business of the corporation who appears to be in control or management of the place of business;

(c) by mail addressed to the person’s last known business or residential address using any method of mail delivery that permits the delivery to be verified;

(d) by fax or email if the person is equipped to receive the fax or email;

(e) by a courier service;

(f) by leaving the document, in a sealed envelope addressed to the person, with an individual who appears to be at least 16 years of age at the person’s last known business or residential address; or

(g) in a manner ordered by the Board under subsection (8).

Same

(2) Service of a document by means described in clause (1) (a), (b) or (f) is effective when it is left with the individual.

Same

(3) Subject to subsection (6), service of a document by mail is effective five days after the document is mailed.

Same

(4) Subject to subsection (6), service of a document by a fax or email sent on a Saturday, Sunday or a public holiday or on any other day after 5 p.m. is effective on the next day that is not a Saturday, Sunday or public holiday.

2. La mention d’un employé vaut mention d’un employé ponctuel.

Obligation de l’agence

(4) Si une ordonnance exigeant qu’un client réintègre un employé ponctuel dans son affectation est prise en vertu du présent article, l’agence de placement temporaire fait tout ce qui est raisonnablement en son pouvoir afin que le client se conforme à l’ordonnance.

4. L’article 95 de la Loi est abrogé et remplacé par ce qui suit :

Signification de documents

95. (1) Sauf disposition contraire des articles 8, 17.1 et 22.1, le document dont la signification à une personne est exigée ou permise par la présente loi peut être signifié selon l’un ou l’autre des modes suivants :

a) s’il s’agit d’un particulier, à personne en lui laissant une copie du document;

b) s’il s’agit d’une personne morale, à personne en laissant une copie du document à un dirigeant, à un administrateur ou à un mandataire de celle-ci ou à un particulier qui paraît assumer la direction d’un établissement de la personne morale;

c) par courrier envoyé à la dernière adresse commerciale ou personnelle connue du destinataire par un mode de livraison du courrier qui permet la vérification de la livraison;

d) par télécopie ou par courrier électronique, si le destinataire est équipé pour les recevoir;

e) par un service de messagerie;

f) en laissant le document, dans une enveloppe scellée adressée au destinataire, à un particulier qui paraît avoir au moins 16 ans, à la dernière adresse commerciale ou personnelle connue du destinataire;

g) le mode ordonné par la Commission en vertu du paragraphe (8).

Idem

(2) La signification d’un document selon le mode prévu à l’alinéa (1) a), b) ou f) prend effet lorsque le document est laissé au particulier.

Idem

(3) Sous réserve du paragraphe (6), la signification d’un document par courrier prend effet cinq jours après la mise à la poste du document.

Idem

(4) Sous réserve du paragraphe (6), la signification d’un document envoyé par télécopie ou par courrier électronique un samedi, un dimanche, un jour férié ou un autre jour après 17 heures prend effet le premier jour suivant qui n’est ni un samedi, ni un dimanche, ni un jour férié.
(5) Subject to subsection (6), service of a document by courier is effective two days after the courier takes the document.

(6) Subsections (3), (4) and (5) do not apply if the person establishes that the service was not effective at the time specified in those subsections because of an absence, accident, illness or cause beyond the person’s control.

(7) If the Director considers that a manner of service other than one described in clauses (1) (a) to (f) is appropriate in the circumstances, the Director may direct the Board to consider the manner of service.

(8) If the Board is directed to consider the manner of service, it may order that service be effected in the manner that the Board considers appropriate in the circumstances.

(9) In an order for service, the Board shall specify when service in accordance with the order is effective.

Proof of issuance and service

(10) A certificate of service made by the employment standards officer who issued an order or notice under this Act is evidence of the issuance of the order or notice, the service of the order or notice on the person and its receipt by the person if, in the certificate, the officer,

(a) certifies that the copy of the order or notice is a true copy of it;
(b) certifies that the order or notice was served on the person; and
(c) sets out in it the method of service used.

Proof of service

(11) A certificate of service made by the person who served a document under this Act is evidence of the service of the document on the person served and its receipt by that person if, in the certificate, the person who served the document,

(a) certifies that the copy of the document is a true copy of it;
(b) certifies that the document was served on the person; and
(c) sets out in it the method of service used.

5. (1) Subsections 102 (3), (4) and (5) of the Act are repealed and the following substituted:

Notice

(3) The notice referred to in subsection (1) shall specify

(5) Sous réserve du paragraphe (6), la signification d’un document par messagerie prend effet deux jours après la prise en charge du document par le service de messagerie.

(6) Les paragraphes (3), (4) et (5) ne s’appliquent pas si le destinataire établit que la signification n’avait pas pris effet au moment précisé dans ces paragraphes pour cause d’absence, d’accident, de maladie ou pour une cause indépendante de sa volonté.

(7) S’il estime qu’un mode de signification autre que ceux prévus aux alinéas (1) a à f) est approprié dans les circonstances, le directeur peut enjoindre à la Commission de l’envisager.

(8) S’il lui est joint d’envisager un mode de signification, la Commission peut ordonner que la signification soit effectuée selon le mode qu’elle estime approprié dans les circonstances.

(9) Dans l’ordonnance de signification, la Commission précise le moment auquel la signification ordonnée prend effet.

Preuve de la délivrance et de la signification

(10) L’attestation de signification donnée par l’agent des normes d’emploi qui a pris une ordonnance ou délivré un avis aux termes de la présente loi constitue la preuve de la prise de l’ordonnance ou de la délivrance de l’avis, de sa signification au destinataire et de sa réception par ce dernier si, dans l’attestation, l’agent fait ce qui suit :

a) il atteste que la copie de l’ordonnance ou de l’avis en est une copie conforme;
b) il atteste que l’ordonnance ou l’avis a été signifié au destinataire;
c) il indique le mode de signification utilisé.

Preuve de la signification

(11) L’attestation de signification donnée par la personne qui a signifié un document aux termes de la présente loi constitue la preuve de la signification du document au destinataire et de sa réception par ce dernier si, dans l’attestation, la personne qui a signifié le document fait ce qui suit :

a) elle atteste que la copie du document est une copie conforme;
b) elle atteste que le document a été signifié au destinataire;
c) elle indique le mode de signification utilisé.

5. (1) Les paragraphes 102 (3), (4) et (5) de la Loi sont abrogés et remplacés par ce qui suit :

Préavis

(3) Le préavis prévu au paragraphe (1) précise les date,
the time and place at which the person is to attend and shall be served on the person in accordance with section 95.

Documents

(4) The employment standards officer may require the person to bring to the meeting or make available for the meeting any records or other documents specified in the notice.

Same

(5) The employment standards officer may give directions on how to make records or other documents available for the meeting.

(2) Section 102 of the Act is amended by adding the following subsections:

Use of technology

(7) The employment standards officer may direct that a meeting under this section be held using technology, including but not limited to teleconference and videoconference technology, that allows the persons participating in the meeting to participate concurrently.

Same

(8) Where an employment standards officer gives directions under subsection (7) respecting a meeting, he or she shall include in the notice referred to in subsection (1) such information additional to that required by subsection (3) as the officer considers appropriate.

Same

(9) Participation in a meeting by means described in subsection (7) is attendance at the meeting for the purposes of this section.

6. Subsections 103 (6), (7), (7.1), (7.2) and (8) of the Act are repealed and the following substituted:

Service of order

(6) The order shall be served on the employer in accordance with section 95.

Notice to employee

(7) An employment standards officer who issues an order with respect to an employee under this section shall advise the employee of its issuance by serving a letter, in accordance with section 95, on the employee.

Compliance

(8) Every employer against whom an order is issued under this section shall comply with it according to its terms.

7. Subsection 104 (1) of the Act is amended by striking out “finds that an employer has contravened any of the following” in the portion before paragraph 1 and substituting “finds a contravention of any of the following”.

8. (1) Subsection 106 (1) of the Act is amended by striking out “may serve a copy of the order” and substituting “may serve a copy of the order in accordance with section 95”.

heure et lieu de la réunion à laquelle la personne doit assister et est signifié à cette dernière conformément à l’article 95.

Documents

(4) L’agent des normes d’emploi peut exiger que la personne apporte à la réunion les dossiers ou autres documents que précise l’avis ou les rende accessibles aux participants à la réunion d’une autre façon.

Idem

(5) L’agent des normes d’emploi peut donner des directives sur la façon de rendre les dossiers ou autres documents accessibles aux participants à la réunion.

(2) L’article 102 de la Loi est modifié par adjonction des paragraphes suivants :

Utilisation de moyens technologiques

(7) L’agent des normes d’emploi peut donner des directives portant qu’une réunion prévue au présent article soit tenue à l’aide de moyens technologiques, notamment la téléconférence et la vidéoconférence, qui permettent la participation simultanée des participants à la réunion.

Idem

(8) L’agent des normes d’emploi qui donne des directives en vertu du paragraphe (7) à l’égard d’une réunion inclut dans le préavis prévu au paragraphe (1) les renseignements qu’il estime appropriés et qui s’ajoutent à ceux exigés par le paragraphe (3).

Idem

(9) La participation à une réunion par un moyen prévu au paragraphe (7) constitue la présence à la réunion pour l’application du présent article.

6. Les paragraphes 103 (6), (7), (7.1), (7.2) et (8) de la Loi sont abrogés et remplacés par ce qui suit :

Signification de l’ordonnance

(6) L’ordonnance est signifiée à l’employeur conformément à l’article 95.

Avis à l’employé

(7) L’agent des normes d’emploi qui prend une ordonnance à l’égard d’un employé en vertu du présent article en avise celui-ci en lui signifiant une lettre conformément à l’article 95.

Observation de l’ordonnance

(8) L’employeur contre qui une ordonnance est prise en vertu du présent article se conforme aux conditions de celle-ci.

7. Le paragraphe 104 (1) de la Loi est modifié par substitution de «conclut qu’il a été contravenou à l’une ou l’autre des parties suivantes» à «conclut qu’un employeur a contravenou à l’une ou l’autre des parties suivantes» dans le passage qui précède la disposition 1.

8. (1) Le paragraphe 106 (1) de la Loi est modifié par substitution de «leur signifier, conformément à l’article 95, une copie de l’ordonnance» à «leur signifier une copie de l’ordonnance».
(2) Subsection 106 (3) of the Act is amended by adding “in accordance with section 95” at the end.

(3) Subsections 106 (7), (8) and (9) of the Act are repealed.

9. (1) Subsection 107 (1) of the Act is amended by striking out “may serve it on them” in the portion before clause (a) and substituting “may serve it on them in accordance with section 95”.

(2) Subsection 107 (3) of the Act is repealed.

10. Subsections 108 (2), (3) and (4) of the Act are repealed and the following substituted:

Payment may not be required

(2) No order under this section shall require the payment of wages, fees or compensation.

Other means not a bar

(3) Nothing in subsection (2) precludes an employment standards officer from issuing an order under section 74.14, 74.16, 74.17, 103, 104, 106 or 107 and an order under this section in respect of the same contravention.

Application of s. 103 (6) to (9)

(4) Subsections 103 (6) to (9) apply with respect to orders issued under this section with necessary modifications, including but not limited to the following:

1. A reference to an employer includes a reference to a client of a temporary help agency within the meaning of Part XVIII.1.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee within the meaning of Part XVIII.1.

11. Subsections 109 (1) and (2) of the Act are repealed and the following substituted:

Money paid when no review

(1) Money paid to the Director under an order under section 74.14, 74.16, 74.17, 103, 104, 106 or 107 shall be paid to the person with respect to whom the order was issued unless an application for review is made under section 116 within the period required under that section.

Money distributed rateably

(2) If the money paid to the Director under one of those orders is not enough to pay all of the persons entitled to it under the order the full amount to which they are entitled, the Director shall distribute that money, including money received with respect to administrative costs, to the persons in proportion to their entitlement.

12. Section 110 of the Act is repealed and the following substituted:

Refusal to issue order

110. (1) If, after a person files a complaint alleging a contravention of this Act in respect of which an order could

(2) Le paragraphe 106 (3) de la Loi est modifié par adjonction de «conformément à l’article 95» à la fin du paragraphe.

(3) Les paragraphes 106 (7), (8) et (9) de la Loi sont abrogés.

9. (1) Le paragraphe 107 (1) de la Loi est modifié par substitution de «il peut leur signifier l’ordonnance conformément à l’article 95» à «il peut leur signifier l’ordonnance» dans le passage qui précède l’alinéa a).

(2) Le paragraphe 107 (3) de la Loi est abrogé.

10. Les paragraphes 108 (2), (3) et (4) de la Loi sont abrogés et remplacés par ce qui suit :

Versement non exigible

(2) Aucune ordonnance prévue au présent article ne doit exiger le versement d’un salaire, de frais ou d’une indemnité.

Aucun obstacle à d’autres moyens

(3) Le paragraphe (2) n’a pas pour effet d’empêcher l’agent des normes d’emploi de prendre une ordonnance en vertu de l’article 74.14, 74.16, 74.17, 103, 104, 106 ou 107 et une ordonnance en vertu du présent article à l’égard de la même contravention.

Champ d’application des par. 103 (6) à (9)

(4) Les paragraphes 103 (6) à (9) s’appliquent, avec les adaptations nécessaires, à l’égard des ordonnances prises en vertu du présent article et notamment :

1. La mention d’un employeur vaut mention d’un client d’une agence de placement temporaire au sens de la partie XVIII.1.

2. La mention d’un employé vaut mention d’un employé ponctuel ou d’un employé ponctuel éventuel au sens de la partie XVIII.1.

11. Les paragraphes 109 (1) et (2) de la Loi sont abrogés et remplacés par ce qui suit :

Somme versée en l’absence de révision

(1) La somme versée au directeur aux termes d’une ordonnance prévue à l’article 74.14, 74.16, 74.17, 103, 104, 106 ou 107 est versée à la personne à l’égard de qui l’ordonnance a été prise à moins qu’une demande de révision ne soit présentée en vertu de l’article 116 dans le délai imparti à cet article.

Répartition proportionnelle de la somme

(2) Si la somme versée au directeur aux termes d’une de ces ordonnances est insuffisante pour payer à toutes les personnes la somme intégrale à laquelle elles ont droit aux termes de l’ordonnance, le directeur la répartit proportionnellement, y compris toute somme reçue au titre des frais d’administration, entre les personnes concernées.

12. L’article 110 de la Loi est abrogé et remplacé par ce qui suit :

Refus de prendre une ordonnance

110. (1) Si, après qu’une personne dépose une plainte portant sur une prétendue contravention à la présente loi à
be issued under section 74.14, 74.16, 74.17, 103, 104 or 108, an employment standards officer assigned to investigate the complaint refuses to issue such an order, the officer shall, in accordance with section 95, serve a letter on the person advising the person of the refusal.

Deemed refusal

(2) If no order is issued with respect to a complaint described in subsection (1) within two years after it was filed, an employment standards officer shall be deemed to have refused to issue an order and to have served a letter on the person advising the person of the refusal on the last day of the second year.

13. (1) Subsection 112 (6) of the Act is amended by striking out “wages or compensation” and substituting “wages, fees or compensation”.

(2) Section 112 of the Act is amended by adding the following subsection:

Application to Part XVIII.1

(9) For the purposes of the application of this section in respect of Part XVIII.1, the following modifications apply:

1. A reference to an employer includes a reference to a client of a temporary help agency within the meaning of Part XVIII.1.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee within the meaning of Part XVIII.1.

14. (1) Subsections 113 (3) and (4) of the Act are repealed and the following substituted:

Service

(3) A notice issued under this section shall be served on the person in accordance with section 95.

(2) Subsection 113 (7) of the Act is amended by striking out “section 103, 104 or 108” and substituting “section 74.14, 74.16, 74.17, 103, 104 or 108”.

15. (1) Subsection 114 (1) of the Act is amended by striking out “wages or compensation” in the portion before clause (a) and substituting “wages, fees or compensation”.

(2) Subsection 114 (4) of the Act is amended by striking out “wages or compensation” and substituting “wages, fees or compensation”.

(3) Section 114 of the Act is amended by adding the following subsection:

Application to Part XVIII.1

(6) For the purposes of the application of this section in respect of Part XVIII.1, the following modifications apply:

1. A reference to an employer includes a reference to a client of a temporary help agency within the meaning of Part XVIII.1.

l’égard de laquelle une ordonnance pourrait être prise en vertu de l’article 74.14, 74.16, 74.17, 103, 104 ou 108, l’agent des normes d’emploi chargé de faire enquête sur la plainte refuse de prendre une telle ordonnance, il signifie une lettre à la personne, conformément à l’article 95, pour l’en aviser.

Ordonnance réputée refusée

(2) Si aucune ordonnance n’est prise à l’égard d’une plainte visée au paragraphe (1) dans les deux ans qui suivent son dépôt, l’agent des normes d’emploi est réputé avoir refusé de prendre une ordonnance et avoir signifié une lettre pour l’en aviser à la personne le dernier jour de la deuxième année.

13. (1) Le paragraphe 112 (6) de la Loi est modifié par substitution de « que représentent le salaire, les frais ou l’indemnité auxquels l’employé a droit en application de la transaction par rapport à ceux prévus » à « qui existe entre le salaire ou l’indemnité auquel l’employé a droit en application de la transaction et le salaire ou l’indemnité prévu ».

(2) L’article 112 de la Loi est modifié par adjonction du paragraphe suivant :

Application à la partie XVIII.1

(9) Pour l’application du présent article à l’égard de la partie XVIII.1, les adaptations suivantes s’appliquent :

1. La mention d’un employeur vaut mention d’un client d’une agence de placement temporaire au sens de la partie XVIII.1.

2. La mention d’un employé vaut mention d’un employé ponctuel ou d’un employé ponctuel éventuel au sens de la partie XVIII.1.

14. (1) Les paragraphes 113 (3) et (4) de la Loi sont abrogés et remplacés par ce qui suit :

Signification

(3) L’avis délivré en vertu du présent article est signifié à la personne conformément à l’article 95.

(2) Le paragraphe 113 (7) de la Loi est modifié par substitution de « l’article 74.14, 74.16, 74.17, 103, 104 ou 108 » à « l’article 103, 104 ou 108 ».

15. (1) Le paragraphe 114 (1) de la Loi est modifié par substitution de « d’un salaire, de frais ou d’une indemnité » à « d’un salaire ou d’une indemnité » dans le passage qui précède l’alinéa a).

(2) Le paragraphe 114 (4) de la Loi est modifié par substitution de « d’un salaire, de frais ou d’une indemnité » à « d’un salaire ou d’une indemnité ».

(3) L’article 114 de la Loi est modifié par adjonction du paragraphe suivant :

Application à la partie XVIII.1

(6) Pour l’application du présent article à l’égard de la partie XVIII.1, les adaptations suivantes s’appliquent :

1. La mention d’un employeur vaut mention d’un client d’une agence de placement temporaire au sens de la partie XVIII.1.
2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee within the meaning of Part XVIII.1.

16. Section 115 of the Act is amended by adding the following subsection:

**Application to Part XVIII.1**

(1.1) For the purposes of the application of subsection (1) in respect of Part XVIII.1, the following modifications apply:

1. A reference to an employer includes a reference to a client of a temporary help agency within the meaning of Part XVIII.1.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee within the meaning of Part XVIII.1.

17. Part XXIII of the Act is amended by adding the following section:

**Interpretation**

115.1 In this Part, a reference to an employee includes a reference to an assignment employee or a prospective assignment employee within the meaning of Part XVIII.1.

18. Section 116 of the Act is repealed and the following substituted:

**Review**

116. (1) A person against whom an order has been issued under section 74.14, 74.16, 74.17, 103, 104, 106, 107 or 108 is entitled to a review of the order by the Board if, within the period set out in subsection (4), the person,

(a) applies to the Board in writing for a review;

(b) in the case of an order under section 74.14 or 103, pays the amount owing under the order to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount; and

(c) in the case of an order under section 74.16, 74.17 or 104, pays the lesser of the amount owing under the order and $10,000 to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount.

**Employee seeks review of order**

(2) If an order has been issued under section 74.14, 74.16, 74.17, 103 or 104 with respect to an employee, the employee is entitled to a review of the order by the Board if, within the period set out in subsection (4), the employee applies to the Board in writing for a review.

**Employee seeks review of refusal**

(3) If an employee has filed a complaint alleging a contravention of this Act or the regulations and an order could be issued under section 74.14, 74.16, 74.17, 103, 104 or 108 with respect to such a contravention, the employee is entitled to a review of an employment standards officer’s
refusal to issue such an order if, within the period set out in subsection (4), the employee applies to the Board in writing for such a review.

Period for applying for review

(4) An application for a review under subsection (1), (2) or (3) shall be made within 30 days after the day on which the order, letter advising of the order or letter advising of the refusal to issue an order, as the case may be, is served.

Extension of time

(5) The Board may extend the time for applying for a review under this section if it considers it appropriate in the circumstances to do so and, in the case of an application under subsection (1),

(a) the Board has enquired of the Director whether the Director has paid to the employee the wages, fees or compensation that were the subject of the order and is satisfied that the Director has not done so; and

(b) the Board has enquired of the Director whether a collector’s fees or disbursements have been added to the amount of the order under subsection 128 (2) and, if so, the Board is satisfied that fees and disbursements were paid by the person against whom the order was issued.

Hearing

(6) Subject to subsection 118 (2), the Board shall hold a hearing for the purposes of the review.

Parties

(7) The following are parties to the review:

1. The applicant for the review of an order.

2. If the person against whom an order was issued applies for the review, the employee with respect to whom the order was issued.

3. If the employee applies for the review of an order, the person against whom the order was issued.

4. If the employee applies for a review of a refusal to issue an order under section 74.14, 74.16, 74.17, 103, 104 or 108, the person against whom such an order could be issued.

5. If a director of a corporation applies for the review, the applicant and each director, other than the applicant, on whom the order was served.

6. The Director.

7. Any other persons specified by the Board.

Parties given full opportunity

(8) The Board shall give the parties full opportunity to present their evidence and make their submissions.

tion, l’employé a le droit de faire réviser le refus d’un agent des normes d’emploi de prendre une telle ordonnance s’il en fait la demande par écrit à la Commission, par voie de requête, dans le délai imparti au paragraphe (4).

Délai de présentation

(4) La demande de révision prévue au paragraphe (1), (2) ou (3) est présentée dans les 30 jours qui suivent le jour où est signifiée l’ordonnance, la lettre portant avis de l’ordonnance ou la lettre portant avis du refus de prendre une ordonnance, selon le cas.

Prorogation de délai

(5) La Commission peut proroger le délai de présentation d’une demande de révision prévue au présent article si elle l’estime approprié dans les circonstances et que, dans le cas d’une demande prévue au paragraphe (1) :

a) d’une part, elle s’est informée auprès du directeur pour savoir s’il a versé à l’employé le salaire, les frais ou l’indemnité qui faisaient l’objet de l’ordonnance et est convaincue que le directeur ne l’a pas fait;

b) d’autre part, elle s’est informée auprès du directeur pour savoir si les honoraires ou débours de l’agent de recouvrement ont été ajoutés, en application du paragraphe 128 (2), à la somme fixée dans l’ordonnance et, si tel est le cas, elle est convaincue que la personne contre qui l’ordonnance a été prise les a payés.

Audience

(6) Sous réserve du paragraphe 118 (2), la Commission tient une audience aux fins de la révision.

Parties

(7) Sont parties à la révision les personnes suivantes :

1. L’auteur de la demande de révision d’une ordonnance.

2. Si la personne contre qui une ordonnance a été prise demande la révision, l’employé à l’égard duquel l’ordonnance a été prise.

3. Si l’employé demande la révision d’une ordonnance, la personne contre qui celle-ci a été prise.

4. Si l’employé demande la révision d’un refus de prendre une ordonnance en vertu de l’article 74.14, 74.16, 74.17, 103, 104 ou 108, la personne contre qui l’ordonnance pourrait être prise.

5. Si un des administrateurs d’une personne morale demande la révision, le requérant et chacun des autres administrateurs à qui a été signifiée l’ordonnance.


7. Les autres personnes que précise la Commission.

Pleine possibilité

(8) La Commission donne aux parties la pleine possibilité de présenter leur preuve et de faire valoir leurs arguments.
Practice and procedure for review

(9) The Board shall determine its own practice and procedure with respect to a review under this section.

19. Subsection 117 (1) of the Act is repealed and the following substituted:

Money held in trust pending review

(1) This section applies if money with respect to an order to pay wages, fees or compensation is paid to the Director in trust and the person against whom the order was issued applies to the Board for a review of the order.

20. (1) Subsection 119 (10) of the Act is amended by striking out “wages or compensation” wherever it appears in the portion before clause (a), in clause (a) and in clause (b) and substituting in each case “wages, fees or compensation”.

(2) Subsection 119 (12) of the Act is repealed and the following substituted:

Interest

(12) If the Board issues, amends or affirms an order or issues a new order requiring the payment of wages, fees or compensation, the Board may order the person against whom the order was issued to pay interest at the rate and calculated in the manner determined by the Director under subsection 88 (5).

21. Clauses 120 (6) (a) and (b) of the Act are amended by striking out “wages or compensation” wherever it appears and substituting in each case “wages, fees or compensation”.

22. Section 125 of the Act is repealed and the following substituted:

Third party demand

125. (1) If the Director believes or suspects that a person owes money to or is holding money for an employer, a director or another person who is liable to make a payment under this Act, the Director may demand that the person pay all or part of the money otherwise payable to the employer, director or other person who is liable to make a payment under this Act to the Director in trust, on account of the liability under this Act.

Client of temporary help agency

(2) Without limiting the generality of subsection (1), that subsection applies where a client of a temporary help agency, within the meaning of Part XVIII.1, owes money to or is holding money for a temporary help agency.

Pratique et procédure

(9) La Commission régit sa propre pratique et procédure à l’égard des révisions prévues au présent article.

19. Le paragraphe 117 (1) de la Loi est abrogé et remplacé par ce qui suit :

Sommé détenu en fiducie

(1) Le présent article s’applique si une somme relative à une ordonnance de versement d’un salaire, de frais ou d’une indemnité est versée au directeur en fiducie et que la personne contre qui l’ordonnance a été prise demande à la Commission de réviser l’ordonnance.

20. (1) Le paragraphe 119 (10) de la Loi est modifié par substitution de «d’un salaire, de frais ou d’une indemnité» à «d’un salaire ou d’une indemnité» dans le passage qui précède l’alinéa a) et de «de salaire, de frais ou d’indemnité» à «de salaire ou d’indemnité» partout où figurent ces mots aux alinéas a) et b).

(2) Le paragraphe 119 (12) de la Loi est abrogé et remplacé par ce qui suit :

Intérêts

(12) Si elle rend, modifie ou confirme une ordonnance exigeant le versement d’un salaire, de frais ou d’une indemnité ou quelle en rend une nouvelle, la Commission peut ordonner à la personne contre qui l’ordonnance a été prise de verser des intérêts, calculés au taux et selon le mode de calcul fixés par le directeur en vertu du paragraphe 88 (5).

21. Les alinéas 120 (6) a) et b) de la Loi sont modifiés respectivement par substitution de «d’un salaire, de frais ou d’une indemnité» à «d’un salaire ou d’une indemnité» à l’alinéa a) et de «que représentent le salaire, les frais ou l’indemnité auxquels l’employé a droit en application de la transaction par rapport à ceux prévus» à «qui existe entre le salaire ou l’indemnité auquel l’employé a droit en application de la transaction et le salaire ou l’indemnité prévu» à l’alinéa b).

22. L’article 125 de la Loi est abrogé et remplacé par ce qui suit :

Tiers

125. (1) S’il croit ou soupçonne qu’une personne doit une somme à un employeur, à un administrateur ou à une autre personne qui est tenu au versement d’une somme en application de la présente loi ou qu’elle détient une somme pour le compte d’une de ces personnes, le directeur peut lui enjoindre de lui verser, en fiducie, la totalité ou une partie de la somme payable par ailleurs à cet employeur, à cet administrateur ou à cette autre personne, au titre de l’obligation que lui impose la présente loi.

Client de l’agence de placement temporaire

(2) Sans préjudice de la portée générale du paragraphe (1), ce paragraphe s’applique si un client de l’agence de placement temporaire, au sens de la partie XVIII.1, doit une somme à l’agence ou détient une somme pour le compte de cette dernière.
Service

(3) The Director shall, in accordance with section 95, serve notice of the demand on the person to whom the demand is made.

Discharge

(4) A person who pays money to the Director in accordance with a demand under this section is relieved from liability for the amount owed to or held for the employer, director or other person who is liable to make a payment under this Act, to the extent of the payment.

Liability

(5) If a person who receives a demand under this section makes a payment to the employer, director or other person with respect to whom the demand was made without complying with the demand, the person shall pay to the Director an amount equal to the lesser of,

(a) the amount paid to the employer, director or other person; and
(b) the amount of the demand.

23. Clause 128 (3) (a) of the Act is repealed and the following substituted:

(a) shall pay any amount collected with respect to wages, fees or compensation,
   (i) to the Director in trust, or
   (ii) with the written consent of the Director, to the person entitled to the wages, fees or compensation;

24. (1) Subsection 129 (3) of the Act is repealed and the following substituted:

Orders void where settlement

(3) If an order to pay has been made under section 74.14, 74.16, 74.17, 103, 104, 106 or 107 and a settlement respecting the money that was found to be owing is made under this section, the order is void and the settlement is binding if the person against whom the order was issued does what the person agreed to do under the settlement unless, on application to the Board, the individual to whom the money was ordered to be paid demonstrates that the settlement was entered into as a result of fraud or coercion.

(2) The French version of subsection 129 (4) of the Act is amended by striking out “visée par l’avis” and substituting “contre qui il a été délivré”.

25. Subsections 133 (1) and (2) of the Act are repealed and the following substituted:

Additional orders

(1) If an employer is convicted under section 132 of contravening section 74 or paragraph 4, 6, 7 or 10 of subsection 74.8 (1) or if a client, within the meaning of Part XVIII.1 is convicted under section 132 of contravening

Signification

(3) Le directeur signifie, conformément à l’article 95, un avis de la demande à la personne à laquelle la demande s’adresse.

Dégagement de la responsabilité

(4) Quiconque verse une somme au directeur conformément à une demande prévue au présent article est dégagé de la responsabilité à l’égard du versement de la somme due à l’employeur, à l’administrateur ou à une autre personne qui est tenu au versement d’une somme en application de la présente loi ou détenue pour leur compte, jusqu’à concurrence de la somme versée.

Obligation

(5) La personne qui reçoit une demande prévue au présent article et qui verse une somme à l’employeur, à l’administrateur ou à l’autre personne visé par la demande sans se conformer à celle-ci verse au directeur la moins élevée des sommes suivantes :

a) la somme versée à l’employeur, à l’administrateur ou à l’autre personne;

b) la somme indiquée dans la demande.

23. L’alinéa 128 (3) a) de la Loi est abrogé et remplacé par ce qui suit :

a) doit verser toute somme recouvrée au titre d’un salaire, de frais ou d’une indemnité :
   (i) soit au directeur, en fiducie,
   (ii) soit, avec le consentement écrit du directeur, à la personne qui a droit au salaire, aux frais ou à l’indemnité;

24. (1) Le paragraphe 129 (3) de la Loi est abrogé et remplacé par ce qui suit :

Nullité des ordonnances en cas de transaction

(3) Si une ordonnance de versement a été prise en vertu de l’article 74.14, 74.16, 74.17, 103, 104, 106 ou 107 et qu’une transaction a été conclue en vertu du présent article à l’égard de la somme due, l’ordonnance est nulle et la transaction est exécutoire si la personne contre qui l’ordonnance a été prise fait ce qu’elle a convenu de faire aux termes de la transaction, à moins que, sur requête présentée à la Commission, le particulier qui doit recevoir la somme dont le versement a été ordonné ne démontre que la transaction a été conclue par suite de fraude ou de coercition.

(2) La version française du paragraphe 129 (4) de la Loi est modifiée par substitution de «contre qui il a été délivré» à «visée par l’avis».

25. Les paragraphes 133 (1) et (2) de la Loi sont abrogés et remplacés par ce qui suit :

Ordonnances supplémentaires

(1) Si un employeur est déclaré coupable, en application de l’article 132, d’une contravention à l’article 74 ou à la disposition 4, 6, 7 ou 10 du paragraphe 74.8 (1) ou qu’un client, au sens de la partie XVIII.1, est déclaré cou-
section 74.12, the court shall, in addition to any fine or term of imprisonment that is imposed, order that the employer or client, as the case may be, take specific action or refrain from taking specific action to remedy the contravention.

Same

(2) Without restricting the generality of subsection (1), the order made by the court may require one or more of the following:

1. A person be paid any wages that are owing to him or her.
2. In the case of a conviction under section 132 of contravening section 74 or 74.12, a person be reinstated.
3. A person be compensated for any loss incurred by him or her as a result of the contravention.

26. (1) Section 134 of the Act is amended by striking out “An employer” in the portion before clause (a) and substituting “A person”.

(2) The English version of clauses 134 (a) and (b) of the Act is amended by striking out “the employer” wherever it appears and substituting in each case “the person”.

27. Subsection 135 (1) of the Act is amended by striking out “other than section 74” and substituting “other than section 74 or paragraph 4, 6, 7 or 10 of subsection 74.8 (1)”.

28. Subsection 140 (3) of the Act is amended by striking out “an employer has failed to make a payment required” and substituting “a person has failed to make the payment required”.

29. Subsection 142 (2) of the Act is repealed.

Commencement

30. This Act comes into force six months after the day it receives Royal Assent.

Short title

31. The short title of this Act is the Employment Standards Amendment Act (Temporary Help Agencies), 2009.
New Ontario Temporary Help Agency Legislation

The Ontario legislature passed The Employment Standards Amendment Act (Temporary Help Agencies), 2009, which amends the Employment Standards Act, 2000 (the “Act”) to include specific obligations for temporary help agencies with respect to their employees. The following highlights some of the key amendments.

The amendments define “Assignment Employees” as employees employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency. The amendments clarify that a temporary help agency is in fact the employer of the Assignment Employees. In addition, the amendments clarify that Assignment Employees do not cease to be employees of the agency because he or she has been assigned by the agency to perform work for a client on a temporary basis or because the employee is not assigned to perform work for a client.

Among the obligations imposed on temporary help agencies is the requirement to provide certain information to its Assignment Employees. Assignment Employees must be provided with contact information for the agency, information about work assignments, including the client’s contact information, hours of work and hourly wages associated with the assignment and a general description of the work to be performed. In addition, the temporary help agency must also provide Assignment Employees with copies of the Ministry of Labour publications regarding rights of Assignment Employees under the Act. The amendments also clarify how the notice of termination and severance pay obligations under the Act apply to Assignment Employees, including how to determine wages owed during the notice period.

Temporary help agencies are prohibited from charging fees to its Assignment Employees and, subject to limited exceptions, from restricting Assignment Employees from entering into employment relationships with clients of the agency. Clients of temporary help agencies are prohibited from taking reprisals against Assignment Employees on a variety of grounds, including if the Assignment Employee makes inquiries about, or seeks to enforce, his or her rights under the Act.

The Amendments received Royal Assent on May 6, 2009 and will come into force on or about November 6, 2009.
Employment Perspectives at the Dawn of a New Decade

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New obligations for temporary help agencies in Ontario

LELIA COSTANTINI (lcostantini@stikeman.com)

The Ontario legislature has passed the Employment Standards Amendment Act (Temporary Help Agencies), 2009, which amends the Employment Standards Act, 2000 (the Act) to include specific obligations for temporary help agencies with respect to their employees. The following highlights some of the key provisions in the amendments.

The amendments define “Assignment Employees” as individuals employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency. The amendments clarify that the temporary help agency is in fact the employer of the Assignment Employees and that Assignment Employees do not cease to be employees of the agency because they have been assigned by the agency to perform work for a client on a temporary basis, or because they are not assigned to perform work for a client.

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EI Commission Work-Sharing Program offers employers a cost-reduction option

LELIA COSTANTINI (lcostantini@stikeman.com)

In the current economic climate, many companies are faced with the need to reduce costs. Often the means of achieving this goal is through workforce reductions or layoffs. For many employers, however, the termination and severance obligations associated with staff reductions can be costly. In addition, the use of temporary layoffs in the non-unionized workplace could potentially result in a claim for constructive dismissal.

One possible alternative the employers may want to consider is the use of work-sharing arrangements through participation in the Federal Employment Insurance Commission (the Commission) Work-Sharing Program (WSP).

How the program works

The WSP is designed to assist employers avert temporary layoffs by providing income support to workers eligible for Employment Insurance benefits who are willing to work a temporary reduced work-week when there is a reduction in the normal level of business activity that is beyond the control of the employer. The program involves the creation of Work-Sharing Units and Work-Sharing Agreements, which must be approved by both employee and employer representatives and by the Commission.

The minimum duration of a Work-Sharing Agreement is six weeks. For any applications received under the Work-Sharing Program after February 1, 2009, the maximum duration of a Work-Sharing Agreement is period is fifty-two weeks. This new maximum will be in effect only until April 3, 2010.

Employer eligibility

An employer must have been in business in Canada for at least two years to be eligible to participate in the Work-Sharing Program. Employers must show the shortage of work is temporary and unexpected, as the WSP is not intended to subsidize declining establishments, or to cover companies during an expected seasonal slowdown. The employer must also demonstrate that the need to reduce working hours is unavoidable.

An employer is not allowed to increase their workforce during a Work-Sharing Agreement, except for replacements of essential separating staff. Prior consent of the Commission is required when hiring such replacements. In addition, while participating in the WSP, the employer must maintain all existing employee benefits for the duration of the WSP. The WSP cannot be put into place where there is a labour dispute.

Application for participation

To apply for the WSP, an employer must provide a completed application form and a recovery plan. If the application is approved by the Commission, the employer and a representative acting on behalf of the employees must enter into a Work-Sharing Agreement with the Commission. The employer must also provide a list identifying the employees to be included in the Work-Sharing Unit.

The Work-Sharing Unit is the group of employees to be covered by the WSP and must consist of two or more people. The WSP is intended to cover “core staff” only (i.e. the minimum number of year-round permanent full-time/part-time employees who are required to carry out the functions that will lead to a full recovery within the time frame of the agreement). As a result, outside sales staff, managers and those who assign workloads are generally not eligible for inclusion in the Work-Sharing Unit.

An employer must also provide a written description of its plan for recovery (the Recovery Plan). The Recovery Plan must include the following:

> the expected duration and the actual cause for the work shortage;

> an outline of the steps to be taken to generate business and thus alleviate the work shortage (including objectives, activities, realistic timeframes, milestones and expected outcomes);
> a description of employer-initiated skills enhancement/upgrading (if applicable) to take place during the life of the Work-Sharing Agreement;

> projections for future sales and the business;

> a description of measures taken to overcome the downturn in business before applying for the WSP;

> any workforce adjustments to be made before or after the period of time for which the employer requires the use of a Work-Sharing Agreement;

> a description of what the company has identified as alternatives to a Work-Sharing Agreement;

> a description of the risks that may hinder the recovery of the business and what the alternative plan is.

The application must be received by the Commission at least thirty days in advance of the proposed effective date of the Work-Sharing Agreement. In addition, if approved, it is important to note that it will take up to twenty-eight days for employees to receive their Employment Insurance benefit payments.

**Employee eligibility**

The eligibility requirement for employees to receive WSP benefits is the same as for regular Employment Insurance benefits. Employees must have 420-910 hours of insurable employment before the effective date of the Work-Sharing Agreement (the exact number of required hours depends on specific region in Canada). This means that it is possible that individual employees covered by a Work-Sharing Agreement may not be entitled to collect benefits.

It is also important to inform employees that Employment Insurance benefits are taxable and are often not taxed at source. As a result, many employees participating in the WSP may have to pay income tax on benefits received on their annual income tax return.

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**Ontario’s Bill 168 targets violence, harassment in the workplace**

Bill 168, *An Act to amend the Occupational Health and Safety Act (OHSA) with respect to violence and harassment in the workplace* received first reading in the Ontario legislature on April 20, 2009. Under Bill 168, OHSA protections for employees are now explicitly extended to the protection of employees from violence and harassment in the workplace. Bill 168 would require employers to establish workplace violence and harassment policies, develop programs to implement such policies, and assess the risk of workplace violence.

**Definitions of workplace violence and harassment**

Bill 168 defines “workplace harassment” and “workplace violence” as follows:

*Workplace harassment* means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.

*Workplace violence* means:

> the exercise of physical force by a person against a worker in a workplace that causes, or could cause, physical injury to the worker; and/or

> an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker.

The definition of “workplace harassment” is broad; unlike “harassment” as defined in the *Human Rights Code*, the definition of “workplace harassment” under Bill 168 includes conduct that is not related to a prohibited ground of discrimination, e.g.; sex or race. The current definition of “workplace violence” only deals with physical harm or injury.
Employer assessments
Bill 168 requires employers to assess the risk of workplace violence that may arise and to report the results of the assessment to the joint health and safety committee or its representative. Bill 168 also places an obligation on employers and supervisors to provide information, including limited personal information, to a worker about a person with "a history of violent behaviour" if:

> the worker could be expected to encounter that person in the course of his/her work; and
> the risk of workplace violence is likely to expose the worker to physical injury.

Bill 168 does not provide guidance on who would be defined as a person with a "history of violent behaviour." In addition, under the current draft the person must have a history of "violent" behaviour, not "harassing" behaviour, in order for the disclosure obligation to be triggered.

Domestic violence
Bill 168 explicitly addresses the issue of domestic violence in the workplace by requiring employers to "take every precaution reasonable in the circumstances" to protect workers from domestic violence that would likely cause physical injury to workers in the workplace. This obligation on the employer arises only if the employer is aware, or ought reasonably to be aware, of the situation. What constitutes "domestic violence" is not defined.

Work refusals
Bill 168 as drafted would also amend Part V of OHSA so that workers would have the right to refuse or stop work where they felt endangered by workplace violence. In such cases, the worker’s refusal to work would be investigated by the employer and, if required, a Ministry of Labour inspector.

Summary
The OHSA already provides that employers must take every precaution reasonable under the circumstances for the protection of a worker; Bill 168 provides that these duties of employers’ and supervisors’ would apply to workplace violence and harassment. Bill 168, if passed into law in its current form, will place specific obligations on employers to develop and implement policies and programs to deal with violence and harassment in the workplace.

For further information, please contact your Stikeman Elliott representative, the editor or author listed above or any member of our Employment, Labour & Pension Group listed at www.stikeman.com
Supreme Court delivers the final word in *Kerry*: Welcome news for pension plan sponsors

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On August 7, the Supreme Court of Canada (SCC) released its highly anticipated decision in the *Kerry* case. The decision provides certainty and direction on a number of issues relevant to nearly every pension plan sponsor in Canada. The decision sets out the following principles:

- Where the plan documents do not forbid it, defined benefit (DB) surplus may be used to fund (i.e. to “cross-subsidize”) defined contribution (DC) contributions;
- Where the plan documents do not forbid it, reasonable and appropriate plan expenses may be paid out of the pension fund;
- Where expenses may be paid out of the pension fund, employers that perform some of their pension plan administration in-house may charge reasonable expenses associated with such administration to the fund;
- Retroactive amendments to pension plans are valid if authorized by statute;
- Costs associated with pension litigation will not be automatically paid out of the pension fund; and
- The Ontario Financial Services Tribunal will receive considerable deference in its decisions concerning the interpretation of a pension plan text or the interplay between the *Pension Benefits Act* and a plan text.

More generally, *Kerry* sounds a retreat from the rote application of trust-law principles to the resolution of pension plan disputes, an approach that has held sway in the courts for much of the past two decades in Canada.

**Background**

Before reaching the SCC, *Kerry* originated from two decisions of Ontario’s Superintendent of Financial Services (the Superintendent), which were then appealed successively to the Financial Services Tribunal (the Tribunal), the Divisional Court, and the Ontario Court of Appeal.

*Kerry* (Canada) Inc. (the Company) sponsored a defined-benefit pension plan (the Plan) established by a predecessor corporation in 1954. The original Plan trust provided that contributions to the Plan were to be used for the “exclusive benefit” of Plan members and, other than to specify that trustee fees must be
paid by the employer, was silent on the payment of plan expenses. In 1975, the Plan text was amended to allow for third-party plan expenses to be paid from the pension fund, although it was not until 1985 that the Company actually started paying such expenses out of the fund. In 1985, the Company also began taking contribution holidays as the Plan had accumulated a substantial surplus.

In 2000, the Company amended the Plan, introducing a DC provision. When the DC provision was introduced, existing members were given the option of converting their defined benefits to the DC provision or remaining in the DB provision of the Plan. The DB component was closed off to new members, all of whom were steered into the DC component. The 2000 amendment to the Plan creating the DC provision established a new funding vehicle for the latter, which was seemingly separate from the DB trust.

Following the amendment in 2000, a group of former employees and current plan members asked the Superintendent to invalidate the contribution holidays that the Company had taken since 1985, the Company’s use of pension fund assets to pay plan expenses, and its use of the surplus from the DB provision to fund the DC provision.

The case then went to the Tribunal, which delivered decisions on the expenses and cross-subsidization issues, and also addressed whether the members’ litigation costs were payable out of the Plan’s assets. On the expenses issue, the Tribunal essentially said that the “exclusive benefit” language in the Plan’s original 1954 trust permitted expenses incurred for the primary benefit of members to be payable from the Plan’s assets and that a pension plan’s administrative expenses are incurred for the primary benefit of its members. On the cross-subsidization issue, the Tribunal blessed the practice of using DB surplus to fund DC contributions in principle, but required the Company either to retroactively amend the Plan to make DC members beneficiaries of the DB trust or to repay the contribution holiday it had enjoyed through cross-subsidization. The Company chose the retroactive-amendment approach. On costs, the Tribunal ruled that it did not have the authority to order costs be paid from the Plan fund.

At the Divisional Court, where the hearing took place immediately following the SCC’s 2004 decision in the Monsanto case, the Court determined that the Tribunal’s decisions were to be reviewed on a correctness standard (i.e. the Tribunal had to be correct in law in its analysis and not just reasonable as to its decisions) and that the Tribunal was wrong on the cross-subsidization and expenses issues. The Company was ordered to repay an amount equal to all the expenses it had paid out of the fund since 1985, and the 2000 amendment adding the DC provision was held to be invalid. The Divisional Court did hold, however, that the parties’ legal costs were not payable from the Plan.

In 2007, at the Ontario Court of Appeal, the Company won on all material points. In what was heralded as an employer-friendly decision by Justice Eileen Gillese, the Court distinguished Monsanto and determined that the Tribunal’s original decisions needed only to be reasonable and not, as the SCC had suggested only three years prior, correct. It endorsed the Tribunal’s decisions on the payment of expenses and cross-subsidization. Laying down very broad principles that could be made applicable to many pension plans, Justice Gillese determined that there is nothing inherently wrong with using DB surplus to fund DC contributions where the plan text and trust agreement in question do not prohibit it. On the expenses issue, she also concluded that unless explicitly prohibited by a pension plan text, expenses that are reasonable and appropriate in the administration of a plan may be paid out of the Plan fund to third-party service providers, though not to the employer/administrator itself.

The SCC granted the members leave to appeal.

Supreme Court of Canada decision

Cross-subsidization

The most contentious issue in Kerry, as evidenced by the dissent on this issue of Justices LeBel and Fish, was whether surplus accumulated in the DB provision of the Plan could be used to satisfy employer contributions to the DC provision of the Plan; that is, to cross-subsidize. The majority decision of the Court authored by Justice Rothstein held confidently and succinctly that it could be so used, provided that DC members were also beneficiaries of the original DB trust.

On this latter requirement, the initial 2000 Plan amendment that added the DC provision was, to be kind, unclear. Not to be deterred on its path, however, the majority of the Court upheld the Tribunal’s decision that a retroactive
amendment to the Plan clarifying that DC members were beneficiaries of the DB trust, thus enabling the cross-subsidization, was not prohibited by the Pension Benefits Act.

The SCC’s endorsement of this aspect of the Tribunal’s decision may signal a new willingness to hold employers to a less rigorous standard with respect to plan drafting and to allow the employer’s intent to rule the day in pension disputes. Although it is certainly preferable to have all plan documents precisely reflect the employer’s intent, if some scope for stylistic flexibility is henceforth to be afforded employers and their professional advisers, that would be most welcome.

Ultimately, the majority found that, with the retroactive amendments, there was one plan and one trust fund and that the use of the trust funds for the benefit of the DC members did not infringe the exclusive benefit provisions. The majority did not examine the hypothetical question of whether treating DC members as beneficiaries of the same trust might potentially expose any of the assets in their DC plan accounts to a deficit that could subsequently arise in the DB portion of the pension fund.

**Plan expenses**

On the issue of whether administrative expenses are properly payable from the Plan fund, the SCC agreed with the Court of Appeal and the Tribunal that reasonable plan expenses are payable out of a pension plan’s assets unless the plan documents explicitly prohibit the practice. The SCC reasoned that the legitimacy and reasonableness of the costs incurred are the key issues when determining whether plan expenses can be paid from a pension fund and thus, where plan expenses are *bona fide* expenses necessary for the administration of the pension plan, such expenses can be paid out of the fund.

The SCC, however, went further than the Tribunal or Court of Appeal, and was more generous to employers. At paragraphs 60 and 65, Justice Rothstein delivered the following “gift” to plan sponsors:

“...in my view whether services are provided by third parties or the employer itself is immaterial as long as the expenses charged are reasonable and the services necessary.”

“Where trust funds may be used for the payment of plan expenses for services required by the plan, the distinction between whether the services are provided by the settler or a third party is artificial. The only consideration is whether funds can be used to pay expenses and the legitimacy and reasonableness of the costs incurred. To the extent that the expenses at issue are *bona fide* expenses necessary to the administration of the pension plan, it should not matter whether the expenses are owed to a third party or to the employer itself. There is no reason in principle why the employer should be obliged to contract out such services.”

The significance of the above passages will not be lost on any plan sponsor that devotes HR employees and long hours towards the administration of its plan and may be looking for some pecuniary reimbursement for such devotion.

**Costs in pension litigation**

While often referenced merely as a footnote or not at all in discussions on Kerry, the decision reached by all levels of court is also significant on the question of whether the pension plan at issue should fund the legal battles it spawns. The SCC laid down some broad principles as to when legal costs might be payable from a pension fund and, in the end, determined that the members’ costs in relation to the present litigation were not payable from the Plan. The SCC agreed with the Court of Appeal in finding that where litigation is not solely about determining how to properly administer a pension fund, but is adversarial in nature, no costs are payable from the fund.

Further, it was recognized that consideration must be given to the significant economic fact that when an employer settles a pension trust it will often continue to have contribution obligations to the trust fund. In that case, awarding costs out of the pension fund could detrimentally impact the employer, as such a cost award would reduce the surplus and thereby accelerate the recommencement of employer contributions. Time will tell, but it would not be a surprising result if fewer pension cases make it to court when members face the prospect of paying their own expensive legal bill.
**Standard of review**

In what was effectively a bit of an about-face on the issue of the deference to be afforded the Tribunal, the SCC distinguished *Monsanto* and ruled that the Tribunal’s decision on the issue of plan interpretation needed only be reasonable and not correct. This should be welcome news to the true experts who sit on and devote countless hours to the Tribunal, and whose decisions may therefore turn out to prove more frequently the last word on the pension cases they hear.

**Conclusion**

While this final chapter of the *Kerry* saga will, undoubtedly, be fiercely debated in the coming weeks and months, if not years, employers can finally breathe a collective sigh of relief on certain issues. Essentially, so long as plan documentation permits it, plan sponsors no longer have to question the permissibility of cross-subsidization or the payment of plan expenses from the plan’s assets. In fact, if expenses may be paid from the plan, plan sponsors should henceforth be able to recoup from the pension fund the cost of reasonable and necessary administrative services provided to administer the pension plan in-house. Finally, plan sponsors may even be able to breathe a bit easier now, knowing that less-than-perfect drafting of plan documents will not always be catastrophic.

Some commentators will no doubt argue that *Kerry* will further erode the security net for employees participating in pension plans with both DB and DC components. But in the end, the *Kerry* case may actually prove to encourage the continuation of more DB and/or DC pension plans since, with this decision, they may have just become more feasible for many plan sponsors.

For further information, please contact your Stikeman Elliott representative, the author listed above or any member of our Employment, Labour & Pension Group listed at www.stikeman.com.

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2 Among other things, the *Monsanto* decision determined that the Tribunal was not endowed with any particular expertise in the interpretation of the *Pension Benefits Act*. As such, the SCC held in *Monsanto* that as a matter of administrative law, the Tribunal’s decisions were to be reviewed on the higher “correctness” standard as opposed to a more deferential “reasonableness” standard.

3 The Supreme Court’s decision in *Kerry* was unanimous on all other issues.
Enterprises with ten or more employees subject to a “reinforced” version of Quebec’s Pay Equity Act

Amendments to Quebec’s Pay Equity Act came into force on May 28, 2009. The amendments principally affect small enterprises (those with 10 to 49 employees), which will no longer be exempt from the Act. They also tighten compliance requirements under the Act generally, particularly with respect to the time period within which a pay equity plan must be completed and with respect to the ongoing obligations of employers to maintain pay equity in their workplaces.

The newly modified Pay Equity Act now covers enterprises comprised of ten employees or more. These enterprises will have four years (from January 1, 2010) to carry out a pay equity assessment. They will be required to ensure that job classes traditionally occupied by women receive a salary equal to those job classes traditionally occupied by men, even if these job classes are different, provided that they are of the same or comparable value within the enterprise (job class comparisons allow one to determine the salary gap between females and males occupying comparable positions). The employer must pay compensation adjustments to employees who occupy job classes that are predominantly female and that have a comparable value to those job classes which are predominantly male. Pursuant to the new Pay Equity Act, enterprises facing financial difficulties may, upon receipt of authorization from the Pay Equity Commission, spread out their compensation adjustment payments.

Once pay equity has been attained, enterprises must conduct an audit every five years to ensure that pay equity is being maintained.

The Pay Equity Act establishes a cut-off date, namely December 31, 2010, for enterprises currently subject to the law (those enterprises employing fifty employees or more) who have not yet completed a pay equity plan. Enterprises that have already completed their plans must conduct an evaluation of their maintenance of pay equity by the same December 31, 2010 deadline.

It is estimated that, as of today, approximately half of the enterprises subject to the Pay Equity Act have not yet completed their pay equity plan. The Minister of Labour has undertaken to ensure that the law will be applied with more firmness in the future. To this end, it has granted itself sufficiently strong tools, in the form of these amendments to the Pay Equity Act, to provide enterprises with incentives to attain pay equity within the prescribed period.
In particular, an enterprise which fails to meet the deadline will be liable to pay amounts owed to its employees with interest at the legal rate, calculated from the date the enterprise became subject to the law. Such an enterprise may also lose its right to spread out its compensation adjustment payments. It may also be obliged to pay an additional indemnity, ranging between 2% to 3% of the compensation owed, to affected employees, in addition to the fines described below.

Fines have been increased and are now:

> Between $1,000 and $15,000 for an enterprise with fewer than fifty employees;
> Between $2,000 and $30,000 for an enterprise with fifty to one hundred employees; and
> Between $3,000 and $45,000 for an enterprise with one hundred employees or more.

For subsequent offences, the amounts of the fines are doubled.

The law obliges employers to post a detailed description of the pay equity steps taken in their enterprise for sixty days. Employers also have the obligation to keep, for a five year period, both the information used to evaluate pay equity and the content of all postings.

The Pay Equity Act will be re-evaluated in ten years.

The new Pay Equity Act should encourage all Human Resource personnel to not only implement pay equity, but to also ensure the maintenance of pay equity. It is now mandatory in all enterprises with ten employees or more to identify the facts likely to create discriminatory salary gaps, such as the creation or abolishment of job classes and the modification of certain functions, in order to establish salary structures that ensure not only pay equity but also fair pay for all job classes.

For further information, please contact your Stikeman Elliott representative or any member of our Employment and Labour Group listed at www.stikeman.com

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1 Act to amend the Pay Equity Act, S.Q. 2009, c.9.
Supreme Court clarifies departing employees’ duties to employers

In the recent decision of the Supreme Court of Canada (SCC) in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* (2008 SCC 54), the SCC confirmed that there is no general duty owed by departing employees to refrain from competing against their former employer; however, employees do have an implied duty to provide reasonable notice of resignation and to act in good faith.

**Background**

RBC Dominion Securities Inc. (RBC) and Merrill Lynch Canada Inc. (Merrill Lynch) both had offices in Cranbrook, British Columbia, and each was the other’s main competition in the investment brokerage business. In November 2000, without any advance notice, virtually all of the investment advisors at RBC left and went to Merrill Lynch. Among the advisors to leave RBC was the branch manager who had coordinated the mass exit. As a result of the departure, only two junior investment advisors and two administrative staff members remained at the branch. In addition, in the preceding weeks before the advisors left RBC, several of RBC’s client records were surreptitiously copied and transferred to Merrill Lynch.

**Lower Court decisions**

At the trial, the judge awarded damages in RBC’s favour, finding that the individual advisors had breached their requirement to give reasonable notice of resignation and misappropriated confidential information. The trial judge also awarded $225,000 against the individual advisors for unfairly competing against RBC after their employment had ended and, $1,483,239 against the branch manager for breaching his implied duty of good faith.

The British Columbia Court of Appeal agreed with the award of damages for failure to give proper notice of resignation and for taking confidential information to Merrill Lynch; however, the Court of Appeal overturned the $225,000 damage award, noting that there was no obligation on the advisors to compete fairly following the end of their employment. The Court of Appeal also overturned the $1,483,239 awarded against the branch manager.

**Supreme Court of Canada decision**

RBC appealed the Court of Appeal’s decision, arguing that both damage awards should be reinstated. At the trial level, the judge had found that even
though the employees were not subject to express written restrictions, they continued to be under a general duty not to compete with their former employer following the end of their employment.

The SCC disagreed with trial judge, stating that:

> The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.

The SCC ultimately agreed with the Court of Appeal on this point and concluded that it was wrong to award damages on the basis that the employees continued to be under a duty not to compete.

The SCC, however, did reinstate the trial judge’s award of $1,483,239 in damages against the branch manager for breaching his duty of good faith by orchestrating the mass exodus to Merrill Lynch. The Court concluded that it was an implied term of his contract to retain the employees of RBC who were under his supervision and that by organizing their mass exit, he breached his duty of good faith.

The SCC agreed with the decisions of both lower courts and concluded that employees have an implied obligation to give reasonable notice of termination, noting that a notice period of 2.5 weeks was appropriate. The award of punitive damages, for disclosure of the confidential information, was also upheld.

The benefit of this decision to employers is that it recognizes that an employee may be held liable for failure to give reasonable notice of his or her termination depending on the circumstances. Employers also now has the ability to argue that employees with responsibilities similar to the branch manager, have a duty of good faith, which, in this case, was breached by organizing a mass exodus.

### Update on the “inevitable disclosure” doctrine in Canada

The doctrine of “inevitable disclosure” is based on the proposition that an employee who performs the same or similar work for a direct competitor of a former employer, will inevitably use or disclose confidential information and trade secrets in the course of performing his/her duties for the new employer. Although this doctrine has been accepted in several U.S. cases such as *PepsiCo, Inc. v. Redmond*, 54 F. 3d 1262 (7th Cir. 1995) (*PepsiCo*), it has not received similar treatment in the common law courts in Canada.

In *PepsiCo*, the Court allowed an injunction preventing a PepsiCo general sales manager from assuming similar duties with PepsiCo’s chief competitor. The sales manager had detailed knowledge of PepsiCo’s marketing plans for the coming year and was set to be involved in marketing decisions at his new employer. PepsiCo did not contend that any trade secrets were actually stolen, but rather asserted that in his new role the misappropriation of PepsiCo’s confidential information would be inevitable as the employee would be able to anticipate PepsiCo’s strategies and would not be able to block out that information when making decisions for his new employer.

In contrast, the doctrine of inevitable disclosure was rejected by Canadian courts in *ATI Technologies Inc. v. Henry* [2000] O.J. No. 4596 and *Future Shop v. Northwest-Atlantic (B.C.) Broker Inc.* [2000] B.C.J. No. 2659 (*Future Shop*). In *Future Shop* the Court stated that the application of this doctrine would require a significant change in the tests applicable in Canada.

Recently, in *Longyear Canada, ULC v. 897173 Ontario Inc.*, 2007 CarswellOnt 7958 (*Longyear*) the Ontario Superior Court of Justice again refused to apply the doctrine of inevitable disclosure. In this case, the plaintiff, Boart Longyear Inc. (Boart) was a provider of products and services in the mining exploration field. J.N. Precise (JNP) had entered into an agreement to sell substantially all of its assets to one of Boart’s competitors, Sandvik
Mining and Construction Canada Inc. (Sandvik). Pursuant to the transaction, most of the employees of JNP were to transfer to Sandvik, including three employees who had previously worked for Boart (collectively the “Former Employees”).

Boart sought an injunction to restrain the sale, along with an injunction to restrain the Former Employees from disclosing Boart’s trade secrets and confidential information to Sandvik, which the Former Employees had acquired while employed by Boart. In its arguments Boart claimed that if the Former Employees were allowed to work for Sandvik it would result in the inevitable disclosure of Boart’s proprietary information. The Court rejected this argument, citing Future Shop, and stated that it was “not satisfied that the doctrine of ‘inevitable disclosure’ put forth by Boart based on U.S. authorities is the applicable law in Canada.”

The Court’s recent rejection of the inevitable disclosure doctrine in Longyear highlights the importance of analyzing the enforceability of non-competition agreements. Given the conflicting approaches taken by the Canadian and U.S. courts, this will be especially important for U.S. employers with employees in Canada. Generally, in Canada a non-competition agreement will only be enforceable if it is (i) reasonable in duration and geographic scope; (ii) protects a legitimate proprietary interest; (iii) does not prohibit competition in general; and (iv) is not contrary to the public interest. This reinforces the recent jurisprudence that supports that courts prefer a proper non-solicit over a non-competition agreement.

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**Bill 84 and Bill 95 introduced to amend Occupational Health and Safety Act**

Ontario has recently introduced two proposed amendments to the Occupational Health and Safety Act (the Act): Bill 84 and Bill 95.

**Bill 84: Workplace death, injury and illness registry**

Bill 84, the Occupational Health and Safety Amendment Act (Workplace Deaths, Critical Injuries and Occupational Illnesses Registry), 2008, requires that the Minister of Labour create a registry containing information about all deaths, injuries and occupational illnesses that are required to be reported by employers pursuant to certain sections of the Act.

The registry must contain the following information:

1. the name of the employer;
2. the nature of the employer’s business;
3. the job title of the worker who was killed, injured or who suffered the occupational illness;
4. a description of the death, injury or occupational illness of the worker; and
5. such other information as may be prescribed by regulation.

The Bill also stipulates the Freedom of Information and Protection of Privacy Act and the safeguarding of “personal health information” within the meaning of the Personal Health Information Protection Act, 2004 will apply to disclosure of “personal information.” Given this stipulation, it will be interesting to see what details employers will be required to provide, especially with respect to the description of the nature of the death, injury or occupational illness.

First reading of Bill 84 was carried on June 2, 2008. It is not yet known when the Bill is expected to receive Royal Assent, and therefore, when it will be in effect.
Bill 95: The use of scents in the workplace

A topical issue that is now garnering legislative attention is addressed in Ontario Bill 95, the *Occupational Health and Safety Amendment Act (Scented Products), 2008*, which requires employers to prepare policies and maintain programs with respect to the use of scented products in the workplace.

Bill 95 would amend subsection 25(2)\(^1\) of the *Act* by making it a duty of employers to:

1. prepare and review, at least annually, in consultation with employees, a written policy on the use of scented products in the workplace; and

2. develop and maintain a program to implement the policy referred to above.

It is important to note that the Bill, as drafted, does not require employers to adopt a specific scent policy, such as a scent-free or scent-reduction policy. It merely aims at ensuring that all employers consult employees about what is reasonable for their particular workplace and implement an appropriate fragrance strategy and a program that fits their particular work environment.

First reading of Bill 84 was carried on June 12, 2008 and no further steps have been taken. The Bill would become law in Ontario six months after receiving Royal Assent.

Helpful information regarding scents and scent-related policies can be found at the Canadian Centre for Occupational Health and Safety’s website at www.ccohs.ca.

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For further information on any of the above articles, please contact your Stikeman Elliott representative, the editor, Nancy Ramalho (nramalho@stikeman.com), or any member of our Employment, Labour and Pension Group listed at www.stikeman.com

\(^1\) Subsection 25(2) contains a laundry list of duties of employers under the Act.
Supreme Court declares ambiguous non-competition clauses unenforceable

On January 23, 2009, the Supreme Court of Canada handed down a decision regarding the Court’s role in interpreting and enforcing restrictive covenants. More specifically, the Supreme Court held that it is not for a Court to interpret or “fix” ambiguous restrictive covenants in an effort to uphold their validity.

Facts and Judicial History
In the case of Shafron v. KRG Insurance Brokers (Western) Inc., Mr. Shafron’s employment contract with KRG Insurance Brokers (Western) (“KRG”) contained a restrictive covenant that prohibited him from competing with KRG for a three-year period after the termination of his employment in the “Metropolitan City of Vancouver”. In 2001, Mr. Shafron left the employ of KRG and began working as an insurance salesman for Shaw Insurance Agency in Richmond, British Columbia. KRG sought to have the restrictive covenant contained in Mr. Shafron’s employment contract enforced. Mr. Shafron challenged the enforceability of the restrictive covenant on the basis that there was no recognized meaning for the phrase "Metropolitan City of Vancouver.”

The trial court dismissed KRG’s claim. However the Court of Appeal overturned the lower court’s decision and, by relying on the doctrine of notional severance (the process of reading down a contractual provision so as to make it legal and enforceable), clarified the meaning of "Metropolitan City of Vancouver” as to denote “the University of British Columbia endowment lands, Richmond and Burnaby.” By doing so, the Court of Appeal upheld the restrictive covenant and ruled that Mr. Shafron was in breach of same.

The Supreme Court
The Supreme Court of Canada reversed the ruling of the Court of Appeal. It found that the expression "Metropolitan City of Vancouver" was neither clear nor certain, and as such the restrictive covenant could not be validly upheld and enforced. The Court further articulated that it is not for the Court to step in and impose a meaning on an ambiguous clause that the parties themselves did not intend. Ruling otherwise would “invite the employer to impose an unreasonable restrictive covenant on the employee” given that the employer could rely on the Court to read down the language and enforce such a restrictive covenant.

In Quebec, non-compete covenants are expressly governed by Article 2089 of the Civil Code of Quebec, which provides that a non-competition clause must be limited to time, place and type of employment and whatever is necessary...
for the protection of the legitimate interests of the employer, failing which it will not be enforceable. The Supreme Court decision further buttresses this legal rule.

This decision indubitably illustrates that courts will not step in to “save” or enforce language in an employment contract that is vague or uncertain. Employers cannot circumvent the absolute necessity of drafting clear, reasonable and unambiguous restrictive covenants, otherwise, they risk losing the faculty to protect their interests when faced with departing employees.

For further information, please contact your Stikeman Elliott representative.

1 2009 SCC 6.
2 Paragraph 40 of the judgment.
Employment Perspectives at the Dawn of a New Decade

FIRM PROFILE

About Stikeman Elliott and our Employment, Labour & Pension Group
Employment and Labour

The Stikeman Elliott Employment & Labour Group has represented clients for the past 40 years in all aspects of the individual and collective employment relationship, both at the provincial and federal level. Members of the group have gone on to become judges and to hold senior positions in government.

The Employment & Labour Group at Stikeman Elliott advises employers on all facets of the employment relationship. Although all members of the group have wide-ranging employment and labour law experience, each has developed expertise in particular areas. This approach ensures that we can provide advice in a timely, cost-effective and efficient manner. We enjoy long-standing relationships with clients in virtually all industries and in a broad range of business activities. The Group has been recognized as a leader in the Canadian marketplace by Chambers Global’s Guide to the Leading Lawyers for Business. The Group has also been endorsed by PLC Which Lawyer?, with our Quebec practice cited in the area of labour and employment and our Ontario practice cited in the area of pensions and benefits.

We regularly assist employers and their executives with:

> Business immigration and relocation;
> Compliance with employment related statutes;
> Director and officer liability issues and fiduciary duties;
> Drafting and enforcing confidentiality, non-solicitation and non-competition covenants;
> Employee drug and alcohol testing;
> Employment contract and incentive compensation issues;
> Employment-related class proceedings;
> Health and safety in the workplace including the strategic planning of worker’s compensation assessments (Quebec);
> Human rights and harassment in the workplace;
> Incentive compensation such as bonus plans and stock option plans;
> Management education and training;
> Managing chronically ill and absent employees;
> Occupational health and safety;
> Outsourcings, restructurings and plant and facility closures;
> Pay equity;
> Privacy and access to information issues in the employment setting;
> Pleading employment-related litigation;
> Privacy and access to information issues;
> Proactive and strategic advice regarding relevant laws;
> Reorganization and workforce reduction;
> Strategic human resources planning;
Termination and severance practices and arrangements;
Transition and retention programs, and retirement benefits;
Workplace policies; and
Wrongful dismissal.

In the field of labour relations, we focus exclusively on representing management. Our services in this field include advice and representation in:

Collective agreement administration;
Collective bargaining;
Discipline and termination of employment;
Instituting proactive and positive employee relations practices and programmes;
Labour arbitration and dispute resolution;
Industrial conflicts (strikes, lock-outs and picketing);
Successor-employer proceedings;
Unfair labour practices;
Union organizing, certification and decertification campaigns; and
Strategic labour advice.

Members of the Group regularly appear as counsel for employers in the courts and before various employment and labour-related administrative tribunals both under federal and provincial legislation.

While we often deliver our services on a continuing basis, we are also regularly involved in the employment and labour-related aspects of commercial transactions, including those arising from mergers, acquisitions, insolvency and receivership, and in strategic employment and human resource planning. Our advice includes negotiating the human resources aspects of a corporate transaction and drafting various related agreements including transition services agreements, employment agreements and restrictive covenant agreements.

**Professional Activities**

Several members of the group have lectured at the university level, authored books, legal service manuals and articles, including *Le congédiement déguisé au Québec – Fondements théoriques et aspects pratiques*, *The Employment Contract, Le contrat d’emploi*, *Executive Employment Law*, *Les dirigeants: leurs droits et leurs obligations*, as well as a section dealing with labour law in the publication titled *Doing Business in Canada*.

As part of our commitment to assist corporate leaders to establish and refine positive management and employee practices, we regularly provide in-house seminars and produce newsletters that address topical and timely employment issues.
Pension & Benefits

National and international enterprises have a growing demand for innovative legal advisors to assist in the increasingly sophisticated and complex environment in which pension and employee benefit programmes operate today. Our National Pension and Benefits Practice Group is widely recognized for its ability to assist clients in this area, which will continue to grow in importance as the Canadian population ages.

The group is centred in the firm’s Employment, Labour & Pension Group, but also draws upon expertise from the Corporate, Litigation and Taxation Groups of the firm. This approach provides flexible and multi-disciplinary solutions tailored to the client’s specific needs. As the first law firm in Canada with practitioners in both Montréal and Toronto devoted exclusively to pension matters, we offer a unique capacity to advise on matters governed by Quebec, Ontario, and federal pension law. Our practice has been endorsed as a Canadian leader by Chambers Global’s 2009 Guide to the World’s Leading Lawyers for Business.

Expertise
Pension and benefit programmes are becoming increasingly sophisticated and the regulatory and legal framework in which they exist increasingly complex. Our pension expertise includes the full range of legal matters in this area. We draft pension plan rules, trust agreements, investment management agreements and investment policies; advise on pension plan governance and pension fund investment issues; negotiate pension surplus-sharing agreements; advise on the impact of transactions such as mergers and acquisitions, reorganizations, insolvencies, outsourcings, and privatizations; design and administer employee share ownership plans and phantom stock plans; negotiate and structure executive compensation arrangements and advise on the taxation thereof; help financial institutions develop pension and retirement products; advise on creditor protection of retirement income arrangements; represent plan sponsors before pension regulatory tribunals and the courts and counsel employers on benefits-related issues in unionized environments.

Professional Activities
Members of Stikeman Elliott’s National Pension and Benefits Group are involved in many professional development activities, including:

> Constituting the editorial board of Canadian Cases on Pensions and Benefits, a monthly law report published by Thomson Carswell;

> Sitting on the Quebec Pension Board, Financial Services Commission of Ontario and Financial Services Tribunal Legal Advisory Committees, Ontario Bar Association Pension and Benefits Section Executive, Association of Canadian Pension Management and Canadian Pensions and Benefits Institute;

> Publishing articles in various newspapers, law reviews, and pension industry publications;

> Contributing the Canada chapter to Employee Share Plans: International Legal and Tax Issues;

> Speaking at meetings and conferences of numerous organizations both in Canada and abroad; and

> Advising foreign governments on pension reform.
Firm Profile

Stikeman Elliott is recognized nationally and internationally for the sophistication of its business law practice. The firm is a Canadian leader in each of its core practice areas – corporate finance, M&A, banking, corporate-commercial, real estate, tax, insolvency, structured finance, competition, intellectual property, administrative law, employment and business litigation – and has developed in-depth knowledge of a wide range of industries including mining, energy, banking, insurance, infrastructure, retail, telecommunications and technology. Located in Toronto, Montréal, Ottawa, Calgary and Vancouver, its Canadian offices are among the leading practices in their respective jurisdictions. Stikeman Elliott is also prominent internationally, with a longstanding presence in London, New York and Sydney and extensive experience in China, South and Southeast Asia as well as in central and eastern Europe, Latin America, the Caribbean and Africa. The firm’s 500 members include many of Canada’s most prominent business lawyers, including leading litigators, in several of Canada’s provinces.

London-based World Finance magazine named Stikeman Elliott as the 2008 Best Corporate & Commercial Team in Canada and Chambers Global identifies it as one of Canada’s two top-tier Corporate/M&A practices. The firm is frequently ranked among Canada’s leaders in domestic and cross-border M&A league tables from Thomson Financial, Mergermarket and Mergerstat Review. Stikeman Elliott is also the leading adviser in Canadian securities offerings, ranking first from 2005 to 2008 (inclusive) in Bloomberg league tables in terms of overall volume, as well as receiving top rankings from the Financial Post. The firm’s National Litigation Group, whose specializations include class actions, securities litigation and restructurings, has been ranked among the top three business litigation practices in Canada by Lexpert. Among Stikeman Elliott’s other highly regarded practices are competition/antitrust (named as a leader by the Global Competition Review), taxation (highly ranked by Lexpert) and structured finance (widely considered to be Canada’s foremost practice in that field). The firm is also well known for its extensive regulatory and government relations expertise; the latter anchored by its office in Ottawa.

Because Stikeman Elliott has grown through internal expansion, rather than through mergers, the firm’s clients can expect a consistently high level of service from each of its eight offices. Its offices frequently work together on major transactions and litigation files, and regularly collaborate with prominent U.S. and international law firms on cross-border transactions of global significance. The firm has invested heavily in leading-edge knowledge management systems in order to assure our clients of advice of the highest quality, grounded in the accumulated expertise of Stikeman Elliott’s national and international practice.

“They are hands down the best business law firm in the country. They provided excellent, results-driven advice: extremely diligent, hard-working, dependable.”

Client Interview
CHAMBERS GLOBAL (2008)
Our Offices

Stikeman Elliott’s Canadian offices are located in the major business and financial centres of Montréal, Toronto, Ottawa, Calgary, and Vancouver. Outside Canada, the firm’s network includes offices or representation in the United Kingdom, the United States and the Asia-Pacific region. Our unsurpassed international experience ensures that we can serve our clients wherever their business takes them.

Montréal
The firm’s Montréal office is one of the most successful and respected in the city. Its practice is focused on M&A, securities, banking, cross-border financial restructuring, international tax and commodity transactions, real estate, environmental law, intellectual property, information technology, transportation, insurance and employment law. The Montréal litigation group is widely recognized as one of the leading business law litigation teams in Quebec. Stikeman Elliott’s expertise in civil law and commercial transactions is particularly significant where an organization has operations in Quebec or in other jurisdictions with codified civil law-based legal systems, such as Central and Eastern Europe and South America. Much of the work carried out in the Montréal office has a strong international focus.

Toronto
The Toronto office of Stikeman Elliott is a broadly based corporate-commercial law practice with a strong transactional focus. The firm’s Toronto lawyers include many of Canada’s foremost practitioners in the areas of M&A, securities, banking, structured finance, insolvency, tax, real estate, competition, employment, pensions, technology, outsourcing, mining and electricity law. The Toronto business litigation group is highly regarded for its record in commercial litigation, most notably securities litigation, class action defence and complex insolvencies and restructurings. The office is renowned for its expertise in cross-border transactional and litigation work and counts many major global corporations and financial institutions among its clients.

Calgary
Our Calgary office, with currently more than 50 legal personnel, is home to some of Alberta’s leading lawyers. The Calgary office opened in 1992 and maintains a business law practice focused on M&A, securities, real estate, joint ventures, project financings, structured financings, tax, employment and banking. The office also has a significant international dimension, advising on foreign investment in the Canadian energy sector and cross-border trade in energy resources. In addition, the office maintains a commercial litigation practice and is renowned for its regulatory practice involving oil and gas and electricity related matters. The Calgary office has recently won two awards for its active role in the community.

Vancouver
Celebrating 20 years in the city in 2008, our Vancouver practice includes a number of British Columbia’s leading lawyers in the areas of M&A, securities, banking, litigation and real estate. Our corporate lawyers lead local matters and draw on expertise of other Stikeman Elliott offices in national and international matters. We have one of British Columbia’s most prominent real estate development and acquisition practices, while our Litigation Group has acted for all levels of government and offers a broad range of commercial dispute resolution and advocacy services, including significant class action expertise. A very experienced group
of lawyers also practice in the areas of public-private partnerships, infrastructure development and project finance. The Vancouver office has a strong cross-border focus, acting as the firm’s Canadian gateway to the Asia-Pacific region.

**Ottawa**
The Ottawa office of Stikeman Elliott focuses on administrative law and regulated industries, with particular emphasis on competition law, intellectual property law, international trade, government procurement and public policy. Industry sectors in which the office has expertise include such federally-regulated commercial sectors as telecommunications, broadcasting, transportation, and energy, as well as those (such as packaging and labelling) that are subject to food and drug administration.

**London**
Drawing over 40 years of experience in the city, Stikeman Elliott’s London office has long been recognized for its leadership in international corporate transactions, including leveraged buy-outs, take-over bids and share and asset purchases. Our London corporate finance team is a leading advisor to Canadian companies with respect to Toronto Stock Exchange and AIM listings and has been recognized for many years as one of the most prominent international advisors in the Eurobond markets. We have also been at the forefront of developing the legal framework for the issuance of Maple Bonds in Canada. Our lawyers have broad industry expertise, as well as significant experience in Africa, in the mining sector. The office also serves as the gateway for our India, Middle East and Sovereign Wealth Fund practices. As well, our private client practice ranks amongst the world’s leading practices in the area.

**New York**
The New York office of Stikeman Elliott has extensive experience in Canada-U.S. cross-border corporate transactions, with a particular focus on M&A, corporate finance, banking and structured finance. The firm’s New York lawyers provide Canadian legal advice on cross-border acquisitions, investments, banking, securities and regulatory matters to U.S. corporations, investment dealers, advisors, banks and funds.

**Sydney**
Stikeman Elliott’s Sydney office, the hub of our Asia-Pacific practice, is involved in multi-jurisdictional securities and M&A law with a sectoral emphasis on mining, cross border M&A, infrastructure development and project finance.

**Asia**
Stikeman Elliott regularly acts in transactions involving clients across Asia, including, in particular, India, China, Hong Kong, Thailand and the Middle East. Reflecting the position of Canada as a target for a rapidly expanding Asian region and as a significant source of capital, the firm provides advice on a large number of significant transactions from Asia into Canada, as well as advising on Canadian investment into Asia. The firm has a particularly high profile in resource-sector transactions and is involved in the vast majority of IPOs originating in Asia that involve placements into Canada.