



Law Society
of Ontario

Barreau
de l'Ontario

24th Employment Law Summit

CO-CHAIRS

Neena Gupta

Gowling WLG (Canada) LLP

Kim Patenaude

RavenLaw LLP

October 11, 2023





Law Society
of Ontario

Barreau
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Law Society of Ontario

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24th Employment Law Summit



CO-CHAIRS: **Neena Gupta**, *Gowling WLG (Canada) LLP*

Kim Patenaude, *RavenLaw LLP*

October 11, 2023

9:00 a.m. to 4:00 p.m.

Total CPD Hours = 5 h Substantive + 1 h Professionalism

**Law Society of Ontario
Donald Lamont Learning Centre
130 Queen Street West
Toronto, ON**

SKU CLE23-01005

9:00 a.m. – 9:05 a.m.

Welcome

Neena Gupta, Gowling WLG (Canada) LLP

Kim Patenaude, RavenLaw LLP

9:05 a.m. – 9:45 a.m.	Legislative Developments Amy Derickx, <i>Gowling WLG (Canada) LLP</i> Claire Boychuk, <i>Nelligan Law</i>
9:45 a.m. – 9:55 a.m.	Question and Answer Session
9:55 a.m. – 10:15 a.m.	Major Case Law Review Kumail Karimjee, <i>Karimjee Resolutions and Karimjee Law</i>
10:15 a.m. – 10:20 a.m.	Question and Answer Session
10:20 a.m. – 10:40 a.m.	Break
10:40 a.m. – 11:20 a.m.	Class Action Matters Elisha Jamieson-Davies, <i>Hicks Morley Hamilton Stewart Storie LLP</i> Lior Samfiru <i>Samfiru Tumarkin LLP</i>
11:20 a.m. – 11:30 a.m.	Question and Answer Session
11:30 a.m. – 12:00 p.m.	Employees, Dependent and Independent Contractors: It's a Matter of Character Christopher D'lorio, Director, Human Resource Practice <i>Price Waterhouse Coopers LLP</i> Melanie Reist, <i>Morrison Reist Krauss LLP</i> Kyle Shimon, <i>Emond Harnden LLP</i>

12:00 p.m. – 12:05 p.m.	Question and Answer Session
12:05 p.m. – 1:05 p.m.	Lunch
1:05 p.m. – 1:45 p.m.	Workplace Harassment and Violence Investigations Jeffrey Goodman, <i>Mathews Dinsdale & Clark LLP</i> Dorian Persaud, <i>Persaud Employment Law</i> John Westdal, <i>APTUS Conflict Solutions Inc.</i>
1:45 p.m. – 1:55 p.m.	Question and Answer Session
1:55 p.m. – 2:30 p.m.	Extraordinary Damages: Moral, Punitive, Tortious Damages, and Human Rights Remedies Natalie MacDonald, <i>MacDonald & Associates LLP</i> Alexandra Monkhouse, <i>Monkhouse Law</i>
2:30 p.m. – 2:40 p.m.	Question and Answer Session
2:40 p.m. – 3:00 p.m.	Break
3:00 p.m. – 3:50 p.m.	The Promise and Peril of AI and Technology (50 m ) Mark Doble, Chief Executive Officer, <i>Alexi</i> Nicole Heelan, Analyst/Employment Services Lead <i>ClearyX</i> Amy Salyzyn, Associate Professor, Faculty of Law <i>University of Ottawa</i>

3:50 p.m. – 4:00 p.m.

Question and Answer Session (10 m )

4:00 p.m.

Program Ends



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24th Employment Law Summit

October 11, 2023

SKU CLE23-01005

Table of Contents

TAB 1A	Prohibition on Wage-Fixing and No-Poach Agreements: What Employers Need to Know1A - 1 to 1A - 12
	<i>Amy Derickx, Gowling WLG (Canada) LLP</i>
	<i>Elad Gafni, Gowling WLG (Canada) LLP</i>
	<i>Michael Walsh, Gowling WLG (Canada) LLP</i>
TAB 1B	Federal Legislative Developments1B - 1 to 1B - 8
	<i>Claire Boychuk, Nelligan Law</i>
TAB 2	Major Case Law Update 2 - 1 to 2 - 24
	<i>Kumail Karimjee, Karimjee Resolutions and Karimjee Law</i>
	<i>Mika Imai</i>

TAB 3A	Class Actions 101 (PowerPoint)3A - 1 to 3A- 3
	<i>Elisha Jamieson-Davies, Hicks Morley Hamilton Stewart Storie LLP</i>
TAB 3B	Class Actions Update: An Employee-Side Perspective3B - 1 to 3B - 20
	<i>Lior Samfiru, Samfiru Tumarkin LLP</i>
	<i>Kevin Hamilton, Samfiru Tumarkin LLP</i>
Tab 4A	Tax Consequences of Employment vs. Independent Contractor Status4A - 1 to 4A - 2
	<i>Christopher D’lorio, Director, Human Resource Practice Price Waterhouse Coopers LLP</i>
Tab 4B	Employees, Dependent and Independent Contractors: It’s a Matter of Character4B - 1 to 4B - 7
	<i>Melanie Reist, Morrison Reist Krauss LLP</i>
	<i>Taylor Maitland, Morrison Reist Krauss LLP</i>
Tab 4C	Independent Contractors: Employer Obligations and Penalties for Misclassification4C - 1 to 4C - 11
	<i>Kyle Shimon, Emond Harnden LLP</i>
	<i>Brett Hynes, Emond Harnden LLP</i>
TAB 5A	Privilege in Workplace Investigations 5A - 1 to 5A - 8
	<i>Jeffrey Goodman, Mathews Dinsdale & Clark LLP</i>
	<i>Qasid Iqbal, Mathews Dinsdale & Clark LLP</i>

TAB 5B	Workplace Harassment and Violence Investigations Best Practices for Workplace Investigations.....	5B - 1 to 5B - 5
	Dorian Persaud, <i>Persaud Employment Law</i>	
	Barbara Darby	
TAB 6A	Extraordinary Damages (PowerPoint)	6A - 1 to 6A - 8
	Natalie MacDonald, <i>MacDonald & Associates LLP</i>	
TAB 6B	Tortious, Human Rights Damages and Reporting Considerations in Employment	6B - 1 to 6B - 10
	Alexandra Monkhouse, <i>Monkhouse Law</i>	
TAB 7	Technological Competence for Lawyers: Where are we in in 2023?	7 - 1 to 7 - 6
	Nicole Heelan, Analyst/Employment Services Lead <i>ClearyX</i>	
	Amy Salyzyn, Associate Professor, Faculty of Law, <i>University of Ottawa</i>	



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TAB 1A

24th Employment Law Summit

**Prohibition on Wage-Fixing and
No-Poach Agreements: What Employers
Need to Know**

Amy Derickx

Gowling WLG (Canada) LLP

Elad Gafni Gowling

Gowling WLG (Canada) LLP

Michael Walsh

Gowling WLG (Canada) LLP

October 11, 2023



**Prohibition on Wage-Fixing and No-Poach Agreements:
What Employers Need to Know**

By: Amy Derickx, Elad Gafni, and Michael Walsh

Gowling WLG (Canada) LLP

Introduction

On June 23, 2022, Parliament enacted the most significant amendments to the *Competition Act* (the “Act”) in over a decade.ⁱ Among other notable changes, the amendments expand the criminal conspiracy provisions in section 45 of the Act to include new prohibitions on wage-fixing and no-poach agreements between unaffiliated employers. The new prohibitions came into force on June 23, 2023.

On May 30, 2023, the Competition Bureau, which administers and enforces the Act, published its wage-fixing and no-poaching [enforcement guidelines](#) (the “Guidelines”)ⁱⁱ. The Guidelines are intended to provide businesses with transparency and clarity on the Bureau’s enforcement approach to the new criminal provisions. The publication of the Guidelines followed a public consultation process, where interested parties were invited to provide their views on a draft version. The Guidelines clarify a number of important points, and flag areas for consideration as employers implement compliance strategies following the coming into force of the new provisions.

New Criminal Prohibitions

Section 45 is the cornerstone of the Act. It criminally prohibits types of conduct that are considered egregious violations of competition, such as agreements between competitors to: (i) fix prices; (ii) allocate markets; and (iii) implement controls/limits on supply or production.

The amendments added a new subsection 45(1.1) to the Act that makes it a criminal offence for unaffiliatedⁱⁱⁱ employers to enter into agreements:

1. to fix, maintain, decrease, or control salaries, wages or other terms and conditions of employment (e.g., wage-fixing agreements); or,
2. to not solicit or hire each other’s employees (e.g., no-poach agreements).

The conspiracy provisions in the Act, including the new prohibitions on wage-fixing and no-poach agreements, are considered *per se* criminal offences. *Per se* offences address conduct that is presumed to be injurious to fair and proper competition, and are treated as inherently illegal. As such, simply engaging in the conduct is sufficient to violate the law, regardless of other factors such as business rationale or actual competitive effects.

Notably, the prohibition on no-poaching agreements only applies to agreements to not solicit or hire “each other’s” employees. Therefore, one-way non-solicit clauses are not captured by the new provisions.

The new provisions apply to agreements entered into on or after June 23, 2023, but may also apply to agreements entered into before that date; there is no “grandfathering” of pre-existing agreements. The Guidelines state that enforcement against agreements entered into prior to June 23, 2023 is “unlikely” unless the parties “reaffirm or implement the restraint on or after June 23, 2023.” However, given the lack of enforcement of the new provisions to date, it is unclear precisely what constitutes “reaffirming” or “implementing” an existing agreement.

The new conspiracy provisions were introduced to fill a gap in the scope of section 45, as it did not apply to “buy-side” agreements between competitors, including those applicable to the labour market such as wage-fixing and no-poaching agreements. Parliament was prompted to address the legislative gap in response to the controversy over COVID-19 “hero pay” for grocery workers.

Early in the COVID-19 pandemic, Canada’s main grocery chains instituted a hero pay bonus for frontline workers, and proceeded to remove that bonus simultaneously when the severity of the pandemic waned in the summer of 2020. At a hearing of the Standing Committee on Industry and Technology to study the matter, grocery executives confirmed that they had communicated prior to announcing the end of their respective hero pay programs. In response to questions seeking clarity on the applicability of the Act, the Competition Bureau confirmed that the application of section 45 was limited to “supply-

side” agreements for goods and services, and not “buy-side” agreements. In turn, Parliament proceeded to amend the Act to include section 45(1.1).

Penalties

Contraventions of the new criminal prohibitions on wage-fixing and no-poach agreements are subject to a fine in the discretion of the court and, in cases where an individual is prosecuted, the possibility for imprisonment for a term not exceeding 14 years.

Businesses should also be aware of the possibility of private actions for damages, including class actions. Section 36 of the Act permits any person who has suffered loss or damage as a result of conduct that is criminally prohibited in the Act to sue for and recover damages. For example, class action litigation regarding alleged price-fixing schemes is already common in Canada. Accordingly, employers who enter into illegal no-poach or wage-fixing agreements in contravention of subsection 45(1.1) may also face private actions for damages, including possibly class actions.

Defences

The Act contains certain defences applicable to section 45 offences that are also available for cases involving wage-fixing and no-poach agreements. These include a general exemption from competition laws under section 4 of the Act for certain collective bargaining activities, as well as the regulated conduct defence that applies to conduct that is required or authorized by or under another Act of Parliament or the legislature of a province.

However, the most important defence is the ancillary restraints defence (“ARD”), which serves to allow restraints on competition that would otherwise violate section 45 if:

- i. the restraint is ancillary to a broader or separate agreement that includes the same parties;
- ii. the restraint is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement; and,
- iii. the broader or separate agreement, considered alone, is not prohibited under the Act.

Ancillary restraints are distinct from “naked restraints”, which are restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance, or joint venture, and are commonly recognized as the most egregious forms of anti-competitive conduct. Ancillary restraints, on the other hand, are restraints that are truly subordinate and collateral to a broader agreement, and generally regarded as efficiency enhancing and therefore pro-competitive. As noted in the Guidelines, “subsection 45(1.1) is directed at “naked restraints” on competition ... include[ing] restraints on wages or job mobility that are not implemented to further a legitimate collaboration, strategic alliance or joint venture”.

In the Guidelines, the Bureau helpfully explains that, in assessing whether a restraint is directly related and reasonably necessary to give effect to the objective of a broader agreement, “the Bureau will not “second guess” the parties with reference to some other restraint that may have been less restrictive in some insignificant way”. At the same time, the Bureau cautions that it may conclude that a restraint was not reasonably necessary “if the parties could have achieved an equivalent or comparable arrangement through practical, significantly less restrictive means that were reasonably available to the parties at the time when the agreement was entered into”. Generally, the Bureau will consider the duration of an ancillary restraint, the subject of the restraint and its geographic scope (e.g., whether it applies to employees unrelated to the collaboration) to determine whether it is reasonably necessary to give effect to the objective of the broader agreement. Accordingly, parties are encouraged to consider these aspects of any ancillary restraints, in order to maximize the chances that the ARD will apply, if necessary.

Circumstantial Evidence

The Act provides that courts may infer the existence of a conspiracy, agreement, or arrangement contrary to the criminal provisions in section 45 of the Act from circumstantial evidence alone, with or without direct evidence of communication. Indeed, as the Guidelines point out, while “conscious parallelism” (i.e., acting independently with awareness of the likely response of one’s competitors or in response to the conduct of competitors) does not violate section 45 (including the new prohibitions

on wage-fixing and no-poach agreements), parallel conduct coupled with facilitating practices, such as sharing sensitive information, may be sufficient to prove an agreement was concluded.

For this reason, employers and human resources professionals should be wary of information sharing and/or casual discussions between unaffiliated employers regarding wages, salaries, terms and conditions of employment, and non-solicitation/non-hiring of each other's employees, as any such communication may be viewed by the Bureau as a "facilitating practice" in furtherance of an illegal conspiracy. Employers should now regard internally held information on these matters (including, for example, wages) as competitively sensitive.

Key Takeaways

- (1) Wage-fixing and no-poach agreements between unaffiliated employers are criminally prohibited as of June 23, 2023, and subject to significant penalties, including potentially private litigation such as class actions;
- (2) Naked restraints will almost always be unlawful, whereas ancillary restraints may be defensible; and
- (3) Strictly avoid information sharing and/or casual discussions between unaffiliated employers that may give rise to the impression or appearance of an illegal conspiracy.

ⁱ *Competition Act*, RSC, 1985, c C-34.

ⁱⁱ Government of Canada: Enforcement Guidelines on wage-fixing and no poaching agreements (<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/enforcement-guidelines-wage-fixing-and-no-poaching-agreements>)

ⁱⁱⁱ The new prohibitions apply only to unaffiliated employers. Under the Act, "affiliation" is determined on the basis of control. See subsection 2(2) of the Act. For example, if the same parent company or individual controls two employers, those employers would be considered affiliated for the purposes of the Act (however, franchisors and franchisees are not generally regarded as affiliated).

2023 KEY ONTARIO LEGISLATIVE EMPLOYMENT LAW CHANGES

<i>Employment Standards Act, 2000, SO 2000, c 41 (ESA)</i>				
Topic/Bill	Important Date(s)	Section	Legislative Changes	Description of Impact
Business and Information Technology Consultants <i>Working for Workers Act, 2022, SO 2022, c 7 - Bill 88</i>	Effective on January 1, 2023	Added definitions to subsection 1(1)	<p><u>Definitions</u></p> <p>S. 1(1): “business consultant” means an individual who provides advice or services to a business or organization in respect of its performance, including advice or services in respect of the operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance or strategy of the business or organization.</p> <p>“information technology consultant” means an individual who provides advice or services to a business or organization in respect of its information technology systems, including advice about or services in respect of planning, designing, analyzing, documenting, configuring, developing, testing and installing the business’s or organization’s information technology systems.</p>	An individual who meets the definition of “business consultant” or “information technology consultant” (IT consultant) is exempt from the <i>ESA</i> if certain conditions are met.
Business and Information Technology Consultants <i>Working for Workers Act, 2022, SO 2022, c 7 - Bill 88</i>	Effective on January 1, 2023	Additions to subsections 3(7) and 3(8)	<p><u>Business and IT consultants</u></p> <p>S. 3(5): This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:</p> <p>...</p> <p>11.1 If the requirements of subsection 3(7) are met, a business consultant or an information technology consultant.</p> <p>S. 3(7): For the purposes of paragraph 11.1 of subsection 3(5), the following are the requirements that must be met:</p> <p>1. The business consultant or information technology consultant provides services through,</p>	Application of ESA An individual who meets the definition of “business consultant” or “information technology consultant” (IT consultant) is exempt from the <i>ESA</i> if certain conditions are met. Section 3(7) sets out those conditions.

			<p>i. a corporation of which the consultant is either a director or a shareholder who is a party to a unanimous shareholder agreement, or;</p> <p>ii. a sole proprietorship of which the consultant is the sole proprietor, if the services are provided under a business name of the sole proprietorship that is registered under the <i>Business Names Act</i>.</p> <p>2. There is an agreement for the consultant's services that sets out when the consultant will be paid and the amount the consultant will be paid, which must be equal to or greater than \$60 per hour, excluding bonuses, commissions, expenses and travelling allowances and benefits, or such other amount as may be prescribed, and must be expressed as an hourly rate.</p> <p>3. The consultant is paid the amount set out in the agreement as required by paragraph 2.</p> <p>4. Such other requirements as may be prescribed.</p> <p>Rules re calculation of rate</p> <p>S. 3(8): For the purposes of paragraph 2 of subsection 3(7), such other rules as may be prescribed apply with respect to the calculation of a consultant's hourly rate or other compensation.</p>	
Importance	<p>These changes seek to provide employers with greater clarity when determining whether certain workers are captured by the <i>ESA</i>. Organizations that want to ensure business and IT consultants (as defined) are not subject to the <i>ESA</i> should review their existing agreements to determine whether they comply with the above requirements.</p> <p>It is unclear, however, what impact these statutory exemptions may have, if any, on the analysis at common law regarding the characterization of independent contractors. Therefore, there is a risk that business and IT consultants who are exempt from the <i>ESA</i> could still be an employee or dependent contractor at common law. This may create employment-related obligations for an organization, including the requirement to give reasonable notice of termination. Until there is clarity on these new exemptions, employers should continue to consider the common law tests with respect to the status of the worker.</p> <p>For more information from the Ontario government on the business and IT consultant exemptions, please click here.</p>			

Infectious Disease Emergency Leave, O Reg 228/20			
Topic	Important Dates	Section(s)	Description of Impact
Paid infectious disease emergency leave	Effective from April 19, 2021 to March 31, 2023	Sections 50.1 and 50.1.1 ESA Section 11 O Reg 228/20	ESA was amended on April 29, 2021 to require employers to provide eligible employees with up to three days of paid infectious disease emergency leave for certain reasons related to COVID-19. Paid infectious disease emergency leave was retroactive to April 19, 2021, and subsequently ended on March 31, 2023.
Importance	<p>Paid infectious diseases emergency leave is no longer in effect. Employers should adjust internal COVID-19 accommodations accordingly.</p> <p>Important to note that unpaid infectious disease emergency leave continues to be in effect pursuant to subsection 50.1(1.1) of the ESA.</p> <p>For more information from the Ontario government on infectious disease emergency leave, please click here.</p>		

Licensing - Temporary Help Agencies And Recruiters, O Reg 99/23			
Topic	Important Dates	Section(s)	Description of Impact
Who is required to have a licence?	Effective on January 1, 2024	Section 1 and 2 O Reg 99/23	<p>Licensing requirements for THAs and Recruiters:</p> <p>Every legal entity that operates as a temporary help agency (THA) or that acts as a recruiter, as defined under the ESA, must apply for a licence.</p> <p>Per section 1(1) of the ESA, a THA is “an employer that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer”. If a THA is located outside of Ontario, but assigns employees to work in Ontario, the licensing requirements apply.</p> <p>A recruiter includes any person who, for a fee, finds or attempts to find employment in Ontario for prospective employees, or finds, or attempts to find, employees for prospective employers in Ontario. The term “recruiter” is now defined in section 1 of O Reg 99/23. A recruiter does not have to be located in Ontario for the licensing requirements to apply.</p> <p>If a legal entity operates as a THA and acts as a recruiter, it must submit two applications: one to operate as a temporary help agency and one to operate as a recruiter. Each application requires an application fee and letter of credit.</p>
When to apply for licensing?	Early application	Sections 74.1.1 and	Transitional Rule

	began in July 2023	74.1.2. Part XVIII.1	<p>Applicants who applied for a THA or recruiter licence before January 1, 2024 and have not received a decision by that date may continue to operate on and after January 1, 2024 until the Ministry provides a written decision.</p> <p>Applications after January 1, 2024 Applicants cannot operate as a temporary help agency or recruiter until the Ministry issues a licence.</p>
How to apply for licensing?	Early application began in July 2023	Sections 74.1.3 and 74.1.10	<p>Online Application</p> <p>Applications are submitted online at Ontario.ca</p>
Users of temporary help agencies and recruiters.	Effective January 1, 2024	Sections 74.1.1, 74.1.2 and 74.1.7	<p>Users of temporary help agencies and recruiters</p> <p>Where the Ministry refuses to provide a licence, the affected THA or recruiter must give written notice to the applicable client, employee, and employer within 30 days of the notice of refusal.</p> <p>Clients Clients of THAs cannot knowingly engage or use the services of a THA unless the THA holds a licence to operate.</p> <p>Employers Employers, prospective employers and other recruiters cannot knowingly engage or use the services of any recruiter unless the recruiter holds a licence to act as a recruiter.</p>
What are the repercussions?	Starting January 1, 2024	Sections 108 and 113	<p>Penalties</p> <p>If an employment standards officer finds a contravention of any of the following prohibitions, the officer may issue a notice of contravention (see below):</p> <ul style="list-style-type: none"> - operating as a THA without a licence; - acting as a recruiter without a licence; - clients knowingly using an unlicensed THA; or - employers, prospective employers or other recruiters knowingly engaging or using the services of an unlicensed recruiter. <p>An employment standards officer can issue a notice of contravention with the following penalties:</p> <ul style="list-style-type: none"> - \$15,000 for a first contravention; - \$25,000 for a second contravention in a three-year period; or. - \$50,000 for a third contravention in a three-year period.
Importance	In an effort to enhance protection for temporary workers and workers being recruited, the Ontario government introduced licensing requirements for THAs and recruiters.		

Businesses that use THAs or recruiters must be aware that, as of January 1, 2024, it will be a violation of the *ESA* to knowingly engage or use the services of an unlicensed THA or recruiter. Employers must familiarize themselves with these new licensing requirements and should make appropriate inquiries of any THAs or recruiters with whom they work.

For more information from the Ontario government, [please click here](#).

Accessibility for Ontarians with Disabilities Act, 2005, SO 2005, c 11 (AODA)

Topic	Description	Deadline
Deadline for filing accessibility compliance report	All Ontario businesses or non-profit organizations with 20 or more employees and designated public sector organizations must file an accessibility compliance report by December 31, 2023.	December 31, 2023
How to file a compliance report?	Download and complete the following form: https://forms.mgcs.gov.on.ca/en/dataset/on00468 .	
What are the website accessibility requirements? O Reg 191/11, s 14 (1).	<p>Applicability of Website Accessibility Requirements</p> <ul style="list-style-type: none"> - Businesses or organizations with 50 or more employees or designated public sector organizations - Direct control or control through a contractual relationship over the website's appearance, functionality and content. <p>Accessibility Requirements</p> <ul style="list-style-type: none"> - Websites and web content published on or after January 1, 2012 must meet WCAG 2.0 level AA. At a high level, this includes: <ul style="list-style-type: none"> - Distinguishable content - Navigable content - Readable text content - Predictable web pages - Input assistance - Internal websites (intranet or extranet) do not have to meet WCAG 2.0 levels A/AA. However, if an individual asks the organization to make content available to them in an alternate accessible format (such as large print or braille), the organization must work with the individual to meet their needs. <p>Failure to Comply</p> <p>If an organization cannot convert content, the organization must provide individual seeking visual accessibility with an explanation why the information or communication is unconvertible and provide a summary of the unconvertible content.</p>	Effective on January 1, 2021; deadline is December 31, 2023
Importance	<p>All Ontario businesses with 20 or more employees and public sector organizations must meet this mandatory compliance report deadline. For more information from the Ontario government on completing an accessibility report, please click here.</p> <p>For more information from the Ontario government on website accessibility requirements, please click here.</p>	

Occupational Health and Safety Act, RSO 1990, c O.1 (OHSA)

Topic	Important Dates	Section(s)	Legislative Changes
<i>Working for Workers Act, 2022, SO 2022, c 7 - Bill 88</i>	Effective on June 1, 2023	Section 25.2 of the OHSA	<p>Schedule 4 of Bill 88 added section 25.2 to the OHSA, which requires employers who become aware, or ought reasonably to be aware that there may be a risk of a worker having an opioid overdose at the workplace to:</p> <ul style="list-style-type: none"> - Ensure that, at all times, there is at least one naloxone kit available that is in good working condition. - Comply with prescribed requirements regarding the provision and maintenance of the naloxone kit. - Ensure that the worker in charge of the naloxone kit receives prescribed training to administer naloxone and to acquaint the worker in charge of the kit with any hazards related to the administration of naloxone. <p>See Naloxone Kits, O Reg 559/22 for details regarding the prescribed requirements for the maintenance and contents of naloxone kits.</p>
Importance	<p>Naloxone is a drug that can temporarily reverse the effects of an opioid overdose and can either be injected in a muscle or given as a nasal spray. Since June 1, 2023, Ontario employers are required to provide naloxone kits in the workplace and worker training on how to administer naloxone when an employer becomes aware, or ought reasonably to be aware, of the following scenarios:</p> <ul style="list-style-type: none"> • There is a risk of a worker opioid overdose. • There is a risk that the worker overdoses while in a workplace where they perform work for the employer. • The risk is posed by a worker who performs work for the employer. <p>If all of these scenarios are present, the employer must comply with the OHSA requirements to provide naloxone in the workplace.</p> <p>For more information from the Ontario government, please click here.</p>		



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TAB 1B

24th Employment Law Summit

Federal Legislative Developments

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October 11, 2023



Federal Legislative Developments

Claire Boychuk, Nelligan Law

The author is grateful for the support of articling student Emma Lodge in preparing this article.

Overview

This article begins with an overview of federal privacy legislation and the newly issued guidelines from the Office of the Privacy Commissioner of Canada on privacy in the workplace. It then highlights key privacy legislation to watch on the federal stage in the next year. Finally, it summarizes recent changes to Part III of the *Canada Labour Code*, including amended statutory termination entitlements.

Overview of Federal Privacy Legislation

There are two key pieces of privacy legislation in Canada, both of which focus on safeguarding personal information. The governing principle for both acts is that *“individuals should, to the greatest extent possible, have control over what is known about them and by whom”*¹.

The [Privacy Act](#), RSC 1985, c P-21 applies to the public sector and in the employment context to 260 federal government institutions. The *Privacy Act* regulates the collection, use, retention, and disclosure of personal information when an individual is interacting with the government including in their employment with the federal government.²

The [Personal Information Protection and Electronic Documents Act](#), SC 2000, c 5 (PIPEDA) applies to the private sector and to employers that are governed by federal legislation. Recall that the *Constitution Act, 1867* does not provide that privacy laws fall under the exclusive jurisdiction of

¹[Canada's Federal Privacy Laws \(Library of Parliament\)](#)

²[The Privacy Act legislation and regulations - Office of the Privacy Commissioner of Canada](#)

either level of government. This means that when the federal government enacts privacy legislation, it must do so within the confines of its section 91 powers. As such, PIPEDA was enacted relying upon the federal government’s “general trade and commerce” power in s. 91(2) of the *Constitution Act, 1867*, meaning that it has been drafted within the boundaries of that power and focuses on commercial activities. As such, PIPEDA only applies to commercial or for-profit organizations.

The Act governs the use, collection, and disclosure of personal information and balances the right to privacy with reasonable commercial needs. PIPEDA applies in all provinces except those that have “substantially similar” private sector privacy laws (currently Alberta, British Columbia, and Quebec). Ontario has narrow legislation addressing particular privacy issues – such as the [electronic monitoring policy requirement](#)³, and Ontario’s broader [Personal Health Information Protection Act](#). However, Ontario does not have comprehensive privacy legislation that fully displaces PIPEDA.⁴

Both the *Privacy Act* and PIPEDA are under the purview of the Office of the Privacy Commissioner of Canada (OPC), an independent agent who ensures compliance with the *Acts*. The Commissioner conducts investigations into privacy breaches but does not have the power to issue penalties or make binding orders.⁵

Overview of the Office of the Privacy Commissioner’s new guidelines

On May 29, 2023, the Office of the Privacy Commissioner of Canada (OPC) published [new guidance on workplace privacy for employers that are subject to federal privacy legislation](#). The guidelines carry interpretational force; they do not displace existing legislation but provide practical tips for employers on how to best meet their obligations under existing legislation.

³ In 2022, Ontario passed [Bill 88, Working for Workers Act](#) which, among other changes, requires employees with more than 25 employees to create a written policy regarding the electronic monitoring of employees. While this change does not create any new privacy rights for employees, it does require employers to be transparent and open about policies in place.

⁴ For a discussion of privacy legislation and provincial legislative competence, see Josh Nisker, [PIPEDA: A Constitutional Analysis](#)

⁵ [Canada’s Federal Privacy Laws \(Library of Parliament\)](#)

In launching the new guidelines, the OPC has emphasized the business case for diligent privacy practices: *“whether or not privacy is protected by legal requirements, fostering a workplace culture where privacy is valued and respected contributes to morale and mutual trust, and makes good business sense.”*⁶

The OPC has also made clear that employers cannot contract out of privacy rights; employees *“cannot consent to having their personal information handled contrary to legal requirements.”*⁷

The guidelines also set out the federal posture on employee monitoring. Employers must ensure that the measures they take to monitor employees are “specific, targeted, and appropriate in the circumstances.”⁸ All measures should be transparent, and employees must know how they will be monitored, as well as what any potential consequences might be of that monitoring.

Eight Practical Tips for Employers from the OPC

1. Examine all relevant legal obligations and authorities

- The *Privacy Act*, PIPEDA, provincial regulations
- Also consider collective agreements, human rights law, workplace policies

2. Map what employee information is being collected, used, and disclosed

- Examine what information is being collected to determine if it is “personal information”
- Determine the sensitivity of this information and what privacy measures are required

3. Conduct Privacy Impact Assessments (PIAs)

- PIAs are a risk management process that is required under the *Privacy Act*

⁶ [Privacy in the Workplace - Office of the Privacy Commissioner of Canada](#)

⁷ *Ibid.*

⁸ *Ibid.*

- The OPC has a [Guide to the Privacy Assessment Process](#) that can help to identify and minimize privacy risks
- Organizations under PIPEDA do not have a legal requirement to undertake a PIA, but may find it helpful in assessing their own privacy risks

4. Test your proposed employee management information practices

- Before implementing any new practices, ensure that they have been tested and the amount of employee information collected, used, and disclosed is appropriate

5. Limit collection

- Collect only what is reasonable and required for the purposes

6. Be transparent and open

- Develop policies that are accessible and clear, and ensure that they are communicated to employees before being put into practice. A policy should include:
 - What personal information is being collected from employees;
 - The purpose for which the personal information is being collected;
 - How the personal information will be collected;
 - How the information will be used, including potential consequences for employees;
 - How long the personal information may be retained

7. Respect key privacy principles

- Some other key principles include
 - Accountability
 - Accuracy of personal information
 - Limiting collection, use, disclosure, and retention

- Having security safeguards in place to protect personal information
- Openness of policies and practices
- Individual access
- Affected individuals being able to challenge compliance

8. Be aware of inappropriate practices/no-go zones

- Employers should be aware of unequal positions of power of employees and ensure that they are not requesting information that employees may feel they are pressured to produce

To review the detailed guidelines, visit the OPC site to learn more: [Privacy in the Workplace \(OPC\)](#).

Looking to the Future

Following years of calls to reform federal privacy legislation, Parliament is once again studying comprehensive privacy legislation that would overhaul existing regulations. At present, Canadian privacy law focuses more on data protection than the exercise of privacy rights.⁹ The current legislation has remained largely unchanged since it was first enacted in 2004, and as former Privacy Commissioner Daniel Therrien stated, the Canadian privacy regime has *“sadly fallen behind the laws of many other countries in the level of privacy protection provided to citizens.”*¹⁰

Legislative Updates

In 2022, the government of Canada introduced [Bill C-27: the Digital Charter Implementation Act, 2022](#), which completed second reading and was referred to committee on April 24, 2023.

⁹ [Canada’s Federal Privacy Laws \(Library of Parliament\)](#)

¹⁰ [News release: Canada’s access to information and privacy guardians urge governments to modernize legislation to better protect Canadians - Office of the Privacy Commissioner of Canada](#)

Bill C-27 would create two separate Acts: the *Consumer Privacy Protection Act* and the *Personal Information and Data Protection Tribunal Act*.¹¹ Bill C-27 would achieve several goals. It would overhaul PIPEDA and replace it with a consumer privacy protection act. Additionally, it would introduce new powers to the OPC, modernize the laws themselves, and create an artificial intelligence and data act to establish a framework for new technologies.¹² Bill C-27 would make significant changes to the privacy landscape in Canada, and federally regulated employers should continue to monitor the legislation as it advances through committee.

Overview of the recent Canada Labour Code updates

There have been several changes to the [Canada Labour Code](#) in the last year, many of which give new responsibilities to employers.¹³

Now in Force

- **December 1, 2022:** All employees in the federally regulated private sector are now entitled to 10 days of paid medical leave per year.¹⁴
- **June 12, 2023:** The minimum age of employment was changed from 17 to 18 years of age. Employers may now only employ a person under the age of 18 in specific non-hazardous occupations. A person under the age of 18 may only work when not required to attend school, when the work is non-hazardous, when the work is not prohibited by the *Canada Labour Standards Regulations*. Moreover, the work must take place before 11 pm or after 6 am.¹⁵

¹¹ For a review of the constitutionality of the legislation, see [The Constitutional Validity of Bill C-11, the Digital Charter Implementation Act - Office of the Privacy Commissioner of Canada](#)

¹² For more discussion on that see [Regulating AI In Canada : A Critical Look at the Proposed Artificial Intelligence and Data Act | CanLII](#)

¹³ Learn more and stay informed by monitoring the Canada Gazette and the [Canada Labour Program Forward Regulatory Plan](#)

¹⁴ [Government of Canada: 10 days of paid sick leave now in force for nearly 1 million federally regulated workers across Canada](#)

¹⁵ [Government of Canada: Pay and minimum wage, deductions, and wage recovery](#)

- **July 9, 2023:** Employers must reimburse employees for reasonable work-related expenses. This only applies to expenses made on or after the day this regulation comes into force.¹⁶

Saturday October 7, 2023

- On July 9, 2023, regulation came into force that requires employers to provide information to employees regarding their employment rights and obligations. This information must be provided to employees within 30 days of commencing employment and provided if they are terminated. This material must also be posted in an accessible place in the workplace.¹⁷ This information will be provided by the Minister but has yet to be released.
- Also on July 9, 2023, regulation came into force that requires employers to provide employees with a written employment statement within 30 days of commencing their employment.¹⁸ The statement is to include information including, but not limited to: job title, work address, the term of employment, hours of work, overtime rules and wage rate. Existing employees should receive their written statement by October 7. Any modification to the employment terms might require an updated employment statement.

December 15, 2023

- Federally regulated employers will be required to provide free menstrual products to their employees and provide disposal containers at every workplace toilet.¹⁹ The amendment to require free menstrual products is part of a broader platform to address the financial barriers to accessing menstrual products and, more broadly, to advance gender equality in the workplace.

¹⁶ [Regulations Amending Certain Regulations Made Under the Canada Labour Code \(Reimbursement of Reasonable Work-Related Expenses\)](#)

¹⁷ [Canada Labour Code s 253.1\(1\)](#)

¹⁸ [Regulations Amending Certain Regulations Made Under the Canada Labour Code\(Employment Statement\)](#)

¹⁹ [Regulations Amending Certain Regulations Made Under the Canada Labour Code \(Menstrual Products\)](#)

February 1, 2024

- **Amendments will come into force that create greater termination entitlements.**²⁰

Section 230 of the *Code* will be amended to provide employees who have completed at least three years of continuous service a longer notice period when they are terminated without cause; up to a maximum of eight weeks' notice or pay in lieu of notice.

- Employees will also be required to and require employers to provide a written statement to employees upon termination that lists their vacation benefits, wages, severance pay and other benefits and pay arising from employment at the time of termination.

²⁰ [Government of Canada: Termination, layoff or dismissal](#)



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TAB 2

24th Employment Law Summit

Major Case Law Update

Kumail Karimjee

Karimjee Resolutions and Karimjee Law

Mika Imai

October 11, 2023



Major Case Law Update

Kumail Karimjee and Mika Imai

This paper reviews significant employment law decisions from the last year (October 2022 to September 2023). Given that every case is no doubt significant to the counsel and clients involved, let us start by apologizing to those we have missed. As consolation, let us not forget that recognition as “significant” is sometimes a dubious honour.

1. CERB not deductible from wrongful dismissal damages.

Yates v Langley Motor Sport Centre Ltd., 2022 BCCA 398 [Yates]

As with so many other legal issues relating to COVID-19, there was considerable uncertainty about whether CERB benefits received should be set off from wrongful dismissal damages. The issue was litigated in various provinces across Canada with divergent results. Now, in addition to several Ontario Superior Court decisions, there are two appellate decisions from other provinces finding that CERB benefits are not deductible.

Yates is the first appellate decision to weigh in on CERB deductibility. In reaching its decision, the BCCA applied the SCC’s reasoning in *IBM Canada Ltd. v Waterman*, 2013 SCC 70 [Waterman]¹ on the issue of compensating advantages, that is the situations where:

...the plaintiff receives a benefit that would result in compensation of the plaintiff beyond [their] actual loss and *either* (a) the plaintiff would not have received the benefit but for the defendant’s breach, *or* (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant’s breach [emphasis in original] (para 32).

A compensating advantage issue arises when a plaintiff receives a benefit that would over-compensate them for their actual loss and the benefit is sufficiently connected to the employer’s breach of contract. The BCCA accepted that a “compensating advantage problem” arose in *Yates* because CERB benefits were “clearly intended ‘to be an indemnity for the sort of loss resulting from the defendant’s breach’” (para 44, quoting from *Waterman* at para 32). This was not the end of the analysis. There are well-recognized exceptions that apply to compensating advantages, such as charitable gifts and private insurance. Further, whether a compensating advantage should be deducted depends “on justice, reasonableness and public policy.”

In assessing deductibility, drawing on *Waterman*, the court enumerated several factors including: the nature and purpose of the benefit and specifically how closely the benefit reflects an indemnity for the same type of loss, whether the plaintiff contributed to the benefit, and

¹ In *Waterman*, the issue was whether pension benefits received by an employee should be set off from wrongful dismissal damages (they were not).

broader policy considerations. The three main policy considerations in assessing deductibility are punishment, deterrence, and the provision of incentives for socially responsible behaviour.

The BCCA determined that the trial judge erred in failing to consider the “broader policy considerations” identified in *Waterman*. The BCCA determined that a consideration of broader policy considerations supported non-deductibility. The BCCA stated that it seems wrong for the employer that has breached the employment contract to enjoy a windfall from an income support program for workers impacted by the pandemic.² The policy considerations applied were the desirability of equal treatment of those in similar situations, incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

Regarding equal treatment, the BCCA sought to avoid a situation where the date of an employee’s termination (i.e., during or after a temporary layoff) would dictate the treatment of CERB.³ For example, if termination occurred during the temporary layoff period, the employee would presumptively remain entitled to CERB during the layoff up to the termination, but if termination fell even a day after expiry of the temporary layoff period, CERB would be deducted for the entire layoff period.

Relatedly, the BCCA was concerned that if the timing of termination affected an employer’s potential damages, it might incentivize employers to delay termination until after the temporary layoff period.

The BCCA further noted that deducting CERB from damages would create uncertainty because the amount to be deducted might not be known until after the realization of any income tax impacts.

Finally, the BCCA determined that the logic of the compensating advantage problem is to address situations where the employee would be better off because of the employer’s breach. However, CERB was an emergency measure to provide financial aid to mitigate harm in a period of great uncertainty when many people lost their livelihoods. In this context, the BCCA noted that the combination of CERB and wrongful dismissal damages did not really leave individuals “better off.”

Oostlander v Cervus Equipment Corporation, 2023 ABCA 13 [*Oostlander*]

Oostlander found the BCCA’s reasoning in *Yates* compelling and followed it. Of note, the plaintiff in *Oostlander* was not terminated due to the pandemic (para 18). The ABCA therefore questioned whether the law around compensating advantage applied (para 22). The ABCA

² The same analysis was applied in earlier case law cited determining that employment insurance and welfare benefits are not deductible from damage awards.

³ British Columbia’s *ESA*, like Ontario’s, provided for a retroactive deemed termination at the end of a lay off period. As a result, the timing of the termination could impact whether CERB benefits overlapped with the period for which wrongful dismissal damages were assessed. This could cause inconsistent results for similarly situated employees.

deemed it unnecessary to resolve this issue, as it agreed with the BCCA that, even if CERB were a compensating advantage, broader policy considerations favoured non-deduction (para 22).

Tan v Stostac Inc., 2023 ONSC 2121 [Tan]

Ontario counsel may be assisted by *Tan*, a recent Ontario decision following both *Yates* and *Oostlander*.

2. Change in substratum applied with employee who was always a senior executive with no change in title. Substance matters more than form and a fundamental expansion in duties may render a termination clause unenforceable.

Celestini v Shoplogix Inc., 2023 ONCA 131 [Celestini]

The principal issue in *Celestini* was the common law doctrine of “changed substratum”. The ONCA explained the doctrine as follows:

The doctrine applies where there have been fundamental expansions in the employee’s duties after the employment contract was made, such that the substratum of the employment contract has disappeared or substantially eroded, or it can be implied that the contract could not have been intended to apply to the role ultimately occupied by the employee (para 1).

The motion judge in *Celestini* found that the doctrine applied and in the result the employer was unable to rely on a termination clause limiting notice. This conclusion was based on a fundamental and substantial increase in the employee’s responsibilities over the 12 years following execution of the employment agreement. The employee, pursuant to the contract and in title, was the employer’s CTO. However, after the hiring of a new CEO and the reduction of senior management personnel, the employee’s workload and responsibilities increased dramatically. Specifically, the Plaintiff took on managing aspects of sales and marketing, directing additional managers and senior staff, travelling to pursue international sales, handling infrastructure responsibilities, and soliciting investment funds. Concomitantly, the Plaintiff’s compensation significantly increased through a new incentive compensation plan.

The Court of Appeal rejected the employer’s argument that the doctrine required changes resulting from a promotion. In this case, the employee had always been a senior executive and held the same job title of CTO under the employment agreement and at the time of hire. The court held that there must be a fundamental expansion in the employee’s duties, but this does not require a title change as the assessment is “one of substance, not form.” Title is just one contextual factor, but the focus is on the duties and degree of responsibility of the employee.

The Court of Appeal also rejected the employer’s argument that the changes were incremental, not fundamental, as this finding was entitled to deference on appeal and the ONCA did not find any palpable or overriding error in the motion judge’s findings regarding the nature of the changes and the meaning of the original contract (para 44).

Of note, the general language in the contract providing that the employee would perform “any other duties that may reasonably be assigned to him by the CEO or the board” did not insulate the contract from attack under the change in substratum document.

The takeaway for employer counsel, as referenced in the court’s decision, is that it is possible to contract out of the change of substratum doctrine in two ways. First, an employment contract may state that the termination provisions will apply even if the employee’s position, responsibilities, salary or benefits change. Second, written employment contracts will remain enforceable despite fundamental changes in duties if the employer and employee ratify its ongoing applicability when changes occur (para. 35).

3. Once (or three times) again, employers must pay incentive compensation during the notice period.

Celestini v Shoplogix Inc., 2023 ONCA 131

While the central question in *Celestini* related to the doctrine of changed substratum (discussed above), bonus payment on termination was also at issue.

The motion judge found that the employee was entitled to bonus amounts owing during the 18-month notice period, less the amount of accrued bonus paid on termination (para 4). The employer had argued that, notwithstanding any application of the changed substratum doctrine, the Incentive Compensation Agreement (“ICA”) ousted the employee’s entitlement to bonus on termination. The ICA included the following language:

... if prior to end of the Compensation Period, Shoplogix terminates Employee's employment for a reason other than Cause, then Shoplogix shall pay to Employee the Incentive Compensation earned up to the date of termination within thirty (30) days of the effective date of termination (para 48).

The employer maintained its position on appeal, and it was dismissed by the ONCA:

The ICA provides that if Shoplogix terminated Mr. Celestini’s employment for a reason other than cause, then Shoplogix would pay the bonus earned up to the date of termination. Like the clauses considered in *Matthews* and *Lin*, s. 2 of the ICA does not unambiguously oust Mr. Celestini’s right to damages upon the circumstances that actually arose, that is, a without cause termination without reasonable notice - termination without cause must be taken to mean a lawful termination following the reasonable notice period. I agree with the motion judge that the ICA did not oust the right to common law damages representing the loss of bonus over the reasonable notice period (para 55).

The ONCA also declined to find a reversible error with respect to the motion judge’s three-year averaging approach for the bonus entitlement (para 61).

Nader v University Health Network, 2022 ONCA 856 and 2022 ONSC 447 [*Nader*]

Nader dealt with the rights of an employee when terminated while on a secondment with another entity and bonus entitlement during the notice period.

The Plaintiff was an executive with the University Health Network (“UHN”) who took a secondment with Ontario Health. He entered into a two-year secondment agreement which provided that throughout the secondment he would remain an employee of the UHN.

When Ontario Health decided to terminate the secondment arrangement and the UHN did not return him to his original position, the Plaintiff argued that he was entitled to be paid out for the period remaining under his two-year secondment agreement AND receive contractual notice under his employment agreement with his employer. The court disagreed. The Court of Appeal upheld the finding that a secondment agreement is not an employment agreement, that the employee remained an employee of the UHN during the secondment, and that the secondment agreement contemplated early termination. As a result, upon termination, the employee was only entitled to the termination entitlements provided for in his employment agreement with UHN.

As for the bonus claim, the employment agreement simply provided for the payment of 12 months of “salary” upon termination. The term “salary” was undefined, and the employee’s evidence was that the bonus was a substantial and integral part of his compensation. Of note, the Court of Appeal held that the employee was entitled to payment of the “discretionary performance-based bonus” during the 12-month notice period on the basis that it was “properly considered part of the compensation owed on termination.” The motion judge had denied the bonus claim on the basis that the plaintiff had failed to put forward sufficient evidence of performance and of whether he would have been eligible for 25% or some lesser amount. The Court of Appeal overturned that finding on the basis that the motion judge overlooked the evidence that the Plaintiff had received bonuses in three prior years. This evidence was held to be sufficient to award performance-based bonus during the notice period.

Nader is a reminder that leaving key terms such as “salary” undefined in a termination clause will likely result in the adoption of a “total compensation” approach to the assessment of damages.

Maynard v Johnson Controls Canada LP, 2023 ONCA 392 [*Maynard*]

In *Maynard*, the ONCA upheld a finding that an employee was entitled to unvested Restricted Stock Units (“RSUs”) on termination despite the inclusion of a forfeiture provision in plan terms. *Maynard* can be contrasted with *Battison v Microsoft Canada Inc.*, 2021 ONCA 727 [*Battison*] where the ONCA found that the employee was not entitled to unvested RSUs. The key factual difference is the extent of the employer’s efforts to notify employees of the plan terms. In *Battison*, the employer sent annual emails to eligible employees requiring acceptance of the

stock award agreement and accompanying plan documents; no such efforts were made by the employer in *Maynard*.

In *Maynard*, the employee's compensation was altered 10 years into employment to include a bonus and incentive plan distributed through RSUs. The RSU plan included a forfeiture provision for RSUs that were still subject to a restriction period at the time of termination. The motion judge found that the employee only learned of the forfeiture provision through the lawsuit. As such, it did not form part of the employment agreement. Further, given that the forfeiture clause provided for discretionary relief, it was found to be ambiguous.

On termination, the employee refused to sign a release for a contractually enhanced termination package because it did not include his bonus or the value of the RSUs, which constituted 37% of his compensation package (paras 5-6).

Of note, the employee did not challenge termination provision in the employment agreement, but rather sought the contractually stipulated severance payment with RSUs rather than just base salary and benefits as offered by the employer. The employment agreement provided for payment on termination of a "lump-sum equivalent to 4 weeks of pay based on your salary for each completed year of service." The motion judge held that the termination provision with its reference to "4weeks of pay based on your salary" provided for "full compensation" and therefore included equity and bonus amounts. In the absence of a clear limitation, the employee was entitled to RSUs under the contractual lump-sum severance payment.

The ONCA upheld the motion judge's decision:

Because Mr. Maynard was not aware of the forfeiture provision and did not agree to it when the Share and Incentive Plan came into force, the exclusion of his RSUs from the calculation in para. 16 of the employment agreement breached that provision. It was open to the motion judge to interpret the payments required under para. 16 as not being limited to base salary and specified benefits but to include the bonus/RSU elements of Mr. Maynard's compensation (para 9).

The takeaway is that, despite *Battison*, in addition to requiring clear plan terms limiting rights under stock plans, courts may look for clear evidence demonstrating that the employer communicated restrictive plan terms to the employee. Further, like in *Nader* (above), general compensation terms like "salary" or "pay" in the absence of enforceable limiting language will often be interpreted in favour of employees to include all forms of compensation including bonus and equity.

4. Proving a failure to mitigate typically requires affirmative evidence and is certainly not a walk in the park.

Lake v La Presse, 2022 ONCA 742 [*Lake*]

On a summary judgement motion, the employee in *Lake* was awarded 8 months' notice; however, the motion judge discounted the employee's damages by two months for failure to mitigate. The ONCA determined that the motion judge erred in doing so. In the motion decision, the judge justified the two-month reduction based on a series of inferences:

. . . I infer that, had the [appellant] expanded the parameters of her job search, searched earlier, and applied for more positions, her chances of obtaining a position would have improved significantly. Although there is no direct evidence in front of me of other positions that the [appellant] could have applied for, I find it is reasonable to assume that they existed. If vice-president roles were available, more junior roles were also available. The [appellant] chose unreasonably to limit her job search, which had a corresponding impact on her ability to find work (para 7).

The employee successfully appealed. In its decision, the ONCA reviewed and clarified the law on mitigation:

- Under the test for mitigation, the defendant must prove,
 1. that the plaintiff failed to take reasonable steps to mitigate her damages; and
 2. that if she had done so she would have been expected to secure a comparable position reasonably adapted to her abilities.
- Employees are not obligated to search for a lesser paying job after a reasonable period of searching for similar employment.
 - “The obligation of a terminated employee in mitigation is to seek ‘comparable employment’, which typically is employment that is comparable in status, hours and remuneration to the position held at the time of dismissal [citation removed]” (para 19).
- When assessing whether jobs are comparable, the focus should be on job duties, not on position title.
 - “Without evidence contradicting the appellant’s assertion that the vice-president roles had similar job responsibilities to her previous employment, the motion judge speculated, based on the title of the positions alone, that such positions were not comparable” (para 25).
- The onus is on the employer to prove a failure to mitigate; meeting this onus will typically benefit from affirmative evidence.
 - “In the absence of affirmative evidence from the respondent, or any suggestion in cross-examination that the appellant failed to apply for an available position that was comparable in nature to her former position, the record did not support

the motion judge's conclusion that the appellant failed to make reasonable efforts to mitigate her damages" (paras 27-28).

Though the ONCA agreed with aspects of the motion judge's decision, including the finding that the employee waited too long to commence her job search, a late start was not sufficient to support a reduction in damages. A breach of the duty to mitigate is only relevant if the employer satisfies the court that, with reasonable steps, the employee "would likely have found a comparable position" (para. 32). Practically speaking, the ONCA appears to be saying that it is not enough to show that comparable positions may have been "available" as the test requires the employer to prove that, if reasonable steps were taken, the employee would have found comparable employment (para. 34). This reflects a very high standard for an employer to meet.

5. Employment discrimination based on the *Code* ground of citizenship found against non-citizen, non-permanent resident, international student when employer required proof that candidate "permanently eligible to work in Canada".

Imperial Oil Limited v Haseeb, 2023 ONCA 364

This case has generated significant attention as it woven its way through the HRTO, Divisional Court and the ONCA. While the ONCA decision itself does not add much upon the HRTO decision, it is notable in that it confirms the application of the *Human Rights Code* (the "*Code*") to certain non-citizen residents and sets limits on the types of work permit restrictions employers can set.

By way of background, Haseeb was an international mechanical engineering student at McGill University on a student visa. Once graduated, he would be entitled to a Post-Graduate Work Permit ("PGWP"), the only condition being a university letter attesting to the completion of his degree. The PGWP would enable Haseeb to work in Canada unrestricted for up to three years, during which he could apply for permanent resident status.

While in his final semester, Haseeb applied to Imperial. Imperial required applicants be "permanently eligible to work in Canada" (para 10). To avoid getting screened out of the process, Haseeb lied and answered that he was permanently eligible to work (para 11).

Haseeb was the top-rated candidate in his group and was offered the position, conditional on proof that he was able to work in Canada on a permanent basis (i.e., Canadian birth certificate, citizenship certificate or certificate of permanent residence). Haseeb disclosed that he was an international student and would receive a PGWP upon graduation. Haseeb provided a link to an immigration website and explained that the PGWP would be valid for three years. Imperial withdrew its offer.

At the HRTO, Haseeb asserted discrimination based on citizenship. Imperial argued that the distinction was based on immigration status not citizenship because permanent residents were also permitted to work. Further, the job offer was withdrawn because of Haseeb's dishonesty, not because he was unable to fulfil the permanent eligibility requirement.

The HRTO found Imperial's eligibility restriction constituted direct discrimination, stating the following:

- The *Code* distinguishes between citizens and non-citizens, with the latter including those with varying residence statuses and entitlements to work in Canada (para 108). To obtain protection under the *Code*, Haseeb only needed to establish the discriminatory treatment was linked to his being a non-citizen of Canada (para 108).
- The fact that Imperial allowed permanent residents to work did not negate the discrimination; partial discrimination against a group is still discrimination (para 109).
- Imperial did not establish that Haseeb's dishonesty was the only reason for withdrawing the offer; Haseeb's citizenship status was also a factor.
- There was no doubt that Haseeb would obtain a PGWP shortly after graduation and the evidence of immigration experts suggested that Haseeb could reasonably anticipate obtaining permanent residency status within 6-18 months of applying.
- In the alternative, if the discrimination was not direct, Imperial had not established the *bona fide* occupational requirement defence.

The majority at the Divisional Court quashed the HRTO's decision and declined to remit the matter for a new hearing. The Divisional Court concluded that "permanent residence" was not a recognized ground under the *Code* and was not captured by "citizenship". Further, the fact that permanent residents (i.e., non-citizens) were allowed to work at Imperial was contrary to a finding of discrimination.

The ONCA overturned the decision of the Divisional Court. On the standard of review, the ONCA found that the majority of the Divisional Court stated the appropriate standard of review (reasonableness), but erred in its application:

... the majority failed to give "respectful attention" to the reasons of the tribunal. Although the majority said it was applying a reasonableness standard, the substance of the analysis by both judges in the majority approached the review by asking how they themselves would have decided the issues and restarted the analysis from scratch (para 46).

In concluding that the HRTO's decision was reasonable, the ONCA rejected a rigid approach to "citizenship" under the *Code* and re-affirmed that partial discrimination is still discrimination:

The fact that the policy does not exclude all non-Canadian citizens does not "cure" its discriminatory effect. Rather, it results in partial discrimination (against a subset of non-Canadian citizens eligible to work in Canada), rather than full discrimination (against all non-Canadian citizens eligible to work in Canada) (para 154).

The ONCA also addressed the apparent floodgates concerns of the Divisional Court:

What appears to have driven the reasoning of the majority in the Divisional Court was a floodgates concern that if Imperial's treatment of the appellant constituted discrimination on the basis of citizenship, then, in the view of the majority, any non-Canadian citizen anywhere in the world could claim discrimination in employment on the basis of citizenship if they were not considered for a job in Canada.

[. . .]

The analogy posited by the majority of the Divisional Court is flawed. It fails to recognize the fundamental distinction between PGWP-holders and other non-Canadian citizens . . . The tribunal was clear in its reasons that the central fact that drove its analysis was that when the appellant received his PGWP on graduation (of which there was no doubt based on the tribunal's findings), he would have the right to work full-time, anywhere in Canada, for any employer. The tribunal's reasoning would not extend to a person without an unrestricted right to work in Canada (paras 196-97).

The ONCA's extensive review of human rights principles and analysis at paragraphs 49 to 69 may also be of interest to counsel.

The context here is that Canada actively seeks to attract huge numbers of international students and, in so doing, provides a gateway to work permits and permanent residence to international students. Given this context, employers will need to carefully consider eligibility requirements imposed for employment so as not to exclude non-citizens who have or are likely to obtain a right to work in Canada.

6. Employee silence during a period of temporary lay-off does not constitute condonation.

Pham v Qualified Metal Fabricators Ltd., 2023 ONCA 255 [Pham]

Pham is another pandemic-era decision. It involves a claim for wrongful dismissal following an several layoff extensions. The employee was laid off on March 23, 2020 shortly after the commencement of the pandemic. He was subsequently placed on Infectious Disease Emergency Leave ("IDEL"). After nine months of unpaid leave, the employee alleged that he had been wrongfully dismissed. The ONCA clarified the law on constructive dismissal and condonation in the context of layoffs, stating that employee silence cannot be equated with acquiescence.

The following comments from the ONCA are worth highlighting:

- "The fact that a layoff was conducted in accordance with the *ESA* 'is irrelevant to the question of whether it is a constructive dismissal' [citation omitted] (para 33).
- Unless there is an express or implied term in the employment contract stating otherwise, a unilateral layoff by the employer constitutes constructive dismissal.

- Implied terms will not be readily found. (In *Pham*, it was not sufficient that there was a past practice of laying off employees.)
- The onus is on the employer to establish condonation.
- Employee silence during periods of temporary layoff does not constitute condonation; condonation must be expressed by positive action.
 - “Positive action includes expressed consent to the layoff or expressing a willingness to work before claiming wrongful dismissal such that the employer would reasonably believe that the employee consented to the change in the terms of employment” (para 55).
- Employees are not required to inquire about recall before claiming constructive dismissal.

While the ONCA provides helpful guidance on the law, the appeal turned on whether proceeding by way of summary judgment was appropriate. The ONCA found that it was not as the motion judge mistakenly understood that proceeding by way of summary judgment was on consent and therefore failed to consider whether there was a genuine issue requiring trial. Accordingly, the ONCA’s decision to weigh in on the substantive issues did not resolve the case on its merits, but rather led to the court remitting the matter to the ONSC for trial.

7. Mitigation applies to fixed term independent contractor contracts.

Monterosso v Metro Freightliner Hamilton Inc., 2023 ONCA 413 [Monterosso]

Monterosso addressed the outstanding question from *Howard v Benson Group Inc.*, 2016 ONCA 256 and *Mohamed v Information Systems Architects Inc.*, 2018 ONCA 428 – whether independent contractors on a fixed-term contract are required to mitigate damages. The ONCA confirmed that, absent contractual language to the contrary, the duty to mitigate applies. In reaching this conclusion, the ONCA overturned the trial judge’s finding on this issue and distinguished independent contractors from employees and dependent contractors.

Notwithstanding the reversal in this case, the result was the same. The ONCA found that the independent contractor had met his duty to mitigate based on extensive evidence detailing his unsuccessful job search efforts.

More generally, *Monterosso* serves as a reminder of the risks associated with fixed-term contracts. In this case, the trial judge’s finding (upheld on appeal) was that the contract unambiguously provided for a 72-month fixed term and did not contain an early termination provision. The independent contractor was therefore awarded damages for the remaining 65 months, i.e., \$552,500 plus HST.

8. Sexual harassment of a subordinate involving physical touching held not to be just cause.

Café La Foret Ltd. v Cho, 2023 BCCA 354 [Cho]

In *Cho*, the BCCA upheld a trial decision finding that sexual harassment by a 60-year-old Head Baker (“Cho”) against a 30-year-old subordinate Assistant Baker did not give the employer just cause to terminate.

The conduct in question, as determined by the trial judge, involved: i) “applying a brief light tap on her left shoulder, followed by a brief open hand pat to her upper back” in the context of Cho telling his subordinate about a therapeutic massage he had received, and, ii) “lightly tapping her in the buttock area while discussing pain in his lower back.” The contact was determined to be brief, but also intentional, non-consensual, and sexual in nature.

When confronted by the employer, Cho admitted his conduct and asked whether he should apologize or quit his job. The employer instead required that Cho sign an affidavit. Executing the affidavit was ostensibly a condition of his ongoing employment, but it also included a restriction which would have made it impossible for Cho to continue in his role (i.e., a prohibition on communicating with current, former or future female staff). The employer refused to provide an ROE unless the affidavit was signed. The employer’s attempts to get Cho to sign the incriminating affidavit was the basis for a \$25,000 aggravated/punitive damages award.

The employer on appeal argued that the trial judge considered irrelevant factors in assessing whether the sexual harassment supported a cause termination. The following warrant mention.

First, the employer’s initial attempt to remediate the relationship was found by the trial judge to weigh against cause because it suggested that the employer viewed the relationship as salvageable. Parenthetically, this conclusion is arguably contradicted by the trial judge’s later finding that aggravated/punitive damages were warranted because the employer’s remediation efforts were disingenuous. In any event, on appeal, the employer argued (unsuccessfully) that there would be a chilling effect if attempts at reconciliation could be used against an employer seeking to establish cause. Ultimately, the BCCA found that an employer’s willingness to try to preserve the employment relationship should not be determinative of whether the conduct is serious enough to support dismissal. However, the BCCA accepted that “it was open to trial judge to consider, whether the employer viewed the relationship breakdown from the outset as either irremediable or salvageable should the employee take responsibility, express remorse, apologize, or in some manner make amends.”

Second, in assessing the severity of the sexual harassment, the trial judge identified the power imbalance between the two employees but found that it was not “overly prohibitive”. The trial judge relied on the fact that the power imbalance did not stop the Assistant Baker from quickly filing a complaint. The BCCA found that the timing of the complaint was not indicative of the power imbalance because there is no universal way that those who are sexually harassed will

respond. The BCCA nonetheless determined that the trial judge's error was not material to the decision.

Third, the employer took issue with the trial judge considering Cho's intentions on the basis that the intention of the perpetrator has no bearing on the nature and degree of the harassment's severity. The BCCA agreed that "the severity of sexual harassment does not depend on the intentions of the perpetrator." However, the BCCA went on to say that "intentions may be relevant to whether the employee's misconduct amounts to cause for termination" because "the employee's intentions can be a factor in assessing the salvageability of the relationship."

There are several employer takeaways from the reasoning in *Cho*:

- Think carefully about if/how to attempt reconciliation. Only engage in remediation efforts if genuine.
 - In *Cho*, if remediation was never actually desired, the employer instead ought to have considered immediate termination or accepting Cho's offer to resign.
- Do not make legally required documents (e.g., a ROE) contingent on employee action.
- Do not pressure employees to sign legally incriminating documents.
- Create, distribute and apply a harassment policy.
 - In *Cho*, the trial judge noted the absence of a policy and the failure to alert Cho that such conduct would be inappropriate and dismissal a possibility.

9. Consideration needed for a new contract with a mandatory arbitration clause.

Goberdhan v Knights of Columbus, 2023 ONCA 327

The respondent sold insurance for the Knights of Columbus ("Knights") as a field agent. The parties signed three contracts. When the respondent's field agency was terminated, he sued for wrongful dismissal. The Knights moved for an order to stay the action pursuant to the *Arbitration Act, 1991*. The motion judge found that the latter two contracts, along with the mandatory arbitration clauses contained therein, were invalid for lack of consideration (para 4). The ONCA upheld the decision:

The respondent's statements [regarding consideration] were not bald or conclusory. They amounted to his evidence that the new contracts were not advantageous to him and that he had not received any benefit other than continued employment. The respondent's evidence was not challenged by cross-examination, nor did the appellant put forward any evidence that there had been fresh consideration for the new contracts (para 21).

The appellant sought to show consideration by pointing to various changes in the contract including mediation and arbitration provisions and the change of law from Connecticut to Ontario. The ONCA upheld the motion's judge's decision finding that the mediation and

arbitration clauses were not fresh consideration and that a change of law could not be considered a benefit without evidence. The court held that giving up the right to commence court proceedings, have a trial by jury, and to participate in class actions were detrimental, not a benefit. The ONCA found no error in the motion judge's conclusion that if the respondent wished to work for the Knights he had no practical choice but to sign.

10. Workplace investigation report protected by qualified privilege and claim against investigators dismissed as a SLAPP suit.

Safavi-Naini v Rubin Thomlinson LLP, 2023 ONCA 86

This case will be of particular interest to counsel who conduct or are otherwise engaged with workplace investigations.

At issue was a defamation suit brought by the complainant in a workplace sexual harassment investigation against the investigators. The complainant was a medical resident at Northern Ontario School of Medicine ("NOSM") and the respondents were two faculty doctors. NOSM retained Rubin Thomlinson to conduct the investigation.

The allegedly defamatory statements were contained in Rubin Thomlinson's executive summaries submitted with the final report. This included statements that the complainant was not found to be a credible or reliable witness and the respondent doctors were not found to have breached the *Occupational Health and Safety Act*.

The motion judge granted Rubin Thomlinson's anti-SLAPP motion to dismiss the defamation action. In applying section 137.1 of the *Courts of Justice Act*, the motion judge held:

- (1) the summaries related to a matter of public interest;
- (2) this was a situation of qualified privilege because of the social utility of NOSM receiving frank communication about an important topic;
- (3) there was no evidence to support a finding of malice against [the investigator]; and
- (4) a balancing exercise favoured protection of the expression (para 13).

All four conclusions were raised (and dismissed) on appeal. With respect to public interest, the ONCA offered the following comments:

- The subject matter of the executive summaries – sexual harassment and workplace harassment – was an area in which the public has "substantial interest" (para 19).
- The existence of NOSM as an educational institution furthered the public interest (para 21)
- Safavi-Naini's decision to retain a publicist to "shame" the school into investigating further made it a matter of public interest. The matter garnered extensive media attention and included comments by Safavi-Naini that patient safety was affected (para 32).

On the topic of qualified privilege, the ONCA agreed that it was properly applied by the motion judge:

The respondents had a duty to NOSM to complete the investigation and to provide their report to NOSM, and NOSM had a corresponding interest or duty to receive it. The respondents' provision of the Executive Summaries to NOSM falls squarely within this privilege.

The ONCA found no reason to interfere with the motion judge's finding on malice and, based on the above conclusions, determined that the balancing exercise could not succeed.

11. Anti-SLAPP motion dismissed - Employer defamation action allowed to proceed against workers and workers' rights organization for public comments that employer, owners, and managers were "wage thieves" even though the comments were held to be expression on a topic of public interest. The comments were viewed as imputing criminality.

2110120 Ontario Inc. v Buttar, 2023 ONCA 539 [Buttar]

This case is of note for its potential impact on workers' rights organizations and individuals protesting perceived workplace injustices. The takeaway from the ONCA is that such efforts must be carefully tailored to ensure accusations are not overbroad or misleading.

The case was brought as an anti-SLAPP motion after a trucking company sued several former trucker drivers and a workers' rights organization for defamation (amongst other causes of action) based on a series of protests, a phone zap, and other public efforts to recover alleged unpaid wages. The key phrases in dispute were that the company, its owners and managers, were wage thieves and had stolen wages. These pressures were mounted following *Canada Labour Code* proceedings which resulted in findings against the company and orders to pay for some of the drivers. At the relevant time, however, the decisions were under appeal and the company had paid the disputed monies to the labour board pending disposition.

While the ONCA overturned the motion judge's finding that the expressions did not relate to a matter of public interest, the court proceeded to dismiss the anti-SLAPP motion by applying the balance of the test under section 137.1(4) of the *Courts of Justice Act*. The ONCA found the following:

- The court's role is not to assess the merits of each cause of action but "... to determine whether there is reason to believe that the respondents will succeed in the proceeding" (para 57). In the case before the court, there was evidence to support a finding of defamation.
- "... there [was] a basis in the record and the law to support a finding that the statements that the respondents were 'wage thieves' or had 'stolen' the appellants wages were not substantially true" (para 71).
- "... there [was] sufficient evidence that could support a finding of malice based on the inflammatory tone and invocation of criminality present in the impugned remarks, the evidence of an ulterior motive to embarrass, shame and intimidate the respondents into

paying the appellants' claims, and a recklessness or indifference to the truth of what was stated" (para 75).

- ". . . the expression in question addressed a topic of public interest, but the imputation of personal criminality by the appellants and their supporters, and their motivation, reduce the public interest in its protection" (para 89).

Accordingly, the ONCA dismissed the appeal and allowed the company's action to proceed.

12. Sometimes the *Rules* really matter.

Oliveira v Oliveira, 2023 ONCA 520 [*Oliveira*]

Oliveira highlights the importance of the deemed undertaking rule and the consequences that can flow from a breach. The employee, Mario Oliveira, was a union organizer who was fired less than a year after his complaint of harassment was substantiated via independent investigation. He brought an action for wrongful dismissal. As part of production received through the discovery process, Oliveira received a copy of the workplace investigation report (the "Report") for his complaint. He then sent a copy of the Report to the Office of the Premier of Ontario, a reporter at the Toronto Star, and two other non-parties. Oliveira declined to withdraw the Report, despite requests that he do so. An article was subsequently published by the Toronto Star that referred to the Report.

The motion judge found that Oliveira knowingly breached the undertaking rule and, other than a belated apology, took no steps to fix the breach. By way of remedy, the motion judge struck the wrongful dismissal action and awarded costs of \$36,725.

On appeal, the ONCA dealt with both the above breach of the deemed undertaking rule, as well as a second action related to Oliveira's breach of two interlocutory injunctive orders. The former is of note for employment counsel given that the ONCA upheld the striking of the wrongful dismissal action after determining that other alternatives short of dismissal would not be suitable.

13. An employee needs to act fast to object to changes in compensation or assert constructive dismissal, at least in Alberta.

Kostecky v Paramount Resources Ltd, 2022 ABCA 230 [*Kostecky*]

Kostecky serves as a reminder that employees need to act promptly when claiming constructive dismissal. In fact, the ABCA got into the minutiae, with the court splitting in concurring judgments on exactly how many days was reasonable in the case before it (and signalling a generally applicable limit for all employees – 15 days).

On March 27, 2020, the employer informed the employee that on April 1st her compensation package would be reduced. On April 22nd, the employer terminated Kosteckyj without cause. At no point prior to dismissal did Kosteckyj state that she either refused to accept the changes or had not made up her mind.

Both the trial judge and the ABCA found the changes to the employment contract substantial. The issue was in the employee's response (or lack thereof). The summary trial judge found that Kosteckyj was not obligated to decide whether the cost-cutting program was a fundamental change to her contract in the 25 days between when she was informed and when she was terminated.

For the ABCA, 25 days was too long, "The fact that she worked for three weeks doing the same tasks from the same office is clear evidence that she accepted the reduced level of compensation" (para 15). According to Justice Wakeling:

I am satisfied that no more than ten business days after April 1, 2020 constituted a reasonable period of time for Ms. Kosteckyj, a professional engineer and a healthy, knowledgeable and informed person, to collect the information she needed to assess the state of the employment market for professional engineers in Calgary and elsewhere, to consult legal counsel to ascertain her rights and obligations as an employee and to make an informed and prudent decision on the merits of rejecting or accepting the new employment terms (para 59).

The standard set by the ABCA is a stringent one. Of note, the employer provided four days' notice (including a weekend) of its salary reduction and the change occurred at the early stages of a global pandemic. The ABCA did not find this significant. The ABCA characterized the situation (and others like it) as relatively straightforward:

A thoughtful person will do [their] best to estimate how much time it will take to find a new job that pays more than the reduced compensation the current job offers.

[. . .]

Most of the time the answer is self-evident – it is better to be employed than unemployed. While the employee is undoubtedly in a stressful situation, the answer to the key question is usually obvious and not difficult to discover.

For both employers and employees, Justice Wakeling points to the need for certainty and a "bright-line test" (para 66). While Justice Wakeling acknowledges that employees "without the attributes of Ms. Kosteckyj" might require additional time, "it would be a rare case that a reasonable period would exceed fifteen business days" (para 60).

Justices Pentelechuk and Ho (concurring in the result) avoided setting a specific time period for Kosteckyj due to the absence of argument on that issue. They nonetheless found that 25 days was a sufficient period of time and noted Kosteckyj's length of service as a partial justification.

The ABCA therefore found that Kosteckyj was not constructively dismissed. In some cases, this would be a complete answer to an employee's claim. Here, however, Kosteckyj was terminated shortly after the alleged constructive dismissal. As a result, she remained entitled to wrongful dismissal damages and the primary difference was that her pay in lieu of notice was based on her compensation *after* the cost-cutting program.

14. The tort of harassment revived, at least in Alberta.

Alberta Health Services v Johnston, 2023 ABKB 209 [Johnston]

As counsel will likely recall, in *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 [Merrifield], the ONCA found that there was no tort of harassment. The ONCA did, however, leave the door open to a different conclusion in different circumstances:

. . . while we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case (para 53).

This year, the tort of harassment is back in the limelight. Although the case below is not an employment law case, its re-introduction of the tort of harassment gives it broader application.

The Plaintiffs, Alberta Health Services and two of its employees, asserted that mayoral candidate Kevin J. Johnston engaged in defamation, tortious harassment, an invasion of privacy and assault.

According to the ABKB, "During his mayoralty campaign, on his eponymous online talk show, and anytime there was a microphone nearby, Mr. Johnston spewed misinformation, conspiracy theories, and hate" (para 1). Further, Johnston showed pictures of a Plaintiff employee and her family and described them in an extremely discriminatory and derogatory manner and "Mr. Johnston's bombastic statements show that he recognized violence by those allied with him as a possibility" (para 18).

In assessing the tort of harassment, the ABKB considered *Merrifield* and the decisions that followed. In discussing *Caplan v Atlas*, 2021 ONSC 670, which found a tort of internet harassment, the ABKB stated:

The idea that there is no general tort of harassment but there is a narrower tort of internet harassment makes no sense. If there is a tort of internet harassment but not a

general tort of harassment, that means that the mode of harassment – using the internet – determines whether harassment is actionable. While internet harassment is a problem, so too is old-fashioned low-tech harassment (para 81).

The ABKB proceeded to provide four primary reasons for establishing the tort of harassment:

1. The inherent wrongful nature of harassment, as evidenced by the criminal offence of harassment
2. It remains open to the legislature to also create a statutory cause of action, but the common law can operate in tandem
3. Harassment is already recognized as a justiciable issue, as indicated by the availability of other legal remedies (e.g., restraining orders)
4. Existing torts insufficiently address the harms inflicted by harassment

With respect to point 4, the ABKB noted that the tort of intentional infliction of mental suffering is not adequately protective because it requires both intention and a provable illness:

Harassers often act with reckless disregard as to the consequences of their actions as opposed to having the intention required to satisfy the requirements of the tort of intentional infliction of mental suffering. And victims of harassment will often engage in self-preservation avoidance behaviour – quitting a job, changing residence, buying a security system, disengaging with social media, etc – so that no visible or provable illness arises. The harms and costs associated with harassment that fall short of a visible or provable illness are not recoverable pursuant to the tort of intentional infliction of mental suffering (para 100).

The ABKB went on to provide that the test for the tort of harassment will be met where the defendant has:

1. engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
2. that [they] knew or ought to have known was unwelcome;
3. which impugn the dignity of the plaintiff, would cause a reasonable person to fear for [their] safety or the safety of [their] loved ones, or could foreseeably cause emotional distress; and
4. caused harm (para 107).

Applying the test to the facts before the court, the ABKB found the tort was established.

15. Termination for just cause upheld for failure to comply with mandatory vaccine policy in health care setting.

Lakeridge Health v CUPE, Local 6364, 2023 CanLII 33942 (ONLA) [*Lakeridge*]

The last two years have brought much more clarity when it comes to permissible pandemic-era policies. *Lakeridge* is an Ontario labour arbitration decision dealing termination for cause for failure to comply with a hospital's mandatory vaccination policy. Arbitrator Herman determined the case in favour of the hospital.

Under the mandatory vaccination policy, approximately 104 employees were placed on unpaid leaves and 47 were ultimately terminated. Two policy grievances and four individual grievances went to hearing. The union took the position that the hospital should have placed unvaccinated employees on an extended unpaid leave and then returned them to active employment.

In finding the policy reasonable, Arbitrator Herman considered:

- The statutory and collective agreement provisions setting out employee rights to a safe and healthy work environment.
- The exceptional circumstances presented by COVID-19, particularly for hospitals.
- The efficacy of COVID-19 vaccines at preventing severe illness and reducing transmission.
- The significant staffing challenges faced by the hospital.

Notably, Arbitrator Herman found that the policy was also reasonably applied to remote employees given that:

- In almost all cases, entirely remote work was not practical without relieving employees of some of their duties.
- Remote employees were still expected to come to the hospital on occasion, such as for training.
- Requiring remote work for unvaccinated employees would limit the hospital's ability to redeploy employees as needed.
- Unvaccinated employees would be at higher risk of community infection and more severe symptoms.

Arbitrator Herman further rejected the union's argument that, prior to termination, the hospital should have considered whether an unvaccinated employee had already been infected. While the union argued that prior infection offered protection from future infection and transmission, Arbitrator Herman found the scientific evidence too limited on this point.

The only qualification Arbitrator Herman made to the reasonableness of the policy was with respect to the duration that employees were placed on leave. In practice, this ranged from several days to three weeks. Arbitrator Herman found instead that a four-week leave of absence was appropriate to balance the hospital's interest in restaffing quickly and employees' right to a "reasonable period of reflection before termination" (para 198).

16. Starting a civil claim, even if narrowly drafted, may result in the dismissal of an HRTO proceeding.

Almseideen v McKesson Canada, 2023 HRTO 255 [McKesson]

The applicant in *McKesson* filed both a civil action and a human rights application following termination from employment. The applicant split the issues and did not plead a breach of the *Code* (or seek *Code*-related damages) in the civil suit. The HRTO nonetheless dismissed the application on the basis that the two actions had substantially similar underlying facts and subsection 34(11) was intended to prevent case splitting.

The HRTO relied on *Corrigan v Ontario*, 2020 HRTO 689 and *Zheng v G4S Secure Solutions (Canada) Ltd.*, 2022 ONSC 93. In those cases, however, there was significant overlap not only in the facts relied upon, but also the legal issues to be determined. In fact, in *Corrigan* the applicant explicitly sought general damages and damages for loss of income under the *Code*.

McKesson adopts an extremely broad interpretation of s. 34(11) of the *Code* to support the dismissal of a human rights application. Section 34(11) states that an application may not be made where "a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement" of their rights under the *Code*. However, *McKesson* appears to adopt the view that any civil action between the same parties with some facts overlapping irrespective of whether the application seeks to advance any right under the *Code* will be barred. Following *McKesson*, it may be that civil claims will increasingly trump HRTO proceedings, even where the civil action is narrowly drafted to address only non-human rights related employment issues such as contractual damages and *ESA* entitlements.

17. Costs – beware sometimes the tail wags the dog.

While costs decisions are highly discretionary and context-dependent, there are instances where courts send a message to counsel that have broader bearing on litigation strategy and choice of forum. Counsel should take note. As seen below, costs awards can far exceed damages and settlements.

Chin v Beauty Express Canada Inc., 2023 ONSC 56 [Chin]

The Plaintiff was successful in her claim for wrongful dismissal but awarded only \$16,000 (of nearly \$200,000 claimed). In deciding costs, Justice Morgan was highly critical of the Plaintiff for

litigating her case in Superior Court rather than in Small Claims Court. In the circumstances, Justice Morgan ultimately declined to award costs to either party.

Plaintiff's counsel had sought substantial indemnity costs, arguing:

- the claim was of high importance to the Plaintiff
- the Defendant's conduct unduly lengthened the proceeding
- the final award exceeded the Rule 49 offer to settle served by the Defendant

Conversely, Defendant's counsel argued costs should be denied given that:

- the award of \$16,000 was well under the Small Claims Court limit and the ONSC should exercise its discretion under Rule 57.05
- the award fell far below the claim for nearly \$200,000
- the Plaintiff vigorously pursued claims for aggravated, punitive and human rights damages at trial, all of which were dismissed by the trial judge

Justice Morgan characterized the trial as a waste of resources for both the parties and the court. Specifically, the court stated: "[b]ut for the Plaintiff's rather large overreach, the entire litigation would have been far more expeditiously and inexpensively pursued in Small Claims Court" (para 9).

Justice Morgan faulted the plaintiff for pursuing an "extensive claim" based on emotion rather than reason and pursuing moral and punitive damages based on hurt feelings without objective evidence. Justice Morgan therefore found costs were not payable to either party.

Janmohamed v Dr. M Zia Medicine Professional Corporation, 2022 ONSC 6561 [Janmohamed]

The parties settled a wrongful dismissal action for \$15,000, exclusive of costs. The Plaintiff ultimately accepted the Defendant's offer to settle. The parties could not agree on costs and argued the costs issue only. In awarding costs, Justice Myers offered commentary on the difficulty of setting costs in the context of settlement:

The parties settled all issues but costs. They ask me to ascribe success and blame on reading their submissions or, in the plaintiff's case, by reading the thousands of pages of summary judgment materials and the parties' lengthy affidavits of documents. Unfortunately, neither endeavour equips me to do what the parties want – to have a judge support their side on the merits. If they wanted that outcome, they should have gone to the motion or to trial (para 4).

Notwithstanding the fact that the case settled for only \$15,000, the case settled before discoveries, and the Defendant was entitled to costs for the period after its Rule 49 offer, Justice Myers fixed costs to be paid by the Defendant to the Plaintiff at \$30,000. In doing so, Justice Myers made several interesting observations, including:

- The action might have been brought in the Small Claims Court, but this appears to have little impact on the cost award.
- The bad faith and discrimination claims were “excessive but typical for this type of litigation.” Specifically, “[t]his is standard fair of pleading to ensure that discovery is available just like every car accident case has a litany of far-fetched allegations of driver negligence to ensure that the plaintiff is able to ask questions on discovery.”
- Awarding no costs would be “too technical” and not “just.” The employer “should not be incentivized to low-ball” and force litigation for reasonable notice. As such, a wrongfully dismissed employee should reasonably expect their costs to be paid by the employer. It would be unjust to leave an employee “under water” when bringing the employer to what they should have done at the time of termination.

Aware Ads Inc. v Walker, 2022 ONSC 6121 [Walker]

This costs award is another cautionary tale for counsel who may vigorously pursue legal positions without solid footing on the merits. In this case, it led to a costs award of more than \$425,000 against the employer.

The costs endorsement followed the ONSC’s dismissal of the employer’s motion for an interlocutory injunction. The employer was previously unsuccessful in seeking an interim injunction. Both motions related to alleged contractual breaches by two former employees.

In deciding costs, Justice Centa rejected the employer’s request that costs be reserved to the trial judge, stating “absent extraordinary circumstances, costs on an unsuccessful interlocutory injunction should be payable forthwith [citations removed]” (para 10). Justice Centa also declined to exclude the employer’s costs of the cross-examination given that the cross-examinations would be of “doubtful utility for trial” (para 13). Further, should the matter proceed to trial, the trial judge could take costs awarded to date into account (para 14).

Justice Centa awarded defendant employee Greg Walker substantial indemnity costs for four primary reasons:

1. There were no reasonable grounds for the motion and the case was not materially stronger than the prior case presented for the interim injunction.
2. The allegations were serious, and none had a strong *prima facie* case.
3. Exceptionally broad relief was sought, then withdrawn, and then amended several times, significantly increasing the defendants’ costs.
4. The request for relief appeared more an attempt to punish than to protect a valid business interest.

Justice Centa fixed costs at \$275,000, reduced from the \$309,488.51 sought by Walker (paras 26-30).

With respect to the other employee, Jasper Pirrie, Justice Centa went further still, and awarded full indemnity costs, finding that the employer's conduct was extraordinary and truly reprehensible. Justice Centa pointed to the employer's persistence despite the weakness of the claim as clearly found on the interim injunction motion. Further, the employer barely mentioned Pirrie in its materials, yet maintained its claim through cross-examinations and to the eve of hearing:

I reject Aware Ads' after-the-fact explanation that it dropped the request for relief against Mr. Pirrie because the passage of time made it less relevant. The fact is that it presented zero evidence against Mr. Pirrie in its material and its own witnesses did not dispute the most important parts of Mr. Pirrie's defence. I find that Aware Ads effectively abandoned its motion against Mr. Pirrie and did so only when it delivered its factum (para 23).

Costs of \$154,654.29 were awarded without challenge to Mr. Pirrie's bill of costs (para 25).



Law Society
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TAB 3A

24th Employment Law Summit

Class Actions 101 (PowerPoint)

Elisha Jamieson-Davies

Hicks Morley Hamilton Stewart Storie LLP

October 11, 2023



Class Actions 101

FOR MORE INFORMATION

To find out more about how Hicks Morley can serve you in this area, please contact: www.hicksmorley.com

This handout is intended as a general guide only and not specific legal advice. Updated September, 2023.

Stages of a Class Action

Certification
Motion

Common Issues
Trial

Individual Issues
Trials

***Summary Judgment Motion or Motion to Strike** – Can now occur pre-certification motion

***Settlement** – Can happen at any time but must be approved by the Court

Certification Motion – Requirements for Certification

- A plaintiff must show that the claim:

1.

Discloses a cause of action

2.

Contains an identifiable class of two or more persons

3.

Raises issues common to the class members

4.

Is the preferable procedure* for resolving the common issues

5.

Has an appropriate representative plaintiff

Certification Motion – Standard for Certification

Not plain and obvious that...

...the claim does not disclose a cause of action

Some basis in fact that...

...the claim contains an identifiable class of two or more persons

Some basis in fact that...

...the claim raises issues common to the class members

Some basis in fact that...

...a class action would be the preferable procedure for resolving the common issues

Some basis in fact that...

...there is an appropriate representative plaintiff

Certification Motion – Preferable Procedure?

- In order to establish that a class action would be the “preferable procedure” for resolving the common issues under s. 5(1)(d) of the CPA, the plaintiff must show some basis in fact **both that**:

A class proceeding is **superior to all reasonably available means** of determining class members’ entitlement, including case management of individual claims, and administrative proceedings

Common factual and legal issues **must predominate** over questions affecting only individual class members

What Happens if the Class Action is Certified?

Notice to Class

Typically includes placing an advertisement in one or more newspapers. May also involve direct notification to class members. Class members can then opt out

Pleadings

The Defendant usually defends after the matter is certified. This is when third parties would be named

Discovery

After notice is given, the parties then engage in documentary discovery and examinations for discovery. This is the stage when all relevant documents are disclosed

Summary Judgment Motions

Either party (or both) can bring a summary judgment motion to dispose the proceeding. The motion determines the common issues on a paper record

Common Issues Trial

After discovery is complete and expert reports have been exchanged, the parties then proceed to a trial of the common issues that were certified

Individual Trials

This step occurs if there are any issues remaining after the common issues trial

***Settlement** – Can happen at any time but must be approved by the Court



Law Society
of Ontario

Barreau
de l'Ontario

TAB 3B

24th Employment Law Summit

**Class Actions Update:
An Employee-Side Perspective**

Lior Samfiru

Samfiru Tumarkin LLP

Kevin Hamilton

Samfiru Tumarkin LLP

October 11, 2023



Class Actions Update: An Employee-Side Perspective

Lior Samfiru & Kevin Hamilton
Samfiru Tumarkin LLP
September, 2023

Introduction

With the creation of the *Class Proceedings Act, 1992*, SO 1992 c. 6 (the “CPA”),¹ the modern class action regime in Ontario has now been around for 30 years; however, it was only in or around the early to mid-2010’s that the CPA become increasingly utilized in the context of employment law.² Recently, in *Curtis v Medcan Health Management Inc*, 2022 ONSC 5176, the court alluded to the relevance of class action in the area of employment law stating that “[i]ndividual claims under the ESA and individual actions would be much less effective” at achieving the goal of behaviour modification and that “absent the possibility of class actions, there may be little incentive for employers to comply [...]”.³

This begs a number of questions for counsel practicing in the area of employment law: What is procedurally different about proceeding by way of class action? What purposes are class actions serving in the realm of employment law today? What recent cases should counsel be aware of and where are class actions in employment law headed? This paper aims to provide some insight into the answers to these questions.

What is Procedurally Different about Class Actions

a) The Standard Claim under the Rules of Civil Procedure and the Ministry of Labour Complaint

A standard claim brought by a plaintiff employee against their employer under the *Rules of Civil Procedure* (the “Rules”) consists of three primary pleadings, the Statement of Claim, the Statement of Defence, and the Reply to the Statement of Defence.⁴ If all filing and service deadlines are respected, the pleadings can be completed in approximately 30 days, and then the parties are off to the races of litigation, and towards the determination of the claim on its merits.

Similarly, under the complaint regime set out by the Ministry of Labour, Immigration, Training and Skills Development for violations of the *Employment Standards Act, 2000*, SO 2000 c. 41 (the “ESA”),⁵ once a claim is filed, an investigation of the facts underlying the claim and a decision on the merits will follow with little additional procedural complexity. However, the timeline may be somewhat unpredictable as claims are investigated in the “order in which they are received.”⁶

b) The Class Proceedings Act, 2000 – Considerations for Representative Plaintiff’s Counsel

¹ *Class Proceedings Act, 1992*, SO 1992, c. 6.

² Barry Kuretzky and Rhonda B. Levy, “Ontario, Canada Companies Beware: Class Action Lawsuits Alleging Worker Misclassification Are on the Rise” (March 4, 2019).

³ *Curtis v Medcan Health Management Inc*, 2022 ONSC 5176 at para 53.

⁴ RRO 1990, Reg 194, *Rules of Civil Procedure*.

⁵ *Employment Standards Act, 2000*, SO 2000 c. 41.

⁶ *Ministry of Labour, Immigration, Training and Skills Development, Claim Form* at 1.

In contrast to the above, where a plaintiff seeks recourse through class action by offering themselves up as representative plaintiff for a putative class, both the plaintiff and their counsel are agreeing to effectively delay the determination on its merits until after a potentially lengthy and procedurally complex motion for certification. Moreover, this certification stage only comes after plaintiff counsel has spent considerable time preparing for and drafting the Statement of Claim to ensure that both the cause of action, common issues and definition of the class are carefully crafted to provide the best chance of success at certification.

To put the procedural complexity of class actions into a temporal perspective, a few recent examples of the timeline between the commencement of a claim and the decision on certification and/or pre-certification settlement can be seen in the following selection of cases:

Class Action	Date of Claim	Decision on Motion for Certification	Approximate Time Elapsed
<i>Grigoryev v Russel Security</i>	March 2021	December 2021 (on consent – settlement) ⁷	>1 year
<i>Cunningham v RBC</i>	July 2020	December 2022	1.5 years
<i>Horner v Primary Response Inc and Garda Canada Security Corporation</i>	August 2018	July 2020 (on consent – settlement) ⁸	2 years
<i>Montague v Handa Travel Student Trip Ltd</i>	May 2018	October 2020	2 years 5 months

i. *The Test for Certification under the CPA*

Given the above, when deciding whether to proceed by class action, counsel to the representative plaintiff of the putative class should first and foremost consider whether the putative class will even be able to satisfy the five criteria set out in s. 5(1) of the *CPA* at the certification motion to get certified:

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,

⁷ *Grigoryev v Russel Security*, [Settlement Order](#).

⁸ Law Times, “[Proposed class action for security guards’ unpaid wages settles for \\$2.9 million](#)”.

- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.⁹

ii. The 2020 Amendments to the CPA

In addition to the five criteria outlined under s. 5(1), counsel must also consider two important amendments to the *CPA* which took effect in 2020. First, whether a class action is the “preferable procedure” having satisfied the minimum requirements of the newly added s. 5(1.1):¹⁰

- (1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1)
 - (d) only if, at a minimum,
 - (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
 - (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.¹¹

To put it briefly, with this added conjunctive test under s. 5(1.1), counsel to the representative plaintiff of the putative class must be able to establish that proceeding by way of class action is “superior to all reasonable available means” and that the common issues “predominate” over any individual issues. The consequence of this additional requirement is that it has arguably opened the door to a greater number of challenges by defendant employers at the certification motion. However, some commentators may disagree on whether s.5(1.1) will affect the difficulty of meeting the certification criteria in reality.¹²

Additionally, the potential for challenge is further increased given the second important amendment to the *CPA* that took effect in 2020, namely, the addition of s. 4.1. Under this provision, now even at the pre-certification stage the putative class can be challenged by way of a motion under this early resolution provision. The court had its first opportunity to interpret s. 4.1 in *Dufault v Toronto Dominion Bank*,¹³ and in that case, the court stated:

⁹ *CPA*, s. 5(1).

¹⁰ As amended by Schedule 4 of the *Smarter and Stronger Justice Act, 2020*, S.O. 2020, c. 11 (Bill 161).

¹¹ *CPA*, s. 5(1.1).

¹² See Joshua Mandryk and Jody Brown’s article, “[Employment Class Actions in Ontario: Where are we now and where are we headed?](#),” (May 5, 2021); see also Monkhouse Law’s article, “[Class Actions in Employment Law – Current Developments and Upcoming Issues](#)” (July 28, 2021).

¹³ Bennett Jones LLP, “[Class Actions: Looking Forward 2022](#)” at 6.

The legislative intention as set out in s. 4.1 is clear: if a pre-certification motion can arguably dispose of the proceeding in whole or in part, or can narrow the issues or the evidence, the motion must be heard before certification, unless the court orders that the two motions be heard together.¹⁴

Given the above, these potential challenges to the certification stage must be top of mind when considering whether to proceed by way of class action. In turn, when addressing the criteria of s. 5(1) and s.5(1.1), plaintiff counsel would be wise to start anticipating the potential grounds employer counsel may assert in trying to challenge the putative class.¹⁵ To this point, plaintiff counsel should recall that the *CPA* explicitly states that certain grounds shall not bar certification:

Certain matters not bar to certification

6 The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.¹⁶

iii. *The Potential Carriage Motion*

Another procedural issue to briefly touch on is the potential need for a carriage motion under s. 13.1, in cases where individual plaintiffs of the putative class have separately retained different counsel for the purpose of pursuing the same claim. Aside from reflecting on counsel's own experience and ability to pursue a class action claim, counsel to the representative plaintiffs who are parties to the carriage motion must keep in mind that they not only bear the costs of the motion but are also unable to recoup any of these costs from any party to the action.¹⁷

iv. *The Common Issue Requirement*

The final preliminary issue to touch on – though by no means the last that may apply – is the common issue requirement. Although the common issue requirement is one of the five criteria under s. 5(1) already discussed above, this is often a hotly contested issue in the certification stage. In short, the legal principles underlying the common issue criteria was summarized by the

¹⁴ *Dufault v Toronto Dominion Bank*, 2021 ONSC 6223 at para 6.

¹⁵ Eric S Block, and Justine Lindner, "[Examining the Surge in Employee Misclassification Class Actions](#)" (September 2021).

¹⁶ *CPA*, s. 6.

¹⁷ *CPA*, 13.1(7).

Ontario Court of Appeal in Canada in *McCracken v Canadian National Railway Company* as follows:

The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: [...]

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: [...]

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant:[...]

Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a [page771] class action could only make the proceeding less fair and less efficient": [...]¹⁸

[citations omitted]

Many class actions fail to satisfy this criterion.

c) Conclusion on Certification Procedural Issues

Taking for granted these complexities and that a class action will be certified, it would be remiss to not highlight that certification is not a ruling on the merits.¹⁹ What will likely ensue certification is a potentially lengthy journey to the decision on the merits of the case and/or a settlement. A case in point, can be seen by the recent settlement of the class action against CIBC by employees for unpaid overtime. After 15 years of litigation, CIBC and the class only just reached a \$153 million settlement on July 5, 2023 – the original claim was filed in 2007.²⁰

Non-Procedural Considerations for Plaintiff Counsel

Given the above complexities and potential lengthiness of proceeding by class action, plaintiff counsel will have to diligently review the specific circumstances of the case and the putative class. In short, plaintiff counsel must determine not only satisfy themselves that the claim could meet the criteria of section 5 and that class action is the preferable procedure as assessed under s.

¹⁸ [*McCracken v Canadian National Railway Company*, 2012 ONCA 445](#) at para 83.

¹⁹ *CPA*, s. 5(5).

²⁰ *Fresco v Canadian Imperial Bank*, [Settlement Approval Order](#); CIBC Unpaid Overtime, "[CIBC Unpaid Overtime Class Action](#)".

5(1.1.)), but they must also ensure that it is the procedure that best serves their client. The courts have observed that the *CPA* has three objectives: 1) access to justice; 2) judicial economy; and 3) behaviour modification.²¹ From a practical sense, these three objectives should arguably also inform plaintiff counsel's assessment of whether class action is suitable for their client's case.

a) Access to Justice

It is trite to say that litigation can be prohibitively expensive to many. In many employment related matters, an individual's claim may be quite small, and the cost-benefit analysis of pursuing a claim will not balance out. For this reason, class actions are preferable in cases where individual claims are small, but based on the number of putative class members, the collective amount of damages becomes significant. There is both strength in numbers, and more money on the table. As we have seen in many recent employment class actions, individual claims contained within a class may be small; however, the damages can range in the tens to hundreds of millions of dollars.

v. Ability to Pay Costs / Legal Fees

Given the foregoing, one feature of class actions that may be attractive to plaintiff employees is the costs framework set out under the *CPA*. Whereas clients bringing an individual action will be responsible for paying their legal fees while also bearing the risk of any adverse costs consequence dependent on their retainer, putative class members, other than the representative plaintiff do not have any upfront legal fees, and face no risk of an adverse costs consequence (except with respect to any subsequent determination of their own individual claims).²² To this same effect, representative plaintiff's may be able to reduce their potential liability for costs and legal fees through their retainer agreement. The courts have held that a contingency fee of 33%, plus disbursements and taxes for class counsel is "presumptively valid."²³

vi. Class Proceeding Fund

Another unique aspect relevant to employee's looking to bring a class action against their employer, is the potential access that they have to the Class Proceedings Fund (the "CPF"), among other third-party funding agreements. The CPF was created under the *Law Society Act*, with the specific purpose of providing financial support to approved class action plaintiffs for legal disbursements and indemnifying them for adverse costs awards in CPF funded proceedings.²⁴ In exchange for a levy in the amount of 10% of any awards or settlement in the action and a return of funded disbursements, this access to justice initiative may assist plaintiffs in vindicating their legal rights, especially where the risk of financial exposure far outweighs the potential benefits.²⁵

²¹ [Brown v Canadian Imperial Bank of Commerce, 2012 ONSC 2377](#) at para 87.

²² *CPA*, s. 31(2).

²³ [Phillip v Deloitte Management Services LLP, 2023 ONSC 1210](#) at para 9.

²⁴ Law Foundation of Ontario, "[Class Proceedings Fund](#)".

²⁵ *Ibid.*

While entitlement to the fund is not automatic and requires a formal application, when considering whether to bring a class action over another procedure, plaintiff's counsel should consider whether their prospective action could obtain funding from the CPF. Considerations for funding under the CPF include:

- Strength of the case
- Scope of public interests involved
- Plaintiff's fund-raising efforts
- Likelihood of certification as a class proceeding
- Availability of funds at the time of application
- Presence of other relevant case-specific factors²⁶

Interestingly, based on the CPF's 2021 annual report, employment related class actions were the second most funded category of class actions funded by the CPF, after those relating to investments/securities.²⁷ Of the \$4,696,650 total funding awarded in 2021 by the CPF, \$1,340,452 was awarded to employment class actions. To add further perspective on the potential relevance of the CPF to future employment claims, the category that received the third most funding, only received \$321,373.²⁸

b) Judicial Economy

While a lawyer's duties are owed first and foremost to the client, lawyers also have an obligation to the administration of justice. At a time where our civil courts are dealing with significant backlog, undoubtedly, there are some benefits to the system when one judge, in one court room can dispose of several dozen, hundred, or even thousands of claims at once. At the same time, proceeding this way reduces the risks that similar claims are not decided differently, which could create additional costs to your client by way of appeal, and/or an unhappy client when a colleague tells them about the more favourable or lucrative award in their individual action that was on similar facts and common issues.

c) Behaviour Modification

Regardless of whether your client remains actively employed by the defendant, one of your client's objectives may be trying to have the employer change the impugned policies that caused their loss, and class action can help send this message.²⁹ Class action puts additional pressure on defendant employers that may not exist where individual claims are pursued. This can be from a purely financial risk perspective, but also from a reputational perspective which can have impacts on the former. Why? Class actions are more likely to obtain significant media attention than individual claims.

²⁶ *Ibid.*

²⁷ Law Foundation of Ontario, "[2021 Annual Report](#)" at 43.

²⁸ *Ibid.*

²⁹ In commenting on the *Grigoryev v Russell Security* class action for the Law Times News articling, "[Settlement shows class actions a tool for non-unionized employees to assert their rights: lawyer](#)", Joshua Mandryk, a lawyer with Goldblatt Partners LLP, commented that that case was "significant in employment class actions as it's another example of classes of non-unionized employees negotiating employer policy changes as part of class action settlements."

At What Cost? What is lost?

Despite class actions offering the potential benefits outlined above, depending on a class member's perspective and relation to the action, class actions may also come with some drawbacks. Arguably, the overarching drawback is that class members are relinquishing significant control over the legal process.

a) Settlement Under the CPA

Loss of control is notable with respect to the opportunity to pursue a settlement agreement. When class action is pursued, any class member that does not opt-out of the class action loses their ability to settle their claim on their own terms, and on an individualized basis. Although, the *CPA* framework permits settlement, no settlement agreement is binding on a class action until it is approved by the court.³⁰ This approval can only be obtained when the court is satisfied that the settlement is “fair, reasonable, and in the best interests of the class or subclass members”.³¹

As loss of control may be a real concern to some individual plaintiffs, employment counsel should consider explaining to their client the opt-out provision found in s. 9 of the *CPA*, which allows a class member to opt out within the time specified in the certification order. For example, in the most recent motion decision in *Uber*, in ruling on the Notice of Certification that had to be disseminated following the certification of the class, Justice Perell provided the following relevant commentary about opting out:

[43] The case at bar is a case in which the Class Members may wish to exercise their right to opt out, particularly because they may not wish to sue the defendant at all and they may not wish to be bound by a judgment or settlement reached by the Plaintiffs. Some Class Members may wish their individual status to continue. [...] **there may be Class Members that do not wish to be bound by the resolution of the common issues. These Class Members for subjective or financial reasons may not wish to be bound by a court order that made a finding that they are or may be employees of Uber.**

[44] The case at bar is thus one of the relatively rare cases where on a class-wide basis, there may be more than a few class members who advertently wish to exercise their right to opt out. The case at bar, thus does call for a robust and effective Notice Plan and a Notice that clearly elucidates the information needed to make an informed decision about whether or not to exercise the right to opt out. [...].³²

³⁰ *CPA*, s. 27.1.(1) and (3).

³¹ *CPA*, s. 27.1(5).

³² [*Heller v Uber Technologies Inc.*, 2022 ONSC 1998](#) at paras 43-44.

Notwithstanding this loss of control, class members are nonetheless able to participate in the proceeding as permitted by the court.³³

Case Law Developments

In the last several years, class actions have arisen in the employment context with respect to issues like misclassification, vacation pay, overtime, and many more. This section provides a brief update on some of the recent developments in the case law.

a) Misclassification Cases

The cases that seem most ripe for class action are misclassification cases, especially in light of the developing and expanding gig-economy and, I predict, remote working. Employee misclassification is one of the top two or three issues coming up in my practice right now; it's unbelievably common, and I am not alone in this.³⁴ Alexandra Monkhouse was quoted in the Law Times stating, that judges now are a lot more sensitive to the idea that as somebody who is in an independent contractor agreement might actually be an employee."³⁵ In these types of cases, employees may be able to seek remedies for unpaid minimum standards entitlements under the *ESA*, as well as claims Canada Pension Plan and Employment Insurance, along with the potential adverse tax consequences that flow from the misclassification. Additionally, these actions may include claims for general, punitive, aggravated, and exemplary damages.³⁶

As succinctly summarized by Joshua Mandryk and Jody Brown of Goldblatt Partners LLP, Ontario courts have certified misclassification claims have in a vast array of industries and contexts, such as:³⁷

- investment advisors as overtime-exempt managers;³⁸
- salespeople as independent contractors;³⁹
- document reviewers as independent contractors;⁴⁰
- cable and internet installers as independent contractors;⁴¹
- teachers as independent contractors;⁴²

³³ *CPA*, s 14(1).

³⁴ Law Times article, ["Class actions on worker misclassification will continue"](#).

³⁵ Law Times article, ["Uber v. Heller and Foodora decisions leading gig workers to pursue legal rights: lawyer"](#).

³⁶ Barry Kuretzky and Rhonda B. Levy, ["Ontario, Canada Companies Beware: Class Action Lawsuits Alleging Worker Misclassification Are on the Rise"](#) (March 4, 2019).

³⁷ See Joshua Mandryk and Jody Brown's article, ["Employment Class Actions in Ontario: Where are we now and where are we headed?"](#) (May 5, 2021).

³⁸ [Rosen v BMO Nestbitt Burns Inc, 2012 ONSC 2144](#).

³⁹ [Omarali v Just Energy, 2016 ONSC 4094](#).

⁴⁰ [Sondhi v Deloitte, 2017 ONSC 2122](#).

⁴¹ [Sayers v Shaw Cablesystems Limited, 2011 ONSC 962](#).

⁴² [Walmsley v 2016169 Ontario Inc, 2020 ONSC 1416](#).

- major junior hockey players as amateur student athletes, interns/trainees or independent contractors;⁴³ and
- trip leaders on student vacation packages as volunteers.⁴⁴

[Rosen v BMO Nesbitt Burns Inc, 2016 ONSC 4752](#)

This was the first misclassification overtime class action to be certified on a contested basis.⁴⁵ The class contained approximately 1,800 members. The court ultimately approved a 14 million settlement after a two-day mediation, whereby settlement class members would not be required to prove any overtime hours to establish entitlement.⁴⁶

Interestingly, Justice Belobaba remarked in this case that while it is “well known” that he favours contingency fees in class action, they also create a conflict of interest dilemma when it comes to class counsel’s settlement position.⁴⁷ In turn, class counsel must “present hard evidence showing why the settlement amount falls within a range or zone of reasonableness.”⁴⁸ In this case, this was achieved by class counsel through presenting data from comparable U.S. overtime settlements in the financial services section.⁴⁹

[Walmsley v 2016169 Ontario Inc, 2020 ONSC 1416](#)

This was a class action brought by a class of teachers alleging they were misclassified as independent contractors and therefore alleged that they were entitled to certain minimum entitlements under the *ESA*.⁵⁰ This case is notable as it is an example of the potential for the settlement in class actions, pre-certification. Although the certification hearing was heard, counsel asked the court to defer its reasons so it could pursue settlement discussions which ultimately resulted in a settlement of approximately \$2.5 million, which was subsequently approved by the court.⁵¹

[Morris v Solar Brokers, 2020 ONSC 101](#)

This was a costs endorsement arising from a certification motion, whereby plaintiff’s counsel sought substantial indemnity costs on the basis that it viewed its offer with respect to consenting to certification has having qualified as a Rule 49, which they “beat” at the motion. In choosing not to award costs to either party, the court remarked that it could not see “how one can “beat” a non-monetary settlement offer.”⁵² The court further reasoned:

⁴³ [Berg v Canadian Hockey League, 2017 ONSC 2608](#).

⁴⁴ [Montague v Handa Travel Student Trip Ltd, 2020 ONSC 6459](#).

⁴⁵ [Rosen v BMO Nesbitt Burns Inc, 2016 ONSC 4752](#) at para 3.

⁴⁶ *Ibid* at para 5-6.

⁴⁷ *Ibid* at para 14.

⁴⁸ *Ibid* at para 17.

⁴⁹ *Ibid* at para 18.

⁵⁰ [Walmsley v 2016169 Ontario Inc, 2020 ONSC 1416](#) at paras 5-6.

⁵¹ *Ibid* at para 10.

⁵² [Morris v Solar Brokers, 2020 ONSC 101](#) at para 7.

[...] The only monetary amount at stake in the motion and mentioned in the offer is the amount of costs payable to the Plaintiff. Since costs have yet to be determined, the Plaintiff did not “beat” anything in my ruling.

It is a policy of this court to encourage parties and their counsel to work toward settlement of their disputes to the extent possible. Whether prompted by the Plaintiff’s offer or otherwise, the Defendants did just that. The matter was all but resolved by the time it got to a hearing. The two issues that remained outstanding raised legitimate questions about sub-classes and representative Plaintiffs. It turned out that I agreed with the Plaintiff’s position on one of those issues and with the Defendants’ position on the other.

I understand that Plaintiff’s counsel would like compensation for the time and effort it took to work out the settlement of many of the certification issues. A victorious party in a proceeding can expect a judge deciding the matter to award it costs as a matter of course, barring anything unusual: *Blue Range Resource Corp. (Re)* (2001), 2001 ABCA 177 (CanLII), 202 D.L.R. (4th) 523 (Alta CA); *Ryan v McGregor* (1925), 1925 CanLII 460 (ON CA), 58 OLR 213 (Ont CA). But a **settlement is not a victory**, and a settling party does not carry the same expectation. It would not provide an incentive to responding parties to settle claims if negotiating a settlement were treated as an unsuccessful arguing of matter, and the costs incurred in the negotiation were as a matter of course made payable to the moving party by the responding party.

[emphasis added]

Montaque v Handa Travel Student Trip Ltd, 2020 ONSC 6459

This case involved plaintiffs who were allegedly misclassified by the defendant as volunteers. Recently, on June 27, 2022, the parties achieved a \$450,000 settlement which included an agreement that the defendant would reclassify future staff previously classified as volunteers, as employees.⁵³ As pointed out by the court in its the certification decision, this was a “novel” misclassification case for Ontario.⁵⁴ Moreover, according to a recent CBC article, Justice Morgan remarked that the settlement of this case “will have a significant impact on employment law going forward.”⁵⁵

This is the perfect example of a case where pursuing a claim on an individual basis would have made little sense, as the damages on an individual basis were quite small:

In *Cloud*, at para 73, the court explained that the overarching policy goals that inform the preferability analysis are: (a) judicial economy, (b) access to justice, and (c) behaviour modification. Here, there are 1000 affected class

⁵³ CBC News article, “[Ontario class action settlement reclassifies volunteers as employees, setting new precedent](#)” (August 11, 2022).

⁵⁴ *Montaque v Handa Travel Student Trip Ltd, 2020 ONSC 6459* at para 8.

⁵⁵ CBC News article, “[Ontario class action settlement reclassifies volunteers as employees, setting new precedent](#)” (August 11, 2022).

members, each with basic minimum wage and overtime claims. The individual claims of these 1000 will be very small and would not warrant individual litigation despite the importance of that income to these low-income workers. Common determinations on their employment status will significantly contribute to these claimants' access to justice.

In similar employment classification actions, the courts have held that a class action is the preferable procedure: see, *Rosen, supra*, *Fresco, supra*. The Court of Appeal in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 156 (CanLII), 2012 ONCA, at para 156, observed that, like here, "there is every reason to believe that a common issues trial judge, assisted by the parties and their experts, will be able to design and successfully implement a satisfactory compensation system."

In these circumstances, a class action is undoubtedly the preferable procedure, as required by section 5(1)(d) of the CPA.⁵⁶

[emphasis added]

b) Statutory Pay Cases: Vacation, Holiday, Severance, Termination and Overtime

Absent misclassification, failure of an employer to pay statutory entitlements under the *ESA* is another area ripe for litigation as a class.

Curtis v Medcan Health Management Inc, 2022 ONSC 5176

This was an appeal to the Divisional Court of the decision on certification rendered by Justice Perell. In overturning Justice Perell's decision, the Divisional Court found that Justice Perell erred in his finding that a class action was not the "preferable procedure" and certified the class action against the defendant employer for its failure to pay vacation pay and public holiday as required under the *ESA*.⁵⁷ The Divisional court went on to provide the following overview of the Justice Perell's error with respect to his failure to consider the barriers to access to justice in the case at bar:

Had the certification judge expressly considered the barriers to access to justice present in this case, the economic and psychological barriers, and the potential for a class proceeding to address those barriers would have become evident. In this case, the individual claims are relatively small, some as low as a few hundred dollars, which would be a barrier to proceeding with individual actions. The cost of litigating individual actions would be disproportionate to the amount claimed, such that many class members would not bring a claim. This is especially true given that the Respondents are likely to raise a limitations defence in almost every case. Moreover, class members might have difficulty finding counsel who would be willing to take their individual cases, given the low amount of recovery. See *Navartnarajah v. FSB Group Ltd.*, 2021 ONSC 5418, 2021

⁵⁶ *Montague v Handa Travel Student Trip Ltd*, 2020 ONSC 6459 at paras 22-24.

⁵⁷ *Curtis v Medcan Health Management Inc*, 2022 ONSC 5176 at para 1-6.

CarswellOnt 11479, at para. 25; *Azar v. Strada Crush Limited.*, 2018 ONSC 4763, 2018 CarswellOnt 13722A **class proceeding would relieve individual class members of the need to incur out-of-pocket expenses to hire a lawyer, which would in many cases be prohibitive, to pursue their claims.**

In addition, the **fear of reprisal would operate as a barrier to access to justice** because the class consists not solely of former employees of Medcan, but also includes current employees. Those employees would be less willing to pursue individual actions against Medcan for fear of a negative impact on their employment circumstances: *Navartnarajah*, at para. 24; *Walmsley v. 2016169 Ontario Inc.*, 2020 ONSC 1416, 2020 CarswellOnt 3196, at para. 38. By contrast, a class proceeding would provide anonymity, and security in numbers: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, [2012] O.J. No. 2885, at paras. 167-71; *Rosen v. BMO Nesbitt Burns Inc.* 2013 ONSC 2144, 9 C.C.E.L. (4th) 315. Even if class members did not have a fear of reprisal, many might not be aware of their ability to pursue an individual claim. Because of the notice requirement, a class proceeding would ensure that class members become aware of their ability to make a claim.

Because the certification judge failed to consider the barriers to access to justice, his analysis of the ability of a class proceeding to address those barriers, as compared to individual actions, was incomplete. Had he considered the ability of individual actions to address the barriers to access to justice he would have found that individual actions could not address those barriers. The access to justice barriers that could be addressed by means of a class action would be left in place. See *LBP Holdings v. Hycroft*, 2020 ONSC 59, 2020 CarswellOnt 36.⁵⁸

[emphasis added]

Additionally, the Divisional court provided the following relevant commentary:

In employment cases such as this one, **class proceedings would serve the goal of behaviour modification because they would signal to employers that they are expected to be informed of and to comply with their statutory obligations regarding employee compensation.** Individual claims under the *ESA* and individual actions would be much less effective in achieving this goal because the amounts recovered would be relatively small. Moreover, individual claims would never result in the employer being held entirely accountable for the “full costs of their conduct.” *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 29. In a case such as this one, absent the possibility of a class action, there may be little incentive for employers to comply, especially where the non-compliance may persist for years, and their liability may be cut-off by a statutory limitation period.

⁵⁸ [*Curtis v Medcan Health Management Inc.*, 2022 ONSC 5176](#) at paras 38-41.

It is worth noting that class proceedings have repeatedly been found to be the preferable procedure for employment and ESA-related cases: *Walmsley*; *Fulawka*; *Navartnarajah*; *Rosen*; *Azar*; *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518, 73 C.C.E.L. (4th) 45; *Montague v. Handa Travel Student Trip Ltd.*, 2020 ONSC 6459, 67 C.C.E.L. (4th) 311.⁵⁹

[emphasis added]

[Cunningham v RBC Dominion Securities, 2022 ONSC 5862](#)

In this putative class action commissioned employees claim for unpaid vacation and holiday pay for commissioned employees. In his analysis of preferability under the *CPA*, pre-2020 amendments, Justice Belobaba asserted his agreement with the Divisional Court in *Curtis v Medcan Health* with respect to class actions in the context of *ESA* violations:

To satisfy the (unamended) preferability requirement, the plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings, namely access to justice, judicial economy and behaviour modification.

I have already referred to the recent decision of the Divisional Court in *Curtis v. Medcan Health*,^[22] that also dealt with an *ESA* claim for unpaid vacation and public holidays. The **Court canvassed the applicable case law and correctly concluded that: "[C]lass proceedings have repeatedly been found to be the preferable procedure for employment and ESA-related cases."**^[23]

This makes sense. **Access to justice is best achieved via a class proceeding in an ESA case because claims may be relatively small**, especially those of the partially-commissioned Associates and Assistants. And **even where the claims are larger, as in the case of the IAs, they may not be pursued for fear of reprisal**. Judicial economy is best achieved when the core liability issues can be litigated and decided, as here, in one proceeding. Behavioural modification — encouraging large financial entities to comply with *ESA* requirements that were obviously enacted to protect their employees — is a self-evident social benefit and will likely be achieved on the evidence herein. And, in any event, there is no suggestion from the defendant that some other form of proceeding would be preferable.⁶⁰

[emphasis added]

c) Other Types of Cases

[McAnsh v Ontario, 2023 ONSC 3537](#)

⁵⁹ *Ibid* at paras 53-54.

⁶⁰ *Cunningham v RBC Dominion Securities, 2022 ONSC 5862* at paras 43-45.

This was a proposed class proceeding where the issue underlying the claim was whether provincially appointed adjudicators with a fixed term appointment to an administrative tribunal could sue the government for its failure to renew their appointment at the end of the term.⁶¹ In granting the defendant's motion to strike under Rule 21 of the *Rules*, the court found that adjudicators were statutory office holders and not employees, the consequences of which could not allow the claim to proceed.⁶² This case demonstrates not only how class proceedings can be stuck out through the application of Rule 21, but also highlights that these types of claims will not make for viable class actions going forward.

d) Other Developments

i. Costs and Legal Fees

[Brazeau v Canada \(AG\), 2021 ONSC 8158](#)

Although not an employment case, an interesting legal development in the area of class action that deserves mention given its potential applicability to employment class actions, comes from the 2021 decision of Justice Perell in *Brazeau v Canada (AG)*.⁶³ In this case the CPF sought judicial direction as to whether the committee overseeing the CPF had the authority to approve funding for individual class members at the individual issues stage.⁶⁴ In his decision Justice Perell remarked that “[b]ecause most class actions settle, this motion requires the court to explore largely unexplored legal territory about the administration of a class action at the individual trials stage, a stage which rarely occurs in practice.”⁶⁵ Ultimately, Justice Perell held that the CPF’s committee “had authority but not the obligation, to approve funding” to individual class members in these circumstances.⁶⁶ The rationale being that if the Law Foundation was required to fund individual class members through the CPF, it would “expose the Class Proceeding Fund to indeterminate liability.”⁶⁷

Therefore, should a class action subsequently include individual issues trials, individual class members may not necessarily be able to obtain funding from the CPF and in these instances may be liable for costs. Given the potential for individual issues in the context of employment class actions, this is undoubtedly an emerging issue to keep on eye on.

ii. Declassification

[Navartnarajah v FSB Group Ltd, 2023 ONSC 2574](#)

⁶¹ [McAnsh v Ontario, 2023 ONSC 3537](#)

⁶² *Ibid* at paras 51 and 69.

⁶³ [Brazeau v Canada \(AG\), 2021 ONSC 8158](#).

⁶⁴ [Law Foundation of Ontario, 2021 Annual Report](#) at 36.

⁶⁵ [Brazeau v Canada \(AG\), 2021 ONSC 8158](#) at para 1.

⁶⁶ Law Foundation of Ontario, “2021 Annual Report” at page 36; [Brazeau v Canada \(AG\), 2021 ONSC 8158](#) at paras 5-6.

⁶⁷ [Brazeau v Canada \(AG\), 2021 ONSC 8158](#) at para 83.

This recent misclassification case reminds us that court can decertify a class action. In this case, the court began its reasons with the following rhetorical question, “Can a procedural regime designed to foster access to justice become a vehicle for denial of justice?”⁶⁸ As it would appear, where 66 of 69 putative class members opt out, another cannot be located, and another is deceased, the answer to that question will likely be ‘yes’.⁶⁹

In this case, defendants’ counsel submitted that in light of this changed situation regarding the class, the conditions for certification were no longer met and brought a motion under section 10(1) of the *CPA* to decertify the action and the court granted the motion.⁷⁰ Interestingly, this is a case where the defendants had taken the view at the certification stage that the putative class members financially benefitted from being independent contractors and therefore had predicted that there would be numerous opt-outs from the class if the action were to be certified.⁷¹ In fact, the court at during certification did take note of this issue as it related to the preferable procedure criteria, and warned about the class action procedure being misused but nevertheless certified the class:

It is the preferable procedure requirement that poses most squarely the Defendants’ overarching opposition to certification of this as a class action – that is, the very nature of the claim is a detriment to all but a small portion of the class who, perhaps like the current Plaintiff, were only independent contractors for a relatively short period of time...

As [Defendants’ counsel] explain it, the current arrangement in which producers are independent contractors is to the financial advantage of most of the producers. If the Plaintiff wins his case and he and the entire class of producers are found to have been employees all along and thus are entitled to vacation pay and overtime pay, they may also be liable for back taxes. After all, independent contractors enjoy a variety business deductions and other tax advantages that employees do not enjoy.

Further, if the producers all turn out to have been employees of the Defendants, the Defendants themselves may bring claims to the value of each producer’s book of business making this asset untransferable. I do not put these issues forward in order to pre-judge whether Defendants’ counsel is right or wrong in making these arguments, but I do point out that there is a risk that the producers may get more than they ask for and may not like it. What Defendants’ counsel’s argument suggests is that at some point, the majority of class members may find that their financial interest was hijacked by the claim rather than advanced by the claim.⁷²

⁶⁸ [*Navartnarajah v FSB Group Ltd*, 2023 ONSC 2574](#) at para 1.

⁶⁹ *Ibid* at para 8.

⁷⁰ *Ibid* at para 3

⁷¹ *Ibid* at para 5.

⁷² *Ibid* at para 6.

Given the above, employee counsel – whether considering or pursuing a class action – should stay on the lookout as their case progresses for any similar factual basis that could arise and likewise result in a failure of the action at the certification stage or at a subsequent decertification motion.⁷³

Further, counsel should be aware of the potential adverse cost consequences related to its conduct during a decertification motion where proceeding as a class action has become impractical. This is exemplified in the court’s costs endorsement:

[...] the Plaintiff’s approach to the motion, and that of counsel on his behalf, was excessive. Class counsel have a duty to the class, but all parties have responsibility for costs if they run them up unnecessarily. Rules 57.01(1)(e), (f), and (g) of the *Rules of Civil Procedure* collectively provide that where that happens, the other party’s remedy is to seek costs on a substantial indemnity basis.⁷⁴

The plaintiff was ordered to pay the Defendant \$100,000 in costs for the decertification motion.⁷⁵

iii. Dismissal for Delay

Section 29.1(1) of the *CPA* provides that where certain steps aren’t achieved by the first anniversary of the proceeding, on a motion, the court shall dismiss the proceeding for delay:

Mandatory dismissal for delay

29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

- (a) the representative plaintiff has filed a final and complete motion record in the motion for certification;
- (b) the parties have agreed in writing to a timetable for service of the representative plaintiff’s motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;
- (c) the court has established a timetable for service of the representative plaintiff’s motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding; or
- (d) any other steps, occurrences or circumstances specified by the regulations have taken place.⁷⁶

⁷³ Genevieve Cantin, “[The Class Has Spoken: Ontario Court Decertifies Employment Misclassification Class Action](#)”.

⁷⁴ [Navartnarajah v FSB Group Ltd, 2023 ONSC 4024](#) at para 13.

⁷⁵ *Ibid* at para 24.

⁷⁶ *CPA*, s. 291(1).

This provision was recently dealt with for the first time by the court in *Bourque v Insight Productions*, which just so happened to be an employee misclassification case.⁷⁷ In granting the defendant’s motion to dismiss for delay, Justice Belobaba bluntly summarized his decision in the following way: “The point of this decision is simple: s. 29.1 of the CPA means what it says.”⁷⁸

While a number of decisions have been rendered since that have been more flexible in their approach, these cases should remind counsel of the importance of meeting the timelines outlined above.⁷⁹

i. Honorariums

Phillip v Deloitte Management Services LLP, 2023 ONSC 1210

This case involved 500 individuals who provided document review and e-discovery services to third parties, who alleged that they were misclassified as independent contractors and therefore claimed damages for entitlements under the *ESA*. After approximately 8 years of litigation, this case was finally resolved after two days of mediation. The court in turn approved the \$2.4 million settlement amount, along with a \$8,000 honorarium to the representative plaintiff.⁸⁰

In granting only \$8,000 of the request \$20,000 honorarium, the court made the following remark:

[...] “representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where the representative plaintiff can demonstrate a level of involvement and effort that goes beyond what is normally expected and is “truly extraordinary”, or where there is evidence that they were financially harmed because they agreed to be the class representative, that the payment of an honorarium may be justified.”⁸¹

Doucet v The Royal Winnipeg Ballet, 2023 ONSC 2323

This was not an employment case; however, it was an appeal to the Divisional Court which addressed the practice of awarding honorariums to representative plaintiffs and other class members. The class proceedings judge had expressly departed from the practice on the basis of the jurisprudence holding that these honorariums should be “rare”.⁸² On appeal, the Divisional court confirmed that the prior jurisprudence should be followed and that these payments should be “rare”, “modest” and should “foster the goals of class proceedings while addressing significant concerns about an apparent conflict of interest between recipients of these payments

⁷⁷ Bennett Jones LLP, “[Class Actions: Looking Forward 2023](#)” at 4; *Bourque v Insight Productions, 2022 ONSC 174*.

⁷⁸ *Bourque v Insight Productions, 2022 ONSC 174* at para 2.

⁷⁹ Bennett Jones LLP, “[Class Actions: Looking Forward 2023](#)” at 4-5.

⁸⁰ *Phillip v Deloitte Management Services LLP, 2023 ONSC 1210*

⁸¹ *Ibid* at para 15.

⁸² *Doucet v The Royal Winnipeg Ballet, 2023 ONSC 2323* at para 3.

and other class members.”⁸³ Notwithstanding, the Divisional Court allowed the appeal in part with respect to the honorarium for the lead representative plaintiff. It granted her an honorarium of \$7,500.00.⁸⁴

On the facts of the case, the Divisional Court was not prepared to permit honorariums be paid to the other three non-representative plaintiffs; however, the court left the issue of whether these types of payments would ever be payable to non-representative plaintiffs for another day.⁸⁵

What does the Future of Class Actions Hold

While it would be futile to say with any certainty what the future of employment class actions is, we will hopefully have some further clarity in the area of misclassification class actions as we continue to follow along with those currently in progress dealing with gig-workers and await a decision on their merits. To this same point, plaintiff counsel will want to keep abreast of amendments to minimum standards legislation like the *ESA*, where even subtle amendments like a change to the definition of “employee” could either trigger a surge of class action claims or assist in deciding those that are pending.

⁸³ *Ibid* at para 4.

⁸⁴ *Ibid* at para 119.

⁸⁵ *Ibid* at 105.



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TAB 4A

24th Employment Law Summit

**Tax Consequences of Employment vs.
Independent Contractor Status**

Christopher D'Iorio, Director, Human Resource Practice
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October 11, 2023



Tax Consequences of Employment vs. Independent Contractor Status

	Where the service provider is an ... EMPLOYEE	Where the service provider is an ... INDEPENDENT CONTRACTOR
Nature of the Income and Taxation	Income from Employment under ITA Part I, Division B, Subdivision A Very limited deductions available under ITA 8 Preferential treatment for stock options [ITA 110(1)] and certain deferred income plans Typically no installment payments of tax required by employee Treatment under tax treaties as employment income	Income from a business under ITA Part I, Division B, Subdivision B Deductions available on general corporate principles, but possibly limited if a “personal services business” [ITA 248(1), 125(7), 18(1)(p)] Installment payments of tax may be required Treatment under tax treaties as business income
Income tax Withholding	Withholding required on each payment of remuneration is required by the payor [ITA 153(1)] for: <ul style="list-style-type: none"> • Periodic payments, ITA Reg 102 • Non-periodic payment, ITA Reg 103 	No withholding required , unless the person is a non-resident, in which case withholding is required under ITA Reg 105
Income Tax Reporting	Reporting required - all remuneration reportable on Form T4 or T4A (or applicable Québec forms)	Reporting required ¹ - all payments reportable on Form T4A (or applicable Québec form)
Social Security - Employment Insurance	Employee and employer premiums required	No premiums required for regular benefits – special program benefits available upon registration
Social Security - Québec Parental Insurance Program	Employee and employer premiums required	Self-employed premiums required (different basis for calculation)
Social Security - Canada/Québec Pension Plan	Employee and employer contributions required	Self-employed contributions required

¹ Note that the CRA advises that no penalties will be assessed for failure to complete Box 48 on the T4A for a payment of fees for services.

	Where the service provider is an ... EMPLOYEE	Where the service provider is an ... INDEPENDENT CONTRACTOR
Payroll Taxes	Payroll taxes may apply (differ by province, e.g., Employer Health Tax in Ontario, Health Service Fund in Québec, etc.)	Typically no payroll taxes exigible for service recipient
GST/HST	Not required for employee	May be required



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TAB 4B

24th Employment Law Summit

Employees, Dependent and Independent Contractors:
It's a Matter of Character

Melanie Reist

Morrison Reist Krauss LLP

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October 11, 2023



Employees, Dependent and Independent Contractors: It's a Matter of Character

By: Melanie Reist and Taylor Maitland

The issue of whether an individual is an employee or an independent contractor can have significant consequences on both individual workers and the companies for whom they provide services.

While this area of law has evolved significantly in recent decades, misclassification still occurs, either as the result of a mistake or misunderstanding, or a conscious decision made by an employer to avoid certain costs and responsibilities. In my experience, employers continue to be surprised that an independent contractor relationship cannot be created merely by calling it such in a written independent contractor agreement.

Distinctions Between Independent Contractors versus Employees

An individual who is deemed to be an independent contractor is ineligible for certain benefits under the *Employment Standards Act, 2000* such as overtime pay, pregnancy and parental leave, and vacation pay.

In law, an independent contractor is considered to have equal bargaining power with the party receiving the services and the relationship is thereby governed by commercial law principles, not employment law.

However, courts and various government tribunals have shown a willingness to look beyond the surface to the substance of the parties' relationship in determining an individual's status as an employee or independent contractor. The consequences can be quite significant for both employers and employees. For employers, it can mean significant statutory liability for income taxes, Canada Pension Plan and employment insurance premiums, as well as potential notice and severance pay obligations under applicable provincial statutes and damages for failure to provide reasonable notice at common law. For the individual, this principle can affect the right to collect employment insurance benefits, statutory termination and severance pay, and possibly payment in lieu of notice at common law.

A variety of tests have been articulated through the years in determining whether an individual is an employee or an independent contractor.

Initially, the emphasis was placed on the a degree of control exercised by the company over both the individual and the work to be performed. Under this "control test", relevant issues include: whether the individual has control over the days or hours of work and the customers to be called upon; when and how much vacation is taken; whether to attend meetings; and if appropriate, what clothes are worn.

Subsequent judicial treatment of this issue has acknowledged that control, in and of itself, may not be conclusive. In *Montreal v. Montreal Locomotive Works Ltd.*, [1947] D.L.R. 161 (P.C.), Lord Wright articulated an expanded test to respond to what he described as "more complex conditions of modern industry." This test identified four factors, and thus was aptly named "the four fold test," and sometimes "the entrepreneur test". The four factors are control, ownership of tools, the chance of profit, and the risk of loss. The question at the heart of the analysis is "whose business is it?". A true contractor would have the chance to profit from the business and a corresponding risk of loss, as opposed to having compensation determined for them.

In *Stevenson Jordan and Harrison Ltd. v. MacDonald*, [1952] T.L.R. 101 (C.A.), Lord Denning introduced what has become known as the "organization" or "integration" test. The test considers whether the individual's work is done as an integral part of the business or is not integrated but only accessory to it.

In the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.J. 61, the court reviewed the various tests and concluded that there is no universal test to determine whether a person is an independent contractor or an employee. In that case the Court was dealing with the issue of whether Sagaz was vicariously liable for the tortious conduct of its consultant. The answer to that question was based upon a finding of whether the consultant was an employee or an independent contractor. This remains the prevailing case for determinations of this issue. Writing for the majority, Justice Major stated:

"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. However, other factors to consider include 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 held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case."

Jurisprudence shows that the courts will draw from the various tests in determining an individual's status. Moreover, it makes it clear that the test is not rigid and will likely be greatly impacted by the particular facts of each case.

These “facts” will often include the written agreement between the parties as a starting point, because it can provide insight as to the intention of the parties. However, a written agreement is not determinative. If an individual with an independent contractor agreement is treated like an employee in most respects, the court is likely to find that they are an employee.

Braiden v. La-Z-Boy Canada Limited

Several years ago, I was counsel for the plaintiff in *Braiden v. La-Z-Boy Canada Limited*, [2006] O.J. No. 2791 (S.C.J.). Justice Sills found that Braiden, a furniture sales representative, was an employee and not an independent contractor. Justice Sills made this finding notwithstanding the following undisputed evidence at trial:

1. Braiden was paid commission without any deductions for income tax, Canada Pension Plan or employment insurance premiums;
2. Braiden was responsible for remitting Goods and Services Tax on the commissions that he was paid and for remitting his own income taxes;
3. Braiden signed annual agreements which, amongst other things, confirmed that he was not an employee of La-Z-Boy;
4. For several years Braiden's services were provided through a corporate vehicle called Gordon Braiden Sales Inc.;
5. Braiden had employees and operated out of a leased office space; and
6. Braiden registered his business as an employer with the Workplace Safety and Insurance Board.

Braiden brought a wrongful dismissal action when La-Z-Boy, pursuant to a written agreement, terminated the relationship with only 60 days notice. At the time, Braiden had worked for La-Z-Boy for almost 23 years. Braiden commenced a wrongful dismissal action claiming that he was an employee or, alternatively, a dependent contractor entitled to reasonable notice. Justice Sills ordered La-Z-Boy to pay damages in the amount of \$138,760.66 based on a notice period of 20 months.

Justice Sills found that Braiden was directed by La-Z-Boy (if he wanted to keep his job) to incorporate, have an office outside of his home, hire staff and apply for a WSIB number. He had no authority to set prices, negotiate his commissions or determine his territory. He was completely dependent on La-Z-Boy for his livelihood. Braiden was in the La-Z-Boy business so to speak - his business was not ancillary to it.

On appeal, the Court of Appeal confirmed that Braiden was an employee and focused on the issue of consideration; where it ruled that an employer who wants to change the termination provision of a contract of employment (from reasonable notice to a fixed notice period) must provide some benefit to the employee in exchange for that change.

Although the “in the alternative argument” that Braiden was a dependant contractor was not addressed by the court at the trial level or on appeal, we would soon get more information on this intermediate category from the Court of Appeal in *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916.

Dependent Contractor

Apart from the assessment of employee or independent contractor, an additional complicating factor is the existence of an intermediate or hybrid category of worker called a “dependant contractor”. This category was recognized early on in *Carter v. Bell & Sons Canada Ltd.* [1936] O.J. No. 203 (C.A.).

Put simply, a dependent contractor is a contractor, but one who is economically dependent on the company to which they provide services. As such, due to the contractor's reliance and economic dependence on the company, they are entitled to reasonable notice upon termination, as if they were an employee.

Often the notice period awarded will be reflective of an employment situation regardless of whether the relationship is labelled one of employment or dependent contractor.

The Ontario Court of Appeal decision in *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 is the leading decision in Ontario confirming the existence of dependent contractors in Ontario. This case involved a salesperson for Reid's Heritage Homes. She received money from Reid's for each home she sold, which she then used to pay her own employees. When the company offered McKee a new, six-month contract after nearly 20 years, she rejected the offer and brought

an action for wrongful dismissal. In establishing such a category, the Court articulated a two-part test to employ when determining whether a worker is a dependent contractor. First, apply the *Sagaz* test described above to determine whether the worker is an employee or a contractor. If the worker is not an employee, determine whether there is nevertheless near or complete exclusivity, and whether there has been a level of economic dependency on one customer/company. At this stage of the analysis, this question is determinative of the issue.

Since the decision in *McKee*, other decisions have continued to shape the law surrounding dependent contractor status. In *Keenan v. Canac Kitchens Ltd*, 2016 ONCA 79, the Ontario Court of Appeal held that a worker's exclusivity cannot be established by looking at a "snapshot" of their working history. Rather, one must consider the full history of the relationship between a worker and company and determine whether this full history demonstrates economic dependence nearing complete or near complete exclusivity. In this case, a husband and wife initially worked for Canac Kitchens Ltd. (*Canac*) as employees beginning in 1976 and 1983 respectively. In 1987, they were told that they would carry on their work as contractors. This working relationship continued, with the Keenans working almost exclusively for *Canac* until 2007, when they began to do some work for a competitor. In 2009 they were advised that their services were no longer needed and were terminated effective immediately without notice or pay in lieu of notice. On appeal, *Canac* argued that the Keenans were independent contractors because they hadn't worked exclusively for *Canac* during their last two years of service. The Court of Appeal dismissed this argument; finding that the trial judge properly looked at the full history of the parties' work relationship and the two years of non-exclusive service did not alter the high degree of exclusivity demonstrated in the overall history.

In *Thurston v. Ontario (Children's Lawyer)*, 2019 ONCA 640, the Court of Appeal clarified what level of dependency is required to tip the scale from an independent contractor to a dependent contractor. Thurston was a sole practitioner lawyer who provided legal services to the Office of the Children's Lawyer pursuant to a series of fixed-term agreements. While the agreements did not automatically renew, she was continuously reappointed for a period of 13 years. Upon the expiry of her last agreement, Thurston brought a claim alleging that she was a dependent contractor and seeking common law reasonable notice. The motion judge found that she was a dependent contractor, however, the Court of Appeal for Ontario disagreed. Relying on *McKee* the Court of Appeal held that the threshold of near complete exclusivity requires "substantially more than a majority of the dependent contractor's income [to be] earned from the contracting party."

Therefore, despite earning approximately 40% of her income from the OCL, this was not enough to establish dependent contractor status.

Where a dependant contractor relationship is established, the assessment and determination of an appropriate notice period will be more reflective and aligned with the treatment of an employment versus an independent contractor relationship.

Recent Developments from the Court of Appeal

A recent case from the Court of Appeal has provided guidance on the expectations placed on independent contractors to mitigate their damages following the breach of a fixed term independent contractor agreement.

In *Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413, Metro Freightliner Hamilton Inc., Metro Truck Niagara Inc., and Metro Collision Services Inc., engaged the services of Monterosso as an independent contractor for a 72-month term. However, the agreement was terminated early without cause. Monterosso filed a claim for the payments due for the remaining 65 months of the contract.

The trial judge found that the contract did not have a termination provision, and it clearly and unambiguously provided for a 72-month fixed term. As a result, the trial judge found in favour of Monterosso and awarded him \$552,500.00 plus HST, representing the remaining amount due under the contract.

On appeal, the company argued that the trial judge erred in failing to consider internal email correspondence which suggested that a provision was added to the contract to ensure the respondent would be paid until the last day of active service. The company also argued that the trial judge erred in holding that Monterosso was not required to mitigate his damages. The Court of Appeal rejected the first argument but agreed that the trial judge erred by conflating the situation of independent contractors with that of employees working under fixed-term contracts.

Although the Court of Appeal previously held in *Howard v Benson Group Inc.*, 2016 ONCA 256 that *employees* under fixed-term contracts are entitled to damages equaling the loss of income for the balance of the fixed term without a duty to mitigate, the court never confirmed the same for *independent contractors*.

The Court of Appeal confirmed that fixed-term independent contractors have a duty to mitigate their damages in the event of a breach of the independent contractor agreement, unless the agreement provides otherwise.

Conclusion

Given the developments in the law, it is essential for companies to carefully consider the nature of the relationship between itself and the worker to create written agreements and relationships that reflect the nature of the relationship they seek to establish.

Ultimately, the determination of whether an individual is an employee or an independent contractor must be made on the evidence adduced before and accepted by the trier of fact. The existence of a contract between the parties stating that an employee/employer relationship does or does not exist will not be a determining factor. While the parties may choose any type of relationship, the legal characterization of the relationship will be determined by actual conduct.



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24th Employment Law Summit

Independent Contractors: Employer Obligations and Penalties for Misclassification

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Independent Contractors: Employer Obligations and Penalties for Misclassification

Introduction

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The distinction between independent contractors and employees is an important issue in employment law. This distinction creates significant implications ranging from tax and remittance obligations to employment standards and common law notice obligations. However, the distinction between classifying a worker as an employee or independent contractor may have the greatest impact to the parties in the context of a wrongful dismissal. At termination, if a worker is classified as an employee they are entitled to reasonable notice before the working relationship can be terminated, no such duty exists for independent contractors.

There are several factors for parties to consider in deciding how they wish to structure their service relationship. There are a host of potential benefits to a service recipient to engaging service providers as “contractors”. Though the service recipient is presumably paying the service provider something akin to a wage or project fee, the service recipient is likely avoiding ancillary employee-related costs such as vacation pay, overtime, health benefits, and additional taxes associated with employment, such as employer contributions to the Canada Pension Plan (CPP) and Employment Insurance (EI). Many service providers will often, though not always, prefer to be classified as independent contractors as this classification can have significant income tax benefits.

Though there are potential benefits to both parties, there are also downsides whereby legislators and adjudicators are increasingly taking issue with the classification of service providers as independent contractors. With this in mind, it is increasingly important for the parties to be aware of the potential consequences associated with their desired classification.

1. Obligations on Employers with Respect to Employees and Independent Contractors

Amongst their obligations, employers of employees must: deduct and remit income taxes (including CPP and EI deductions), report employee income and any deductions, provide T4 slips to employees, often incur costs of benefits plans, maintain proper record and other administrative requirements, provide at least *Employment Standards Act, 2000* (“ESA”) minimum

standards, (e.g., overtime, vacation, and public holidays), and provide notice of termination and severance pay where required. This non-exhaustive list provides an insight into the different areas employers must be mindful of during an employee-employer relationship.

Comparatively, the obligations of a service recipient, otherwise the employer, in an independent contractor relationship look much different. For example, ‘employers’ of independent contractors do not have to: provide payroll deductions, provide *ESA* minimum standards (e.g., overtime, vacation, public holidays), or provide employment-related notice or severance on termination. Indeed, independent contractors are generally less onerous for an employer to administer in terms of money and labour time. Though there are situations where a service provider is certainly an independent contractor, such as the person you may hire for the discreet project of building a deck at your home, many of the situations that counsel are presented with in practice are more complicated.

2. Test for Independent Contractor or Employee Relationship

The distinction between an employee and an independent contractor can be difficult to determine because there is no universal test that can be applied to classify a working relationship. The language of the *ESA* may be a useful starting point for employers who are questioning whether a worker is an employee or an independent contractor. The *ESA* provides the following definition of an employee:

“employee” includes,

- (a) a person, including an officer of a corporation, who performs work for an employer for wages,
- (b) a person who supplies services to an employer for wages,
- (c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer’s employees, or
- (d) a person who is a homeworker,

and includes a person who was an employee; (“employé”)¹

¹ *Employment Standards Act*, 2000, SO 2000 c 41 s. 1.

However, the *ESA* does not provide a comparable definition for an independent contractor. Therefore, to classify a working relationship, employers will need to examine how courts have differentiated between employees and independent contractors.

The Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz Industries Canada Inc* reiterated earlier jurisprudence that:

[46] It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose. The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.²

Sagaz is considered the starting point, and leading authority, in cases where workers who are classified as independent contractors claim to be employees for *ESA* purposes. Many labour boards have also either expressly cited the *Sagaz* decision, or used parallel reasoning, to guide their analysis in determining how to properly classify a worker.³

Sagaz highlights that the key question is whether the person who has been engaged to perform the services is performing them as a person in business on their own account.⁴ Employers and contractors may be tempted to simply draft a contract that classifies their work as a contract for services, however, the parties' own classification of the relationship is not a conclusive factor.⁵ Instead, adjudicators will look beyond the way the parties described themselves and will assess the true nature and substance of the arrangement based on the facts. These factors include assessing:

- the control and direction over the worker;
- the party that has ownership of the tools and equipment;
- the worker's exposure to financial loss and opportunity of profit; and

² *71122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 2 SCR 983 ("*Sagaz*") at para 46.

³ See generally: *Raid Inc. V Williams Black*, 2021 CanLII 108656; *Brian Graff v Real Crowd Capital Inc.*, 2023 CanLII 12654; *Spectrum Event Paramedical Services (GP) Inc. o/a Spectrum Event Medical Services LP v Samuel Sutton*, 2019 CanLII 93810.

⁴ *Supra* note 2 at para 47.

⁵ *Ibid* at para 49.

- how integral the worker is to the employer's operations.⁶

The Supreme Court emphasizes that the above listed factors are a non-exhaustive list and that there is no formulaic application. Instead, the relative weight of each factor will depend on the particular facts and circumstances of each case.⁷

More recently, the Supreme Court of Canada in *McCormick v Fasken Martineau DuMoulin LLP* commented on the nature of employment relationships in the Human Rights context, stating:

[23] Deciding who is in an employment relationship for purposes of the *Code* means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations?

...

[27] Control and dependency, in other words, are a function not only of whether the worker receives immediate direction from, or is affected by the decisions of others, but also whether he or she has the ability to influence decisions that critically affect his or her working life. The answers to these questions represent the compass for determining the true nature of the relationship.⁸

While the case law reveals no bright line test for classifying a working relationship, what is clear is that adjudicators will examine the contextual factors of each case to determine the true intention of the parties relationship.

3. Risks, Penalties and Disadvantages for Misclassification

Misclassifying a working relationship has serious legal consequences, more so for employers in the sense of risk of governmental sanction. While workers do not share the same degree of risk, there are disadvantages for workers who are classified as independent contractors, including lost statutory protections and entitlements. In the case of employers, if

⁶ *Ibid* at para 47.

⁷ *Ibid* at para 49.

⁸ *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 23 and 27.

they are found to have misclassified a worker as an independent contractor at the time of termination, then the employer may be required to provide pay-in-lieu of notice of termination, fulfill any missed statutory obligations, and may face small or even large monetary fine for the misclassification. These risks, penalties, and potential disadvantages make it important that employers correctly identify the nature of the relationship before contracting with any employee or independent contractor.

(i) Wrongful Dismissal Damages

The 2015 Federal Court of Appeal decision of *Rennie v VIH Helicopters Ltd* provides an interesting example of how courts and adjudicators analyze a worker's classification.⁹ In this case, Mr. Rennie, a helicopter maintenance engineer, sued VIH Helicopters Ltd., claiming damages for unjust (wrongful) dismissal.¹⁰ Mr. Rennie provided services for VIH for almost fifteen years through a number of legal entities.¹¹ At termination, VIH Helicopters Ltd claimed that Mr. Rennie had been an independent contractor, in part relying on the fact that Mr. Rennie had signed an "independent contractor agreement" and that Mr. Rennie himself characterized his status as an independent contractor on numerous occasions.¹²

Nonetheless, when Mr. Rennie and VIH's relationship came to an end, Mr. Rennie took the position that he was an employee of VIH's and sought damages for wrongful dismissal.¹³ The adjudicator reviewed the circumstances of Mr. Rennie's work and ultimately concluded that he was an employee.¹⁴ While the Federal Court reversed the adjudicator's decision, the Federal Court of Appeal reinstated the decision and held there was a reasonable evidentiary basis to conclude that the relationship was that of an employee and employer.¹⁵

⁹ *Rennie v VIH Helicopters Ltd.*, 2015 FCA 25

¹⁰ *Rennie v VIH Helicopters Ltd.*, 2014 FC 22 at para 1.

¹¹ *Ibid* at para 5.

¹² *Ibid* at para 7.

¹³ *Ibid* at para 15.

¹⁴ *Ibid* at para 1.

¹⁵ *Supra* note 9 at para 18.

In reaching this conclusion the adjudicator emphasized that the control and direction of Mr. Rennie's work, the ownership of tools, the exposure to financial loss, and the integration of Mr. Rennie into the company, all factored towards a finding of an employee and employer relationship. First, Mr. Rennie was trained and supervised by VIH, and VIH controlled Mr. Rennie's day-to-day responsibilities.¹⁶ Second, the adjudicator found that VIH supplied Mr. Rennie with most of the tools and equipment necessary for the job.¹⁷ Third, with few exceptions Mr. Rennie's sole employer was VIH.¹⁸ Fourth, the adjudicator found that Mr. Rennie was an integral part of VIH's business and was not distinguishable from other employees engaged in the same type of work.¹⁹

While other minor factors supported VIH's claim that Mr. Rennie was an independent contractor, the above factors overwhelmingly supported a finding that the nature of VIH's and Mr. Rennie's working relationship was one of employer and employee. Mr. Rennie was awarded over \$65,000 in wrongful dismissal damages.²⁰ The *Rennie* case serves as a reminder that adjudicators will scrutinize the nature of the working relationship, even if the contract identifies the worker as an independent contractor. Employers should further be aware of the large wrongful dismissal damages that can be associated with misclassifying a worker.

(ii) Missed Statutory Payments

Employers can also be held liable for any unpaid statutory obligations such as vacation and holiday pay, owed to either current or former employees. For example, the Ontario Labour Relations Board in *TJ Dustin Ruttan v Hennessey Point Property Maintenance*, was tasked with reviewing whether Mr. Ruttan was an independent contractor or an employee of Hennessey Point.²¹ Prior to this dispute reaching the Board, an Employment Standards Officer ("Officer") investigated Hennessey Point for *ESA* contraventions but did not issue any Notice of

¹⁶ *Rennie and VIH Helicopters Ltd.*, 2013 CarswellNat 744, at para 20 ("*Rennie*").

¹⁷ *Ibid* at para 22-23.

¹⁸ *Ibid* at para 24.

¹⁹ *Ibid* at para 25.

²⁰ *Ibid* at para 84; *Supra* note 9 at para 17.

²¹ *TJ Dustin Ruttan v Hennessey Point Property Maintenance*, 2020 CanLII 42462 ("*Ruttan*")

Contraventions (“NOC”).²² However, Mr. Ruttan sought an application for review, claiming Hennessey Point misclassified his employment status, contrary to section 5.1(1) of the *ESA* and sought damages for unpaid vacation and holiday pay.²³

The Board found that having regard for the principles set out in *Sagaz*, Mr. Ruttan was an employee of Hennessey Point.²⁴ First, the Board highlighted that Hennessey Point was responsible for supplying and controlling the bulk of Ruttan’s work and his corresponding remuneration.²⁵ The Board described this evidence as “precisely the kind of economic dependence that points to a finding of an employee and employer relationship.”²⁶ Second, Hennessey Point owned the equipment that Mr. Ruttan used for work.²⁷ Third, the Board found that Mr. Ruttan had no real chance of making a profit or incurring a loss in a real business sense.²⁸ Fourth, the evidence indicated that while Mr. Ruttan performed a number of small side projects, he never turned down work from Hennessey Point, and were performed when Hennessey Point had no work available for him.²⁹

Based on these factors the Board found that Mr. Ruttan was not on the facts carrying on a business on his own account.³⁰ Instead, the Board determined he was an employee of Hennessey Point providing services on behalf of the company.³¹ The Board later held that the claimant was entitled to \$2,139.08 (\$53,477.21 x 4%) for missed vacation pay and \$1,822.86 in pay for the 19 missed public holidays.³² In total, the employer was forced to pay \$3,961.94 for missed statutory payments. The *Ruttan* case serves as a caution to employers about their ongoing statutory obligations and that damages can ensue even during the working relationship.

²² *Ibid* at para 2.

²³ *Ibid* at para 3.

²⁴ *Ibid* at para 34.

²⁵ *Ibid* at para 35.

²⁶ *Ibid* at para 35.

²⁷ *Ibid* at para 37.

²⁸ *Ibid* at para 38.

²⁹ *Ibid* at para 38.

³⁰ *Ibid* at para 42.

³¹ *Ibid*.

³² *TJ Dustin Ruttan v Hennessey Point Property Maintenance*, 2020 CanLII 65666 at para 21.

(iii) Fines and Penalties under the *ESA*

Employers should also be aware that misclassification of a worker is now expressly prohibited under the *ESA*. Specifically, in 2017, the Ontario government introduced the *Fair Workplaces, Better Jobs Act, 2017* (“Bill 148”) which included many changes to the *ESA*. Among them, was the express prohibition of misclassifying an employee as an independent contractor.³³ Effective November 27, 2017, the *ESA* now includes the following provision:

No treating as if not employee

s.5.1(1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act. 2017, c. 22, Sched. 1, s. 5.³⁴

Bill 148 also created a reverse onus by placing the burden of proof on the employer to establish that the worker was not an employee under the *ESA*. The provision read:

Onus of proof

s.5.1(2) Subject to subsection 122 (4), if, during the course of an employment standards officer's investigation or inspection or in any proceeding under this Act, other than a prosecution, an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer.³⁵

However, in 2018, the Ontario government introduced the *Making Ontario Open for Business Act, 2018* (“Bill 47”) which struck out the reverse onus requirement in s. 5.1(2). Therefore, when Bill 47 came into force on November 21, 2018, the burden returned to the claimant, who must

³³ Bill 148, *An Act to amend the Employment Standards Act, 2000, the Labour Relations Act, 1995 and the Occupational Health and Safety Act and to make related amendments to other Acts*, 2nd Sess, 41st Parl, 2017, (assented to 27 November 2017).

³⁴ *Supra* note 1 at s. 5.1(1).

³⁵ *Ibid*, as it appeared on 27 November 2017.

establish an employee-employer relationship.³⁶ Nonetheless, the codification prohibiting misclassification should serve as another caution to employers to ensure proper classification of employees.

Along with the amendments to the *ESA*, the Ontario government increased their enforcement powers. The Ministry of Labour hired 175 Officers to conduct more frequent inspection blitzes in specific sectors. Their mandate is to ensure proper compliance with the *ESA*, and to educate employees and employers on their rights and responsibilities. These Officers also have the power to issue fines and penalties for noncompliance. Specifically, if an Officer finds that an employer has misclassified an employee, they can issue a NOC. These NOC carry a fine of \$250 for a first-time offence, a \$500 fine for a second contravention within a three-year period, and a \$1,000 fine for a third or subsequent contravention in a three-year period.³⁷ The penalties are further multiplied by the number of workers they affect.³⁸ Employers may also face prosecution for the misclassification and, if found guilty, the penalties range from a fine between \$50,000 and \$500,000, depending on the number and frequency of contraventions, and whether the wrongdoer is a person or a corporation.³⁹ To date, the reported fines for misclassification remain relatively minor. However, Bill 148 and the new 5.1(1) section in the *ESA* creates an additional source of liability for employers who must be proactive to ensure proper compliance.

Since the introduction of the new misclassification provision, Officers have issued numerous NOC fines – some of which have been reviewed by the Ontario Labour Board. For example, in *CDA AZ-DZ Driver Services Inc. v Boris Tseitlin*, the Board was in part tasked with reviewing three NOC fines issued for the employer's contravention of s. 5.1(1) of the *ESA*.⁴⁰ First, the evidence highlighted that the workers had to get approval from CDA for vacation or sick time.⁴¹ Second, they did not own their vehicles or the necessary tools.⁴² Third, they had no other

³⁶ Bill 47, *An Act to amend the Employment Standards Act, 2000, the Labour Relations Act, 1995 and the Ontario College of Trades and Apprenticeship Act, 2009 and make complementary amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (assented to 21 November 2018).

³⁷ *Penalties and Reciprocal Enforcement*, O Reg 289/01 s. 1.

³⁸ *Ibid.*

³⁹ *Supra* note 1 at s. 132.

⁴⁰ *CDA AZ-DZ Driver Services Inc. v Boris Tseitlin*, 2019 CanLII 120152.

⁴¹ *Ibid* at para 29.

⁴² *Ibid* at para 16.

way to make income other than their hourly rate for driving.⁴³ Fourth, they could not hire helpers and they had no control over their driving routes.⁴⁴ These factors all led the Board to conclude that these drivers were employees of CDA.⁴⁵ The Board confirmed two NOC fines of \$250 each (a total of \$500) and withdrew the third contravention as it occurred before s. 5.1(1) of the *ESA* came into force.⁴⁶ This is an early example of OLRB jurisprudence, but suggests that the Board will likely be considering similar factors to courts in determining whether or not a service provider ought to be classified as an employee.

(iv) Lost Protections and Entitlements for Independent Contractors

While this paper has largely focused on the legal risks of misclassifying a working relationship for the employer, workers should also be aware of the potential disadvantages of being classified as an independent contractor. First, independent contractors forgo protection under employment standards, health and safety, and workers' compensation laws.⁴⁷ This means that independent contractors are not entitled to benefits such as vacation entitlements, statutory holidays or overtime pay and they are not automatically insured or entitled to WSIB benefits.⁴⁸ Contractors can apply to WSIB on their own account and choose optional insurance coverage, but they are responsible for the optional coverage premiums.⁴⁹

Second, in an employer-employee relationship, employers may be obligated to contribute to CPP (when the employee is in pensionable employment) and EI (when the employee is in insurable employment).⁵⁰ For CPP, the employer and employee portion are the same amount, and the Employer will deduct the CPP contributions from their employees pay and remit these

⁴³ *Ibid* at para 16.

⁴⁴ *Ibid* at para 16.

⁴⁵ *Ibid* at para 31.

⁴⁶ *Ibid* at para 37.

⁴⁷ Government of Canada, "Responsibilities, benefits and entitlements for employees and self-employed workers" (28 July 2022), online: *Government of Canada* < <https://www.canada.ca/en/revenue-agency/services/tax/canada-pension-plan-cpp-employment-insurance-ei-rulings/cpp-ei-explained/employees-self-employed-workers-responsibilities-benefits-entitlements.html> >.

⁴⁸ *Ibid*.

⁴⁹ WSIB Ontario, "Workers and Independent Operators Policy" (4 July 2023), online: *WSIB Ontario* < <https://www.wsib.ca/en/operational-policy-manual/workers-and-independent-operators> >.

⁵⁰ *Supra* note 47.

amounts to the Canada Revenue Agency.⁵¹ Comparatively, independent contractors pay both the employer and employee portions of the CPP contributions.⁵² Further, independent contractors do not pay EI premiums unless they opt into the EI program for employment insurance benefits and if they choose to opt in, then they pay the same EI premiums that employees pay.⁵³

Conclusion

The distinction of whether a worker is an employee, or an independent contractor is important for both the employer and employee to understand before entering any working relationship. As this paper has outlined, employers should remain informed of (1) their obligations owed to employees and independent contractors; (2) who can properly be characterized as an independent contractor; and (3) the risks, penalties and disadvantages for misclassification. There are additional preventative steps employers and workers can take to ensure proper compliance with the *ESA*.

For employers, these include reviewing the changes made to the *ESA*; reviewing the differences between an independent contractor and employee in the Ontario Ministry of Labour's *ESA* Guideline; ensuring well drafted employment and independent contractor agreements and reviewing any current arrangements with independent contractors. For workers, these largely include familiarizing oneself with the benefits and entitlements they will potentially be foregoing by entering into an independent contractor relationship versus an employment relationship, and then weighing that against the potential savings the worker may realize on taxes and related withholdings.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*



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24th Employment Law Summit

Privilege in Workplace Investigations

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Privilege in Workplace Investigations

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There are many reasons why employers conduct workplace investigations. Where employers receive complaints alleging bullying and harassment, violence or discrimination, they become statutorily obligated to investigate these incidents in order to meet their obligations under occupational health and safety and human rights legislation. Lesser forms of workplace misconduct or other cultural issues often cause employers to choose to carry out an investigation, even if not strictly statutorily required, but more often using external investigators.

Investigations are critical in both circumstances as they assist the employer in determining whether the alleged conduct occurred and if so, what steps to take or corrective and/or disciplinary measures to implement to attempt to remedy the misconduct and prevent its reoccurrence. The investigator plays a crucial role in planning and undertaking the investigation, preparing findings, and if requested by the employer, recommending remedial action.

Right at the outset, the employer is faced with one of its most difficult decisions – whether the investigation should be conducted by an internal or external investigator. As part of this decision-making process, employers will normally involve their internal and or external legal counsel in the process of engaging and instructing an investigator. This is done with the intention of cloaking the investigation, including the investigator's findings and recommendations, with privilege.

Most employers understand that they should not retain their own legal counsel to conduct the investigation due to the real possibility that the investigator may later be required to testify in legal proceedings to defend their findings. This would prevent that counsel or firm from also acting for the employer in that litigation, and potentially put the privilege attached to the legal advice provided to the employer in jeopardy. As a result, the employer will normally retain an investigator from outside their internal legal group and/or outside legal counsel instead. This leaves their counsel available to provide legal advice that may be required during or after the investigation and act as litigation counsel in any litigation arising from the investigation.

The primary question that this paper is intended to address is: are investigators' findings protected by privilege and given how employers typically use investigators' reports, should they even attempt to cloak these types of reports in privilege?

In the course of conducting workplace investigations, two types of privilege are typically available: solicitor-client privilege and litigation privilege. Employers tend to take the position that when an investigation is conducted by a third-party investigator or in-house counsel, privilege will normally attach to the subsequent investigation report. This paper discusses not only the difficulty in claiming privilege over such documents, but whether such an attempt even makes sense given that the investigator's report will often form a critical piece of evidence in the employer's defence of legal proceedings stemming from the findings of that investigation.

Both forms of privilege are briefly outlined below:

Solicitor-Client Privilege:

Solicitor-client privilege applies to all confidential communications between a lawyer and client which is related to the provision of legal advice. In order for a communication to be protected by solicitor-client privilege, it must meet the following 3 elements:

1. The communication must be between a client and lawyer, who is acting in his or her capacity as a lawyer;
2. The communication must be given in the context of obtaining legal advice; and
3. The communication must be intended to be confidential.¹

Despite these elements, it is established law that solicitor-client privilege does not attach to every communication between a client and lawyer. The communication must be of a legal nature, and meet the requirements set out above. Solicitor-client privilege further attaches to documents which form the “continuum of communication” between a lawyer and client which either reveal legal advice received or are a “necessary step” in the process of receiving legal advice.²

Litigation Privilege:

Litigation privilege applies to and protects communications and documents which are in the furtherance of litigation. As opposed to solicitor-client privilege, litigation privilege arises in the context of the adversarial process rather than with respect to the relationship between a client and his or her lawyer.³ Litigation privilege applies to documents or communications that are created for the dominant purpose of existing or anticipated litigation.⁴ Courts have considered the following test when determining whether litigation privilege applies to a document or communication:

1. Was the litigation a reasonable prospect at the time the communication or document was produced; and
2. If so, what was the dominant purpose of its production?⁵

With respect to what a reasonable prospect of litigation is, the courts have stated that this means somewhere between more than a mere possibility but less than a certainty.⁶ In other words, a reasonable prospect of litigation arises when a reasonable person would conclude that a claim is unlikely to resolve without recourse to litigation.⁷

The difficulty in asserting and maintaining privilege:

As held by the courts, privilege over documents and communications is a narrow protection with respect to either litigation privilege or solicitor-client privilege. For example, the purpose of litigation privilege is to allow counsel to develop litigation strategies. Therefore, it is not the information itself that litigation privilege protects but rather it is “the tact that counsel for a party is going to take, or the approach that is going to be pursued” that falls under the protection of privilege.⁸

With respect to the narrow protection of litigation privilege, Justice Robert J. Sharpe has written:

¹ 106307 v Wang, 2022 ONSC 7288 at para 28.

² 578115 Ontario Inc. v Sears Canada Inc., 2013 ONSC 4135 at para 30.

³ Blank v Canada (Department of Justice), 2006 SCC 39 at para 27 [Blank].

⁴ Ibid at para 59; General Accident Assurance Co. v Chrusz, 1999 CarswellOnt 2898 at paras 32-33.

⁵ Hamalainen (Committee of) v Sippola, 1991 CarswellBC 320 at paras 19-20.

⁶ Ibid at para 22.

⁷ Ibid.

⁸ R v Assessment Direct Inc., 2017 ONSC 5686 at para 10.

While the formal rule of privilege will permit a party to refuse to produce witness statements, reports or other documents gathered in anticipation of litigation, the actual effect of the privilege is substantially reduced by the oral discovery rule which requires disclosure of evidence contained in those documents. What remains protected is something very close to the lawyers' work product.⁹

This statement demonstrates the difficulty of claiming privilege over documents, such as an investigation report, even where the document has been created in the anticipation of litigation. As provided by Justice Sharpe, the oral discovery rule requires a party to divulge the evidence contained in a document. Therefore, in the process of litigation, a party may be required to disclose the contents and findings of an investigation report even where such documents were created by in-house counsel, or a third-party investigator at the direction of counsel.

This was illustrated in *R v Assessment Direct Inc.*, where the applicant sought to claim litigation privilege over recordings of telephone conversations it had with potential witnesses with respect to an allegation of fraud.¹⁰ The applicant submitted that its counsel had advised it to make these recordings to gather evidence for the potential litigation.¹¹ In concluding that the recordings were not protected by litigation privilege, the Court held that their release would not expose counsel's "observations, thoughts and opinions".¹² As this demonstrates, it is the lawyer's strategy that is protected by litigation privilege, and not the information, on its own, that is contained in a document or other material.

In a civil proceeding, a party would be required to reveal the existence of statements, reports etc. and some particulars about these documents in its affidavit of documents, even if privilege is being claimed. As such, the facts contained in such documents may be revealed to the other party in the discovery process.¹³ This emphasizes the principle that litigation privilege is meant to protect a lawyer's work product, such as theories and strategy, but it is not intended to protect facts from disclosure.¹⁴ It is for these reasons that the Supreme Court of Canada ("SCC") has described litigation privilege as "a limited exception to the principle of full disclosure".¹⁵

On the other hand, solicitor-client privilege offers a similarly narrow protection as it also does not attach to advice provided on purely business matters, even if this advice is provided by a lawyer.¹⁶ As held by the SCC, some lawyers, including in-house counsel, "are valued as much (or more) for raw business sense as for legal acumen".¹⁷ In-house counsel typically carry responsibility for both legal and non-legal issues, and so when determining whether privilege attaches, each situation must be assessed on a case-by-case basis.¹⁸

⁹ *Ibid* at para 12 citing Justice Robert J. Sharpe, "Claiming Privilege in the Discovery Process" (1984), *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Evidence*.

¹⁰ *Ibid* at para 4.

¹¹ *Ibid*.

¹² *Ibid* at para 13.

¹³ *Ibid* at para 8.

¹⁴ *Ibid* at 14 citing *Lizotte c Aviva Cie d'assurance du Canada*, [2016] 2 SCR 521.

¹⁵ *Blank*, *supra* note 6, at para 60.

¹⁶ *Guergis v Novak et al*, 2022 ONSC 3829 at para 49; *R v Shirose*, 1999 CarswellOnt 948 at para 50 [Shirose].

¹⁷ *Ibid*.

¹⁸ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at paras 19-20 [Pritchard].

The courts have provided that while such lawyers are regarded as being in the same position as lawyers who practice on their own account, where in-house counsel works in a non-legal capacity, privilege cannot be claimed over communications in this other capacity.¹⁹ As such, solicitor-client privilege applies to communications that fall within the normal and ordinary scope of the lawyer-client relationship.²⁰ Therefore, whether or not solicitor-client privilege is applicable in these situations depends on the nature of the relationship between the entity and in-house counsel, the substance of the advice, and the circumstances in which the advice is sought and provided.²¹

To come within the protection of solicitor-client privilege, in-house counsel must be acting in his/her capacity as a lawyer and providing legal advice that is intended to be confidential. Since in-house counsel can play both legal and non-legal roles within the corporation in which they function, it is not always the case that advice provided by counsel will be protected by privilege. An in-house lawyer may conduct an investigation on behalf of a client, but this does not necessarily mean that the investigation is done for the purpose of providing legal advice. It may be that the investigation is conducted for business reasons and its findings are also applied in the furtherance of business needs, rather than for legal reasons.

In many cases, investigations are fact-finding exercises conducted to determine what occurred with respect to an alleged incident or complaint. In such cases, it is not relevant that a lawyer conducted the investigation as privilege does not attach only by virtue of a lawyer's involvement. However, employers still often attempt to argue that the legal advice they then receive is based on the investigation's findings in an effort to attach privilege to the entire report.

As adjudicators have stated, privilege extends only to the extent an investigation report contains a legal opinion.²² In making this determination, courts and adjudicators look at the purpose for which the investigation report was made. Where an investigator is appointed in order to prepare a fact-finding report, the conclusion will be drawn that the purpose of the report was not to provide a legal opinion.²³ The fact that the report will be used by legal counsel to provide a legal opinion will normally not be enough to extend the privilege, which properly attached to the legal opinion, to the fact-finding report itself. In making this determination, the court will first look at the intended purpose and scope of the investigation. Where an investigator was only asked to perform a fact-finding function, the report will not be found to be privileged. However, if the fact-finding function was "inextricably linked" to the provision of legal advice, the entire report may be found to be privileged.²⁴ "Inextricably linked" means that the facts are "intimately linked to legal analysis, to such an extent that it would be virtually impossible to disentangle them".²⁵ Ultimately, unless the criteria for privilege are met, whether with respect to solicitor-client or litigation privilege, or both, the documents will not be shielded from disclosure.

It is not enough to simply assert privilege over an investigation report or its findings.²⁶ Where the privilege claim is challenged, the asserting party must serve a detailed affidavit which supports its

¹⁹ *Santa Ursula Navigation SA v St. Lawrence Seaway Authority*, 1981 CarswellNat 11 at para 7.

²⁰ *Pritchard*, *supra* note 4 at para 16.

²¹ *Shirose*, *supra* note 2 at para 50.

²² *AM v Kellock*, 2017 HRT0 1327 at para 16.

²³ *Ibid* at para 17.

²⁴ *Slansky v Canada (Attorney General)*, 2011 FC 1467 at para 66; *Gower v Tolko Manitoba Inc.*, 2001 MBCA 11 at para 37-39.

²⁵ *Ibid*.

²⁶ *CNOOC Petroleum North America ULC v ITP SA*, 2022 ABKB 683 at para 88-89.

claim of privilege.²⁷ That affidavit must provide adequate detail in order to identify and specify the grounds upon which privilege is claimed.²⁸ The courts have held that the party claiming privilege must provide the bare minimum amount of information required to allow the other side to determine whether or not the claim of privilege is valid²⁹, including the document's author, the addressee of the document, the date, and a general description of the document.³⁰ This information not only provides the other party with enough information to determine whether the privilege claim is valid, but it also provides confirmation that certain documents exist. As such, the facts and evidence within privileged documents may be disclosed during the discovery process, when a party's representative is examined and answers questions about those documents.

Investigation Reports as a Key Piece of Evidence:

With respect to workplace investigations, an investigation report can often be one of, if not the most, powerful pieces of evidence an employer can rely on in defending any employment decision they make arising out of that report in a court or administrative tribunal.

Though courts and tribunals are not bound by the findings of an investigator, a well drafted and well reasoned report authored by an outside investigator with a strong reputation with the decision maker can significantly influence the decision maker in their credibility review of the evidence. This is especially true as it relates to individuals who the investigator has interviewed but are not called as witnesses at the hearing.

In addition, the report is evidence that the employer has fulfilled its statutory obligations to investigate an incident. Across Canada, there are legislative requirements to conduct an investigation into complaints of harassment, violence and other workplace misconduct.

Finally, an investigation report can also assist in defending against claims of bad faith both as it relates to the conduct of the investigation and the termination of employees arising from the investigator's findings of fact.

However, despite the best efforts of an employer to cloak the investigation report with privilege, the facts and evidence contained within a report may ultimately have to be disclosed during the discovery process because privilege relates to legal advice and not an investigation's findings of fact. In such circumstances, the question becomes whether it is even a worthwhile exercise to attempt to assert privilege claims over an investigation report?

Releasing Privilege:

In the context of litigation, another complexity which tends to arise is where an employer has originally claimed privilege over the investigation report, but then later decides that it wants or needs to rely on that document and call the investigator as a witness in a court proceeding arising from the investigator's findings. The employer is then faced with the difficult questions of whether it can waive the privilege unilaterally, and to the extent it can, how does it do so such that it is only waiving privilege on the report's findings itself, without waiving its privilege in a more global manner.

²⁷ *Ibid.*

²⁸ *Toronto Board of Education Staff Credit Union Ltd. v Skinner*, 1984 CarswellOnt 477 at para 10, 15.

²⁹ *Hanna v Royal & SunAlliance Insurance Co. of Canada*, 2004 CarswellOnt 4773 at paras 11-12.

³⁰ *Ibid* at para 9.

When discussing the concept of the waiver of privilege, assuming there is a valid claim of privilege, the first question that needs to be addressed is to whom does the privilege belong. For example, when discussing both solicitor-client and litigation privilege, the privilege belongs to the client. Therefore, only the client has the authority to waive the privilege and allow the information to be disclosed.³¹ However, settlement privilege, regarding information shared with a view to settling a dispute, belongs to both parties and so it cannot be unilaterally waived by one of the parties.³² Depending on the type of privilege claimed, releasing privilege over a document may require authorization from both parties.

A further complication arises regarding the manner in which privilege is released and this must be carefully considered to limit disclosure and avoid releasing privilege in a global way.

A practical solution to this issue is not to claim privilege over the report and to merely treat it as confidential. Along with its statutory obligations to investigate, an organization also has confidentiality obligations with respect to an investigation. Employers have a duty, to the extent possible, to protect the confidentiality of the individuals involved in the investigation and in particular, the witnesses. This may require that some identifying information be withheld from disclosure. Therefore, in compliance with these obligations, an organization may claim that the full report is confidential and will not agree to provide it to either the alleged victim, respondent or witnesses.

This is why most investigators will create a summary portion of their report which will set out the allegations and findings, but without providing the basis for those findings which may require disclosure of facts and witness names.

Later on, where litigation commences, the organization is then free to, or may be required to, include the actual report during the disclosure process based on its relevance to the issues in the proceeding and whether the employer intends to call the investigator to testify on the investigation and its findings. Claiming confidentiality prevents the report from being disclosed in its entirety, while providing the employer with latitude if and when it determines that it would like to rely on the report. Depending on the nature of the litigation and the decision-maker's openness to such arguments, an organization can also attempt to redact names from a document on the basis of confidentiality. Although, in litigation this would require an order of a court to allow these types of redactions.

Organizations may strategically benefit from claiming confidentiality rather than privilege. This position helps to bypass the complexities which may arise from claiming and releasing privilege, and it also allows the organization to keep its options open with respect to pending litigation.

For Employers:

Despite the difficulties outlined with respect to asserting and maintaining privilege over investigation reports, there are some useful steps employers can take to prepare for potential future litigation. In terms of strategy, whenever conducting an investigation, employers should assume that the factual parts of a report will not be protected by privilege and therefore will likely be disclosed during the legal process. Care should be taken in defining the scope of the

³¹ *Donofrio v Vaughan (City)*, 2008 CarswellOnt 4461 at paras 9-13.

³² *Leonardis v Leonardis*, 2003 ABQB 577 at para 5.

investigation so as to only investigate what is necessary. This is preferable to taking an overly broad approach which may lead to unnecessary facts or information also being disclosed by virtue of their inclusion.

As discussed above, employers should also recognize that just because an investigation report may not be privileged does not mean it is not confidential. Again, the statutory requirements across Canada which require employers to investigate incidents of harassment, violence and misconduct, also require the employer to maintain confidentiality in order to protect those participating in the investigation. Generally, employers should conduct themselves on the basis that the investigation report will not be privileged but should treat it as confidential.

With respect to the fact-finding and legal advice distinction discussed above, another useful avenue for employers is to separate the facts and the legal advice into two separate reports. One report can be entirely factual while a second advisory report includes legal advice derived from the facts. The factual report, which will not be privileged, can be relied on by the employer in a court proceeding to defend the employment decisions arising from the report. The advisory report, which does provide a legal opinion based on the facts in the separate fact-finding report, will arguably be privileged. The employer will not need or want to rely on it to defend the employment decisions they made arising out of fact-finding report. In addition, it is not necessary that the investigator who prepared the fact-finding report be the individual who drafts the separate advisory opinion, and that second report can be drafted by the company's internal or external counsel.

Aside from privilege concerns, employers should also consider the practical implications arising from the decision of whether the investigation is conducted by an internal or external investigator. Where external investigators are retained, because of the investigator's independence and non-familiarity with the workplace, the organization ultimately has less control over the findings of the investigation. The organization may have more control where an internal employee is directed to conduct an investigation, but issues of credibility may arise due to the internal employee's lack of independence.

Therefore, an investigation should be undertaken with consideration and proper planning to both the substantive issues as well as the procedural issues which may later arise in the context of legal proceedings. While privilege is a powerful way to prevent the disclosure of sensitive documents and information, it is not necessarily available or effective in the context of workplace investigations, and their resulting reports. There are various complexities involved in privilege claims such as whether the criteria for privilege are met, to which party(ies) the privilege belongs, and how and when to waive privilege. Most importantly, even where an investigator's findings can be protected by privilege, this could ultimately be disadvantageous for the employer. In asserting privilege over a report, the organization also limits the extent to which it can rely on the report to defend itself in potential litigation. Where an organization finds itself in a dispute arising from employment decisions made based on an investigation report, claiming privilege over that report can have the effect of restricting the organization's ability to put forward its best defence.

This is especially true where the same objective can be achieved through other means, such as claiming confidentiality over the report. In legal disputes, it is critically important to assess the options an organization may have in order to advise on the strongest litigation strategy. Where privilege limits these options by restricting the organization's ability to rely on a document, confidentiality maintains the organization's ability and flexibility to disclose a document to defend itself, where this becomes necessary. As discussed, the investigation report is not only a key piece of evidence with respect to the incident. It also demonstrates the employer's compliance

with its statutory obligations, as well as the justification regarding any decisions made based on the investigation's findings. Organizations ought to be mindful that as the investigation report is a key piece of evidence, locking it away through privilege could be detrimental to its defence strategy.



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TAB 5B

24th Employment Law Summit

**Workplace Harassment and Violence Investigations
Best Practices for Workplace Investigations**

Dorian Persaud
Persaud Employment Law

Barbara Darby

October 11, 2023





Workplace Harassment and Violence Investigations

Best Practices for Workplace Investigations

Barbara Darby and Dorian Persaud

Allegations of workplace harassment take many forms but often arise from allegations of breaches of internal workplace policies, applicable human rights or occupational health and safety or legislation. When presented with allegations of misconduct employers must conduct a fact finding. This paper covers some “best practices” you may wish to consider when setting up and conducting a formal investigation. For the purposes of this paper, we use the term “harassment” or “misconduct” to encompass the spectrum of allegations that can arise in a workplace.

1. Sharing information with Respondent

Workplace policies must contain a procedure for filing a complaint of harassment and indicate how that complaint will be addressed. One problem that arises is where the employer makes a commitment to share a copy of the original complaint submitted by the Complainant. This often creates confusion because the document may not be well-written and is often incomplete. The better approach is to inform the Respondent a complaint has been received in a timely manner. However, the actual Particulars of Complaint are only shared after the investigator has conducted

an interview with the Complainant and received confirmation the Particulars are accurate and complete.

2. Competent Investigator

When the decision is made to conduct a formal investigation, that process must be carried out by a competent investigator. In terms of defining competence, the *Canada Labour Code* and *Occupational Health and Safety Act* focus on the knowledge and experience that a competent investigator must possess.

Occupational Health and Safety Act

- Must conduct investigation that is “appropriate in the circumstances” [s. 32.0.7 (1)(a)]
- Inspector can require an investigator “possessing such knowledge, experience or qualifications as specified” [s. 55.3(1)]

Canada Labour Code

- “knowledge, training and experience in issues relating to workplace violence”
- “knowledge of relevant legislation”
[*Canada Occupational Health and Safety Regulations*, s. 20.9(1)(b) and (c)]

Rules of Professional Conduct – Section 3.1 Competence

3.1-1 "competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client, including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques, and practices.

Employers must ensure they are using a competent investigator, whether that individual is internal or external to the organization. There are several examples of employers conducting flawed investigations because they did not use an investigator with the appropriate skills or experience for the situation. In *Elgert v. Home Hardware Stores Limited* 2011 ABCA 112 (CanLII) the employer was presented with a complaint of sexual harassment and selected an internal investigator who had never conducted a sexual harassment investigation. In *Boucher v. Wal-Mart Canada Corp* 2014 ONCA 419 (para. 30), the investigation team overlooked witnesses with relevant evidence. In both cases the employers incurred extraordinary damages, in part, due to the flawed investigations and harm that resulted.

3. Internal vs. External Investigator

There are several factors to consider when trying to decide whether to use an internal or external investigator. These include the following:

- Nature / Severity of the Allegations
- Complexity of the Investigation Process
- Internal Resources and their Availability
- Reputational Risk
- Appropriate Experience and Proper Training
- Allegations Against Senior Members of Organization
- Impartial and Neutral
- Potential for Legal Challenge
- Cost

In *Piresferreira v. Bell Mobility Inc.*, 2008 CanLII 67418 (Ont. S.C.J.), the Court noted that important rights are at stake during a workplace investigation. As such, employers should be

mindful of undertaking a process that is balanced and free of bias or the appearance of bias. In *Bell Mobility*, the investigator relied almost exclusively on information obtained from the Respondent and failed to appreciate the Complainant's actual work environment because he did not meet with her.

4. Confidentiality

Post-pandemic, many investigation interviews are being conducted via video conference which presents unique challenges with respect to confidentiality. Prior to the interview, it is helpful to have witnesses sign a confidentiality statement acknowledging their obligations, confirming they are not recording the interview and highlighting consequences for breach of confidentiality. At the outset of the interview, it is helpful to confirm the expectations regarding confidentiality and ask whether anyone else is with them in the room. In some cases, I have asked the witness to scan the room with their computer so I can see the surroundings.

5. Investigation Notes

One benefit of conducting interviews via video conference is the ability to record the meeting and prepare an accurate transcript. Following the interview, it is helpful to schedule a follow-up meeting with the witness to have them review and approve the transcript. The benefit of this step is that it reduces the risk of a party or witness challenging the investigator's conclusions by indicating they recorded that individual's evidence incorrectly.

Conclusion

After conducting an investigation, it is advisable to meet with the parties and acknowledge the investigation process and its conclusions. Apart from reviewing the investigator's conclusions, the goal of the exercise is to repair the relationship and help the parties move forward if they both remain in the workplace following the investigation.

Also, it is helpful to have a debrief and consider what lessons the organization learned from the process. Do employees feel safe coming forward to human resources with concerns? Was there a failure in training personnel on how to identify or respond to problematic conduct? This process of reflection and continuous improvement will enable your clients to develop a healthy work environment.



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TAB 6A

24th Employment Law Summit

Extraordinary Damages (PowerPoint)

Natalie MacDonald

MacDonald & Associates LLP

October 11, 2023



EXTRAORDINARY DAMAGES

Natalie C. MacDonald
Owner and Founder
MacDonald & Associates



**MacDonald
& Associates**
EXTRAORDINARY EMPLOYMENT LAW



EXTRAORDINARY DAMAGES

Leading Case *Galea v. Walmart*, 2017 ONSC245

MORAL DAMAGES

PURPOSE: bad faith manner of dismissal where it is reasonably foreseeable that mental distress would arise

“MANNER OF DISMISSAL”:

both pre and post termination behaviour

THE TEST: If Plaintiff can prove that:

- 1) the employer breached its’ obligation of good faith and fair dealings in the manner of dismissal; and

EXTRAORDINARY DAMAGES

Leading Case *Galea v. Walmart*, 2017 ONSC245

MORAL DAMAGES

- 2) This breach resulted in mental distress; and
- 3) It was reasonably foreseeable that this breach would cause mental distress.

MENTAL DISTRESS:

From *Galea*, not required to provide medical evidence.

➡ SCC *Saadati v. Moorhead* 2017, SCC 28

Highest award: \$250,000.00 from *Galea*



MacDonald
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EXTRAORDINARY EMPLOYMENT LAW

EXTRAORDINARY DAMAGES

PUNITIVE DAMAGES

PUPRPOSE: - *“malicious, oppressive and high-handed”* misconduct that *“offends the court’s sense of decency”*.

From *Whiten v. Pilot Insurance Co.* (2002) SCC

“harsh, vindictive, reprehensible, and malicious”, as well as “extreme in its nature and such that by any reasonable standard is deserving of full condemnation and punishment”

From *Keays v. Honda Canada Inc.* (2005) SCC

- Represents *“marked departure”* from ordinary standards of decent behavior
- To punish the Defendant, rather than compensate a Plaintiff.

EXTRAORDINARY DAMAGES

PUNITIVE DAMAGES

THE TEST: the party seeking the award must establish two key elements

- 1) That the conduct is “*harsh, vindictive, reprehensible, and malicious*” as well as “*extreme in its nature and such that by any reasonable standard is deserving of full condemnation and punishment*”; and
- 2) That by any reasonable standard it is deserving of full condemnation and punishment.



EXTRAORDINARY DAMAGES PUNITIVE DAMAGES

FACTORS EXAMINED:

(a) **The proportionate blameworthiness of the Defendant's conduct;**

- 1) whether the misconduct was planned and deliberate
- 2) the intent and motive of the defendant
- 3) whether the defendant persisted in the outrageous conduct over a lengthy period of time
- 4) whether the defendant concealed or attempted to cover up their misconduct
- 5) the defendant's awareness that what he or she was doing was wrong
- 6) whether the defendant profited from their misconduct

EXTRAORDINARY DAMAGES

PUNITIVE DAMAGES

- 7) whether the interest violated by the misconduct was known to be deeply personal to the Plaintiff (e.g., professional reputation)
- 8) the proportionate degree of vulnerability of the Plaintiff, financial or otherwise
- 9) the degree that harm or potential harm was directed specifically at the Plaintiff
- 10) the proportionate need for deterrence, with special consideration of the Defendant's financial power where it may be rationally concluded that a lesser award against a moneyed Defendant would fail to achieve deterrence
- 11) Whether all other penalties have been taken into account and found to be inadequate
- 12) The desire to ensure that the Defendant does not treat compensatory damages as license to get its way irrespective of the legal or other rights

HIGHEST AWARD: From *Galea* - \$500,000.00



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TAB 6B

24th Employment Law Summit

**Tortious, Human Rights Damages and
Reporting Considerations in Employment**

Alexandra Monkhouse
Monkhouse Law

October 11, 2023



Tortious, Human Rights Damages and Reporting Considerations in Employment – Employment Law Summit 2023

Alexandra Monkhouse, Partner at Monkhouse Law Employment Lawyers

Table of Contents

Tortious Remedies.....	2
1. The tort of intentional infliction of mental suffering:	2
2. Intentional or Negligent Misrepresentation	2
3. Injurious Falsehood.....	3
4. Inducing Breach of Contract	3
5. Intentional Interference with Economic Relations.....	3
6. Conspiracy	4
7. Defamation	4
8. Malicious Prosecution	5
9. Harassment sexual in nature and the tort of stalking –potentially new causes of action.....	5
Human Rights Remedies	6
Reportable Transactions and Employment Settlements.....	6
The Reporting Requirement	6
CRA Reporting Rules and Background	7
Federation of Law Societies Injunction	9

This paper attempts to provide a summary of tortious remedies, human rights monetary damages and reporting requirements in employment settlements.

Tortious Remedies

Canadian courts have recognized a number of tort claims available to employees. The successful plaintiff is entitled to be put in the position they would have been had the tort not been committed. It is important to note that damages for tort and aggravated damages for the breach of the implied duty of good faith and fair dealing may be awarded and they do not always result in double recovery (see *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 (CanLII), <<https://canlii.ca/t/g6xvb>>, at para 70). Expert reports may be useful in assessing tortious damages, in certain circumstances.

Below is a list of some of the tort claims made in wrongful dismissal or employment related actions and the main tests and leading case for each type of claim:

1. The tort of intentional infliction of mental suffering:

Leading case: *Prinzo v. Baycrest Centre for Geriatric Care*, 2002 CanLII 45005 (ON CA), <<https://canlii.ca/t/1d0l4>>, paras 43-48

Test:

- (i) conduct that is flagrant and outrageous;
- (ii) calculated to produce harm; and
- (iii) resulting in a visible and provable injury.

2. Intentional or Negligent Misrepresentation

Leading case re negligent misrepresentation *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC), [1993] 1 SCR 87, <<https://canlii.ca/t/1fs5s>> paras 34 to 47

Test:

- (i) there was a “relationship of proximity” between the representor and representee;
- (ii) the representation in question must be untrue, inaccurate, or misleading;

- (iii) the representor must have acted intentionally or negligently in making said misrepresentation;
- (iv) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (v) the reliance must have been detrimental to the representee in the sense that damages resulted.

3. Injurious Falsehood

Leading case: *Lysko v. Braley*, 2006 CanLII 11846 (ON CA), <<https://canlii.ca/t/1n1pt>>, para 133

Test:

- (i) the publication of false statements, either orally or in writing;
- (ii) the false statements reflect adversely on the plaintiff's business or property, or title to property, and so calculated as to induce persons not to deal with the plaintiff;
- (iii) There must be a showing that the published statements are untrue, that they were made maliciously, that is without just cause or excuse; and
- (iv) the plaintiff suffered special damages.

4. Inducing Breach of Contract

Leading case: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 (CanLII), <<https://canlii.ca/t/1rbbt>> para 26

Test:

- (i) Plaintiff had a valid and enforceable contract with the third party;
- (ii) The Defendant was aware of the existence of this contract;
- (iii) The Defendant intended to and did procure the breach of the contract; and
- (iv) As a result of the breach, the Plaintiff suffered damages.

5. Intentional Interference with Economic Relations

Leading case: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 (CanLII), <<https://canlii.ca/t/1rbbt>> para 14 and *Correia v. Canac Kitchens*, 2008 ONCA 506 (CanLII), <<https://canlii.ca/t/1z16c>>, para 100

Test:

- (i) intent to injure the plaintiff;
- (ii) interference with the plaintiff's business by illegal or unlawful means; and
- (iii) the plaintiff suffered economic loss.

6. Conspiracy

Leading case: *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (CanLII), <<https://canlii.ca/t/flxb2>>, para 26, application in employment context: *Prim8 Group Inc. v Tisi*, 2016 ONSC 5662 (CanLII), <<https://canlii.ca/t/gtp1v>>, para 46 to 57

Test:

- (i) The defendants act in combination, that is, in concert, by agreement or with a common design;
- (ii) Their conduct is unlawful;
- (iii) Their conduct is directed towards the plaintiff;
- (iv) They should know that, in the circumstances, injury to the plaintiff is likely to result; and
- (v) Their conduct causes injury to the plaintiff.

7. Defamation

Leading case: *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 SCR 640, <<https://canlii.ca/t/27430>>, Para 28, see *Hampton Securities Limited v. Dean*, 2018 ONSC 101 (CanLII), <<https://canlii.ca/t/hpt21>> paras 130 to 188 for an example in the case of a regulatory filing by an employer

Test:

- (i) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
- (ii) that the words in fact referred to the plaintiff; and
- (iii) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

8. Malicious Prosecution

Leading case: *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669 (CanLII), <<https://canlii.ca/t/g1qjt>>, para 21

Test:

- (i) the proceedings must have been initiated by the defendant;
- (ii) the proceedings must have terminated in favour of the plaintiff;
- (iii) the absence of reasonable and probable cause; and
- (iv) malice, or a primary purpose other than that of carrying the law into effect.

9. Harassment sexual in nature and the tort of stalking –potentially new causes of action

There is no general tort of harassment in Ontario, *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 (CanLII), <<https://canlii.ca/t/hz4fc>>- paras 27 to 43 – there are other remedies to redress the conduct that is alleged to constitute harassment, but the tort may be developed in appropriate circumstances- see para 53.

Leading cases: *Howlett v Northern Trust et al*, 2023 ONSC 4531, *Howlett v. Northern Trust Company*, 2023 ONSC 4531 (CanLII), <<https://canlii.ca/t/k03gb>>, paras 53, 89 to 97 – tort of stalking and harassment sexual in nature.

Harassment sexual in nature: *Bacchus v. Munn*, 2020 ONSC 6650 (CanLII), <<https://canlii.ca/t/jbg2n>>, para 58- pleadings motion.

In the *Howlett* pleading decision by Justice Perell, at para 53, the court stated: “The tort of stalking is distinguishable from existing torts because it refers to a pattern of persistent and unwanted conduct, the intent of which is to follow, alarm, or place under surveillance an individual that reasonably causes that individual to fear for their own safety or suffer emotional distress. The unwanted conduct may include actions such as following the individual, purposefully appearing within the sight of the individual, or appearing at that individual's workplace, residence, or other private locations.”

Human Rights Remedies

In 2008, the Ontario Human Rights Code (“OHRC”) was amended in a number of significant ways. The revisions expanded human rights jurisdiction and created concurrent powers among statutory tribunals, labour arbitrators, and the Ontario courts. Under section 46.1(2) of the OHCR, a person may not commence an action based solely on an infringement of a right under Part I of the Code. In practice, actions for OHCR violations are sometime brought in conjunction with wrongful dismissal actions.

The seminal case summarizing the key remedial principles in assessing human right damages claims is *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII), <<https://canlii.ca/t/2clwv>>, paras 44 to 55, cited in approval and suggested analogous approach by courts in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 (CanLII), <<https://canlii.ca/t/gsbdn>>, paras 60-62

Criteria for the evaluation of human rights damages:

- (i) the objective seriousness of the conduct: injury to dignity, feelings, and self[-]respect is generally more serious depending, objectively, upon what occurred
- (ii) the effect on the particular applicant who experienced discrimination: the applicant’s particular experience in response to the discrimination

Reportable Transactions and Employment Settlements

It has recently been discussed whether settlements in employment may be reportable transactions when there are allocations to general damages.

The Reporting Requirement

Who must disclose

Reportable transactions must be disclosed by:

- the person who gets or expects to get a tax benefit
- the person who enters into the reportable transaction for the benefit of the **above-noted person**
- the promoter or advisor entitled to a fee for the transaction, or
- the person who does not deal at arm's length with the promoter or advisor and who is entitled to receive a fee for the transaction.

How to disclose and by when

To disclose reportable and notifiable transactions, an [RC312 Reportable Transaction and Notifiable Transaction Information Return](#) form must be submitted.

The Form RC312 must be submitted to the CRA within the earlier of:

- 90 days from the time you entered into the transaction, or
- 90 days from the time you became contractually obligated to enter the transaction.

Penalties for failure to report

For corporation with assets of \$50M or more, the penalty is \$2000 weekly, up to the maximum of either \$100,000 or 25% of the tax benefit (whichever is greater).

For all other taxpayers (e.g. individuals, partnerships, corporations, etc.), the penalty is \$500 weekly, up to the maximum of \$25,000 or 25% of the tax benefit (whichever is greater).

CRA Reporting Rules and Background

Generally, the reporting rules are targeting corporate transactions and not the structuring of employment settlements. The main focus of the rules seems to be the tax structuring and SRED credits where advisors may charge contingent fees on the transactions, getting a portion of the tax rebate.

Here are the examples CRA provided for notifiable transactions- see here a summary: <https://taxinterpretations.com/content/635990>

And here the Finance guidance: <https://www.canada.ca/en/department-finance/news/2022/02/income-tax-mandatory-disclosure-rules-consultationsample-notifiable-transactions.html>

Employment settlements are not envisaged as notifiable transactions.

The intended purpose was for the 237.4 Income Tax Act change and it is part of the larger international initiative against base erosion. When it comes to settlements in employment actions, the landscape does not substantially change.

It is important to note that the Minister of Finance is the one who designates the notifiable transactions, see the text of the Income Tax Act 237.4(3): <https://laws-lois.justice.gc.ca/eng/acts/I-3.3/page-201.html#docCont>

Settlements in employment are not notifiable transactions and they would only become reportable transactions if one of the main purposes of entering in the transaction is to get the tax benefit. Generally, one of the main purposes of the transaction, under tax jurisprudence, requires the tax advantage to be more important than the other reasons, see *Gerbros Holdings Company v. Canada*, 2016 TCC 173 (CanLII), <<https://canlii.ca/t/gvv88>>, para 161-167 and 199, or in employment settlements the main reason is to finalize the matter, not to obtain a tax advantage. In employment settlements, generally the tax advantage, if any, is ancillary to the main reason to put an end to the litigation.

The [CRA guidance on reportable transactions](#) provides that:

For greater certainty, there is no legislative reporting obligation under the reportable transaction regime for a transaction or series of transactions where none of the three generic hallmarks - contingent fee arrangements, confidential protection or contractual protection - are present even though it can reasonably be concluded that one of the main purposes of entering into the transaction or series of transactions is to obtain a tax benefit.

There is also a 2017 tax interpretation that the parties involved are the best to make the assessment of what the settlement was for, see here:

<https://taxinterpretations.com/cra/severed-letters/2017-0685961e5>

All that being said, if employers do not think they have exposure for general damages and their only exposure is for common law notice or employment related benefits, then the settlement agreement would reflect that and the settlement amount would be taxable as employment income. In situations where general damages are claimed, given that massive punitive damages have been awarded against employers in certain circumstances, *it is reasonable to settle for general damages*.

Federation of Law Societies Injunction

The Government has agreed to a consent injunction suspending the reporting requirements for legal professionals until November 20, 2023.

There is an ongoing constitutional challenge in BC by the Federation of Law Societies, here is the backgrounder:

<https://flsc.ca/wp-content/uploads/2023/09/Court-Backgrounder-FE-V3.pdf>

Additional Case

Howlett v. Northern Trust Company, 2023 ONSC 4531 (CanLII), <<https://canlii.ca/t/k03gb>>



Law Society
of Ontario

Barreau
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TAB 7

24th Employment Law Summit

Technological Competence for Lawyers:
Where are we in 2023?

Nicole Heelan, Analyst/Employment Services Lead
ClearyX

Amy Salzyn, Associate Professor, Faculty of Law
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October 11, 2023



Technological Competence for Lawyers: Where are we in 2023?
Submission by: Nicole Heelan (ClearyX)
Submission for: The Law Society of Ontario -24th Employment Law Summit

Dr. Amy Salzyn, a panelist in today's session *The Promises & Perils of AI* and a leading expert on legal ethics and technology and the law, published two articles (both included in the materials) on a lawyer's duty of technological competence. This document serves as a brief update to this duty since the publication of these articles- the most recent one being published in December 2020. For ease of reference, please see the title and links to the articles below:

It's Finally (Sort Of) Here!: A Duty of Technological Competence for Canadian Lawyers:

<https://www.slaw.ca/2019/11/26/its-finally-sort-of-here-a-duty-of-technological-competence-for-canadian-lawyers/>

A Taxonomy for Lawyer Technological Competence:

<https://www.slaw.ca/2020/12/18/a-taxonomy-for-lawyer-technological-competence/>

As Dr. Salzyn sets out in her materials, Canadian lawyers must -under the *Model Rules of Professional Conduct* s. 3.1-2- perform legal services at the standard of a competent lawyer (each province/territory has since adopted the *Model Rules* albeit not always in their entirety). To maintain this competence, the commentary goes on to say- lawyers should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. (Note that Ontario and most other provinces/territories- but not all- adopted this commentary.) It is important to underscore that any use of technology must be compatible with the duty to protect client information. The required level of technological competence will depend on whether the use or understanding of technology is necessary to the nature and area of a lawyer's practice and responsibilities and reasonably available to the lawyer. The latter factor of "reasonably available to the lawyer" also depends on proportionality factors which include the location of the firm or practice, the practice area, and clients. For example, a mid-size firm in the GTA with a robust insurance defence practice ought to be using e-discovery. A sole practitioner in rural Ontario specializing in will & estates,

however, may not require nor be seen to require as robust a set of technological tools as the mid-size GTA firm.

The question of which technology is “relevant to the nature and area of the lawyer’s practice and responsibilities” is, by virtue of the evolving nature of technology, fluid. As technology grows and the suite of tools available to us increases so to does our requirement to incorporate relevant tools into our practice, where appropriate.

Recent Case Commentary

Since Dr. Salzyn’s December 2020 article, a particularly helpful case -*WORSOFF v MTCC 1168*, 2021 ONSC 6493- came out of the Ontario Superior Court of Justice. This case adds further colour to both Rule 3.1-2 and the earlier judicial commentary (including from *Cass v 1410088 Ontario Inc.*, 2018 ONSC 6959 canvassed in Dr. Salzyn’s December 2020 article).

WORSOFF grapples with the question of mode of discovery. The defendant wanted to proceed with online discovery which was allowable under the *Civil Procedure Rules* following the modernization package prompted by the pandemic and implemented in January 2021. The plaintiff requested the discovery proceed in person. The plaintiff’s counsel said he went to a Blue Jay’s game with thousands of people and that society was opening. Plaintiff’s counsel also noted that, in his view, in person was “best.” The plaintiff’s argument that in person was “best” did not persuade Justice Myers, who ordered that the discovery proceed via video conference:

...Efficiency, affordability, and enhanced access to justice trump counsels’ comfort and presumptions every time. With the current pace of change, everyone has to keep learning technology. Counsel and the court alike have a duty of technological competency in my respectful view. Older judges and counsel may be behind younger counsel and the rest of society who use computers with greater regularity and sophistication than we do. But everyone

in the civil litigation system in Ontario has had to learn to use the Civil Submissions Online portal and Caselines for example. Technological change affects everyone. Once upon a time, I had to learn how to use a Gestetner (Google it) and then a fax machine. **I do not accept that in person is just “better”. It can be in some cases. But if counsel just prefers it because he or she is more comfortable with it, ought we to reject the printer because I liked my Gestetner (and Word Perfect for that matter)?** The balance of convenience favours easier and more convenient processes with accompanying cost savings. [32]

[emphasis added]

Justice Myers pithily highlights some of the duty of technology’s aims including efficiency, affordability, and enhanced access to justice. Further, Justice Myers plainly dictates that both lawyers and judges have a duty to be technologically competent and to keep learning technology. The example of his own experience (preferring the Gestetner to the printer) is helpful and underscores that personal preference bears no weight on the type of technology that should be employed.

Dispelling (Some of) the Current Fears by Looking Back!

Since the widespread release of ChatGPT last November, tech journalists, legal tech commentators and the media at large produced a flurry of commentary on the advent of this tool (and others like it) and its possible impacts on the legal field. Sometimes the commentary makes it seem like we are on the cusp of Skynet! All of this can be overwhelming and disorienting and, while there are indications this may mark the beginning of massive change in the legal field, we may find solace in looking back. Lawyers have adapted to other forms of technology they may once have balked at or considered inferior to analogue processes. Over time, legal practice reached tipping points where clients expected lawyers to incorporate

certain types of technology into practice. An illustrative and accessible example of this is digital legal research.

There was a day (in the not-too-distant past) where litigators poured over looseleafs to find relevant caselaw. With the onset of digitization of case law and increased accessibility of online legal databases, lawyers and law firms began to shift from looseleaf to these online databases. Law firms adjusted to this technology at varying paces depending on their size and practice areas. Eventually, however, the profession reached a tipping point where every law firm and lawyer ought to be conducting legal research via online databases. Today, if a lawyer failed to cite a persuasive body of case law and were found to have conducted their research not online but on outdated looseleafs, they could be found negligent. Similarly, it would now be inappropriate for a large insurance defence firm to conduct all documentary discovery manually in lieu of using e-discovery tools.

Rest assured; we have not yet reached that tipping point with tools like ChatGPT.

Where do tools like ChatGPT fit into this Duty?

There is no expectation -at this juncture- that lawyers use tools using large language models (“LLMs”)- like ChatGPT-in their practice. Put another way, not using ChatGPT now will not, unlike not using digital research- result in you running afoul of the duty of technological competence. In fact, using ChatGPT in a certain way (for instance, providing it client information) may have you run afoul of the obligation to maintain client confidence (*Rules of Professional Conduct* s. 3.3-1).

On June 23, 2023, Chief Justice Glenn D. Joyal of the Court of King’s Bench of Manitoba issued- with immediate effect- the following practice directive:

With the still novel but rapid development of artificial intelligence, it is apparent that artificial intelligence might be used in court submissions. While it is impossible at this time to predict how artificial intelligence completely and accurately may develop or how to exactly define the responsible use of artificial intelligence in court cases, **there are legitimate concerns about the reliability and accuracy of the information generated from the use of artificial intelligence.** To address these concerns, **when artificial intelligence has been used in the preparation of materials filed with the court, the materials must indicate how artificial intelligence was used.**

[emphasis added]

This directive captures the trepidation many in the legal field are feeling with respect to the possible deleterious effects of LLM tools. While this anxiety is heightened at present it may, over time, be lessened when tools with safeguards become more well known and more widely available. Many legal databases with which we are familiar- along with newer companies- are working on safely integrating ChatGPT (or similar tools) into their systems in ways that will protect client data.

What can we do to?

Lawyers have many questions as it relates to this duty: When will I have to start using LLM tools? Will clients soon expect these tools to prepare memos? When will we reach the next tipping point? While we cannot provide definitive answers to these questions, the best course of action is preparation. Dr. Salzyn, in her December 2020 article, outlines an instructive taxonomy for modern lawyers to equip them to meet this duty. We encourage you to revisit that article. Further, we recommend you read Dr. Salzyn's September 2023 article on AI and legal ethics (also included in the materials):

AI and Legal Ethics 2.0: Continuing the Conversation in a Post- ChatGPT World:

<https://www.slaw.ca/2023/09/28/ai-and-legal-ethics-2-0-continuing-the-conversation-in-a-post-chatgpt-world/>

Generally, lawyers should remain engaged- by attending today's session and reading these materials you are on the right path! Continue to attend seminars/webinars, go to bar society events, chapter/practice events and enroll in technology focused CLE sessions. By working on your technological skills/literacy and keeping your clients' best interests top of mind you will be less likely to run afoul of the ever-evolving duty of technological competence.

Appendix:

Cass v 1410088 Ontario Inc., 2018 ONSC 6959:

<https://www.canlii.org/en/on/onsc/doc/2018/2018onsc6959/2018onsc6959.html>

WORSOFF v MTCC 1168, 2021 ONSC 6493:

<https://www.canlii.org/en/on/onsc/doc/2022/2022onsc1902/2022onsc1902.html>

Practice Direction- Court of King's Bench of Manitoba:

https://www.manitobacourts.mb.ca/site/assets/files/2045/practice_direction_-_use_of_artificial_intelligence_in_court_submissions.pdf