Law Society of Ontario | Barreau de l'Ontario

25th Employment Law Summit

CO-CHAIRS

Neena Gupta
Gowling WLG (Canada) LLP

Kim Patenaude
RavenLaw LLP

October 15, 2024

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Law Society of Ontario | Barreau de l'Ontario

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25th Employment Law Summit

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25th Employment Law Summit

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

Kim Patenaude, *RavenLaw LLP*

October 15, 2024
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 CLE24-01007

9:00 a.m. – 9:05 a.m. **Welcome and Opening Remarks**

Neena Gupta, *Gowling WLG (Canada) LLP*

Kim Patenaude, *RavenLaw LLP*

9:05 a.m. – 9:40 a.m.	**Major Case Law Review** Hossein Moghtaderi, *Filion Wakely Thorup Angeletti LLP* Andrew Montague-Reinholdt, *Nelligan O'Brien Payne LLP*
9:40 a.m. – 9:45 a.m.	**Question and Answer Session**
9:45 a.m. – 10:20 a.m.	**Legislative Update at Federal and Provincial Levels** Colleen Hoey, *Dentons Canada LLP* Raphaëlle Laframboise-Carignan, *RavenLaw LLP*
10:20 a.m. – 10:30 a.m.	**Question and Answer Session**
10:30 a.m. – 10:50 a.m.	**Break**
10:50 a.m. – 11:30 a.m.	**Workplace Implications of Political Expressions** Paul Champ, *Champ & Associates* Adrian Ishak, Senior Corporate Counsel-Global Labour & Employment, *Salesforce.com*
11:30 a.m. – 11:40 a.m.	**Question and Answer Session**
11:40 a.m. – 12:05 p.m.	**Mitigation Revisited** Devin Jarcaig, *Mathers McHenry & Co.* Martin Thompson, *McMillan LLP*
12:05 p.m. – 12:15 p.m.	**Question and Answer Session**

12:15 p.m. – 1:15 p.m.	**Lunch Break**
1:15 p.m. – 1:50 p.m.	**Implications of Insolvency on Employment-Related Claims** Wojtek Jaskiewicz C.S. *WeirFoulds LLP* Jonquille Pak, *JPak Employment Lawyers*
1:50 p.m. – 2:00 p.m.	**Question and Answer Session**
2:00 p.m. – 2:30 p.m.	**Top 5 Workplace Privacy Issues** Roland Hung, *Torkin Manes LLP* Saba Zia, Senior Counsel, *Royal Bank of Canada*
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.	**Ethical Issues for Employment Lawyers (50 m Ⓟ)** Lai-King Hum, *Hum Law Firm PC* Wade Poziomka, *Ross & McBride LLP* Michael Watson, *Gowling WLG (Canada) LLP*
3:50 p.m. – 4:00 p.m.	**Question and Answer Session (10 m Ⓟ)**
4:00 p.m.	**Program Ends**
4:00 p.m. – 6:00 p.m.	**Reception -** Registrants are invited to join us for a reception.

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25th Employment Law Summit

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TAB 1

25th Employment Law Summit

Case Summary Chart

Hossein Moghtaderi
Filion Wakely Thorup Angeletti LLP

Andrew Montague-Reinholdt
Nelligan O'Brien Payne LLP

October 15, 2024

cpd

2024 Employment Law Case Review – Notable Decisions

Case	Summary	Takeaway
Reasonable Notice Period		
Milwid v. IBM Canada Ltd., 2023 ONCA 702 ("***Milwid***"); and *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696 ("***Lynch***")	Employer appealed the granting of a 27-month (*Milwid*) and 30-month (*Lynch*) notice award on summary judgement motion. In both cases, employees were over 60-years of age, had over 35-years of service, had devoted their entire careers to their employers and had technical skills tailored specifically for their employer's business. The appeal was dismissed, motion judge's award was upheld.	Court of Appeal justified the notice periods awarded above the general 24-month cap for "exceptional circumstances." In addition to *Bardal*[1] factors, the court recognized the employee's highly specialized role and length of service, and factored in the Covid-19 pandemic and the lack of transferrable skills in an uncertain economy as exceptional circumstances. The Court laid onus on judges to demonstrate presence of "exceptional circumstances" when calculating reasonable notice period in excess of 24-months.
Mitigation		
Krmpotic v. Thunder Bay Electronics Limited, 2024 ONCA 332	Wrongful dismissal action brought by 59-year-old building maintenance supervisor with nearly 30 years of service. Employee had sustained various workplace injuries and underwent surgery. He was terminated shortly after his return to work and was informed that the termination was due to financial reasons. Employer had paid 16 months of pay at termination and argued that the employee had failed to mitigate his damages.	Employee may be able to establish that they were incapable to mitigate their damages during a reasonable notice period, even without expert medical evidence.

[1] Bardal v. The Globe & Mail Ltd. (1960), *1960 CanLII 294* [*"**Bardal**"*]

	The trial judge awarded 24 months of notice and accepted the employee's evidence that he could not work during the notice period on account of his physical limitations. The trial judge also awarded $50,000.00 in aggravated damages for the employer's dishonest manner of dismissal which caused the employee mental distress. Court of Appeal upheld trial court's award of a 24-month reasonable notice period and $50,000 in aggravated damages. In particular, the Court of Appeal rejected the employer's argument that the award of aggravated damages required a diagnosable medical condition, and medical evidence to draw a causal link between the manner of dismissal and the mental stress.	The absence of a medically diagnosed psychological condition does not preclude an aggravated damages award.
Jimmy How Tein Fat v. PRGX Canada Corp., 2023 ONSC 6374	Summary judgement motion decision on a wrongful dismissal claim. Held that employer did not meet onus to show that employee failed to mitigate their losses. Court awarded 24-month notice period with no reduction for failure to mitigate to a senior level employee, with 29 years of experience, who was 62 at the time of termination. An employee being a "senior employee" is owed a longer notice period due to difficulty of finding comparable employment, although this factor should not overwhelm other factors. The employee also asked Court to look at each head of compensation separately (ie base salary, bonus, vested stock) while the employer wanted to simply calculate the loss based on a 4-year average total income. The Court favoured the plaintiff's approach and found the consideration of bonus amounts requires a "different contractual analysis." With respect to salary, given that the employer had already communicated to the employee that he would receive a merit increase during the next year, the Court used that higher figure to calculate his damages.	The Court will look at employer's actions to facilitate connections for the employee, provide reference letters, etc. as demonstrable help in such cases. Also, the Employer cross-examined the Employee on mitigation efforts, including getting an admission on several competitors that the Employee did not seek work from. It also received an undertaking from the Employee to provide an updated mitigation journal. Following the cross-examination, the Employee contacted all of those competitors, who confirmed they did not have employment opportunities. The Employer attempt to object to that evidence going in the record; however, the Court disagreed and effectively said: you got what you asked for.

	Moreover, the Court awarded damages for lost bonus based on a three year average, in part, because phrases requiring "full-time" or "active" employment are not sufficient to remove an employee's common law right. Court held that if an employer asserts an employee's failure to mitigate, they must demonstrate that they facilitated the employee to find comparable employment.	
Gannon v. Kinsdale Carriers, 2024 ONSC 1060	Employee of 23-years, at a federally regulated trucking company, was dismissed due to closure of business as a result of COVID-19. Employer made efforts to find comparable employment for the employee but the employee chose not to take the position. Employee brought an action for wrongful dismissal seeking 22 months' reasonable notice. In dismissing the plaintiff's action, the court found that the position in question was in fact comparable and her decision not to accept the position meant that she had failed to mitigate her damages.	Dismissed employees have a duty to seek and accept comparable, alternative employment even if the comparable employment is not their preferred choice.
Marshall v. Mercantile Exchange Corporation, 2024 CanLII 71128 ONSC	Employee's 25-year employment as a "courier" terminated due to closure of the company's delivery department. The employee did not search for alternative jobs citing depression as the reason for failure to mitigate his damages. The former employer sought an independent medical examination as per subsection 105 (2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The employee challenged the action and argued that an independent medical examination of his condition was not warranted under the Act. Court acknowledged that it was unusual to order a medical examination in a wrongful dismissal case, however, it was justified given the circumstances of the case.	Court held that independent examinations are available in wrongful dismissal actions in appropriate circumstances. Circumstances of the case including the expectation that replacement work is relatively available to dismissed employees, warrant that the former employee be required to complete a medical examination after 12 months have passed. A medical examination 12 months after termination of employment was considered to be a fair balance of giving an employer a right to test an employee's inability to mitigate damages without employers

		abusing medical examinations to dissuade employees from relying on legitimate medical issues.
Contractual and Policy Drafting		
Boyer v. Calluidus, 2024 ONSC 20	Former employee brought a motion for summary judgment, alleging constructive dismissal and sought significant damages in relation to unpaid vacation pay, deferred bonuses, and stock option entitlements. Employer argued that the employee had resigned and was not entitled to the damages sought. While the court agreed that the employee had not been constructively dismissed, and therefore not entitled to wrongful dismissal damages, he was still owed more than $1.8 million in damages for unpaid vacation pay and compensation owing under Callidus' deferred compensation plan and stock option plan.	Poorly drafted and communicated vacation policy and incentive compensation plans could not restrict an employee's entitlements under common law.
Dufault v. The Corporation of the Township of Ignace, 2024 ONSC 1029	Employee hired pursuant to a fixed-term contract brought an action for wrongful dismissal when her employment was terminated without cause two months into her contract. The court held that the termination provisions of the contract violated the ESA for multiple reasons, rendering it unenforceable. Notably, the Court found that language permitting the employer to terminate the employment without cause as the employer's "sole discretion" and "at any time", to be contrary to the ESA and thus unenforceable. The employee was awarded the value of the remaining portion of her contract with no duty to mitigate.	Employers must take great care in drafting their employment contracts, particularly the termination provisions, to ensure that they do not run afoul of the ESA.
Kopyl v. Losani Homes (1998) Ltd., 2024 ONCA 199	Fixed-term employee was terminated prior to the contract end date on a without-cause basis and paid four weeks' salary in lieu. Employee argued that the termination clause of the employment contract was void since it contravened the ESA. The Employer agreed that the termination clause was	*Howard v Benson Group*[2], which established payment of the full remainder of the contract term, without an

[2] *Howard v Benson Group*, 2016 ONCA 256

	unenforceable but argued that the violation also invalidated the contract's fixed-term clause. Both the application judge and the Court of Appeal found that the invalid termination clause did not render the fixed-term clause unenforceable, as it did not constitute a termination clause, and established payment of the full remainder of the contract term, without an enforceable early termination clause. The employee was entitled to receive the full term's compensation without a duty to mitigate. Contract had a *Waksdale* issue and employer paid reasonable notice (instead of the remainder of the term), arguing that if *Waksdale* invalidated the early termination clause then it also invalidated the implied "remainder of the term" termination protection.	enforceable early termination clause, remains good law. A *Waksdale* violation only invalidates the termination clause and does not render the entire employment contract unenforceable.
Investigations and Privacy Issues		
York Region District School Board v. Elementary Teachers' Federation of Ontario, 2024 SCC 22	Supreme Court of Canada ("**SCC**") analyzed the question of the applicability of the Canadian Charter of Rights and Freedom ("**Charter**") to the Ontario public school board. The union filed a grievance on behalf of two grievors pursuant to the collective agreement between the union and the employer. The grievance involved a school principal's chanced discovery of an online log created and authored by the grievors. The log contained information about, and evidence of, their experiences with, and negative views about, their colleagues.	The Supreme Court unanimously declared that Ontario school boards, being an inherently public function, are subject to the Charter. The Supreme Court in this case provided guidance on how workplace privacy claims under s. 8 of the Charter should be addressed by decision-makers. Court held in *obiter* that a reasonable expectation of privacy takes its colour from the context, and that decision-makers should be cautious in adapting the section 8 framework from the criminal law context to the employment context. Court found relevant contextual factors in the workplace privacy analysis to include factors such as an employer's operational

		realities, policies and procedures, the level and degree of regulation, and the terms of the relevant collective agreement.
Lagala v. Patene Building Supplies Ltd., 2024 ONSC 253	Wrongful dismissal claim brought by a Health, Safety, and Training Manager whose employment was terminated for cause after she submitted an employer's claim form to the Workplace Safety and Insurance Board (the "**WSIB**"), alleging that she was injured while at work. Employee dismissed without notice as a result of how she handled her own claim to the WSIB. In dismissing the action, the court highlighted the integral role of the employee as a health and safety manager and concluded that the employee's repeated lapses in judgement justified the employer's decision to terminate her employment with cause.	Employees in managerial roles may be held to a higher standard of performance and a pattern of flawed behaviour may provide cause for termination.
Jarvis v The Toronto-Dominion Bank, 2024 ONSC 3853	Employee sued employer for wrongful dismissal. The employer alleged that employee was terminated due to internal whistleblower complaints, and employee was fired for cause. Employee sought to inspect the internal investigation report, but received documents that were partially redacted. Employee then demanded un-redacted documents be given to him. The Court ordered employer to disclose the un-redacted names and other identifying information of the complainants and individuals mentioned in the investigation report. Court only permits redaction of documents where disclosure could (1) cause considerable harm, (2) serves no purpose in resolving issue, or (3) infringes public interests deserving of protection. Just because the employer promised complainants confidentiality doesn't mean they can guarantee those assurances if the company intends to rely on their testimonies.	If a company wishes to maintain complainant's expectation of confidentiality, company can terminate employee without cause (according to this judge; however, likely still need to adhere to company policies/legislation that require investigations in certain circumstances). If employee is terminated for cause it would be unfair for the terminated employee to not know the case to meet against them. Companies should thus be careful when assuring confidentiality to other employees in investigations. Public policy considerations do not outweigh need for disclosure, as the proper administration of justice outweighs the importance of other public interests related to confidentiality. Overall fairness requires

	PIPEDA also does not bar disclosure of confidential report, as s. 7(3) permits disclosure without knowledge or consent of individual where necessary to comply with rules of the court. The defendant is to produce in unredacted form the complaints, the whistleblower complaint and the investigation report.	plaintiff be given a full opportunity to respond to allegations against him as per Robinson.
Metrolinx v. Amalgamated Transit Union Local 1587, 2024 ONSC 1900	Employees dismissed for sexual harassment arising from the contents of a private "Whatsapp chat" on their personal phones. The chat came to light when someone anonymously sent screenshots of it to another employee, who then reported it to Human Resources, but chose not to pursue a formal investigation. Arbitrator found no cause for dismissal. Subsequently, Divisional Court quashed the arbitrator's decision finding it unreasonable.	Arbitrator at first instance found no cause for dismissal given that the chat was on personal phones and criticized the employer for investigating the matter given that no formal complaint was pursued. Divisional Court disagreed and quashed the decision. The Court held that an employer has a standalone obligation to investigate if it becomes aware of potential harassment, even if no employee wants to file a formal complaint.
Frivolous Counter Claims/ER Misconduct during Litigation		
Wilds v. 1959612 Ontario Inc., 2024 ONSC 3452	Wrongful dismissal claim where the employer refused to pay *ESA* minimums, provide a letter of reference of confirmation of employment, or reimburse business expenses. Action decided by way of summary judgement. Court discussed the enforceability of termination clauses, and identifies three issues with the clause: (1) a *Waksdale* issue; (2) was dependent on a release; and, (3) it implicitly excluded continuation of some benefits, including life insurance by only referencing health and dental insurance. With respect to mitigation, Court held it against the employer that it failed to provide any reference or letter confirming employment.	Court ordered $10,000.00 in punitive damages for failure pay *ESA,* issuing her ROE late, and not reimbursing expenses. Importantly, the Court noted that fact that even during litigation, the Employer had not yet resolved these issues even after acknowledging a need to do so.

	No mental distress damages because the Employee failed to provide any evidence other than a vague statement that she "suffered mental and financial distress".	
Giacomodonato v PearTree Securities Inc., 2024 ONCA 437	This is a cost endorsement arising from the litigation in this case. The underlying litigation concerned a wrongful dismissal claim which revolved around determining which of the plaintiff's two employment contracts should form the basis of the damages award. The court held that both contracts were valid and enforceable. Most importantly, the court held that it was not pre-occupied with the adequacy of consideration provided for the second contract. In the cost award, the trial judge awarded a significant award against the defendant on account of their conduct during the litigation despite the presence of a Rule 49 award which was in the ballpark of the trial award. In the trial judge's view, the defendant's conduct, including a "meritless" counterclaim, constituted "frivolous and strategic claims" that such a cost award would discourage. The Court of Appeal dismissed the plaintiff's damages award, as well as the respondent's cross-appeal of the cost award and upheld the trial judge's decisions.	Ensure that any changes to an employment contract is accompanied with fresh consideration. Be careful with frivolous, though strategic, counterclaims and litigations tactics as they may justify significant cost awards.
Gazier v. Ciena Canada, 2024 ONSC 865	Summary judgement motion on a straightforward wrongful dismissal action. 58-year-old Senior Director and engineer, with 22 years of service. Plaintiff advanced the claim with a 198-page Motion Record that ballooned to over 4,000 pages following cross-examination, voluminous production requests and undertakings given, largely due to the Defendant fighting having the matter heard on summary judgement. Awarded 24-month notice period, including bonus with no reduction for mitigation. However, calculated bonus based on what it would have been had he remained employed, which was significantly less than the two-year average leading up to termination.	Court agreed to hear matter on a summary judgement basis. Defendant conceded that, in fact, there were only two real issues in dispute, being an allegation made a contradictory statement during cross-examination and his mitigation efforts. Throughout the decision, the Court was critical of the way the Defendant allowed a simple wrongful dismissal action to balloon. IOW: don't overcomplicate what should otherwise be a straightforward matter.

Koshman v. Controlex Corporation, 2023 ONSC 7045	Wrongful dismissal trial allowed to proceed in default due to the corporate defendant's failure to participate, after being served multiple court orders. It was additionally alleged that the employer made a series of derogatory statements toward the former employee during termination of employment. At the outset, Controlex has taken an aggressive defence and counterclaimed against the plaintiff. The court took note of the Employer's failure to adhere to procedural requirements and malicious treatment toward the employee at termination of employment. In addition to the wrongful dismissal damages awarded, the court awarded $100,000 for aggravated and punitive damages.	The decision addressed the power imbalance between employers and employees, especially at the time of termination; and sets precedent by holding the employer responsible for significant financial consequences for failing to adhere to procedure. Employer should consider their approach both at termination and during litigation, as they may be faced with significant damages awards.
Other important decisions		
Ontario English Catholic Teachers Association v. Ontario (Attorney General), 2024 ONCA 101	Protecting a Sustainable Public Sector for Future Generations Act, 2019 ("**Bill 124**") provided for a 3-year window of salary moderation and compensation restraint measures for non-represented and represented public sector employees. Ten applications were brought by a broad range of unions and labour organizations challenging the constitutionality of Bill 124. Application judge found that Bill 124 substantially interfered with collective bargaining in violation of section 2(d) of the Charter and that the breach could not be saved under section 1 of the Charter. As a result of this finding, the application judge concluded that Bill 124 was unconstitutional and struck the entirety of the statute declaring it "void and of no effect." The decision was appealed to the Court of Appeal.	The Court of Appeal agreed that Bill 124 substantially interfered with the collective bargaining rights of the respondent unions and labour organizations. However, it held that the application judge erred in declaring Bill 124 void and of no effect for the non-represented employees who were also subject to the wage restraint provisions. Court acknowledged that Bill 124 applies to both represented and non-represented employees. As such, for non-represented employees, this decision means that Bill 124 again applies to them without interruption, as if Bill 124 had never been declared unconstitutional.

R. v. Greater Sudbury (City), 2023 SCC 28	City of Greater Sudbury tendered a construction project and contracted with a General Contractor (the "GC") to complete the project. The contract stipulated that the GC undertook the project as the "constructor" under Occupational Health and Safety Act, R.S.O. 1990, c. O.1 ("**OHSA**"), assumed control over the day-to-day management of the project and assumed full responsibility for compliance with the OHSA. As is typical in such projects, the City's involvement in the project was minimal and limited to occasionally sending City-employer staff to conduct quality control. In 2015, a member of the public was tragically struck and killed by machinery operated by the GC. Ministry of Labour charged the City and the GC with various violations of the OHSA. Notably, the City was charged for breaching its obligations both as a "constructor" and an "employer" under the OHSA. The matter went to trial, the superior court and ultimately the Ontario Court of Appeal where the City was found to have breached its obligations as an "employer." In a 4-4 split decision, the Supreme Court of Canada (the "SCC") upheld the Court of Appeal decision. The Plurality of the SCC agreed that the City was an "employer" for the purposes of the OHSA and was therefore liable for offences under the OHSA. The SCC also held that an employer found in breach of the OHSA could assert a due diligence defence and remitted the matter back to further adjudication.	The decision will have far-reaching consequences for Ontario construction projects and will undoubtedly upset existing business practices. Construction project owners will have to take the increased exposure points into account as they may face substantially more obligations and liability under the OHSA. The impact of the SCC's divided decision, and the strong dissenting opinions remains to be seen.
Sullivan v. Canada (Attorney General), 2024 FCA 7 & *Khodykin v. Canada (Attorney General),* 2024 FCA 96	Applicants were denied employment insurance benefits under the *Employment Insurance Act* after losing their job for "misconduct" for failing to comply with his employers COVID vaccine policy. EI benefits are not payable during a suspension period where the suspension stems from a claimant's misconduct. Applicant applied for a judicial review with the FCA after he was denied, which was upheld by the Social Security Tribunal and its appeals division.	The FCA found that the test for misconduct focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of the employer's work policies. The SST does not have authority to consider the overall constitutionality of a company's vaccination policy.

		The FCA concluded that "Charter Values" cannot invalidate legislative provisions that administrative decision makers must follow. Only unjustified violations of rights and freedoms can strike down legislation, but until legislation is struck down in another forum, tribunal decision makers must follow their administrative procedures and rules. The applicants remains free to pursue remedies to challenge their dismissals elsewhere including the Human Rights Tribunal if they believe that the employer treated them improperly, or work policies were unfair to him.
Croke v. VuPoint System Ltd., 2024 ONCA 354	The Court of Appeal upheld a motion judge's decision that an employee's refusal to comply with the Employer's COVID-19 vaccination policy constituted a frustration of contract. The Employer worked exclusively for one client. The client implemented a mandatory vaccination policy, applicable to all of its subcontractors, including the Employer. In turn, the Employer formulated a similar policy implemented internally. The employee refused to disclose his vaccination status in contravention to Employer's mandatory vaccination policy. Accordingly, his employment was terminated due to his refusal to comply with the policy. The Court of Appeal accepted the trial judge's finding that the client's vaccination policy was the unforeseeable event which frustrated the employment contract.	There may be circumstances where the actions or requirements of a third party constitute an "unforeseen event" and result in the frustration of the employment contract.

Arora v ICICI Bank of Canada, 2024 ONSC 4115	For cause termination case. Employee alleged to have shared confidential proprietary information for his own benefit, including to set up a competing business with two subordinates and being untruthful during the investigation. The Employee is not a fiduciary: no high degree of autonomy to exercise his power, discretion, or control to affect the Bank's legal or substantial practical interest, or degree of autonomy where his discretion made the bank vulnerable. However, was cause. The Court rejected the notion that cause was equivalent to "capital punishment" although acknowledge it is a significant step that only applies in certain circumstances. Here, the breaches were serious and go to the heart of the employment relationship, given they engage the basic duties of loyalty and honesty. Unsurprisingly, did not award morale damages to the Employee.	The test for an employee becoming a fiduciary is a high bar; likely alleging cause or breach of duties of fidelity or loyalty (see below) are better claims for an Employer seeking damages. For employees: don't steal and set up a competing business while still employed with your subordinates.
Titus v. Hack, 2024 ONSC 3666 *See also the costs decision,* 2024 ONSC 5363	Allegation that the employee breached his contractual duties of fidelity, loyalty and good faith because he copied business records, deleted records from the employer's system, and shared the records with a competitive business. Also, alleged an allegation that he breached his fiduciary obligations. The Court found he was not a fiduciary. While he worked as a Vice President, he was primarily a salesman who was closely supervised. A fiduciary is someone with a high degree of trust and confidence, and discretion to bind or impact the organization. In any event, even if he had been a fiduciary, given the low level of trust, confidence, and vulnerability of the employer, the Court would not have imposed post-termination obligations (such as to not-solicit) for more than six months. The Court also found that he did not breach his contractual duty of good faith, loyalty and fidelity by competing because, while he was employed, he only took peremptory steps to compete post-employment while still employed, as opposed to actually competing. The Court found that he did not misappropriate confidential business documents, despite keeping over 1000 employer documents. The required elements are: 1) the	The Court awarded no damages despite this because the employer failed to lead evidence of harm it suffered and refused to award punitive damages on the basis that there was no independent actionable wrong. It ordered the return of documents only. For all counsel: start with a view of resolving these claims before anything is done with the documents. Employers can insist on a return of documents and, if the employee complies, they can likely avoid any financial liability (assuming they have not yet used those documents improperly).

	documents have a quality of confidence; 2) the documents were imparted to the employee in circumstances importing an obligation of confidence; and 3) they were used in an unauthorized manner. Claim largely failed because: (1) other than with respect to two email chains, the employer failed to lead evidence of why the documents were confidential; and (2) there was no evidence that the documents either were or could have been used improperly. The Court found he did breach his duty of good faith, fidelity and loyalty by misappropriating business documents and sharing them with a competitive business, as well as destroying company laptops. It also found that he committed the tort of conversion.	In addition the Court awarded costs in favour of the Employee of $161,264, finding the Employer's victory to be "pyrrhic"; that the real issue was whether the Employee was a fiduciary, and that the matter could have been handled with a "15-minute motion for summary judgement" instead of an eight-day trial
Wasylyk v Lyft, 2024 ONSC 664, leave to appeal refused.	Class action related to employee misclassification stayed in favour of an arbitration agreement. Case is in contrast to *Uber v Heller*, where the Supreme Court ultimately allowed a similar class action to proceed in the face of an arbitration clause.	In this case, the arbitration clause was upheld because: • The process was accessible: was subject to the law of Ontario, allowed flexible procedural rules, the hearing would take place in the driver's municipality, the driver would only pay up to the amount in filing fees they would have otherwise paid to file in the Superior Court (with Lyft paying the rest), and the matter could be heard by telephone or in writing if the claim was $10,000 or less. • It had an opt-out provision. • It is not unconscionable because it did not dictate exceptional features like time, place, cost, and procedure, unlike in *Heller*. • It is not against public policy to preclude access to class actions where arbitration

		provides for an alternative dispute resolution mechanism. It did not breach the *ESA* because it said the parties would arbitrate, "unless required by applicable law" leaving employees able to pursue statutory remedies.

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TAB 2

25th Employment Law Summit

Legislative Updates at the Federal and Provincial Levels (PPT)

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LEGISLATIVE UPDATES AT THE FEDERAL AND PROVINCIAL LEVELS

25th Employment Law Summit

Colleen Hoey and Raphaëlle Laframboise-Carignan

October 15, 2024

AGENDA - 2024 LEGISLATIVE UPDATES AT THE FEDERAL AND PROVINCIAL LEVELS

WHAT CHANGED?

- *Employment Standards Act, 2000*, SO 2000, c 41.
- *Canada Labour Code*, RSC 1985, c L-2.
- Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012* (assented to June 20, 2024), SC 2024, c 12.
- Other Legislative Updates

WHAT ELSE IS COMING?:

- Bill 190, *Working for Workers Five Act, 2024*,
- Bill 124, *Stopping the Use of Non-Disclosure Agreements Act, 2023*

Questions?

Changes in 2024	Proposed Additional Changes
Employment Standards Act (Working for Workers 4) #1: Strengthened wage protections for restaurant, hospitality &service #2 Ban the use of Canadian experience #3 Requiring Disclosure about the Use of AI #4 Clarifying vacation pay provisions. #5 License to act as a recruiter	*Employment Standards Act (Working for Workers 5 – Jan 2025)* #1: Job Posting information – vacancy and posting retention. #2: No more sick notes #3: Fines – increasing maximum individual fine to $100,000
Canada Labour Code #1 Increase statutory notice entitlements #2 Notice to trade Union where position is redundant #3 Rights of Displaced Workers #4 Statement of Benefits on termination.	*Canada Labour Code – Bill C-58 (June 20, 2025)* #1: Prohibition on Replacement Workers #2 :Rules regarding maintenance of activities during strike/lockout
	Occupational Health and Safety Act (Working for Workers 5) #1 "Virtual harassment" expressly incorporated #2: Employers - permitted to post policies virtually #3: JHSC – the joint health and safety committee may meet virtually #4: Washrooms – washrooms must be sanitary #5: A "home office" is not an "industrial establishment"
Pay Equity Regulations #1 Administrative monetary penalty scheme for violations	*Misuse of Disclosure Agreements Act, Bill 124*
Fighting Against Forced Labour and Child Labour in Supply Chains Act	

CHANGES IN 2024: *Employment Standards Act, 2000*, SO 2000, c 41.

EMPLOYMENT STANDARDS ACT, 2000, SO 2000, C 41.

Previous Act	Changes in 2024
1(1) "employee" includes, (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	**[NEW] Training includes trial periods** 1(2.1) For the purposes of clause (c) of the definition of "employee" in subsection (1), training includes work performed during a trial period.
Employee authorization 13(3) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them with the employee's written authorization. **Same** 13(5) Subsection (3) does not apply if, (b) the employee's wages were withheld, deducted or required to be returned, (ii) because the employer had a cash shortage, lost property or had property stolen and a person other than the employee had access to the cash or property, or	**[NEW] Cash shortage, lost property, etc.** 13(6) For greater certainty, the circumstances set out in subclause (5) (b) (ii) include where a customer of a restaurant, gas station or other establishment leaves the establishment without paying for the goods or services taken from, consumed at or received at the establishment.
Direct deposit 11(4) An employer may pay an employee's wages by direct deposit into an account of a financial institution if, (a) the account is in the employee's name; and (b) no person other than the employee or a person authorized by the employee has access to the account.	**Direct deposit** 11(4) An employer may pay an employee's wages by direct deposit into an account of a financial institution if, (a) the account is selected by the employee and is in the employee's name; (b) no person other than the employee or a person authorized by the employee has access to the account; and (c) the account meets the prescribed criteria, if any.

EMPLOYMENT STANDARDS ACT, 2000, SO 2000, C 41.

Previous Act	Changes in 2024
Same 36(3) The employer may pay the employee vacation pay that accrues during a pay period on the pay day for that period if the employee agrees that it may be paid in that manner and, (a) the statement of wages provided for that period under subsection 12 (1) sets out, in addition to the information required by that subsection, the amount of vacation pay that is being paid separately from the amount of other wages that is being paid; or (b) a separate statement setting out the amount of vacation pay that is being paid is provided to the employee at the same time that the statement of wages is provided under subsection 12 (1). **Same** 36(4) The employer may pay the employee vacation pay at a time agreed to by the employee.	**Same** 36(3) The employer may pay the employee vacation pay that accrues during a pay period on the pay day for that period <u>if the employee has made an agreement with the employer that it may be paid in that manner</u> and, (a) the statement of wages provided for that period under subsection 12 (1) sets out, in addition to the information required by that subsection, the amount of vacation pay that is being paid separately from the amount of other wages that is being paid; or (b) a separate statement setting out the amount of vacation pay that is being paid is provided to the employee at the same time that the statement of wages is provided under subsection 12 (1). **Same** 36(4) The employer may pay the employee vacation pay at a time set out <u>in an agreement that the employee has made with the employer</u>.

EMPLOYMENT STANDARDS ACT, 2000, SO 2000, C 41.

Previous Act	Changes in 2024
No provision re method of payment of employee tips and other gratuities	**[NEW] Method of payment** 14.1 (1) An employer shall pay an employee's tips or other gratuities, (a) by cash; (b) by cheque payable only to the employee; (c) by direct deposit in accordance with subsection (3); or (d) by any other prescribed method of payment. **Place of payment by cash or cheque** (2) If payment is made by cash or cheque, the employer shall ensure that the cash or cheque is given to the employee at his or her workplace or at some other place agreeable to the employee. 2024, c. 3, Sched. 2, s. 5. **Direct deposit** (3) An employer may pay an employee's tips or other gratuities by direct deposit into an account of a financial institution if, (a) the account is selected by the employee and is in the employee's name; (b) no person other than the employee or a person authorized by the employee has access to the account; and (c) the account meets the prescribed criteria, if any.
No provision re posting of tips sharing policy	**[NEW] Policy re employer, etc., sharing in tips** 14.4(6) If an employer has a policy in place with respect to the employer or a director or shareholder of the employer sharing in tips or other gratuities redistributed under subsection (1), the employer shall post and keep posted a copy of the policy in at least one conspicuous place in the employer's establishment where it is likely to come to the attention of the employer's employees. **[NEW] Retention of tips sharing policy** 15(7.2) An employer shall retain or arrange for some other person to retain copies of every written policy on sharing in tips or other gratuities that is required to be posted under subsection 14.4 (6) for three years after the policy ceases to be in effect.

EMPLOYMENT STANDARDS ACT, 2000, SO 2000, C 41.

Previous Act	Changes in 2024
No requirement to hold a license to operate a temporary help agency	**[NEW] Licence to operate as temporary help agency** 74.1.1 (1) No person shall operate as a temporary help agency unless the person holds a licence for that purpose. **Same** (2) No client shall knowingly engage or use the services of a temporary help agency unless the person who operates the temporary help agency holds a licence for that purpose as required under subsection (1).
No requirement to hold a license to act as a recruiter	**[NEW] Licence to act as recruiter** 74.1.2 (1) No person shall act as a recruiter unless the person holds a licence for that purpose. **Same** (2) No recruiter, employer or prospective employer shall knowingly engage or use the services of a recruiter unless the recruiter holds a licence for that purpose as required under subsection (1).

EMPLOYMENT STANDARDS ACT, 2000, SO 2000, C 41.

New Part of the ESA (Not yet in force) PART III.1 JOB POSTINGS	
Definitions	8.1 In this Part, and for the purposes of Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions) and Part XXVII (Regulations) insofar as matters concerning this Part are concerned, "artificial intelligence" has the meaning set out in the regulations; ("intelligence artificielle") "employer" means an employer as defined in subsection 1 (1) and includes a prospective employer; ("employeur") "publicly advertised job posting" has the meaning set out in the regulations. ("annonce publique de poste")
Compensation range information	8.2 (1) Every employer who advertises a publicly advertised job posting shall include in the posting information about the expected compensation for the position or the range of expected compensation for the position. **Exception** (2) Subsection (1) does not apply to a publicly advertised job posting that meets such criteria as may be prescribed. **Range of expected compensation** (3) For the purposes of subsection (1), a range of expected compensation is subject to such conditions, limitations, restrictions or requirements as may be prescribed.

EMPLOYMENT STANDARDS ACT, 2000, SO 2000, C 41.

New Part of the ESA (Not yet in force) PART III.1 JOB POSTINGS	
Canadian experience	8.3 (1) No employer who advertises a publicly advertised job posting shall include in the posting or in any associated application form any requirements related to Canadian experience. **Exception** (2) Subsection (1) does not apply to a publicly advertised job posting that meets such criteria as may be prescribed.
Use of artificial intelligence	8.4 (1) Every employer who advertises a publicly advertised job posting and who uses artificial intelligence to screen, assess or select applicants for the position shall include in the posting a statement disclosing the use of the artificial intelligence. **Exception** (2) Subsection (1) does not apply to a publicly advertised job posting that meets such criteria as may be prescribed.

New Record Keeping Requirement (Not yet in force)	
Retention of job postings	15 (7.1) An employer shall retain or arrange for some other person to retain copies of every publicly advertised job posting within the meaning of Part III.1 and any associated application form for three years after access to the posting by the general public is removed.

CHANGES IN 2024:
Canada Labour Code, RSC 1985, c L-2.

CANADA LABOUR CODE, RSC 1985, C L-2.

Previous Act	Changes in 2024
Notice or wages in lieu of notice 230 (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either (a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.	**[NEW] Employer's duty** 230 (1) An employer who terminates the employment of an employee must give the employee (a) notice in writing of the employer's intention to terminate their employment on a date specified in the notice, at least the applicable number of weeks set out in subsection (1.1) before that date; (b) wages in lieu of notice, at their regular rate of wages for their regular hours of work, for at least the applicable number of weeks set out in subsection (1.1); or (c) any combination of notice and amounts of wages in lieu of notice so that the total of the number of weeks of notice in writing and the number of weeks for which wages are paid in lieu of notice is equivalent to at least the applicable number of weeks set out in subsection (1.1).

CANADA LABOUR CODE, RSC 1985, C L-2.

Previous Act	Changes in 2024
Notice or wages in lieu of notice 230 (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either (a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.	**[NEW] Clarification** 230(1.01) The employer's obligation to give and the employee's right to receive notice or wages in lieu of notice under subsection (1) apply whether or not the employee has a right to avail themselves of any procedure for redress under this Part, including under subsection 240(1), with respect to the termination of their employment. **[NEW] Notice period** 230(1.1) The applicable number of weeks for the purposes of subsections (1) and (2) is (a) two weeks, if the employee has completed at least three consecutive months of continuous employment with the employer; (b) three weeks, if the employee has completed at least three consecutive years of continuous employment with the employer; (c) four weeks, if the employee has completed at least four consecutive years of continuous employment with the employer; (d) five weeks, if the employee has completed at least five consecutive years of continuous employment with the employer; (e) six weeks, if the employee has completed at least six consecutive years of continuous employment with the employer; (f) seven weeks, if the employee has completed at least seven consecutive years of continuous employment with the employer; and (g) eight weeks, if the employee has completed at least eight consecutive years of continuous employment with the employer.

CANADA LABOUR CODE, RSC 1985, C L-2.

Previous Act	Changes in 2024
Notice to trade union in certain circumstances 230(2) Where an employer is bound by a collective agreement that contains a provision authorizing an employee who is bound by the collective agreement and whose position becomes redundant to displace another employee on the basis of seniority, and the position of an employee who is so authorized becomes redundant, the employer shall (a) give at least two weeks notice in writing to the trade union that is a party to the collective agreement and to the employee that the position of the employee has become redundant and post a copy of the notice in a conspicuous place within the industrial establishment in which the employee is employed; or (b) pay to any employee whose employment is terminated as a result of the redundancy of the position two weeks wages at his regular rate of wages.	**[NEW] Notice to trade union** 230(2) If an employer is bound by a collective agreement that contains a provision authorizing an employee whose position becomes redundant to displace another employee on the basis of seniority, and the position of an employee who is so authorized becomes redundant, the employer must give at least the applicable number of weeks' notice set out in subsection (1.1) in writing to the trade union that is a party to the collective agreement and to the employee that the employee's position has become redundant. **[NEW] Rights of displaced employee** 230(2.1) For greater certainty, any employee who is displaced and whose employment is terminated is entitled to and shall be given notice or wages in lieu of notice under subsection (1).

CANADA LABOUR CODE, RSC 1985, C L-2.

Previous Act	Changes in 2024
Notice to trade union in certain circumstances 230(2) Where an employer is bound by a collective agreement that contains a provision authorizing an employee who is bound by the collective agreement and whose position becomes redundant to displace another employee on the basis of seniority, and the position of an employee who is so authorized becomes redundant, the employer shall (a) give at least two weeks notice in writing to the trade union that is a party to the collective agreement and to the employee that the position of the employee has become redundant and post a copy of the notice in a conspicuous place within the industrial establishment in which the employee is employed; or (b) pay to any employee whose employment is terminated as a result of the redundancy of the position two weeks wages at his regular rate of wages.	**[NEW] Statement of benefits** 230(2.2) An employer must give any employee whose employment is terminated a statement in writing that sets out their vacation benefits, wages, severance pay and any other benefits and pay arising from their employment with the employer as at the date of the statement. The statement must be given to the employee (a) in the case of an employee who receives notice under paragraph (1)(a), as soon as possible, but not later than two weeks before the date of the termination of their employment; (b) in the case of an employee who receives wages in lieu of notice under paragraph (1)(b), not later than the date of the termination of their employment; and (c) in the case of an employee who receives a combination of notice and wages in lieu of notice under paragraph (1)(c), as soon as possible, but not later than two weeks before the date of the termination of their employment unless the period of notice is shorter, in which case, the day on which notice is given to the employee of the date of the termination of their employment.

CHANGES IN 2024: OTHER LEGISLATIVE UPDATES

FEDERAL: Recent amendments to *Pay Equity Regulations*, SOR/2021-161 under the *Pay Equity Act*, SC 2018, c 27, s 416.

- Introduces new administrative monetary penalty scheme applicable to violations of the Act and Regulations

FEDERAL: *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, SC 2023, c 9.

- Came into force on January 1, 2024
- Purpose: To implement Canada's international commitment to contribute to the fight against forced labour and child labour through the imposition of reporting obligations on
  - (a) government institutions producing, purchasing or distributing goods in Canada or elsewhere; and
  - (b) entities producing goods in Canada or elsewhere or in importing goods produced outside Canada.

CHANGES IN 2024 (CIF 2025):
Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012* (assented to June 20, 2024), SC 2024, c 12.

BILL C-58 (COMING INTO FORCE: JUNE 20, 2025)

Section 94 of the CLC is amended by adding new anti-replacement worker provisions (CIF June 20, 2025)	
Prohibition relating to replacement workers	**Prohibition relating to replacement workers** 94 (4) Subject to subsection (7), during a strike or lockout not prohibited by this Part, no employer or person acting on behalf of an employer shall use the services of any of the following persons to perform all or part of the duties of an employee who is in the bargaining unit on strike or locked out: (a) any employee or any person who performs management functions or who is employed in a confidential capacity in matters related to industrial relations, if that employee or person is hired after the day on which notice to bargain collectively is given; (b) any contractor, other than a dependent contractor, or any employee of another employer; (c) any employee whose normal workplace is a workplace other than that at which the strike or lockout is taking place or who was transferred to the workplace at which the strike or lockout is taking place after the day on which notice to bargain collectively is given; (d) any volunteer, student or member of the public.
Clarification — continuing services	94 (5) If, before the day on which notice to bargain collectively was given, an employer or person acting on behalf of an employer was using the services of a person referred to in paragraph (4)(b) and those services were the same as or substantially similar to the duties of an employee in the bargaining unit, they may continue to use those services throughout a strike or lockout not prohibited by this Part involving that unit so long as they do so in the same manner, to the same extent and in the same circumstances as they did before the notice was given.
Prohibition relating to employees in bargaining unit	94 (6) Subject to subsection (7), during a strike or lockout not prohibited by this Part that, with the exception of work performed for the purpose of compliance with section 87.4 or 87.7, is intended to involve the cessation of work by all employees in the bargaining unit, no employer or person acting on behalf of an employer shall use the services of any employee in that unit for a purpose other than compliance with those sections.

BILL C-58 (COMING INTO FORCE: JUNE 20, 2025)

Section 94 of the CLC is amended by adding <u>new</u> anti-replacement worker provisions (CIF June 20, 2025)	
Exception — threat, destruction or damage	94 (7) An employer or person acting on behalf of an employer who uses the services of any person referred to in paragraphs (4)(a) to (d) or of an employee referred to in subsection (6) does not contravene subsection (4) or (6) if (a) the services are used solely in order to deal with a situation that presents or could reasonably be expected to present an imminent or serious (i) threat to the life, health or safety of any person, (ii) threat of destruction of, or serious damage to, the employer's property or premises, or (iii) threat of serious environmental damage affecting the employer's property or premises; (b) the use of the services is necessary in order to deal with the situation because the employer or person acting on behalf of an employer is unable to do so by any other means, such as by using the services of a person who is not referred to in paragraphs (4)(a) to (d) or in subsection (6); and (c) in the case of the services of a person referred to in paragraphs (4)(a) to (d), the employer or person acting on behalf of an employer gave the employees in the bargaining unit on strike or locked out the opportunity to perform the necessary work before using the services of that person.
For greater certainty	94 (8) For greater certainty, an employer or person acting on behalf of an employer may rely on subsection (7) only for the conservation purposes referred to in paragraph (7)(a) and not for the purpose of continuing the supply of services, operation of facilities or production of goods in a manner contrary to subsection (4) or (6).

BILL C-58 (COMING INTO FORCE: JUNE 20, 2025)

CLC is amended by adding the following sections (CIF June 20, 2025)	
Prohibited use of services during strike or lockout	100.1 Every employer who contravenes subsection 94(4) or (6) is guilty of an offence and liable on summary conviction to a fine not exceeding $100,000 for each day during which the offence is committed or continued.
Administrative monetary penalties	111.01 (1) The Governor in Council may make regulations establishing an administrative monetary penalties scheme for the purpose of promoting compliance with subsections 94(4) and (6), including regulations (a) designating as a violation the contravention of subsection 94(4) or (6); (b) respecting the administrative monetary penalties that may be imposed for a violation, including in relation to (i) the amount, or range of amounts, of the administrative monetary penalties that may be imposed on employers or classes of employers, (ii) the factors to be taken into account in imposing an administrative monetary penalty, (iii) the payment of administrative monetary penalties that have been imposed, and (iv) the recovery, as a debt, of unpaid administrative monetary penalties; (c) respecting the persons or classes of persons who are considered a party to the violation and the amount, or range of amounts, of the administrative monetary penalties for which they are liable; (d) respecting what constitutes sufficient proof that a violation was committed; (e) respecting the powers, duties and functions of the Board and of any person or class of persons who may exercise powers or perform duties or functions with respect to the scheme, including the designation of such persons or classes of persons by the Board; (f) respecting the proceedings in respect of a violation, including in relation to (i) commencing the proceedings, (ii) the defences that may be available in respect of a violation, and (iii) the circumstances in which the proceedings may be brought to an end; and (g) respecting reviews or appeals of any orders or decisions in the proceedings. **Violation or offence** (2) If an act or omission may be proceeded with as a violation or as an offence, proceeding with it in one manner precludes proceeding with it in the other.

BILL C-58 (COMING INTO FORCE: JUNE 20, 2025)

CLC is amended by adding the following sections (CIF June 20, 2025)	
Prohibited use of services during strike or lockout	100.1 Every employer who contravenes subsection 94(4) or (6) is guilty of an offence and liable on summary conviction to a fine not exceeding $100,000 for each day during which the offence is committed or continued.
Administrative monetary penalties	111.01 (1) The Governor in Council may make regulations establishing an administrative monetary penalties scheme for the purpose of promoting compliance with subsections 94(4) and (6), including regulations (a) designating as a violation the contravention of subsection 94(4) or (6); (b) respecting the administrative monetary penalties that may be imposed for a violation, including in relation to (i) the amount, or range of amounts, of the administrative monetary penalties that may be imposed on employers or classes of employers, (ii) the factors to be taken into account in imposing an administrative monetary penalty, (iii) the payment of administrative monetary penalties that have been imposed, and (iv) the recovery, as a debt, of unpaid administrative monetary penalties; (c) respecting the persons or classes of persons who are considered a party to the violation and the amount, or range of amounts, of the administrative monetary penalties for which they are liable; (d) respecting what constitutes sufficient proof that a violation was committed; (e) respecting the powers, duties and functions of the Board and of any person or class of persons who may exercise powers or perform duties or functions with respect to the scheme, including the designation of such persons or classes of persons by the Board; (f) respecting the proceedings in respect of a violation, including in relation to (i) commencing the proceedings, (ii) the defences that may be available in respect of a violation, and (iii) the circumstances in which the proceedings may be brought to an end; and (g) respecting reviews or appeals of any orders or decisions in the proceedings. **Violation or offence** (2) If an act or omission may be proceeded with as a violation or as an offence, proceeding with it in one manner precludes proceeding with it in the other.

BILL C-58 (COMING INTO FORCE: JUNE 20, 2025)

Sections 87.4(2) to (5) of the CLC are replaced by new provisions regarding the maintenance of activities during a strike or lockout (CIF June 20, 2025)

Previous Act	Changes in 2025
Notice 87.4(2) An employer or a trade union may, no later than fifteen days after notice to bargain collectively has been given, give notice to the other party specifying the supply of services, operation of facilities or production of goods that, in its opinion, must be continued in the event of a strike or a lockout in order to comply with subsection (1) and the approximate number of employees in the bargaining unit that, in its opinion, would be required for that purpose.	**Agreement** 87.4(2) An employer and a trade union must, no later than 15 days after the day on which notice to bargain collectively has been given, enter into an agreement with respect to compliance with subsection (1) that sets out (a) the supply of services, operation of facilities or production of goods that they consider necessary to continue in the event of a strike or a lockout; and (b) the manner and extent to which the employer, the trade union and the employees in the bargaining unit must continue that supply, operation and production, including the approximate number of those employees that, in the opinion of the employer and the trade union, would be required for that purpose. **For greater certainty** 87.4(2.1) For greater certainty, if the employer and the trade union conclude that it is not necessary to continue any supply of services, operation of facilities or production of goods in order to comply with subsection (1), they must set out this conclusion in the agreement referred to in subsection (2).
Agreement 87.4(3) Where, after the notice referred to in subsection (2) has been given, the trade union and the employer enter into an agreement with respect to compliance with subsection (1), either party may file a copy of the agreement with the Board. When the agreement is filed, it has the same effect as an order of the Board.	**Filing with Minister and Board** 87.4(3) Immediately after entering into the agreement, the employer and the trade union must file a copy of it with the Minister and the Board. When the agreement is filed, it has the same effect as an order of the Board.

BILL C-58 (COMING INTO FORCE: JUNE 20, 2025)

Sections 87.4(2) to (5) of the CLC are replaced by new provisions regarding the maintenance of activities during a strike or lockout (CIF June 20, 2025)	
Previous Act	**Changes in 2025**
Where no agreement entered into 87.4(4) Where, after the notice referred to in subsection (2) has been given, the trade union and the employer do not enter into an agreement, the Board shall, on application made by either party no later than fifteen days after notice of dispute has been given, determine any question with respect to the application of subsection (1).	**If no agreement entered into** 87.4(4) If the employer and the trade union do not enter into an agreement within the period referred to in subsection (2), the Board must, on application made by either of them, determine any question with respect to the application of subsection (1).
Referral 87.4(5) At any time after notice of dispute has been given, the Minister may refer to the Board any question with respect to the application of subsection (1) or any question with respect to whether an agreement entered into by the parties is sufficient to ensure that subsection (1) is complied with.	**Referral** 87.4(5) The Minister may refer to the Board any question with respect to whether an agreement entered into by the employer and the trade union is sufficient to ensure that subsection (1) is complied with.

PROPOSED CHANGES:
Bill 190, *Working for Workers Five Act, 2024*, 1st Sess, 43rd Parl, Ontario, 2024.

BILL 190 PROPOSES AMENDMENTS TO THE FOLLOWING ACTS:

Building Opportunities in the Skilled Trades Act, 2021, SO 221, c 28.

Current Act	Proposed Amendment(s)
The Minister must register a training agreement under which an individual is to receive training in a trade as part of an apprenticeship program. To register a training agreement, prescribed academic standards must be met (s. 15(1)).	Regulations may set out alternative criteria for academic standards (s. 15(1.1)).

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

Current Act	Proposed Amendment(s)
PART III.1 (not yet in force) requires employers to include specific information in job postings: • Compensation range information • Canadian experience • Use of artificial intelligence	More requirements to publicly advertised job postings: • Disclose whether the posting is for an existing vacancy or not (s. 8.5(1)(a)). • Include "such other information as may be prescribed" (s. 8.5(1)(b)). Requirement to provide job applicants who have been interviewed with "prescribed information" (s. 8.6)
50(6) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.	Amended sick leave provision: • Employers may still require evidence of entitlement to sick leave, but must not require a certificate from a "qualified health practitioner" (s. 50(6) and (6.1)).
132 A person who contravenes this Act or the regulations… is guilty of an offence and on conviction is liable, (a) if the person is an individual, to a fine of not more than $50,000 or to imprisonment for a term of not more than 12 months or to both;	Increased maximum fine for individuals convicted under the Act to $100,000 (s. 132(a))

BILL 190 PROPOSES AMENDMENTS TO THE FOLLOWING ACTS:

Occupational Health and Safety Act, RSO 1990, c 0.1.

Current Act	Proposed Amendment(s)
1(1) "industrial establishment" means an office building, factory, arena, shop or office, and any land, buildings and structures appertaining thereto	1(1) "industrial establishment" means an office building, factory, arena, shop or office other than an office located in a private residence, and any land, buildings and structures appertaining thereto
1(1) "workplace harassment" means, (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or …	1(1) "workplace harassment" means, (a) engaging in a course of vexatious comment or conduct against a worker in a workplace including virtually through the use of information and communications technology that is known or ought reasonably to be known to be unwelcome, or …
1(1) "workplace sexual harassment" means, (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or …	1(1) "workplace sexual harassment" means, (a) engaging in a course of vexatious comment or conduct against a worker in a workplace including virtually through the use of information and communications technology because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or …
No provisions re electronic posting of information	Information is posted in a readily accessible electronic format if: Employer provides directions on where/how to access the information AND the information is posted in an electronic format that can be accessed in the workplace
3 (1) This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith.	(1.1) Despite subsection (1), this Act applies to telework performed in or about a private residence or the lands and appurtenances used in connection therewith.
No provisions requiring constructors and employers to ensure the maintenance of washroom facilities	Constructors and employers are required to maintain washroom facilities provided by them for the use of workers in a "clean and sanitary condition" (s. 23.1; s. 25.3)

BILL 190 PROPOSES AMENDMENTS TO THE FOLLOWING ACTS:

Fair Access to Regulated Professions and Compulsory Trades Act, 2006, SO 2006, c 31.

Current Act	Proposed Amendment(s)
Qualifications A regulated profession shall make information publicly available on what documentation of qualifications must accompany an application and what alternatives to the documentation may be acceptable to the regulated profession if an applicant cannot obtain the required documentation for reasons beyond his or her control.	**Qualifications** 10 (1) A regulated profession shall make information publicly available on what documentation of qualifications must accompany an application and what reasonable alternatives to the documentation will be acceptable to the regulated profession if the required documentation cannot be obtained for reasons beyond an applicant's control.
	Policy re reasonable alternatives to required documentation 12.1 (1) A regulated profession shall have a policy addressing what alternatives to the documentation of qualifications that is normally required will be acceptable. **Plan re parallel processing** 12.2 (1) A regulated profession shall have a plan addressing how it will enable multiple registration processes to take place concurrently.

Ontario Immigration Act, 2015, SO 2015, c 8.

Current Act	Proposed Amendment(s)

Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sched. A.

Current Act	Proposed Amendment(s)
provides that certain workers are entitled to benefits under the insurance plan for PTSD arising out of and in the course of employment	
Section 15.1 creates presumptions that apply to certain firefighters and fire investigators	Section 15.1 establishes a presumption re primary-site skin cancer

BILL 124 Stopping Misuse of Disclosure Agreements Act, 2023:

Stopping Misuse of Non-Disclosure Agreements Act, 2023	
• Would create a general prohibition on Employers being able to enter an NDA with a party if the agreement has "the purpose or effect of concealing the details relating to a complaint of discrimination, harassment, sexual harassment or sexual assault."	Notable exception : a non-disclosure agreement may be entered into if it is the "express wish and preference of the relevant person concerned." There will be conditions of enforceability (i.e. require opportunity for independent legal advice) May be subject to time limits Bill has been sent for second reading.

QUESTIONS?

Law Society of Ontario | Barreau de l'Ontario

TAB 3

25th Employment Law Summit

Workplace Implications of Political Expression (PPT)

Paul Champ
Champ & Associates

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October 15, 2024

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Workplace Implications of Political Expression

Workplace Implications of Political Expression

Expression of political opinions by an employee constitutes “off-duty conduct” that is generally not the concern to the employer.

To discipline or terminate an employee for off duty conduct, there must be a nexus or connection between the employee’s expression and the employment relationship.

Workplace Implications of Political Expression

To constitute grounds for just cause, the employee's conduct must:[1]

- detrimentally affect the employer's reputation
- cause employee to be unable to discharge employment obligations properly
- cause other employees to refuse to work with the individual

[1] *Strowbridge v. Re/Max United Inc ,1992 CanLII 7355 (NL SC) at para 16; and Klonteig v West Kelowna (District), 2018 BCSC 124 (CanLII), para 67*

Harm to Employer's Reputation

- Must be a connection between the employer or nature of the job
- Does employee refer to their employer in the expression, in their social media profile, or in other posts or messages? [1]
- Does employee refer to the nature of their job to add credibility to opinions or statements?
- Morality clauses? (Marlies coach Dusty Imoo and liking Tweets about January 6)
- What about "doxxing"?

[1] *Yahudah v. MacKenzie Community Arts Council*, 2021 BCCRT 1231 (CanLII)

Unable to Discharge Employment Obligations

- Even when “off duty”, courts have recognized that members of regulated professions can still harm public trust and confidence in their profession by their statements and conduct[1]
- When a teacher publicly expresses discriminatory views, it impacts trust and confidence in the integrity of school system because they are a conduit of values and beliefs[2]
- Police officer’s donation to support a protest found on clear and convincing evidence to be illegal may undermine trust in ability to do job[3]

[1] *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685; but see: *Strom v Saskatchewan Registered Nurses’ Association*, 2020 SKCA 112
[2] *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825
[3] *Brisco v. Windsor Police Service*, 2024 ONCPC 24

Refusal, reluctance or inability of other employees to work with them

- Almost no cases so far related to expression of opinions have been justified on grounds that other employees refuse to work with individual
- Racist comments or symbols (like wearing a Confederate flag t-shirt with words “The South Will Rise Again”) will likely make other employees reluctant, but need evidence[1]
- Fine line between controversial political expression and anti-Semitic, racist or other discriminatory expression

[1] *Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213*, 2021 CanLII 16916 (BC LA)

Employment Standards Act, 2000

- In Ontario, off-duty political expression likely cannot constitute “wilful misconduct, disobedience or wilful neglect of duty” under the *ESA*
- Wilful misconduct standard under the *ESA* requires evidence that the employee was “being bad on purpose”[1]
- Contracts with language that provide employee can be terminated for off-duty conduct that prejudices Employer’s reputation, services or morale likely contrary to *ESA*[2]

[1] *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451 at para 28
[2] *Wilds v. 1959612 Ontario Inc.*, 2024 ONSC 3452 at paras 62-63

Prohibiting Expression of Political Opinions On Duty

Employer must show some overriding interest to justify restricting employee's freedom of expression on duty[1]

- Discriminatory views or opinions can be prohibited
- Maintaining an orderly workplace
- Interference with customer relations
- Does Employer prohibit all political expression on duty?
- What about wearing rainbow pins, ribbons or kaffiyeh?

[1] *Re Canada Post Corp. and Canadian Union of Postal Workers*, 1986 CanLII 6677 (CA LA); *Holyrood Manor and H.E.U. (Davis) (Re)*, 2004 CanLII 94726 (BC LA)

Other Issues

- Government employees and journalists may have legitimate restrictions on political expression due to nexus with employment
- Can dismissal with reasonable notice for expressing political opinion lead to additional damages, such as moral damages or human rights?
- Human rights legislation in most provinces prohibit discrimination on the grounds of political opinion or belief[1]
- In Ontario, arguable that adverse treatment for expressing political opinion could be tied to a prohibited ground where the opinion is sufficiently connected to a group that is protected
- Anti-SLAPP may prevent employer from suing employee for defamation for expressing opinions about the employer[2]

[1] British Columbia, Yukon, Northwest Territories, Manitoba, Quebec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador

[2] *Williams v. VAC Developments Limited*, 2024 ONCA 713

Thank you

Paul Champ, Champ & Associates

Adrian Ishak, Senior Corporate Counsel-Global Labour & Employment, Salesforce.com

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TAB 4

25th Employment Law Summit

An Update on Employee Mitigation: Noteworthy Cases in 2023-2024

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October 15, 2024

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An Update on Employee Mitigation: Noteworthy Cases in 2023-2024

By: Devin Jarcaig, Mathers McHenry & Co.[1] and Martin J. Thompson, McMillian LLP

An employee's duty to mitigate is a central issue in many employment law cases, and there have been some interesting developments in this jurisprudence in this area over the last few years. The courts have firmly established that an employee must take reasonable steps to mitigate, and that the burden rests with the employer to prove that an employee failed to do so. However, recent court decisions have elaborated on these principles and provided helpful guidance to both employees and employers. Below we have summarized some of the most significant Canadian mitigation cases that were released in 2023-2024.

Gannon v Kinsdale Carriers, 2024 ONSC 1060	
Facts	Sharon Gannon was employed with Kinsdale Carriers, a trucking company, for 22 years. She was originally hired in the position of office personnel/accounts receivable in July 1988. By 2015, Sharon's position changed to include dispatching duties. She was provided paperwork to reflect the new responsibility and a raise. Her dispatch duties accounted for (at most) 50% of her daily tasks. Sharon was terminated on December 16, 2020 due to the closure of the business. In the months leading up to Sharon's termination, Kinsdale reduced the headcount of its driver, and the Defendant was transparent with Sharon about the financial state of the business and the possibility of closure. Kinsdale contacted Zehr Transport Limited, another trucking company, to canvass potential job opportunities for Sharon. Sharon interviewed with Zehr on December 29, 2020 and they provided her a verbal offer for a dispatcher position with a proposed start date in January 2021. Sharon rejected this offer by text message, stating that she "not want to go back into dispatching." She secured another role with Clark Insurance commencing on December 13, 2021. Gannon claimed that: • she took reasonable steps to mitigate her damages • that there was no "real" offer of employment from Zehr • that the position was not comparable because it was for a full-time dispatcher role, whereas only some of her former duties were related to dispatching.
Issues	1. Did Sharon have advance notice of Kinsdale's closure, and if so, should her damages be reduced? 2. Did Sharon fail to mitigate her damages by refusing to accept an offer of comparable employment? 3. What is the reasonable notice period?

[1] Acknowledgment to Lauren Mazzuca at Mathers McHenry & Co for her assistance with the preparation of these materials.

Analysis	**Did the Plaintiff have advanced notice of the Defendant's Closure, and if so, should damages (if any) be reduced?** Yes, she had constructive notice. The court accepted the employer's evidence that Sharon was aware at the time of her termination that the company was downsizing its operations and had spoken extensively about the financial state of the company. Sharon also admitted that she knew there was a real risk of the business' closure. **Did the Plaintiff fail to mitigate her damages by refusing to accept an offer of comparable employment?** Yes, she was given a verbal offer for a comparable dispatching position that was similar to her current hours. Her rejection of the offer constituted a failure to mitigate. "*Comparable employment does not mean identical employment. It means reasonably adapted to the plaintiff's abilities."* The burden of proof rests on the employer to establish that the employee failed to mitigate. The employer met that burden in this case, since the employee's own evidence confirmed that the dispatching duties represented about 50% that her role and that these duties took precedent over her administrative ones. Zehr did extend a verbal offer. The dispatcher position offered to Sharon constituted comparable employment, and she could have started in the role in January 2021. **Reasonable notice period** The court did not specifically address the reasonable notice period due to its finding that Sharon failed to mitigate her damages.
Ratio	An offer of comparable employment was extended by Zehr on December 29, 2020. Sharon chose to reject it, to her detriment. Sharon failed to mitigate her damages by refusing to accept an offer of comparable employment. Sharon's claim was dismissed with costs to Zehr.

Monteresso Metro Freightliner Hamilton Inc, 2023 ONCA 413	
Facts	The appellants engaged the respondent as an independent contractor. The contract was executed on March 7, 2017 and provided for a 72-month term. The appellants terminated the respondent's services without cause on November 22, 2017. The respondent sued 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 that it clearly and unambiguously

	provided for a 72-month fixed term. She awarded the respondent damages calculated on the basis of the remaining monthly payments due under the contract. The appellants appealed the decision.
Issue	Do independent contractors under fixed-term contracts have a duty to mitigate their damages in the event of a breach of contract, unless the fixed terms of a contract explicitly states otherwise?
Analysis	The trial judge erred by conflating the situation of independent contractors with that of employees working under fixed-term contracts. Although the court confirmed in Howard v Benson Group Inc. that employees under fixed-term contracts are entitled to damages equal to the loss of remuneration for the balance of the fixed term without a duty to mitigate, independent contractors do have a duty to mitigate following a breach of contract. The court also found that the appellants did not meet their burden of proving Monterosso failed to mitigate his damages.
Ratio	The Court of Appeal clarified the confusion from previous unresolved cases and ruled that independent contractors under fixed-term contracts do have a duty to mitigate damages in the event of contract breaches, unless the terms of the contract state otherwise.
Key takeaways	A duty to mitigate arises when a contract is breached, including contracts with independent contractors. However, the contract may provide otherwise which can take it outside the normal circumstances in which mitigation is required.

Lynch v Avaya Canada Corporation, 2023 ONCA 696	
Facts	The appellant terminated the employment of the respondent, a professional engineer, effective March 31, 2021, due to a company restructuring. The respondent had worked for the appellant and the predecessor owner of the business since May 1982. The parties unsuccessfully attempted to reach a termination settlement. The appellant sued for wrongful dismissal and moved for summary judgment. The motion judge found that a 30 month notice period was appropriate and rejected the argument that the appellant had failed to mitigate his damages. The appellant appealed the decision and contended that the motion judge had erred: (a) by awarding a notice period in excess of the relief sought in the Statement of Claim; (b) by misapplying the Bardal factors; and (c) by concluding that the respondent took reasonable steps to mitigate.
Issue	1. What are the "exceptional circumstances" that warrant a notice period in excess of 24 months? 2. Did the respondent take reasonable steps to mitigate his damages?
Analysis	ONCA clarified that the "exceptional circumstances" that warranted a notice period in excess of 24 months are as follows: • The respondent specialised in the design of software to control unique hardware manufactured by the appellant at its Belleville facility

	• It was uncontested that the respondent's job was unique and specialized, and that his skills were tailored to and limited by his very specific workplace experience with the appellant • During his lengthy employment of 38.5 years, the appellant developed one or two patents each year for his employer • The appellant singled out the respondent as a "key performer" in one of his last performance reviews • Although similar and comparable employment would be available in cities such as Ottawa or Toronto, such jobs would be scarce in Belleville where the respondent – who was approaching his 64th birthday – had lived for his entire tenure with the appellant The Court of Appeal also held that the motion judge accurately summarized the relevant law for mitigation. The appellant bears the onus of proving that the respondent did not take reasonable steps, to mitigate and had he done so he would likely have found comparable employment.
Ratio	Appeal dismissed
Key takeaways	The courts have upheld notice periods in excess of 24 months where "exceptional circumstances" are present. Related case: *M v. IBM Canada Ltd.*, 2023 ONCA 702.

Gracias v. Dr. David Walt Dentistry Professional Corporation, 2023 ONSC 2052	
Facts	The employee, Sonia Gracias, was terminated without cause after working for 6 months at the appellant company. She brought an action for wrongful dismissal. Justice Perell granted summary judgment to Garcias and awarded her damages in the sum of $17,587.11. The employer appealed the decision, focusing Garcias' failure to mitigate her damages and alleging that she had falsified evidence of her mitigation efforts. During the course of the litigation, Gracias produced an extensive mitigation log outlining over 139 jobs she applied to online. The appellant engaged a digital forensic examiner to examine the electronic documents, which found over 102 anomalies in Gracias' productions and raised serious questions about their authenticity. The appellant also provided affidavits from various employers referred to in the mitigation log confirming they had not received Garcias' application.
Issues	1. Did the motion judge err in finding that the appellant failed to prove that Gracias did not make reasonable efforts to mitigate her damages? 2. Did the motion judge err in granting summary judgment instead of directing a trial to address the mitigation evidence?

Analysis	The motion judge found that the appellant failed to establish that Gracias did not make reasonable efforts to mitigate her damages. Despite the appellant's forensic evidence that called into question the authenticity of the respondent's mitigation efforts, there was no error in principle or palpable overriding error by the motion judge who found her testimony credible and concluded that her efforts were sufficient. The appellant's evidence was deemed insufficient to prove that Gracias fabricated evidence or failed to mitigate.
Ratio	The appeal was dismissed, and the motion judge's decision to grant summary judgment and award damages to Sonia Gracias was upheld.
Key takeaways	The Court of Appeal held that some of the applications, while suspicious, had not been proven on a balance of probabilities to be falsified despite forensic evidence to the contrary. Gracias had made reasonable efforts to mitigate. Evidence of mitigation needs to be reasonable not comprehensive.

Krmpotic v. Thunder Bay Electronics Limited**,** 2024 ONCA 332	
Facts	Drago Krmpotic worked as a Building Maintenance Supervisor for Thunder Bay Electronics Limited (TBEL) and Hill Street Financial Services for nearly 30 years. On June 13, 2016, his employment was terminated without notice or cause, shortly after returning from medical leave for back surgery. Krmpotic was offered a severance package but refused to accept it. He commenced an action for wrongful dismissal and also claimed mental distress and aggravated damages due to the manner of his dismissal. The employer continued paying his salary for 16 months post-termination and maintained his benefits for several years. Krmpotic moved to Toronto to take a job with his son's company, but he was unable to perform his duties due to his physical limitations.
Issues	1. Did the trial judge err in awarding aggravated damages? 2. Was the reasonable notice period justified? 3. Should the appellants (TBEL and Hill Street) be held jointly and severally liable?
Analysis	**Aggravated Damages:** • The trial judge awarded $50,000 in aggravated damages, finding that the manner in which the employers handled Krmpotic's termination was a clear breach of the duty of good faith and fair dealing required of

	employers during the dismissal process. Specifically, the judge found that the employers' conduct was not candid, reasonable, or forthright, which are key components of this duty. • During the termination meeting, the employers claimed that Krmpotic was being dismissed for financial reasons, but they refused to produce the financial statements that purportedly supported this claim. This lack of transparency was seen as misleading and inconsistent with the employer's obligation to be truthful. • Additionally, the fact that Krmpotic was dismissed just hours after returning from medical leave for back surgery contributed to the perception that the dismissal was handled insensitively. The trial judge found that Krmpotic was terminated not because of financial necessity but because his physical limitations, resulting from workplace injuries, restricted his ability to continue performing the broad range of tasks he had done for nearly 30 years. • The judge considered these actions to be the "antithesis of an employer's duty" to act in good faith during a termination. Even though Krmpotic did not provide medical evidence of a diagnosable psychological injury, the trial judge concluded that the distress Krmpotic experienced went beyond the normal hurt feelings associated with dismissal. This justified the award of aggravated damages, which compensates for the additional harm caused by the employer's bad faith conduct. **Reasonable notice:** • The court upheld the trial judge's determination of a 24-month notice period, which is on the higher end of reasonable notice awards. The judge based this decision on several factors consistent with the principles established in *Bardal v. Globe & Mail Ltd.*: o **Length of Service:** Krmpotic had worked for the appellants for nearly 30 years, a significant tenure that typically warrants a longer notice period. o **Character of Employment**: Krmpotic held a senior position as Building Maintenance Supervisor, where he was responsible for a wide range of duties, including the maintenance of the company's fleet of vehicles and performing physically demanding tasks such as tower rescues and heavy lifting. This high level of responsibility contributed to the decision to award a longer notice period. o **Age:** At the time of termination, Krmpotic was 59 years old. Given his age, the judge recognized that finding comparable employment would likely be difficult, especially in a physically demanding role, which further supported a longer notice period. o **Health and Physical Capacity:** The judge acknowledged that Krmpotic's physical condition, particularly his recovery from back surgery, significantly limited his ability to perform the type

	of physical labor that his job required. The court accepted the testimony of Krmpotic, his wife, and his son regarding his inability to perform such work, reinforcing the justification for an extended notice period. Although the appellants argued that the notice period should be reduced due to a lack of medical evidence proving Krmpotic's incapacity, the judge found that the evidence provided was sufficient to support his conclusion. **Joint and Several Liability:** • The court upheld the trial judge's decision to hold TBEL and Hill Street jointly and severally liable for the damages awarded to Krmpotic. This decision was based on the finding that both companies were Krmpotic's common employers throughout his nearly 30-year employment. • The judge pointed to several key pieces of evidence supporting this finding: o **Employment History:** Krmpotic's employment involved duties that served both TBEL and Hill Street, and his work was intertwined with the operations of both companies. For instance, TBEL was responsible for television broadcasting, while Hill Street provided administrative and accounting services and owned the building where TBEL operated. Krmpotic's role in building maintenance and vehicle fleet management was crucial to the functioning of both companies. o **Company Records and Testimony:** The court relied on testimony from Don Caron, a key witness who held leadership roles in both TBEL and Hill Street, to establish that Krmpotic's employment was considered to be under both entities. Caron's affidavit indicated that Krmpotic's employment had been transferred between the two companies several times, further blurring the lines between the two employers. o **Settlement Memorandum:** The Settlement Memorandum offered to Krmpotic at the termination meeting explicitly named both TBEL and Hill Street as his employers. This document, drafted by the employers themselves, was clear evidence that both companies considered themselves jointly responsible for Krmpotic's employment. Given these facts, the judge concluded that both companies were equally liable for the wrongful dismissal damages, reflecting their joint role as Krmpotic's employers. The decision to hold them jointly and severally liable was legally sound and consistent with the evidence presented.
Ratio	The court upheld the trial judge's decision to award Krmpotic 24 months' notice and $50,000 in aggravated damages, citing the employer's bad faith and insensitive handling of his termination. Both TBEL and Hill Street were held jointly and severally liable for the damages.

Key takeaways	In considering whether Krmpotic had fulfilled duty to mitigate, the trial judge acknowledged that his attempts to find alternate employment in period immediately after termination were "scant at best." Nonetheless, the court concluded that he had not failed to make reasonable mitigation efforts, relying on the fact that he was 59 years old, recovering from back surgery, and as such was significantly limited in his ability to perform daily physical labour as demanded by his occupation.

Teljeur v Aurora Hotel Group, 2023 ONSC 1324	
Facts	An employee with only three years of service was recently awarded a seven month notice period, consistent with the growing trend of awarding lengthier notice periods to short service employees. At the time of his termination, the employee was 56 years old and held the role of General Manager, earning a salary of $72,000 plus benefits. The employee had also incurred $16,800 in business expenses at the time of his termination, and the employer had failed to reimburse him for those expenses even at the time of trial. The employee sued for wrongful dismissal, reimbursement of the business expenses, as well as moral damages for the employer's bad faith conduct.
Issues	1. What is the appropriate period of reasonable notice owed to the plaintiff? 2. Should any award be reduced based on the plaintiff's alleged failure to mitigate damages? 3. Is the plaintiff entitled to damages for loss of fringe benefits? 4. Is the plaintiff entitled to moral damages for the employer's alleged bad faith?
Analysis	**Reasonable notice:** In awarding the employee 7 seven months' of pay in lieu of reasonable notice, Justice McKelvey held that the employee's age, level of seniority, and market conditions (i.e., he was dismissed during the COVID-19 pandemic) were all factors that necessitated a longer notice period despite the fact his tenure was "relatively short. " **Mitigation:** He also specifically noted that, while the mitigation evidence produced by the employee was "skeletal" (he had only contacted 3 three prospective employers over the course of 10 months), there was insufficient evidence to conclude that the employee could have found other work during the notice period. **Fringe Benefits:** The court awarded 10% of the plaintiff's compensation for the loss of fringe benefits during the notice period, as it was reasonable given the lack of detailed information about the benefits plan in the material before the court.

	Moral Damages: Justice McKelvey concluded that the employee was entitled to $15,000 in moral damages after the employer: (a) failed to reimburse his business expenses; (b) failed to advise him of his termination in writing; (c) paid him only his statutory minimums despite having promised him 8 eight weeks of severance at the time of termination; and (d) delayed in issuing his ESA payments.
Held	Damages for reasonable notice based on a 7-month period, minus any amounts already paid. An additional 10% of compensation for the loss of fringe benefits. Reimbursement of $16,680.03 for expenses. $15,000 in moral damages.
Key takeaways	This decision demonstrates a continuing tendency by the courts to award increased notice periods to short service employees, even in circumstances where there is some evidence that the employee made minimal efforts to mitigate his damages. It also suggests that the courts are becoming increasingly less tolerant of employers who engage in bad faith conduct and will not hesitate to make an award for moral damages in those circumstances.

Case Summaries: Other jurisdictions

- **Quebec:**
  - **Gestion Juste pour rire inc c Gloutnay, 2024 QCCA 156**
    - The court essentially determined that expecting him to find comparable employment and mitigate his damages was unrealistic under the circumstances.
    - The court determined that Gloutnay's ability to mitigate his damages was severely limited due to his specialized skills in a niche industry, making it difficult to find comparable employment.
    - His age (54 at the time of dismissal) and long tenure (25 years) further reduced his chances of securing a similar job, especially at the same level of responsibility and salary.
    - The emotional and psychological impact of the dismissal, including a suicide attempt, also hindered his ability to actively seek new employment.
    - Given these factors, the court awarded full compensation for lost wages up to Gloutnay's retirement age of 65, recognizing that mitigating his damages was unrealistic in his situation.
  - **Golf des Quatre Domaines inc c Bélanger, 2024 QCCA 620**
    - Belanger found a new job after her termination, and the court considered the infome when calculating the compensation she was entitled to for the wrongful dismissal

- **Nova Scotia:**
  - **Titus v. Nova Scotia (Workers' Compensation Appeals Tribunal) 2024 NSCA 39**
    - Did the Tribunal err in law by finding that section 73 of the Workers' Compensation Act did not prevent the reduction of the appellant's Extended Earnings Replacement Benefit (EERB) due to the application of section 84 (duty to mitigate) of the Act?
    - The court distinguished this case from the Rhodenizer case, where new evidence was used to reconsider the original EERB award. In contrast, Titus's failure to mitigate, based on the job offer from HPA, was not new evidence but a live issue during the relevant period and had not been resolved when the statutory reviews occurred.
    - The court held that the EERB could still be adjusted for failure to mitigate even after the statutory reviews had taken place, as section 84 of the Act remained applicable to ensure workers comply with their duty to mitigate losses.
    - The court dismissed Titus's appeal, holding that section 73 did not preclude the application of section 84 to reduce his EERB due to his failure to mitigate. The reviews under section 73 must occur after a final determination of the EERB and do not prevent adjustments under section 84 for failure to mitigate.

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TAB 5A

25th Employment Law Summit

Employment Law issues in Insolvency Law

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October 15, 2024

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Employment Law issues in Insolvency Law

Wojtek Jaskiewicz, Partner, WeirFoulds LLP

Insolvency Options in Canada

There are several formal procedures available to companies in financial difficulty and two primary pieces of legislation dealing with insolvency – the *Bankruptcy and Insolvency Act*[1] (the "**BIA**") and the *Companies' Creditors Arrangement Act*[2] (the "**CCAA**"). Each process can be used to restructure a business or liquidate its assets. Typically liquidation is done through a bankruptcy or a receivership pursuant to the BIA and restructuring is accomplished by a proposal under the BIA or a filing under the CCAA.

"Bankruptcy" is a legal status. It means a person (which includes a corporation) who has made an assignment or against whom a bankruptcy order has been made. It is also the legal status of such a person[3]. When a person makes an assignment in bankruptcy, or a bankruptcy order is made against a person all that person's property vests in the trustee and the person ceases to have any capacity to deal with their property[4]. The trustee will liquidate the assets[5], run a claims process to ascertain unsecured claims against the bankrupt[6], and distribute the proceeds from the sale of the property to debtors with proven claims on a *pro rata* basis[7].

A receivership is used by secured creditors to liquidate assets and to recover debt owed to the secured creditor. While a security agreement can provide for the private appointment of a receiver, typically a receiver is appointed by court order pursuant to the BIA[8] or the *Courts of Justice Act*[9]. Like in a bankruptcy, the receiver will take control of the property of the debtor (though technically the property does not vest in the receiver), market the property, and distribute the proceeds amongst the secured creditors. Unlike a bankruptcy, the secured creditors do not share *pro rata*. The secured creditors receive the proceeds based on their respective priorities. If there is residual value left over after secured creditors are paid, the debtor will typically be bankrupted, and the remaining proceeds shared amongst unsecured creditors.

Proposals under the BIA and filings under the CCAA differ from bankruptcies and receiverships in that the debtor remains in possession of its assets and continues to operate, and the primary goal of the process is to restructure the debts of the debtor to allow the debtor to continue in business

[1] R.S.C., 1985, c. B-3
[2] R.S.C., 1985, c. C-36
[3] BIA s. 2 "Bankrupt"
[4] BIA s.71
[5] BIA s. 16(3)
[6] BIA s. 135
[7] BIA s. 136
[8] BIA s. 243
[9] R.S.O. 1990, c. C.43, s. 101

instead of liquidating its assets. The main difference between the two proceedings is that a BIA proposal is highly regulated whereas a CCAA filing is customizable.

In both proceedings the claims of creditors are stayed[10], a court officer is appointed to "monitor" the proceedings[11], and the debtor can make an offer to all its creditors (called a "proposal" in a BIA proposal proceeding or a "plan of arrangement" in a CCAA proceeding) to settle their debts. If the proposal is approved by the requisite number of creditors[12] and the court[13], it becomes binding on all creditors. Once a proposal or plan is approved and carried out by the debtor, the debts are discharged.

The Wage Erner Protection Plan Act and its implications

The amounts owed to employees, such as wages, severance, vacation pay, and any other monetary benefits are unsecured claims. This means they rank in priority behind trust claims[14], secured creditors, and various preferred claims such as amounts owing to landlords[15]. The unfortunate reality is that in most insolvencies, secured creditors receive a distribution but little is left over for unsecured creditors, including employees. The effect is that employees, who are often the most vulnerable creditors, will receive nothing.

The BIA deals with this vulnerability by giving employees a super-priority for wages earned in the six months prior to the filing to a maximum of $2,000[16]. These amounts rank ahead of almost all unsecured creditors but still behind secured creditors[17]. In addition, the *Wage Earner Protection Program Act*[18] (the "**WEPPA**") creates a government program which gives employees additional protection if there are insufficient funds to pay the $2,000 super-priority claim.

The amounts covered by the super-priority and the WEPPA only include unpaid wages, salaries, commissions or compensation[19]. Severance, unpaid vacation pay, or any other amounts owed to employees are not covered by the superpriority or the program established by the WEPPA.

Previously employees only had access to the program if their employer was bankrupt or in receivership. Recent amendments to the WEPPA have added proposals and CCAA filings. Now all employees are treated equally for the purposes of the WEPPA regardless of the nature of their employer's insolvency.

[10] BIA s. 69(1) and 69.1(1); CCAA s.11.02
[11] BIA s. 50(2); CCAA s. 11.7(1)
[12] BIA s. 54; CCAA s. 6(1)
[13] BIA s. 58; CCAA s. 6(1)
[14] BIA s. 67(1)
[15] BIA s. 136 (1)
[16] BIA s. 81.3 and 81.4
[17] BIA s. 136
[18] S.C. 2005, c. 47, s. 1
[19] BIA s. 81.3 and 81.4

Personal liabilities of directors and officers

Directors can be personally liable for their company's failure to pay employee wages, commissions, bonuses, vacation pay and reimbursable expenses. These liabilities may arise before or after a bankruptcy, receivership, or proposal filed under the BIA or CCAA. Section 131 of the *Ontario Business Corporations Act*[20] provides that the directors are jointly and severally liable for unpaid wages up to 6 months' pay as well as accrued vacation pay. Similarly, section 81 of the *Employment Standards Act*[21] (the "**ESA**") provides that if a corporation becomes insolvent or files for bankruptcy, the directors of the corporation can be held personally liable for unpaid wages for up to 6 months, including earned vacation pay, holiday pay, and overtime pay.

The Supreme Court of Canada in its decision in *Barrette v. Crabtree (Succession de)* acknowledges that while shifting liability onto directors is an intrusion on the principle of the corporate personality and contrary to the principles of limited liability, it is nevertheless justified. Directors who authorize or acquiesce in the continued employment of workers when the corporation is not able to pay them, should not be able to shift that loss onto the employee.[22]

Many of these liabilities exist regardless of the employer's insolvency. However, because of the scheme of distribution in an insolvency where secured creditors are paid first and the claims of employees are unsecured, and the fact that the directors and officers lose control of which creditors are paid, the problem is more prevalent when there is an insolvency.

Successor employer obligations

With some notable recent exceptions, the sale of a business in an insolvency is an asset sale. As part of the process employees are often terminated, then rehired by the purchaser of the assets. To the mere insolvency lawyer it may appear that employees who are rehired lose their seniority. However, employment lawyers will know that is not the case. Many cases, such as the recent decision in *Manthadi v. ASCO Manufacturing*[23] ("**Manthadi**") have held that if certain criteria are met, the purchaser of assets will be a successor employer and will be responsible for an employee's length of service with the predecessor employer.

The matter becomes more complicated in the context of an insolvency. At first blush a sale of the assets by a trustee, a receiver or the employer (as part of a liquidating proposal or CCAA) appears to meet all of the criteria in Manthadi. The decision in *Antchipalovskaia v. Guestlogix Inc.*[24] ("**Guestlogix**") makes it clear that successor employer considerations are still relevant in an insolvency context. However, other factors also affect the notice period.

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[20] R.S.O. 1990, c. B.16
[21] 2000, S.O. 2000, c. 41
[22] Crabtree (Succession de) c Barrette, [1993] 1 SCR 1027, 1993 CarswellQue 25, 1993 CarswellQue 155, EYB 1993-67870, 10 BLR(2d) 1, 47 CCEL 1, 101 DLR (4th) 66, 150 NR 272, 53 QAC 279, [1993] SCJ No 37 (SCC) at paras 29-30.
[23] 2020 ONCA 485
[24] 2022 ONCA 454

In Guestlogix the predecessor employer made a filing pursuant to the CCAA. As part of that filing, employees were terminated and the court ordered that all claims, including the claims of employees, were released. The court held that it would be an error to fail to consider the order releasing claims when deciding on the notice period. The court also relied on the earlier decision in *Carpenter v Brains II, Canada Inc.*[25] where the court held that:

> this was not a simple asset sale and a mere change of ownership. The circumstances by which the plaintiff came to be employed by the defendant involved (1) the insolvency of her former employer; (2) an application under the *CCAA*; (3) the termination of her employment by her predecessor employer; (4) her hiring on a temporary basis by the CRO; (5) the termination of her employment by the CRO; (6) the purchase of some, but not all of the assets of the former business by the defendant; and (7) the hiring of the plaintiff by the defendant on the basis that, while it would for *ESA* purposes consider itself to be a successor employer of Nex, she would not have any common law entitlements. While I have found the limitation on her entitlements to be void, I cannot overlook the fact that, at the time of her hiring, the defendant effectively told her that it would not be honoring any prior severance entitlement save for purposes of calculating *ESA* rights.[26]

The result of these cases is that in an insolvency the court will consider an employee's tenure with the predecessor employer but will not give credit for those years in the same way that a court would outside of the insolvency context.

Related Entity/Related Employer Obligations

The doctrine of common employer liability recognizes that an employee may simultaneously have more than one employer. If an employer is a member of an interrelated corporate group, one or more other corporations in the group may also have liability for the employment obligations[27].

This doctrine can create issues for corporations which are attempting to restructure or are generally insolvency. As detailed above, employees who are owed amounts because of their termination can form a significant pool of unsecured creditors. Compromising the amounts owed to terminated employees may be key to a restructuring.

One result of the common employer doctrine is that a related solvent entity may become liable for the termination obligations of the restructuring employer. While the insolvent employer can comprise its debt to the employees, the employees are able to claim the full, uncompromised debt against the related solvent entity defeating the purpose of the restructuring.

[25] 2015 ONSC 6224 ("Carpenter")
[26] Carpenter at para 22
[27] *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 at para 2

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TAB 5B

25th Employment Law Summit

Claiming Against a Bankrupt Employer

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October 15, 2024

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Claiming Against a Bankrupt Employer

25th Employment Law Summit

Jonquille Pak & Ava Clarke, JPak Employment Lawyers
October 15, 2024

What is Bankruptcy?

Bankruptcy is a legislated process under the *Bankruptcy and Insolvency Act* (the "*BIA*")[1] that is generally triggered when a company is unable to pay its debts and voluntarily assigns its debt to a trustee for the benefit of the creditors or is petitioned by a creditor (involuntary assignment). Upon bankruptcy, a licensed trustee is appointed to manage and liquidate the company's assets to pay off creditors, including employees who have claims against the employer.

When a company is bankrupt, under s. 69(1) of the *BIA* most civil claims against it are automatically stayed, including any claims brought by an employee or former employee.[2]

How Does Bankruptcy Affect Employee Claims Against the Company?

The purpose of the bankruptcy process is to provide relief to a company by halting actions taken by creditors and creating an orderly process for paying off creditors with what is left of the company's property. The company's assets are vested in a trustee who sells or otherwise disposes of assets and distributes the proceeds to the creditors.

In distributing proceeds among creditors, some creditors will have priority over others, meaning they get paid ahead of other creditors in the queue. Generally, secured creditors will be the first class of creditors to be paid out, followed by preferred creditors, followed by non-preferred creditors. After secured creditors are paid, the priority of distribution among unsecured creditors is laid out in s. 136(1) of the *BIA*.

The *BIA* is concerned with ensuring employees are paid the wages they are owed, but this does not include notice or severance obligations. Employees with unpaid wage claims are given 'super-priority status' for the first $2,000 owed in unpaid wages and for unpaid pension contributions.[3] Preferred claims for unpaid wages would apply for any amounts outstanding.[4] The exception to the s. 136 preferred claims is that directors and officers are not entitled to have their claim for wages preferred.[5]

Claims for wrongful dismissal damages, human rights, aggravated or punitive damages, as well as claims for statutory termination pay and severance pay are not considered unpaid wages and

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[1] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

[2] Stay of proceedings applies to any proceeding for the recovery of a claim provable in bankruptcy. Claims which are not automatically stayed are those of secured creditors who took possession of secured assets who intend to deal with those assets and who took possession before the notice of intention (s. 69(2)(a)); secured creditors who gave notice of intention under s. 244 (Advance Notice) of the *BIA* (s. 69(2)(b and c); and if the secured creditor is His/Her Majesty in right of Canada and every province so long as the appropriate forms and notices are filed (s. 69(3)). These exceptions do not apply to most employment law circumstances.

[3] Traditionally, employees would not be considered secured creditors, however they have been legislated into this category for wage recovery and unpaid pension amounts (ss. 81.3(1), 81.4(1), 81.5(1)). The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation is secured. A worker can claim wages for a period beginning six months before the date of bankruptcy until the date of bankruptcy, for a maximum of $2,000. If the trustee or receiver has paid any of this amount, this must be deducted from the claim. by statute, namely ss. 81.3(1) and 136(1) of the *BIA*. Section 81.3(1).

[4] Section 136(1)(d.01) of the *BIA* provides workers "the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor." For example, if the employee was owed wages that exceeded the amount of $2,000, that excess would not be a secured claim, but would be preferred.

[5] *BIA*, *supra* note 1 at s. 140.

therefore have no priority under the *BIA* scheme. This is an important distinction in assessing what an employee may be able to realistically collect against a bankrupt employer.

Potential Options for Employees when an Employer is Bankrupt

a) Proof of Claim Process under the *BIA*

If an employee intends to pursue a claim against a bankrupt employer, they must submit a proof of claim to the trustee, together with any supporting documents substantiating the claim.[6] Under s. 126(2) of the *BIA*, the proof of claim may be made by the bankrupt employer on behalf of the employees, by a representative of the government if they are responsible for labour matters, and by a union, among other options. The proof of claim process applies to any type of claim by an employee, including claims for wrongful dismissal.

Once the proof of claim is filed, the trustee will review the claim and will determine whether it is accepted or objected. The trustee may contact the claimant to ask for clarification or further documents. If the claim is accepted, the creditor is then eligible to receive a distribution from the bankruptcy estate, subject to the availability of assets and the priority of claims.

b) Application to Overcome a Stay

Employees can apply to overcome the stay of proceedings. Section 69.4 of the *BIA*, which allows courts to lift a stay of proceedings on two grounds: a) the applicant is likely to be materially prejudiced by the continuation of the stay, or b) there are other equitable grounds on which to make such a declaration. This involves a balancing of rights between the bankrupt and the applicant.

In *Ma v. Toronto Dominion Bank (2001)*, 2001 CanLII 24076 (ON CA) the Ontario Court of Appeal provided guidance on the interpretation of section 69.4, stating that "*lifting the automatic stay is far from a routine matter*" and that *"there is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4*" The Court further stated that "*the role of the Court is to ensure that there are sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act to relieve against the automatic stay*".[7]

Exemptions from a stay are to be made only where there are "*compelling reasons*". [8]

In *Fiorito v. Wiggins*, 2017 ONCA 765 (CanLII), the Ontario Court of Appeal further stated that "*Material prejudice arises when the bankruptcy would treat a creditor unfairly, differently or in some way worse than other creditors*".[9]

The following is a non-exhaustive list of circumstances in which stays have been lifted:

- the action is one that would survive the *BIA* proceedings;
- the matter is an unliquidated debt that is so complex that the summary process under the BIA is inappropriate;

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[6] *BIA*, *supra* note 1 at s. 124(1).
[7] *Ma v. Toronto-Dominion Bank*, 2001 CanLII 24076 (ON CA) at para 3.
[8] *Can-Industrial Electric Inc. (Re)*, [2022] O.J. No. 6003 at para 48.
[9] *Fiorito v. Wiggins*, 2017 ONCA 765 (CanLII) at para 30.

- if the action is necessary to recover under an available policy of insurance;
- the action has progressed to a point where logic dictates that the action continue to judgment;
- actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties;
- claims involving family property or support claims; and
- injunctive relief sought against multiple defendants for breach of non-compete and non-solicit covenants [10]

Claims not subject to a Stay of Proceedings

Relief that may be declaratory in nature or injunctive relief, which is not a claim provable in bankruptcy may be permitted to proceed as against a bankrupt party or related party.

The Ontario Human Rights Tribunal in *Rijal v. Distinctive Designs Furniture* held that a human rights application against a bankrupt should proceed if the applicant only seeks a declaration that their rights have been infringed.[11] This application would not be a claim 'provable in bankruptcy' as the applicant would not become a creditor seeking a remedy upon the success of their case.[12] In practice, this claim is rare as litigants are unlikely to advance a claim without also seeking damages.

Similarly, under labour relations legislation, unions have been successful at the labour board in proceeding with sale of business or related employer applications involving a bankrupt employer, for the purpose of preserving and protecting bargaining rights.[13]

c) Wage Earner Protection Program Benefit

The *Wage Earner Protection Program Act* ("*WEPPA*")[14] creates an income-replacement benefit available to eligible employees whose employer is bankrupt, subject to receivership or other qualifying insolvency proceeding under the *BIA.*[15] Employees are eligible if their employment has ended and are owed wages, vacation pay, termination pay, or severance pay in the 6 month period prior to the date of bankruptcy or receivership. Employees who are directors, officers, or true managers are not eligible.[16]

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[10] See for instance, *Can-Industrial Electric Inc. (Re)*, [2022] O.J. No. 6003 at para 47; *Stone Sapphire Ltd. v. Transglobal Communications Group Inc*, 2008 ABQB 398; *Shirkie v. Shirkie*, 2015 SKQB 303, 67 R.F.L. (7th) 274; *Howell v. Machi*, [2017] B.C.J. No. 2016; *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, [2007] O.J. No. 599.

[11] *Rijal v. Distinctive Designs Furniture*, 2009 HRTO 297 (CanLII) at para 20.

[12] *Ibid*; See also *Moore v. Ferro & Company, 2017 HRTO 5 (CanLII)*.

[13] See for instance, *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 SCR 123; *Romspen Investment Corp. v. Courtice AutoWreckers Ltd.*, 138 O.R. (3d) 373 (ONCA); *United Food and Commercial Workers Canada, Local 1006A v Ryding Regency Meat Packers Ltd.*, 2022 CanLII 60743 (ON LRB);

[14] S.C. 2005, c. 47, s. 1 [*WEPPA*].

[15] *Ibid* at s. 5.

[16] *Ibid* at s. 6.

The amount paid to an employee under *WEPPA* is the amount of eligible wages owing, up to a maximum of 7 times the maximum weekly insurable earnings under the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EI Act*").[17] In 2024, the maximum *WEPPA* is $8,507.66.

A proof of claim must be submitted before applying for the Program. The employee does not need to have the proof of claim returned to them (approved, varied, or denied by the trustee or receiver) to apply but this will cause a delay in reviewing the application.[18]

WEPPA applications must be submitted to Service Canada within 56 days of either from the date of bankruptcy or receivership or from the date employment ended.

Similar to Employment Insurance ("EI"), *WEPPA* payments are not set off from wrongful dismissal damages wages, but receipt of wages or damages could trigger a repayment obligation similar to EI. However, those who apply for *WEPPA* may also be receiving EI payments. This can result in an overpayment for which the recipient of the benefits (the employee) will be liable for repaying.[19]

d) Claiming Against Directors Personally

i) Ontario Business Corporations Act & the Canada Business Corporations Act

In circumstances when the Corporation has defaulted on wages or other debts owing to an employee, employees may be permitted in certain circumstances to recover against the directors personally.

Under s. 119 of the *Canada Business Corporations Act* ("*CBCA*")[20] and s. 131 of the *Ontario Business Corporations Act* ("*OBCA*") [21], directors are jointly and severally liable for any debts the corporation owes to an employee for services performed for the corporation, up to maximum cap equal to 6 months of wages. Director liability is limited to debts that become payable only during the period of time the person is a director of the corporation.

Debts for services performed include but are not limited to: base salary or hourly earnings; public holiday pay; vacation pay; reasonable travel and out-of-pocket expenses incurred in connection with the performance of their duties; and unpaid bonus owing. [22]

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[17] *WEPPA*, *supra* note 14 at s. 7(1).
[18] Government of Canada, Wage Earner Protection Program for an employee: What you need before you apply, (2024) <https://www.canada.ca/en/employment-social-development/services/wage-earner-protection/employee/before-applying.html>.
[19] *Employment Insurance Act* SC 1996 c 23 at s. 43-45.
[20] R.S.C., 1985, c. C-44 [*CBCA*]. Section 119 expressly provides that: "Directors of a corporation are jointly and severally, or solidarily, liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively."
[21] R.S.O. 1990, c. B.16 [*OBCA*]. Section 131 expressly provides that: "The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the Employment Standards Act, and the regulations thereunder, or under any collective agreement made by the corporation."
[22] See for example, *Englefield v. Wolf*, 2005 CanLII 42483 (ON SC); *Proulx et al. v. Sahelian Goldfields Inc. et al.*, [2001] O.J No. 3728 (ON CA); *Mills-Hughes et al. v. Raynor et al.*, [1988] O.J. No. 38 (ON CA).

"Debts" within the meaning of the *OBCA* and *CBCA* do not include statutory termination pay or statutory severance pay. Further, debts do not include wrongful dismissal damages, as these payments flow from breach of the employment contract, not from services performed for the corporation.[23]

Certain pre-conditions must be met first for a director be liable under the *OBCA*, namely that the corporation is sued for the debt and failed to pay, and the corporation goes into liquidation, is wound up or is bankrupt. Under the *CBCA*, there is an added criteria that an employee must first seek recourse against the corporation before looking to the director, and the suit must be commenced within 6 months of the wages being due.

The Ontario Court of Appeal in *O'Reilly v. Clear MRI Solutions Ltd.*, 2021 ONCA 385 ["*O'Reilly*"], held that the conditions which need to be met to hold a director liable do not need occur before filing the claim or obtaining a formal judgement.[24] There is no time limit prescribed. Where there is a formal judgement given before either condition is met, the liability of the director becomes conditional on either event happening in the future.[25]

ii) The Employment Standards Act, 2000

Section 81(1) of the Ontario *Employment Standards Act, 2000* (the "*ESA*")[26] provides for director liability for unpaid wages (including vacation pay, public holiday pay, overtime pay and regular earnings), up to a maximum of 6 months of wages that become payable while a director and up to 12 months of vacation pay accrued while a director. Directors are not liable for contractual or statutory termination pay or severance pay.

This section largely mirrors the director liability provisions under the *CBCA* and *OBCA*. The purpose behind section 81 is to provide access to a cheaper and speedier administrative process with the Ministry of Labour to claim unpaid wages owed.

The statutory pre-conditions for director liability are slightly different under the *ESA*. There are 4 circumstances in which director liability is established when an employee has not been paid in full for outstanding wages owed:

1) a court-appointed receivership or bankruptcy trustee has been appointed and the employee filed a proof of claim with the receiver or trustee;

2) an order to pay wages was issued by the Ministry of Labour against the employer;

3) the Ministry of Labour has issued an order to pay against directors of the corporation; or

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[23] *Barrette v. Crabtree Estate* [1993] 1 S.C.R. 1027.
[24] *O'Reilly v. Clear MRI Solutions Ltd., 2021 ONCA 385 ["O'Reilly"]* at para 98.
[25] *Ibid*.
[26] *Employment Standards Act*, 2000, s. 81(1).

4) the Ontario Labour Relations Board ("OLRB") issued an order for the employer or directors to pay wages.

Subsection 81(2) provides that the employer is primarily responsible for the employee's wages, but the proceedings against the employer under the *ESA* do not have to run their full course before an order to pay can be issued against a director.

Sections 97 and 98 of the *ESA* prohibit an employee from pursuing the same debt through the Ministry of Labour and the civil courts. An employee has to choose between filing a claim with the Ministry and commencing a civil action in court for the same matter.

It is the Ministry policy that *WEPPA* payments received by an employee will be offset against the outstanding amounts owed by the director.

iii) Oppression Remedies

An oppression remedy is an equitable remedy under section 248 of the *OBCA* and section 241 of the *CBCA*, which gives the court discretion to fashion a remedy that is not just legal but is fair and just in the circumstances. It is a valuable tool that can be used to hold other corporate actors responsible for payments an employer owes to an employee. In order to bring an oppression remedy, the individual must qualify as a complainant, which includes a shareholder, director, officer, creditor and "any other person who, in the discretion of the court, is a proper person" to make an oppression claim.

The oppression remedy has been applied to hold directors personally responsible for amounts owing by the employer to the employee. Unlike the director liability provisions of the *OBCA*, *CBCA* and *ESA*, under an oppression remedy, there is no maximum cap on a director's liability.

To qualify for an oppression remedy, an eligible complainant must establish that their reasonable expectation as a stakeholder was violated by conduct that is oppressive, unfairly prejudicial or that unfairly disregard their interest. One need not establish bad faith, dishonesty or intention to harm. The purpose of the remedy is corrective, not punitive.

The oppression remedy is available to corporate stakeholders, including shareholders, creditors, directors and officers. Employees with unpaid wage claims are considered creditors of the corporation and therefore have standing to bring an oppression claim. Further, employees who also own shares in the company have standing as a shareholder. But in certain circumstances, an employee who is neither a creditor nor a shareholder may obtain an oppression remedy. For example, oppression remedies have been used to hold directors personally liable for wrongful dismissal damages. Having said that, the courts have made it clear that an oppression claim cannot be surrogate for a wrongful dismissal claim or other forms of relief, as a tactic to rope in directors, officers or other corporate actors.[27]

A non-shareholder employee may be found to be a complainant under the oppression remedy in cases where internal corporate maneuvering was used to defeat the employee's claim for

[27] *Abbasbayli v. Fiera Foods Co.*, [2022] O.J. No. 1522 at para 33.

damages by winding up the corporate employer and transferring the corporation's assets out of the company, leaving the corporation unable to satisfy the claims of the employee.[28]

For example, in *Downtown Eatery*, 2001 CanLII 8538 (ONCA) ["*Downtown Eatery*"], the Ontario Court of Appeal held that a former employee was entitled to an OBCA oppression remedy for wrongful dismissal damages against the directors of a corporation. The corporation went out of business, ceased operations and transferred all of its assets to another corporation prior to trial. It was held that the complainant had a reasonable expectation that the company's affairs would be conducted with a view to protecting his interests, and that included maintaining a reserve sufficient to meet the contingency of satisfying a judgment against the corporation.[29]

In *El Ashiri v. Pembroke Residence Ltd.*, 2015 ONSC 1172, the plaintiffs were dismissed from their employment and sued for lost wages, termination pay and punitive damages. They brought an oppression claim under s. 248 of the *OBCA* to make the sole director of the corporate defendant personally liable for the amounts owed by the corporation to the plaintiffs. The Court held that the former employees were proper complainants under s. 248 of the *OBCA*; that their expectations of payment for services rendered were eminently reasonable; and that the director's conduct, was oppressive, high-handed, callous and unfairly prejudicial to the rights and interests of the plaintiffs.[30]

e) Related Employer Claims

If an employee is unable to collect against an insolvent or bankrupt employer, there are certain circumstances in which an employee may pursue their claims against a related or affiliated entity.

i) Employment Standards Act, 2000

Section 4 of the *ESA* provides that associated or related activities or businesses that were carried on by or through an employer and one or more other persons shall be treated as one employer for the purposes of the *ESA and* are jointly and severally liable for any violation of the *ESA* and for any wages owing to an employee.

The OLRB has clarified that a claimant is not required to prove that there was corporate maneuvering with an intent or effect to defeat the requirements of the *ESA* in order to satisfy the section 4 test. All that matters is whether associated or related activities or businesses are or were carried on by or through an employer and one or more other persons. If so, they "shall" be treated as one employer for the purposes of the *ESA*. Section 4 is a deeming provision and does not provide for the exercise of discretion.

Further, it is not necessary to establish an employment relationship between the claimant and the associated or related business or activity in question. The claimant need only establish that the businesses or activities are associated or related.

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[28] *Ibid* at para 28.
[29] *Downtown Eatery*, 2001 CanLII 8538 (ONCA) ["Downtown Eatery"] at para 62.
[30] *El Ashiri v. Pembroke Residence Ltd.*, 2015 ONSC 1172 at para 23 at para 23.

The Ministry of Labour's *ESA* Policy and Interpretation Manual sets out the following non-exhaustive criteria that are to be considered in assessing whether the associated or related employer test is met (listed in order of significance):

- Common management
- Common financial control
- Common ownership
- Existence of common trade name or logo
- Movement of employees between two or more entities
- Use of same assets by two or more entities, or transfer of assets between them
- Common market or customers served by the two or more entities

Notably, the entities do not need to be carrying on business at the same time in order to satisfy associated or related employer test. Where a "Phoenix" arises out of the ashes of a bankrupt employer, the emerging company will often be found to be an associated or related employer. In these scenarios, there will typically be some common management, financial control or ownership as between the bankrupt and the Phoenix.[31]

ii) Common Law

When an employer is unable to cover the employment-related liabilities being sought, the employee may have recourse under the common law as against related entities based on the common employer doctrine. If two are more entities are found to be common employers under the common law, they are jointly and severally liable for the liabilities of the primary employer. The common employer doctrine can apply to any type of employment-related claim, including wrongful dismissal damages, breach of contract, and unpaid wages.

Note that the common employer doctrine is distinct from the concept of piercing the corporate veil, the latter remedy being applied only in circumstances where there is fraudulent or improper activity such that it is necessary to disregard the separate legal personality of a corporate entity.[32]

Under the common employer doctrine, liability of a related entity will only be found if it is established that there was an intention to create an employer/employee relationship between the employee and the related entity(s).

In *O'Reilly*, the Court of Appeal clarified that the parties' subjective thoughts are irrelevant to the analysis. An intention to contract is determined by the conduct of the parties. The Court noted two types of conduct that are central to the analysis: 1) where the effective control over the employee

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[31] ESA Policy & Interpretation Manual, s.4

[32] The Ontario Court of Appeal in *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385 (CanLII) [*O'Reilly*] at paras 46 and 47 clarifies that to pierce the corporate veil as between a parent and subsidiary corporation the court must be satisfied that: (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity. Control by one corporation over another, on its own, does not make the controlling corporation liable for the obligations of the controlled corporation; a fraudulent or improper purpose must also be present.

resided; and 2) whether there was an agreement specifying an employer other than the alleged common employer.

While both are important, the focus is on which business(es) exercise effective control over the employee. Indicators of employer/employee relationship include control over such matters as:

- Section of employee;
- Payment of wages or other remuneration;
- Method of work; and
- Ability to dismiss.[33]

This is not an exhaustive list but does provide guidance on key elements of control.

In *Downtown Eatery,* the Court of Appeal affirmed that these claims rely on the person asserting this fact, usually the employee, establishing a "sufficient degree of relationship".[34] What will constitute a sufficient degree of relationship will depend on the individual circumstances of each case including factors such as: individual shareholdings, corporate shareholdings, interlocking directorships and/or ownership, shared premises, regularly exchanging funds between companies, and sharing common business pursuits.[35]

[33] See *O'Reilly* at para 54
[34] *Downtown Eatery* at para 30.
[35] *de Kever v. Nemato Corp., 2014 ONSC 6576 (CanLII)* at para 5.

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TAB 6

25th Employment Law Summit

Top 5 Workplace Privacy Issues (PPT)

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October 15, 2024

cpd

Top 5 Workplace Privacy Issues

Employment Law Summit

Roland Hung, Partner at Torkin Manes LLP
Saba Zia, Senior Counsel at Royal Bank of Canada

October 15, 2024

Agenda

1. Use of artificial intelligence (AI) and automated decision making in hiring practices
2. The monitoring of employees or otherwise using surveillance
3. Sharing employee information with foreign affiliates
4. Mitigating privacy breaches impacting employees
5. Ensuring background checks are conducted to align with principles of data minimization

Torkin Manes

1. AI & Automated Decision Making

- **Artificial Generative Intelligence**: an advanced form of artificial intelligence capable of performing a range of diverse tasks in a broad replication of human levels of intelligence
- Many challenges with using AI originate from how the technology works:
  - Factual consistency and common-sense knowledge
  - Transparency or bias
  - Hallucinations
  - Ethical issues

Torkin Manes

1. AI & Automated Decision Making

- **Automated decision making** → when a decision is made by a system
- Employers are increasingly using automated decision making to predict, recommend, and make decisions
  - Not considered in *PIPEDA*
  - However, automated decision making is contemplated by Bill C-27's *CPPA*

Torkin Manes

1. AI & Automated Decision Making

CPPA

- Places new responsibilities on employers to disclose:
  - Information explaining the organization's use of any automated decision system
  - Provide an explanation of a prediction, recommendation, or decision upon request
  - No right to objection

Torkin Manes

1. AI & Automated Decision Making

Québec's Law 25, *Act to modernize legislative provisions as regards the protection of personal information*

- Individuals must be informed when a decision is rendered (and latest by the time that decision is rendered) exclusively by an automated process
- Monetary administrative penalty may be imposed. The CAI has new and broad enforcement powers
- *Centre Centre de services scolaire du- Val- des- Cerfs (anciennement Commission scolaire du Val-des-Cerfs)*
  - Commission investigated the use of an algorithm targeting 6th grade students at significant risk of dropping out
  - Use of an algorithmic system to generate a score was recognized as the collection of personal information

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1. AI & Automated Decision Making

Bill C-27, AIDA

- Automated processes could meet the definition of “artificial intelligence systems”
- AIDA could also regulate automated decision making
- HR systems are high risk. This is consistent with GDPR

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2. Monitoring Employees & Using Surveillance

- Employers may monitor their employees and use other surveillance to:
  - ensure productivity;
  - prevent leaks of confidential information; and
  - stop workplace harassment
- Video monitoring, internet/email monitoring, or GPS tracking
- Monitoring should be limited to specific and targeted purposes
  - Assess privacy risks and mitigating measures to monitor in the least invasive way

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2. Monitoring Employees & Using Surveillance

- The Privacy Commissioner of Canada has applied variations of the following four-part test:5

    (1) Is the measure demonstrably necessary to meet a specific need?

    (2) Is it likely to be effective in meeting that need?

    (3) Is there a loss of privacy proportional to the benefit gained?

    (4) Is there a less privacy-intrusive way of achieving the same end?

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2. Monitoring Employees & Using Surveillance

York Region District School Board v Elementary Teachers' Federation of Ontario, 2024 SCC 22

- Two elementary school teachers logged notes of workplace concerns in their personal email accounts
- Principal took pictures of the log from the teacher's laptop
- Ontario public school board employees are entitled to *Charter* s. 8 protection of reasonable expectation of privacy

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2. Monitoring Employees & Using Surveillance

PIPEDA Findings #2021-008

- Employer was a trucking company that installed surveillance devices in their trucks
  - Recorded audio, video, and real-time location information
- Complainant alleged the employer collected personal information for purposes unreasonably
- The OPC found the employer's purposes for audio surveillance were inappropriate

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3. Sharing Employee Information with Foreign Affiliates

- Transfer of personal information by private companies across provincial or national borders is subject to *PIPEDA*
- Schedule 1 of *PIPEDA*, s. 4.1.3 → "comparable level of protection"
  - Protection offered via contractual or other means
- British Columbia and Nova Scotia restrict how public entities can transfer personal information
- Transfer of employee information must be reasonable
- Employer should be transparent about its information-handling practices

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3. Sharing Employee Information with Foreign Affiliates

New *CPPA*

PREAMBLE: …Canada is a trading nation and trade and commerce **rely** on the analysis, circulation and exchange of personal information and data **across borders and geographic boundaries**….

SECTION 5: …in an era in which **data is constantly flowing across borders and geographical boundaries** and significant economic activity relies on analysis, circulation and exchange of personal information – rules to govern the protection of personal information in matter that recognizes the right of privacy of individuals…and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

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3. Sharing Employee Information with Foreign Affiliates

Québec's Law 25, *Act to modernize legislative provisions as regards the protection of personal information*

- Restricts the transfer of personal information outside of Québec
- Organizations must first conduct a Privacy Impact Assessment (PIA):
  - Sensitivity
  - Purpose
  - Protection measures
  - Legal framework & protection principles

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4. Mitigating Privacy Breaches Impacting Employees

- Here are some guidelines that may assist businesses in protecting data containing personal information and limit privacy liability:
  - Develop a breach protocol that is amended periodically to account for improvements in technology.
  - Incorporate a notification procedure in the breach protocol to report breaches to the applicable privacy regulator.
  - Ensure that all contracts with third parties include provisions that require the third-party contractor to immediately inform the organization of any breach or suspected breach. Inform third parties of the breach protocol once it is developed.

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4. Mitigating Privacy Breaches Impacting Employees

- Ensure that record retention and destruction policies comply with existing privacy law requirements. To ensure compliance, destroy or “anonymize” all personal information once it is no longer needed or legally required to be retained.
- Undertake employee training initiatives to ensure familiarity and compliance with all policies and practices.

- For businesses seeking to develop policies and procedures, the following guidelines may be helpful:
- Build a security program that protects the confidentiality, integrity and availability of all information, not just personal information.
- Develop classification standards so that personal information can be easily identified.
- Ensure that proper security controls are in place and conduct risk assessments of all personal information.

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5. Align Background Checks with the Principles of Data Minimization

1. Perform background checks only after a conditional offer of employment has been made and accepted.
2. Collect only information reasonably necessary in order to assess a candidate's application.
3. Always ensure the confidentiality of the information obtained, sharing it only among those individuals directly involved in the hiring process.
4. Consider developing a background screening policy in accordance with applicable provincial law.

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Questions

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TAB 7A

25th Employment Law Summit

"Ethical Issues for Employment Lawyers"

Lai-King Hum
Hum Law Firm PC

October 15, 2024

cpd

25th Employment Law Summit
October 15, 2024

"Ethical Issues for Employment Lawyers"

Lai-King Hum, Hum Law Firm

ONE: Fact Scenario for Discussion / Client unwilling to accept advice

You represent an employer facing a claim for constructive dismissal and harassment/discrimination. The sole racialized employee accuses a non-racialized HR Director of excluding them from key projects and mocking them for their ethnic background. After reviewing the claim, speaking to the HR Director, and going through various email communications between the employee and the HR Director, you assess that the employee's claim may have merit.

Despite this, the HR Director insists on fighting the case, alleging the employee is lying. After reviewing the HRTO application with the client, you believe that the employee could be successful with the claim. However, the Human Resources Director insists that you fight this case and not negotiate, as the employee is lying.

What do you do?

- **Duty of Competence, Honesty and Candour (Rule 3.1 and Rule 3.2, Rules of Professional Conduct)**

    a. Provide honest, competent, and candid advice regarding the strength of the employee's claim, even if your client disagrees:

        i. Provide competent advice based on an understanding of the legal issues, including the strength of the employee's claims and potential risks for the employer.

        ii. Candidly advise the client on the risks of litigation, including reputational harm and the likelihood of an unfavourable outcome.

Ensure that the HR Director understands the potential consequences of proceeding with a weak defence.

- **Duty of Encouraging Settlement (Rule 3.2-4, Rules of Professional Conduct)**

    a. "A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings."

    You are obligated to explore settlement options if it's in the client's best interest to avoid prolonged litigation and potentially damaging outcomes.

- **Duty to Avoid assisting or encouraging dishonest or illegal conduct (Rule 3.2-7, Rules of Professional Conduct)**

    a. You must ensure you are not assisting or facilitating any dishonesty by the HR Director. This includes refusing to support a defence strategy based on falsehoods or misrepresentations.

    b. You must not do or omit to do anything that encourages fraud or dishonesty, and you are prohibited from advising your client on how to violate the law or avoid consequences.

- **Duty as Advocate (Rule 5.1-2, Rules of Professional Conduct)**

    a. "When acting as an advocate, a lawyer shall not

    (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

    (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

    …"

    b. Your duty to the court requires you to avoid prosecuting proceedings motivated by the client's malice. You should also avoid making or presenting misleading or dishonest arguments. If the HR Director's case relies on untruthful statements, you must refuse to present those.

TWO: Fact Scenario for Discussion / Language Barriers

Someone has approached you to represent their father who has been accused of sexual harassment in the workplace. The problem is that the father speaks no English, and you do not speak their language (or have only a limited proficiency).

Can you represent the father?

- **Duty of Competence and Effective Communication (Rule 3.1-2, Rules of Professional Conduct)**

    a. "What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions."

    Ensure you are competent to have effective communication with the father so that he can understand the retainer terms and also make informed decisions. You have a duty to ensure that the client understands your legal advice and the process.

    Client Candour:

    The presence of a family member could limit the client's willingness to speak candidly about sensitive topics. Consider whether the client will feel comfortable fully discussing the harassment case in front of their child. Consider whether it is necessary to retain an interpreter, or to have all important documents translated into this person's language.

- **Quality of Service and Language (Rule 3.2-2B, Rules of Professional Conduct)**

    a. "A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer."

    b. **"**If a client proposes to use a language of his or her choice, and the lawyer is not competent in that language to provide the required services, the lawyer shall not undertake the matter unless he or she is otherwise able to competently provide those services and the client consents in writing."

Ensure you are competent to handle the case by providing legal services in a language the client understands, which may require the assistance of the son/daughter or a certified translator.

It is also advisable to obtain the father's written consent.

- **Confidentiality (Rule 3.3-1, Rules of Professional Conduct)**

  Be mindful of confidentiality that could be compromised if a family member translates sensitive discussions, particularly in a case involving allegations of sexual harassment.

  It is advisable to obtain the father's written consent to disclose the sensitive information to the son/daughter.

Questions?

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Law Society of Ontario | Barreau de l'Ontario

TAB 7B

25th Employment Law Summit

The Tension Between the Regulation of the Legal Profession in Ontario and Human Rights as it Applies to Disability-Related Misconduct

Wade Poziomka
Ross & McBride LLP

October 15, 2024

cpd

The Tension Between the Regulation of the Legal Profession in Ontario and Human Rights as it Applies to Disability-Related Misconduct

By: Wade Poziomka

15 October 2024

It is trite to note that law practice is a stressful profession, and licensees often face significant challenges in satisfying their ethical obligations to their clients, the public and the administration of justice, while coping with their personal and financial obligations.

Law Society of Ontario v. Khan, 2018 ONLSTH 131

Lawyers hold a privileged place in society. We earn considerable incomes relative to the average Canadian and are regarded with respect (for the most part). However, this privilege comes with significant challenges. Lawyers often need to portray confidence (even in situations where we we aren't), work long hours dictated by schedules we have little control over, and navigate conflicts daily in a system that is adversarial by its very design.

There is a growing body of research that suggests that lawyers are at a disproportionate likelihood of developing a mental illness and the actual or perceived risk of stigma that comes along with disclosing mental illness and seeking help.[1] The Law Society of Ontario recognizes that mental health and addiction are serious issues that impact our profession – the challenges and stressors we face make us more vulnerable to these issues.[2]

A brief review of the recent and growing number of discipline decisions of the Law Society Tribunal shows the ramifications of unresolved mental health issues for members of our profession, from reprimands to licence revocations. There is a tension however between the traditional regulatory goals of the Law Society and the duty to accommodate enshrined in the Ontario *Human Rights Code*.

[1] Martin, Andrew Flavelle. *Mental Illness and Professional Regulation: The Duty to Report a Fellow Lawyer to the Law Society.* 660 Alberta Law Review (2021) 58:3 at p. 660.
[2] Law Society of Ontario. *Personal Management*. Located online at https://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/personal-management

The human rights duty to accommodate requires that a licensee impacted by a disability, like mental health or addiction, be accommodated to the point of undue hardship.[3] To claim this protection, a licensee must prove that they have a personal characteristic protected in the *Code* (like disability), that they have experienced an adverse impact, and that the personal characteristic was a factor in the adverse impact.

The goals of regulatory penalties, being specific and general deterrence, are designed to ensure public confidence in the legal profession and protect the public interest.[4] In *Law Society of Ontario v. Khan,* 2018 ONLSTH 131, Adjudicator Raj Anand writing for the panel, recognized this tension:

> The regulatory jurisprudence of this Tribunal and the courts, on the other hand, has adopted a strong presumption against continued status as a licensee in cases of particularly serious misconduct. Here, exceptional circumstances must be proven by the licensee in order to avoid revocation from membership.[5]

In *Khan,* Adjudicator Anand noted that both human rights and regulatory requirements bind the Tribunal in its decisions. To deal with the presumption of revocation established in Tribunal jurisprudence and the duty to accommodate that is well articulated in human rights jurisprudence, the Panel looked to the "essential duties" requirements. In human rights jurisprudence, the *Code* is not infringed if a person requiring accommodation is incapable of performing or fulfilling the essential requirements of the profession.[6] To establish this defense however the Law Society would need to establish that the person cannot be accommodated without undue hardship. The Panel stated at paragraphs 64 and 65:

> Tribunal case law will continue to harmonize the human rights and regulatory requirements, both of which bind the Tribunal in its decisions. For now, we suggest that the two sets of

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[3] The Ontario *Human Rights Code* applies to a lawyer's ability to join and belong to the Law Society of Ontario by virtue of the social area union, professional association or other vocational association as identified in the *Code*.
[4] *Law Society of Ontario v. Khan,* 2018 ONLSTH 131 at para 51.
[5] *Ibid* at para 63. See also *Law Society of Upper Canada v. Mucha,* 2008 ONLSAP 5 and *Law Society of Upper Canada v. Molson*, 2014 ONLSTA 20.
[6] Ontario Human Rights Commission. *Policy on Preventing Discrimination Based on Mental Health Disabilities and Addictions*. Released 18 June 2014. Available online at www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions

> principles merge at the point of "essential duties." In cases from *Bolton* to *Bishop,* the Tribunal and the courts have established the overriding consideration: public confidence in the integrity of the legal professions, and their self-regulation.
>
> In cases where the presumption of revocation applies, the licensee's task is to adduce evidence and argument that demonstrates the existence of exceptional circumstances. On the other hand, the Law Society must demonstrate that it has accommodated the licensee's circumstances up to the point of undue hardship. The Tribunal must carefully review the circumstances in order to determine the appropriate penalty.

The Tribunal then clarifies that the human rights duty to accommodate will be met, if the circumstances the licensee puts forward do not satisfy the Tribunal, he or she can meet the essential duties of every licensee – "to permit the regulator to assure public confidence in the continued integrity of the legal professions and its self-regulations".[7]

Notably, in *Khan* the Tribunal ordered licence revocation and costs in the amount of $20,000 payable to the Law Society, finding that it is "not obvious to us, and we believe it would not be obvious to other licensees and the public, that this is an individual whose continued licence would maintain confidence in the integrity of the profession and its self-regulation by the Law Society."[8]

While there are cases where the hearing panel has dismissed applications on the basis that the Law Society of Ontario failed to accommodate the licensees,[9] those cases are few and far between. The jurisprudence I reviewed seems to be in line with *Khan*, which in my view confuses the onus established in human rights jurisprudence. Section 17 of the *Code* states:

> (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

[7] *Supra* note 4 at para 66.
[8] *Ibid.* at para 91. To be fair, the Tribunal did not find a *prima facie* case of discrimination on the grounds of disability in this particular case and as a result no duty to accommodate.
[9] See *Law Society of Ontario v. Burtt,* 2018 OBLSTH 63 for example.

(2) No tribunal or court shall find a personal incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements.

It would be difficult to argue with the notion that it is a licensee's duty to permit the regulator to assure public confidence in the continued integrity of the legal profession and its self-regulation. This standard is essential. But even essential duties require accommodation by virtue of section 17(2). The Ontario Human Rights Commission correctly notes that the overall objective is the inclusion of employees with disabilities in the workplace.[10]

The *Code* is quasi-constitutional in nature and has special importance, taking precedence over other statutes in Ontario, unless that statute explicitly states it applies despite the *Code*. The jurisprudence developed by the Law Society Tribunal, which presumes revocation, cannot be applied in a manner that reverses the onus and requires the licensee to establish that they can permit the regulator to assure public confidence in profession. That onus is on the Law Society to establish, after looking at accommodation to the point of undue hardship – and based on objective evidence.

Take, for example, a licensee who has alcoholism and has relapsed and engaged in conduct that, under the Law Society Tribunal's jurisprudence, would call for presumptive revocation. This licensee should not have the onus to prove that their continued ability to practice permits the regulator to assure public confidence in the integrity of the profession. That onus belongs with the Law Society, and it should be required to establish that there is no further accommodation that could be offered to the licensee to permit the continued ability to practice and still maintain public confidence in the integrity of the profession. Things such as a leave of absence, addiction treatment, and a requirement to undergo psychological treatment on a regular basis (perhaps with reports to the Law Society), are all things that might allow the licensee to continue to practice while still providing the public with assurance that the Law Society is actively ensuring the integrity of the

[10] Ontario Human Rights Commission. *Policy on Ableism and Discrimination based on Disability*. Approved 27 June 2016. Available online at www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability

profession. In the absence of evidence that these options are untenable or would amount to undue hardship, the onus is unmet, and revocation should not follow.

One in five Canadians will experience mental illness or addiction, and as previously noted, that number is likely higher in the legal profession.[11] Stigma, stereotypes, and prejudice, along with the view that lawyers need to 'play the part' of being a lawyer may prevent lawyers from proactively seeking help. For many lawyers, disabilities are episodic and can fluctuate between periods and degrees of wellness. Conduct engaged in during a period of severe disability may not be reflective of a lawyer's overall character and ability to conduct themselves ethically and with integrity in the legal profession. The Ontario Human Rights Commission notes that service providers must first consider whether the actions of a person are caused by a disability before sanctioning a person for misconduct.[12]

This is not to suggest that lawyers experiencing a disability have carte blanche to behave unprofessionally, and as the Tribunal's jurisprudence points out, not every act of misconduct will be connected to a disability. When it is, however, proper attention should be given to the impact of the licensee's disability and the Law Society should clearly be held to its onus with respect to the duty to accommodate.

Supporting individuals dealing with mental illness or addiction—such as through a temporary licence suspension during treatment—should not undermine public confidence in the Law Society's role as a self-regulator. The public interest is best served by an empathetic understanding of the challenges lawyers face in high-stress, adversarial environments. Acknowledging that mistakes can occur, often due to disabilities, and that these can be addressed through appropriate support, is essential. Ultimately, accommodation aligns with the public interest. Conversely, presumptive revocation and shifting or blurring the onus with respect to the duty to accommodate, does not serve the interests of the legal profession or public.

[11] *Supra* note 6 at p. 1.
[12] *Ibid*.

Law Society of Ontario | Barreau de l'Ontario

TAB 7C

25th Employment Law Summit

"Ethical Issues for Employment Lawyers"

Michael Watson
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October 15, 2024

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25th Employment Law Summit
October 15, 2024

"Ethical Issues for Employment Lawyers"

Michael S.F. Watson, Gowling WLG (Canada) LLP

REPRESENTING MULTIPLE CLIENTS; ACTING AGAINST A FORMER CLIENT

Part 1

Jane D. has started an application under the *Human Rights Code* claiming that Barnett K., her manager, and her employer, ABC Co. discriminated against her. She claims that once Barnett found out she was pregnant, he treated her badly – removing accounts, making snide remarks about employees who get pregnant and using her pregnancy to exclude her from key trade conferences. Her bonus in the fiscal year just before going on pregnancy and parental leave dropped 42%, which she claims is further proof of both systemic and direct discrimination.

Issue: Can you represent both Barnett K. and ABC Co. in defending Jane D.'s application?

Part 2

While drafting the response to the application, Barnett K. acknowledges privately to you, "off the record", that he did make some intemperate remarks.

Your view is that there is still a solid defence to most of the case.

You believe that the case can be settled for a reasonable amount that ABC Co. will be prepared to pay.

Issues:

1. Assuming that you decided to act for both in Part 1, can you still act for both of them?

2. On these facts, do you have any disclosure obligation to either of the clients?

3. What do you do if ABC wants to settle, but Barnett adamantly does not?

4. Does it matter to the answer if ABC is prepared to pay the full amount of the settlement, so that Barnett K. will not have to pay one cent?

Part 3

After the *Human Rights Code* application has been settled, ABC decides to terminate Barnett K's employment, largely due to the overall loss in sales. His admission that he might have made some "joking" remarks about Jane D.'s pregnancy was probably the last straw for the company.

Barnett sues ABC for wrongful dismissal. He then contacts you and asks you to take over the file from his previous lawyer and to represent him in the lawsuit.

ABC also tells you that it wants either you or one of your colleagues in your firm to represent it.

Issue: Can you or another lawyer in your firm act for either Barnett or ABC in the litigation?

Rules of Professional Conduct

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine

and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the Substitute Decisions Act, 1992, S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will, the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

[3] in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(a) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

[3.1] Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients competing at the same time for the same opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single licence. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-26 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4-5(b) does not permit treating information received in connection with the joint retainer as confidential so far as any of the joint clients are concerned.

[*Amended - October 2014*]

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise

the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer shall obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:

(a) The lawyer shall

(i) refer the clients to other lawyers for that purpose; or

(ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate.

(b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation. [*Amended - October 2014*]

LYING IN THE WEEDS

JABCO is a federally-regulated company. It recently dismissed John-Peter (JP), allegedly for just cause, and without any warnings or progressive discipline. JP was a front-line supervisor with a dozen years of service, who allegedly was guilty of time theft and forced those who reported directly to him to cover for him.

There are two scenarios on this fact pattern:

- Scenario 4.1: You act for JP.
- Scenario 4.2: You act for JABCO.

Let's look at each one.

Part 1

You act for JP.

JP has found another job. He instructs you not to tell opposing counsel about his new job. He instructs you to get as good a settlement as possible. Opposing counsel Eleanor asks about re-employment, pointing out that the market is hot. She also reminds you that any settlement will be predicated on a comprehensive statutory declaration by JP regarding his job search, stating whether or not he (i) has turned down any job offers, (ii) is aware of any specific re-employment prospects, (ii) is now re-employed, and (iv) has since his dismissal received any employment or other income, together with the details of such income, if he has received any.

JABCO has agreed to a settlement, subject to receiving the statutory declaration, which JABCO has drafted, stating that JP has received no employment of other income since being dismissed and is not re-employed.

JP tells you "I don't doesn't give a *[deleted]* about any piece of paper and will sign whatever". He instructs you to let him sign everything and get the settlement done. You are sure that the proposed settlement will be withdrawn or reduced in amount if JABCO knows about JP's new job.

Issue: What do you do?

Part 2

This time you act for JABCO.

You know that JP's lawyer is inexperienced and works predominantly in the provincially-regulated field. JABCO knows that JP will find it difficult to find another job. You and your client know that there is a 90-day limitation period for commencing an unjust dismissal complaint under subsection 240(2) of the *Canada Labour Code*.

One week before the expiry of the 90-day limitation period, JP's lawyer makes a reasonable offer, and you recommend that JABCO accept the offer. JABCO instructs you to "buy time", and not respond to the offer before the 90-day limitation period has expired. JABCO intends to instruct you to make a low-ball counter-offer to settle after the threat of reinstatement is eliminated.

Issue: Do you have an obligation to inform the opposing lawyer of the impending deadline for making an unjust dismissal complaint, or may you remain silent and act on JABCO'S instructions?

Rules of Professional Conduct

"**conduct unbecoming a barrister or solicitor**" means conduct, including conduct in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession including, for example,

(a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Courtesy and Good Faith

7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

7.2-2 A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

3.4-9 Despite rule 3.4-8, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and shall refer the other or others to another lawyer for that purpose.

Acting Against Former Clients

3.4-10 Unless the former client consents, a lawyer shall not act against a former client in

(a) the same matter,

(b) any related matter, or

(c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] Unlike rules 3.4-1 through 3.4-9, which deal with current client conflicts, rules 3.4.10 and 3.4-11 address conflicts where the lawyer acts against a former client. Rule 3.4-10 guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

[*Amended - October 2014*]

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ([11]the other lawyer[11]) in the lawyer's firm may act in the new matter against the former client provided that:

(a)the former client consents to the other lawyer acting; or

(b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the

former client's confidential information to the other lawyer having carriage of the new matter.

[*Amended - October 2014*]

Commentary

[1] The guidelines at the end of the Commentary to rule 3.4-20 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Law Society of Ontario | Barreau de l'Ontario

TAB 7D

25th Employment Law Summit

"Ethical Issues for Employment Lawyers" (PPT)

Lai-King Hum
Hum Law Firm PC

Michael Watson
Gowling WLG (Canada) LLP

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Ross & McBride LLP

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October 15, 2024

cpd

ETHICAL ISSUES FOR EMPLOYMENT LAWYERS

SCENARIOS BY LAI-KING HUM, MICHAEL WATSON, WADE POZIOMKA AND NEENA GUPTA

CLIENT UNWILLING TO ACCEPT ADVICE

- You represent an employer facing a claim for constructive dismissal and harassment/discrimination. The sole racialized employee accuses a non-racialized HR Director of excluding them from key projects and mocking their ethnic background.

- After a thorough review, including interviewing your client contact, the HR Director, you assess that the employee's claim may have merit.

- The HR Director insists on fighting the case and not negotiate and states, "the employee is lying."

- What do you do?

WHAT IF THERE IS INSURANCE?

- The HR Director advises you that the claim may be covered by *Employment Practices Insurance Liability (EPIL)* insurance to cover your fees, but you have to get approved by the insurer, which should not be an issue.
- The insurer asks you to provide a report and the HR Director starts asking you specific questions about coverage and whether he would be personally covered if he were to leave the company.
- The HR Director asks you to soft-pedal your assessment, as he doesn't want to look "bad" in the report, which will be reviewed by the executive.

REPRESENTING MULTIPLE CLIENTS – PART 1

- ABC Co. has received a complaint of discrimination against the company and the employee's manager, Barnett.
- There are specific allegations against Barnett including snide verbal remarks about pregnant people and a significant reduction in her bonus.
- ABC Co. wants you to defend both the company and Barnett to save funds.

REPRESENTING MULTIPLE CLIENTS – PART 2

- Barnett admits “off the record” that he did make some intemperate remarks.
- Your view is that there is a solid defence to most of the case.
- Can you still act for both of them?
- Do you have to disclose the remarks?
- What if ABC wants to settle, but Barnett does not – even though Barnett is not being asked to contribute?

REPRESENTING MULTIPLE CLIENTS– PART 3

- ABC decides to terminate Barnett K., largely because of the loss of sales, although the “joking remarks” might have been a factor.
- Barnett starts an action, but contacts you, because he wants you (or someone in your firm) to take over the file.
- ABC want you or one of your colleagues to represent the defence.
- Can you represent ABC or Barnett in the litigation?

LANGUAGE BARRIERS

- Someone has approached you to represent their father who has been accused of sexual harassment in the workplace. The father speaks no English and you do not speak their language or have insufficient proficiency.
- Can you represent the father?
- Do you let the adult child represent the father?
- What if the child were a minor?

DEFENDING YOUR REPUTATION

- A potential client, Marjorie, is referred by the Law Society Referral Service to your firm for a consultation.
- A conflict check is revealed during the initial intake and the individual is referred back to the Law Society Referral Service.
- Marjorie leaves a scathing review on the law firm's Google review page:

  > "This lawyer was recommended from LSRS and he turned me down due to a conflict. Very unprofessional and immature. Maybe even corrupt. Justice isn't blind."

- The Lawyer writes to Marjorie, demanding the review be removed by end of business or else Lawyer will sue Marjorie for defamation.

LYING IN THE WEEDS – PART I – YOU ACT FOR PLAINTIFF

- JABCO is federally-regulated. It recently dismissed John-Peter (JP), allegedly for just cause, and without any warnings or progressive discipline. JP was a front-line supervisor with a dozen years of service, who was allegedly guilty of time theft.
- JP has found another job. He instructs you not to tell opposing counsel.
- Opposing counsel asks about re-employment, pointing out that the market is hot and pointedly asks about re-employment. She reminds you that any settlement will be predicated on a detailed statutory declaration that JP has not found a job, turned down a job, delayed the start of a job and has conducted a full job search.
- Parties are generally in agreement on settlement, subject to the documentation, including the statutory declaration.
- JP insists on signing the statutory declaration. You know that the settlement will be withdrawn or reduced if JABCO knows about JP's new job.

LYING IN THE WEEDS – YOU ACT FOR EMPLOYER – PART II

- Assume that JP has found it difficult to find work and will have a hard time of it, due to his niche skills
- JP's lawyer works almost exclusively with provincially-regulated employers
- You and your client know there is a 90-day limitation period for an unjust dismissal complaint under subsection 240(2) of the Canada Labour Code
- One week before the expiry of the limitation period, JP's lawyer makes a reasonable offer and you recommend JABCO accept the offer
- JABCO instructs you to "buy time" and not respond before the 90-day period. JABCO will instruct you to make a "low-ball" counter-offer to settle after the threat of reinstatement is eliminated.

DUTY TO REPORT AND DISABILITY

- John sent a demand letter regarding a former employee.
- The company is represented by Michael. Michael and John have a friendly relationship.
- John files an application 14 months after the date of discrimination, which Michael finds uncharacteristic.
- Michael calls John. John argues it is in time, but then admits he has been dealing with a significant mental health issue, has developed a gambling addiction, his practice is in shambles and he had “borrowed” funds from a client’s trust fund to pay off a gambling debt, but has since repaid the trust funds, so there’s no loss.
- Michael tells John he has to report himself to the LSO and LawPro. John tells Michael not to worry and that they were only talking as friends.
- What should Michael do?