Labour and Employment Law Conference 2008

Tuesday, June 10, 2008
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Agenda

8:15 a.m.   Continental Breakfast and Registration

9:00 a.m.   Welcome and Introduction by Chair  
Paul Boniferro

9:10 a.m.   The Year in Review  
Speakers: Michael Ford and Erika Ringseis  
Quick hits on significant cases and trends in labour, employment, human rights and privacy.

9:50 a.m.   Employment Law in the Age of Technology  
Speakers: Tina Giesbrecht and Paul Boniferro  
Employment law is changing in the age of technology. What can and should employers do to control employees on social networking sites, protect confidentiality and use technology to their advantage.

10:15 a.m.  Passing the Test: Investigations and Inspections  
Speakers: Earl Phillips and Ben Ratelband  
What to do when a government inspector comes knocking, including OH&S, privacy and human rights. Practical tips for conducting your own workplace investigations.

10:40 a.m.  Break

11:00 a.m.  Q & A  
Challenge our panel with your questions.

11:20 a.m.  Privacy Law Update: Complying with Privacy Legislation, “Best Practices” and Current Issues  
Speakers: Michael Ford and Tina Giesbrecht  
Updates and tips for practitioners regarding outsourcing, privacy audits, record management, access requests and privacy complaints.

11:45 a.m.  Good Bye and Good Luck: The Obligations of Departing Employees  
Speakers: Donovan Plomp and Erika Ringseis  
As the war for talent rages on, the obligations of departing employees are being scrutinized by the courts. Notice obligations of employees and the enforcement of restrictive covenants and confidentiality agreements will be discussed.
12:10 p.m. Looking Ahead

*Speakers: Paul Boniferro, Michael Ford, Tina Giesbrecht and Erika Ringseis*

Discussion will center on what recent legal trends mean for human resources practice including accommodation issues, class action lawsuits, damages update including Wallace Damages and punitive damages.

12:30 - 2:00 p.m. Lunch and Networking Opportunity
Paul Boniferro is a partner and the National Practice Group Leader of our Labour and Employment Group practicing in Calgary and Toronto. Mr. Boniferro is a past member of McCarthy Tétrault’s Board of Partners. He uses his unique combination of experience gained in the private and government/political sectors to advise clients on a wide spectrum of employment and human resource issues, including executive compensation, terminations, wrongful dismissals, grievance arbitration, collective agreement negotiations, human rights complaints, government relations, occupational health and safety issues and WSIB claims.

His advice has been sought by governments of all stripes to provide assistance in developing policy and legislation in labour and employment law. Mr. Boniferro is a bi-annual presenter to the Retail Roundtable Compensation Survey Group where he updates all major Canadian Retailers on developments in the area of Labour and Employment Law. He negotiates with trade unions in the retail sector on behalf of major shopping center managers.

Prior to joining McCarthy Tétrault, Mr. Boniferro was a Senior Policy Advisor to the Ontario Minister of Labour during one of the province’s most significant periods of labour relations reform, where he advised the government on changes to the Labour Relations Act, the Workers’ Compensation Act, the Employment Standards Act and the Pay Equity Act. Since joining McCarthy Tétrault in 1996, he has been retained by the government on a number of occasions to provide advice on labour relations and employment issues. In 2004, Mr. Boniferro was appointed to the Minister of Labour’s Employment Standards Action Group, and prior to that, was appointed by the Premier of Ontario to act as Special Negotiator with Québec on construction labour mobility.

He represents a wide number of private sector employers, both unionized and non-unionized, federally and provincially regulated, including those in manufacturing, energy, property management services, steel and hospitality.

Mr. Boniferro appears in the 2008 Canadian Legal Lexpert Directory, a guide to the leading lawyers in the area of labour and was selected as one of Lexpert’s Top 40 Under 40 in September 2003. A much-requested presenter at
labour and employment conferences, he is also an instructor for the Human Resources Professionals Association of Ontario (HRPAO) and is the past-chair of the HRPAO Government Affairs Committee. He is also a member of the Human Resources Association of Calgary (HRAC) and the Canadian and Calgary Bar Association, Labour and Employment Subsection.

Mr. Boniferro received his BA (Political Science) from the University of Western Ontario in 1987 and his LLB from Osgoode Hall Law School in 1991. He was called to the Ontario bar in 1993 and the Alberta bar in 2007. He has also studied in the MBA program at Lake Superior State University in Michigan.
Biography

Michael Ford is a Partner in our Labour and Employment Group in Calgary. Mr. Ford combines a labour law background with an extensive knowledge of human resources.

Mr. Ford represents unionized employers in collective bargaining, arbitrations, strikes and contract administration, advising non-union employers on dealing with union organizational activity, counselling employers regarding employee discipline and termination, privacy issues, employment agreements, harassment/discrimination, drug testing policies, ill employees, and occupational and health matters.

Mr. Ford counsels clients in the energy, manufacturing, warehousing, communications, retail, financial, transportation and high-tech industries, as well as major public sector institutions in the health and education fields. Mr. Ford has defended many employers in significant labour and employment cases involving provincially and federally regulated workplaces. Mr. Ford has been recognized by the 2007 Canadian Legal Lexpert Directory, a guide to the leading law firms and practitioners in Canada, in the area of employment law and labour law. He is also listed in the 2008 edition of Chamber’s Global: The World’s Leading Lawyers for Business, as a leading lawyer in the area of Employment Law. The Canadian HR Reporter has also acknowledged him as one of Canada’s top employment lawyers.

Mr. Ford is a past President of the Human Resources Institute of Alberta and has been a sessional Instructor of the University of Lethbridge, Faculty of Management (Labour Relations). He is a member of the Canadian Industrial Relations Association, the Canadian Pensions and Benefits Institute, the Human Resources Committee of the Calgary Chamber of Commerce.

Mr. Ford is a frequent speaker on topics including privacy, accommodation, grievances, wrongful dismissal, mergers and acquisitions and harassment at: The Canadian Institute, The Canadian Pensions & Benefits Institute, Infonex, Petroleum Services Association of Canada, Labour Arbitration Conference, Legal Education Society of Alberta, Insight Educational Services, Human Resources Association of Calgary and CBA Labour Law subsection.
Mr. Ford is a member of the Law Society of Alberta and the Canadian and Calgary Bar Associations. He is a member and former Chair of the Labour Law Subsection of the Calgary Bar Association (Southern Alberta) as well as the former Chairman of the Hospital Privileges Appeal Board of Alberta.

Mr. Ford received his B.Comm. (Labour Relations) and LLB from the University of Alberta in 1984, and has been a Certified Human Resources Professional since 1992. He was called to the Alberta bar in 1986.
Biography

Tina Giesbrecht has extensive experience in the practice of labour and employment law.

Ms. Giesbrecht advises a wide spectrum of both federally and provincially regulated clients on labour and employment matters including union organizing campaigns, collective bargaining, interpretation of collective agreements, grievance arbitration, human rights complaints, labour board hearings, strikes, employment related immigration matters, executive compensation employment contracts, personnel policies, fiduciary obligations, non-competition and non-solicitation agreements. She also advises clients on employment issues arising from the purchase and sale of businesses including group terminations and successorship rights. In addition, Ms. Giesbrecht advises employers on privacy, workers’ compensation, occupational health and safety matters and termination of employment.

Prior to joining McCarthy Tétrault, Ms. Giesbrecht practised in Winnipeg and taught employment law at the University of Manitoba. She regularly writes articles and presents seminars on a variety of labour and employment law issues.

Ms. Giesbrecht is currently the Chair of the CBA Labour and Employment Subsection, Alberta Bar Association and a member of the Canadian Bar Association, the Law Society of Alberta, the Law Society of Manitoba, the Manitoba Bar Association, the Canadian Association of Counsel to Employers and the Human Resource Association of Calgary.

She received her BA in 1990 and her LLB in 1993 from the University of Manitoba. Ms. Giesbrecht was called to the Manitoba bar in 1994 and to the Alberta bar in 2001.
Biography

Earl Phillips is a partner in the firm’s Vancouver office practising in the Labour and Employment Group.

His recent experience includes:

- labour arbitrations regarding privacy, attendance management, surveillance and theft;
- labour board hearings regarding true employer, successor and common employer issues, certification and decertification applications and unfair labour practice complaints;
- dismissals and constructive dismissals;
- human rights issues regarding attendance management, substance abuse, disability, and the duty to accommodate; and
- negotiating and drafting executive employment contracts.

Mr. Phillips regularly appears before federal and provincial tribunals and arbitration boards and the courts of British Columbia. He is a frequent writer and speaker on various topics including, most recently, mandatory retirement, employment privacy, whistle-blowing, substance abuse in the workplace and general employment practices.

Mr. Phillips is a member of the Human Resources Management Association of British Columbia and of the BC Labour and Employment Sections of the Canadian Bar Association. He also serves as a director of the Regent College 2000 Foundation and The Children’s Foundation.
Biography

Donovan Plomp is an associate in our Labour and Employment Group in Vancouver. He has appeared as counsel in matters before the British Columbia Labour Relations Board, the Canada Industrial Relations Board, the British Columbia Human Rights Tribunal, the Supreme Court of British Columbia and grievance arbitration panels. He has also assisted clients in drafting employment contracts and policies, as well as advising on a wide variety of workplace issues including privacy, disability, and the application and interpretation of collective agreements.

His recent experience includes:

- advising on labour and employment issues in corporate mergers, acquisitions and reorganizations;
- representing employers in wrongful dismissal and other employment related litigation;
- representing unionized employers in grievance arbitration and labour relations board proceedings, including discharge, discipline, interpretation of collective agreements, unlawful strike and unfair labour practice complaints; and
- advising unionized employers regarding union organizing campaigns and certification and decertification applications.

Mr. Plomp received a BA (Hons) from the University of Ottawa in 1997, and his LLB from the University of British Columbia in 2000. After graduating from law school, Mr. Plomp served as a judicial law clerk with the Supreme Court of British Columbia. Mr. Plomp was called to the British Columbia bar in 2002.

Mr. Plomp is a member of the Canadian Bar Association and the British Columbia Human Resources Management Association. He is also a member of the executive of the BC Employment Law section of the Canadian Bar Association.
Biography

Ben Ratelband is a partner in our Labour and Employment Group in Toronto and is a member of our firm’s newly-formed Environmental Health and Safety Group.

Mr. Ratelband’s practice is focused exclusively on management-side labour, employment and health and safety law. He has advised and represented employers in the sectors of manufacturing, security, trucking, health care, education, information technology, correctional services, hospitality, public service, water supply and finance and investment. Mr. Ratelband has also advised and represented those employers in collective bargaining, labour board proceedings, labour arbitration, mediation, employment litigation, judicial review and civil appeals, employment standards, privacy, human rights, occupational health and safety and workplace safety and insurance. He regularly provides training for clients’ managers and other staff to assist them in meeting their legal duties.

Mr. Ratelband has spoken on various labour, employment and health and safety topics for such organizations as the Canadian Institute, the Rotman School of Business at the University of Toronto and the Human Resources Professional Association of Ontario (HRPAO). He has also written on a number of labour and employment law topics for the Ontario Bar Association and various legal publications.

Prior to joining the firm, Mr. Ratelband worked in the field of management-side labour relations in private and public sector settings in both Ontario and the Yukon. He was legal counsel to the Management Board Secretariat of the Ontario Ministry of the Attorney General, where he represented the Crown as an employer in a variety of forums, including the Divisional Court and the Court of Appeal.

Mr. Ratelband received his BA (Hons.) from York University, where he graduated cum laude in 1992, and he received his LLB from the University of Toronto in 1996. He was called to the Ontario bar in 1998.
Biography

Erika Ringseis is an associate in our Labour and Employment Group in Calgary. With a Ph.D. in Industrial/Organizational psychology, Ms. Ringseis has a strong interest in workplace issues. Her practice focuses on all areas of labour and employment law, including grievance arbitrations, wrongful dismissals, workplace violence, discrimination and harassment issues, leave and employee relations issues, and privacy.

In addition to appearing before arbitration boards, mediation conferences and tribunals, and at various levels of courts in Alberta, Ms. Ringseis has taught and prepared a number of undergraduate and graduate courses, workshops, seminars and guest lectures on various employment, labour, psychology and legal topics including:

- “Employment Standards Code in Alberta,” “Human Rights” “Privacy Law” and “Employment Records” conferences prepared for Lorman Education Services, on an ongoing basis.
- “From the First Handshake to the Last Paycheque: Legal Aspects of Supervision”; workshop seminar prepared and presented to employers throughout Alberta with the Northern Lakes College, 2005 - 2006.

Ms. Ringseis is an active participant in the Calgary legal community as part of the executive team for the Canadian Bar Association Labour/Employment subsection. She is a member of the Canadian Bar Association and the Canadian Society for Industrial and Organization Psychology. She is also a member of the Association of Women Lawyers.

Ms. Ringseis is a volunteer lawyer with the Calgary Legal Guidance, Student Legal Assistance, and a volunteer judge for Jessup and McGillvray Law Moots.
McCarthy Tétrault is Canada’s premier law firm, with a significant presence in all major financial centres in Canada and London, U.K. With close to 700 lawyers, we regularly advise on many of the largest transactions and cases in Canada and around the world.

We are recognized as a top law firm by the leading international legal directories, including Martindale-Hubbell, Chambers Global: The World’s Leading Lawyers, The Guide to the Leading 500 Lawyers in Canada and the Canadian Legal Lexpert Directory.

In 2006, McCarthy Tétrault acted on 117 announced Canadian M&A transactions with a rank value of more than US $56 billion and a significant 25 per cent market share. In addition, we acted on 107 completed Canadian mergers and acquisitions representing a market share of 23 per cent.

With an international client base across a broad range of practice groups, we provide a wealth of Canadian, cross-border and international legal services. Our lawyers and agents are renowned for delivering timely, competitive and comprehensive strategies that enable our clients to achieve the best results.

Practice Groups

McCarthy Tétrault is organized into practice, industry and specialty groups with related business lines. As part of a full-service firm, our lawyers exchange knowledge and resources across practices in the interest of clients. Our integrated organizational structure enables us to serve our clients on the full spectrum of legal matters as no other firm can.

Bankruptcy and Restructuring

Our Bankruptcy and Restructuring Group is multi-jurisdictional in scope — we regularly act on major international matters in the U.S., Europe, and Central and South America. Members of our group are leading practitioners and frequently represent major financial institutions, large corporate creditors, debtors and insolvency professionals, such as court-appointed monitors, receivers and trustees. We have acted on many of the major Canadian and cross-border insolvencies, restructurings and workouts over the past 20 years.

Biotech/Life Sciences

Our Biotech/Life Sciences Group advises on financing and securities, licensing, intellectual property (patents, trade mark and copyright), strategic alliances, mergers and acquisitions, commercial agreements, corporate governance, litigation, regulatory, environmental, international trade and tax matters. We serve a diverse range of clients varying in size from start-up companies to biotech incubators and major multinational corporations. In addition, we advise biotechnology and pharmaceutical clients involved in the research and development of new technologies as well as manufacturers, and distributors of pharmaceuticals and medical devices.

Class Actions

Our Class Actions Group offers outstanding expertise and a demonstrated ability to assist national and international clients in class action litigation. We have represented clients in some of the most high-profile cases in Canada and in a broad cross-section of claims, including securities, consumer, product liability, environmental, competition, labour and tax proceedings. Members of the group are the authors of Defending Class Actions in Canada (2002, CCH), a concise and valuable resource for business executives and corporate counsel. In addition to being skilled courtroom litigators, we recognize that alternative procedures for the resolution of claims can be more fair, efficient and manageable. We have significant experience in the design and use of alternative dispute resolution programs for adjudication and resolution of multiple claims.
Communications

McCarthy Tétrault’s Communications Group advises on a wide range of matters, including telecommunications, broadcasting, Internet and e-commerce and copyright law. We provide counsel and assistance on all matters concerning the business and regulation of the telecommunications and broadcasting industry in Canada. In addition to our Canadian communications practice, McCarthy Tétrault has been involved in communications projects in North, South and Central America, Europe, the Middle East, Asia and Africa. Members of our team have worked on many of the major transactions and regulatory proceedings in the communications field in Canada over the last 25 years.

Competition

Our Competition Group creates effective, business-oriented solutions to sophisticated competition law issues. We advise national and international clients on all aspects of competition law, including mergers and acquisitions, joint ventures and strategic alliances, pricing practices, distribution and marketing, restrictive trade practices and trade association activities. We also help create effective compliance programs. Members of our Competition Group include experienced litigators who have been involved in many landmark cases and seasoned experts in other areas of competition law including mergers and acquisitions.

Corporate Finance and Mergers and Acquisitions (CFMA)

McCarthy Tétrault’s CFMA Group acts for national and international companies, as well as those interested in the activities of entities such as investment dealers, special committees and shareholders. We collaborate with our Financial Services and Technology, Communications and Intellectual Property Groups (TCIP) to provide all the business law needs of our clients. Our group is one of the leading Canadian firms in providing corporate finance advice ranging from private equity and venture capital financing, through private and public offerings to the public, including initial public offerings. Our other main activity is mergers, acquisitions and divestitures of private and public companies where we are consistently ranked at or near the top of Canadian deals, announced and completed.

Energy

Our Energy Group has considerable experience in the development, structuring and financing of energy-related projects, including cogeneration, hydroelectric and wind power projects, mergers and acquisitions, utility restructuring, privatization and energy procurement. We also advise on issues arising from the deregulation or re-regulation of electricity generation and distribution. Members of our group act for all levels of government, lenders, developers, equity investors, steam hosts, electricity and pipeline utilities, fuel suppliers, equipment suppliers and other project participants in Canada and abroad.

Environmental

McCarthy Tétrault’s Environmental Group advises on a broad spectrum of international, federal, provincial, local and municipal environmental regulation. We act on behalf of a wide range of corporate and government clients, including public and private corporations, municipalities, financial institutions, directors, officers, employees and shareholders. We are also at the forefront of emerging environmental issues, such as emissions trading. We work closely with environmental professionals to provide our clients with the most informed decisions regarding environmental matters, from litigation, corporate transactions, assessments and project development to day-to-day business operations.
Family Law

Our Family Law Group specializes in high-profile, complex family law cases and issues. We represent clients at every level of the courts, from local to the Supreme Court of Canada. Our team understands the intricacies of the various provincial statutes that make it crucial to receive local counsel. We have a broad range of experience related to complex property disputes, estate planning, divorce, separation agreements, resolution of spousal support, child support and custody and access. In addition, we assist in the planning of marriage and cohabitation agreements. Our lawyers create comprehensive legal strategies by working closely with other firm practitioners with related experience in tax and estates. We establish the structure and solutions, from strategic planning through legal guidance and direction.

Financial Services

Our Financial Services Group is a leading practice that advises on all aspects of Canadian financial services law. We regularly act on the largest and most complex project financing, securitization, transitions, syndicated credit facilities and secured lending offering. We collaborate with our CFMA and TCIP Groups to ensure seamless service for our clients. We are Canada’s leading law firm with respect to capital funding by banks and insurance companies. We also advise on a broad range of issues, including financial institutions regulation, payments systems, personal property security, electronic securities, foreign exchange clearing and settlement systems. In addition, we assist domestic and foreign financial services companies in their major acquisition and disposition transactions.

Health

McCarthy Tétrault’s Health Group advises on matters integral to health care institutions and pharmaceutical companies, including outsourcing agreements, research and development agreements, joint ventures, and public/private partnerships. We advise on issues pertaining to corporate governance, bylaws, reorganizations, liability, fundraising arrangements, supplier agreements, security enforcement and regulatory compliance. We also have extensive experience in acting for health-related institutions, such as goods and services providers, nursing homes, professional organizations, public and private foundations and charitable organizations. As a result of this experience, we are able to provide effective and efficient legal counsel to clients facing complicated issues that require a diverse range of legal and technical knowledge.

Hospitality

Our Hospitality Group is involved in all aspects of the development, financing, ownership and management of hotels, resorts, food service and other hospitality properties. Our group is multidisciplinary, with respected counsel in corporate and commercial law, real property, labour and employment, taxation, intellectual property, electronic commerce, litigation and insolvency. We represent clients in a wide range of transactions, bringing together innovative ideas and strategies for a variety of owners, managers, lenders, commercial developers, financial institutions, government agencies, individual investors, REITS and their advisors. Our lawyers regularly act for clients in cross-border and international transactions in order to capitalize on global markets.
Immigration

McCarthy Tétrault’s Immigration Group advises clients on a broad range of matters, such as acquiring temporary status, permanent residence, Canadian citizenship certificates and passports. We also advise on the employment, custom and tax issues that may arise in transfer situations, and assist clients in applying for government approval to overcome inadmissibility problems. We work with immigration authorities to ensure the most efficient processing possible for workers arriving from overseas. Our client base includes major entertainment and sports companies, leading Canadian companies in the fields of engineering, mining, high-tech and financial services.

Intellectual Property

Our Intellectual Property Group comprises lawyers and patent and trade-mark agents who advise on patent, trade-mark, copyright, design and trade secret matters. We provide counsel on intellectual property management and commercialization, registration and licensing, validity and infringement and litigious disputes involving intellectual property protection before the courts. In the patent field, our experience covers all major scientific and engineering disciplines, including biotechnology, chemistry, mechanical and electrical engineering, electronics and software. Our clients include national and international companies, public and private research and teaching institutions, hospitals, biotechnology and computer companies, and inventors and start-up technology enterprises.

International

McCarthy Tétrault’s International Group advises on a full range of international commerce matters and has extensive practices in specific industry areas, such as telecommunications and mining. We can communicate effectively in many of the world’s languages and we have a unique familiarity with the common and civil law legal systems that are integral to a national Canadian legal practice. We advise clients on matters, such as project finance, privatization, joint ventures, strategic alliances, licensing, trade regulation, dispute resolution, mergers and acquisitions and commercial arbitration. Our international clients include governments, governmental agencies, financial institutions, private lenders and investors.

Internet and e-Commerce

Our Internet and e-Commerce Group assists companies in developing innovative legal solutions to e-commerce and Internet legal issues, such as copyright, patent and trade-mark protection, domain names, privacy, electronic banking, electronic contracts, financing, intellectual property, taxation and compliance. Our team includes lawyers accomplished in all areas of e-commerce and Internet law, including tax, intellectual property, banking, mergers and acquisitions, corporate finance, securities, strategic alliances, real estate, insurance, litigation and communications. In dealing with Internet and e-commerce issues, our lawyers work with clients who provide products and services across the Internet, and those establishing e-commerce services over the Internet.

Labour and Employment

McCarthy Tétrault’s Labour and Employment Group is a dynamic, experienced group that works with both federal and provincial employers in the public and private sectors. The scope of our experience is as broad as the issues facing today’s employers, including traditional union/management relationships; human rights, wrongful dismissal, employment standards, corporate restructuring and executive compensation, and cutting edge issues such as privacy, novel work arrangements and managing technology in the workplace. We regularly appear before courts and administrative tribunals across
the country on matters such as defending on wrongful or unjust dismissal complaints, or representing employer interests before labour relations boards or human rights tribunals. We provide concise and practical legal advice, recognizing the ever-changing labour and employment regulatory structure. Whether our clients need general advice on statutory rights, employee or management training, or full defence representation, our group has the experience and resources to assist.

Litigation

Our Litigation Group has acted as counsel at all levels of the federal and provincial court systems, before regulatory and administrative tribunals and in commercial arbitrations. We have a diverse litigation practice that includes all aspects of civil, commercial, criminal, family, insurance, professional liability and international law litigation. In addition, we provide alternative dispute resolution strategies and handle complex class action claims. We advise and represent a large client base in corporate, banking, securities, bankruptcy, municipal, environmental, insurance, intellectual property, real estate and telecommunications law.

Mining

McCarthy Tétrault’s Mining Group advises on mining projects globally, on behalf of national and international clients with worldwide interests and businesses without borders. We have offices in the major national and international centres for mining finance and investment, including Vancouver, Calgary, Toronto, Montréal, Québec City and London, U.K. We advise a significant number of the world’s leading mining groups, as well as many junior and intermediate mining companies. We have experience in a number of key regions, including Africa, Asia, Eastern and Western Europe and Latin America, and we have strong relationships with local counsel in those regions.

Municipal

Our Municipal Group has broad experience in dealing with municipal and environmental authorities to obtain initial approval for projects through to financing, construction, leasing and sale. We regularly act for real estate lenders, especially in areas involving construction finance. In addition, we advise on bond issues, loan syndications, workouts in the real estate area and mortgage receivables financing on behalf of real estate developers and lenders. We also advise on planning approvals for all types of development proposals, property and business tax assessments, expropriation matters and emerging environmental law issues.

Privacy

McCarthy Tétrault’s Privacy Group advises on privacy compliance obligations in national and international jurisdictions. We are on top of the latest judicial and policy changes regarding the use and control of data in the public, private and not-for-profit sectors. Using our comprehensive knowledge base, we work with clients from the initial assessment phases of their practices and policies through their adjustments to ensure compliance with industry standards and provincial, federal and international regulations. We also advise clients regarding requests, complaints, regulatory interventions and court actions related to privacy matters. We serve clients in all areas of business, including banking, insurance, manufacturing, the pharmaceutical industry, information technology providers, municipalities and educational and medical institutions.

Real Property

Our Real Property Group has significant experience in all types of industrial and commercial real estate transactions, including development, financing, securitization and public-private joint ventures. We handle a variety of properties, including retail, industrial, commercial, recreational, hospitality, utilities and health care.
Securities Trading and Adviser Regulation (STAR)

McCarthy Tétrault’s STAR Group provides domestic and foreign capital market participants with a comprehensive understanding of the regulatory requirements governing the conduct of their businesses, and the offering of their financial products and services, in Canada. We advise on the regulatory framework which governs the trading of securities, and the offering of investment counselling and portfolio management services in Canada, as well as regulatory requirements that should be considered and addressed when developing new products and services for Canadian residents. We also assist clients on transactions involving the sale, transfer, restructuring or merger of their businesses, products and services, and with the development of strategies in response to compliance audits and inquiries, investigations, enforcement proceedings and civil actions.

Tax

Our Tax Group advises on all aspects of Canadian taxation, including corporate, commodity, sales and use, international trade, customs, estate planning and pensions and employee benefits matters. We have considerable experience negotiating and managing all stages of the tax dispute resolution process, from the initial audit by the Canada Revenue Agency (CRA) to litigation before the courts. We also assist clients in the preparation of briefs seeking legislative amendments to Canada’s tax laws.

Tax Dispute Resolution

McCarthy Tétrault’s Tax Dispute Resolution Group advises on all levels of the tax dispute process, from the audit and pre-assessment stage through to the appeal and litigation process. The group is renowned for its exceptional experience in tax law and litigation, with a remarkable record of precedent-setting tax decisions to its credit.

Technology

Our Technology Group is distinguished by a combination of legal and technical experience in various legal areas, including e-commerce, corporate finance, mergers and acquisitions, licensing, joint ventures, outsourcing, strategic alliances, intellectual property, employment, telecommunications, litigation, finance and taxation. Working together with lawyers from our Financial Services and CFMA Groups, we provide counsel to a diverse client base, from start-up enterprises to leading technology corporations and investment companies. Our lawyers provide effective, innovative and flexible legal services to a broad spectrum of clients, such as software developers, Internet companies, new media publishers, outsourcing services suppliers and buyers, hardware manufacturers, financial intermediaries, universities and governments.

Telecommunications

McCarthy Tétrault’s Telecommunications Group provides advice and representation on regulatory, commercial and financial aspects of the telecommunications business worldwide. We have worked on telecommunications projects in more than 25 countries in North, South and Central America, Europe, the Middle East, Asia and Africa. We provide a broad range of legal and consulting services to telecommunications carriers and users, regulatory agencies, governments, international financial institutions, new service providers, investment banks, telecommunications equipment and systems suppliers and contractors. In recent years, we have worked on a wide range of matters, such as regulatory and policy issues, mergers and acquisitions, financing, privatization, licensing, joint ventures, competition issues, Internet and e-commerce, interconnection and outsourcing.
Trade Law

Our Trade Law Group advises on a wide range of measures concerning cross-border trade in goods, services, technology and intellectual property, including customs and tariff laws, import, export and transaction controls, economic sanctions and trade remedies. We have been involved in most of the major anti-dumping and countervailing cases heard in Canada over the past three decades, acting for domestic producers, importers, exporters and end-users of subject goods. In addition, we have considerable experience advising on the full range of customs issues that arise on the importation of goods into Canada, including customs valuation, transfer pricing, tariff classification, rules of origin, the marking of imported goods, duty remissions and drawbacks and seizures.

Trusts and Estates

McCarthy Tétrault’s Trusts and Estates Group provides comprehensive advice and advocacy on the full spectrum of trust and estate matters, including tax planning, wills, trusts, charitable organizations, powers of attorney, incapacity planning, contentious proceedings and estate administration and accounting. Our comprehensive estate plans and trusts facilitate the accumulation, management and preservation of wealth, and the orderly devolution of assets to subsequent generations. We are engaged in every stage of the planning process and work seamlessly with other members of the firm to deliver the best representation and advice from the top talent in all areas of the law. This enables us to best advise our clients on meeting their goals, such as tax minimization and wealth preservation.

Our Knowledge Management System

Law firms throughout the world are now being challenged as never before to better manage their collective knowledge and expertise to serve their clients. To address this we have developed an electronic Knowledge Management system that captures and retains existing firm-wide knowledge and gives our lawyers access to up to the minute legal developments. The system also enables our lawyers to leverage the wealth of knowledge in the firm to provide quality service to our clients in a timely and efficient manner.

McCarthy Tétrault’s Knowledge Management system is supported by full-time knowledge management lawyers who ensure the accuracy and timeliness of the content. With this electronic matrix of skill, we can quickly put in place the right team of experts to meet the complex needs of our clients.

Contact Us

To learn more about what Canada’s premier law firm can do for you, please contact any of our Regional Managing Partners, or visit us at mccarthy.ca.
# Firm Rankings

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<tr>
<th>PUBLICATION</th>
<th>MCCARTHY TÉTRAULT RANKINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomson Financial and Bloomberg Financial</td>
<td>• McCarthy Tétrault is ranked number one in the 2007 Canadian M&amp;A league tables for the highest value of completed deals.</td>
</tr>
<tr>
<td>Chambers Global: The World’s Leading Lawyers</td>
<td>• In the 2008 edition, McCarthy Tétrault is recognized as Canada’s leading business and litigation law firm.</td>
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| International Financial Law Review (IFLR) 1000   | • Acknowledges McCarthy Tétrault as having an “extraordinarily strong” financial services group.”  
• Cited as “having played strategic roles in many of the most prestigious mergers and acquisitions in the past 18 months”  
• In the 2008 edition, McCarthy Tétrault is one of the leading firms to be recommended in Canadian lending and regulatory advice.  
• In the 2008 edition McCarthy Tétrault is recognized as being one of the leading firms in Project Finance. |
| Canadian Legal Lexpert Directory                 | • More lawyers listed than any other firm each year since the directory began publication.  
• In 2007, 121 McCarthy Tétrault lawyers were recommended in 137 categories - more than any other firm both currently and since the inception of the guide.  
• In the 2007 edition, McCarthy Tétrault was named as a leading firm in Litigation. |
| International Tax Review                         | • McCarthy Tétrault was one of only 6 law firms acknowledged as having the best global brand in Tax.  
• McCarthy Tétrault is ranked as a leading firm for Tax Planning in Canada.                                                                                                                                                     |
Labour and Employment

Hands on support.
Providing real solutions in labour and employment matters.

Our objective advice in complex labour and employment legal issues strengthens your position in the workplace. Creating secure human resource strategies, we are with you every step of the way.

Increased globalization and competition in the new economy require efficient management of human resources and labour relations. McCarthy Tétrault’s Labour and Employment Group has extensive experience in all aspects of labour and employment law at the provincial, federal and international levels.

As part of the nation’s premier law firm, we are committed to providing the best possible service and resources to our clients. With offices across Canada, our firm structure complements the nationwide business activities of many of our clients, enabling us to manage their needs across the country through the strength of a single partnership.

McCarthy Tétrault’s Labour and Employment Group includes lawyers who advise and act as counsel with respect to all aspects of labour relations and employment law. For unionized employers, our practitioners assist in the negotiation of collective agreements and provide representation in labour arbitrations. At the same time, we help clients avoid workplace disputes, fines and litigation. We provide counsel on union certification proceedings, unfair labour practice charges and other union disputes.

For union and non-union groups alike, we advise on corporate reorganizations, employment standards, human rights, employment equity, pay equity, pensions and benefits, workers’ compensation and occupational health and safety. In addition, we handle executive employment matters, such as employment contracts, change-of-control agreements and severance arrangements. Our group regularly advises on current issues such as the Internet in the workplace, novel working relationships and the latest human rights rulings. This enables us to provide the practical, knowledgeable and immediate legal assistance required for your organization to face new challenges in the workplace. Members of our team include litigators with considerable experience in labour and employment related matters.

Our lawyers are skilled in all aspects of business — from the front line to the bottom line. As provincial and federal laws and court decisions affect employment relations more and more, we constantly monitor new developments. Featuring some of the leading legal talents in the country, we are at the forefront of new developments in labour relations, employment policies, regulations and rulings. According to the Canadian Legal Lexpert Directory and Guide to the Leading 500 Lawyers in Canada, our labour and employment lawyers have a reputation for world-class legal experience.

Our Clients

We routinely advise private and public sector employers on compliance with federal and provincial employment regulations. Our labour clients cover a broad spectrum of economic activity, including financial services, manufacturing and technology as well as public sector agencies, such as municipalities, universities and school boards.

How We Can Help

McCarthy Tétrault’s Labour and Employment Group provides knowledgeable and immediate legal assistance in all areas of labour relations, employment law and related litigation.
As a result of the size and the focus of our practice, we have specialists in all areas related to labour and employment law, including:

Alternative Dispute Resolution (ADR)

Our labour and employment lawyers advise clients with respect to alternatives to litigation, including mediation and arbitration. We help develop ADR strategies that can be implemented before claims are filed. In addition, we draft ADR provisions in contracts, assist clients in designing ADR procedures and appear as counsel at mediations and arbitrations. Our lawyers recognize the special needs and circumstances of each client. We formulate and implement cost-saving ADR programs to resolve claims without resorting to expensive litigation. When litigation is unavoidable, we can provide the expertise of some of the country’s leading litigators.

Collective Agreement Bargaining

McCarthy Tétrault’s Labour and Employment Group has extensive experience in acting for employers in collective bargaining. This includes acting as management’s representative at the bargaining table, drafting proposals, developing negotiation strategies, advising on collective agreement language and achieving timely settlements. When necessary, our lawyers can provide advice and prepare clients for strikes and picketing and act on management’s behalf before labour relations boards and courts, with respect to illegal strike and picketing activity.

Disability Management

Keeping employees healthy and productive and reducing the length of disabilities can lower your business’s disability costs significantly. Our lawyers take a comprehensive approach to the legal aspects of managing and accommodating disabilities in the workplace. We provide guidance to employers on the duty to accommodate and on disability management. Our team can advise on the structure of wellness and attendance management programs. We advise on how to integrate short and long-term disability coverage and accelerated return-to-work incentives.

Educational Programs and Seminars

Our Labour and Employment Group is very active in the corporate community, frequently being asked to provide educational programs and seminars. In addition, our practitioners regularly publish articles in a variety of legal and human resources journals and publications. We pride ourselves on staying on the leading edge of knowledge in all aspects of labour and employment law and human resource practices. Practical seminars regularly led by members of our team deal with issues such as workplace harassment, managing absenteeism, progressive discipline, human rights, the duty to accommodate, occupational health and safety and workers’ compensation.

Employment Standards

Our practitioners regularly advise clients in all areas of employment standards. This may include advice on the relationship between the employers’ obligations under relevant employment standards legislation, collective agreements and other statutes. In addition, we appear as counsel on behalf of employers before employment standards tribunals.
Grievance and Interest Arbitration

We regularly assist our clients in planning strategies, including training of supervisors, to avoid or resolve collective agreement disputes without resorting to arbitration. Where arbitration is necessary, our lawyers represent clients before arbitrators, boards of arbitration and tribunals at all levels. Our lawyers guide clients through each step of the grievance process. We believe in early involvement to help avoid litigation and minimize its impact on the daily operation and profitability of your business.

Human Rights Issues

The Labour and Employment Group has extensive experience in a wide variety of matters with respect to the development of human rights policies, including workplace harassment policies, internal human rights procedures and the duty to accommodate. We are regularly involved in reviewing organizational practices and policies of clients for conformity with human rights legislation. Preparing responses to complaints and representing clients at investigative conferences and throughout the investigatory process is an additional aspect of our service. Our lawyers act as counsel before human rights tribunals and boards of arbitration that deal with human rights issues.

Judicial Review and Appeals

We handle all levels of judicial review and appeal work before the courts.

Occupational Health and Safety

Members of the Labour and Employment Group work closely with clients to prevent health and safety disputes and to help ensure compliance with federal and provincial regulations. We represent clients in all areas of occupational health and safety law, including contractor responsibilities on construction sites, appeals from inspector’s orders, prosecutions, inquests, occupational health and safety audits, compliance policies and strategies and related litigation. Our lawyers are supported in these matters by our Environmental Group, which provides advice on environmental audits and compliance policies and strategies.

Pay Equity

Clients sometimes need to evaluate and redress gender-based pay discrimination in the workplace. Our lawyers advise on pay equity plans and find objective ways to determine whether there is a sound basis for pay equity complaints. We advise on how to define what constitutes “equal pay for work of equal value.” The Labour and Employment Group can help you understand the complexities of the various forms of federal and provincial legislation regarding pay equity.

Pensions and Benefits

McCarthy Tétrault also has lawyers with expertise in pensions, retirement plans and other benefits contracts. Members of our group advise clients on all aspects of pension and benefit matters, including tax implications. They can help establish and draft new pension and benefit plans or revise existing ones. Our lawyers also advise on corporate reorganizations and plant closures, acquisitions and dispositions, particularly with respect to the transfer of employees and pensions.

Our lawyers advise on pay equity plans and find objective ways to determine whether there is a sound basis for pay equity complaints.
Workplace Safety and Insurance

Our lawyers regularly represent clients with respect to all workplace safety and insurance matters. This includes representing employers as counsel before hearing officers and at appeal tribunal hearings.

Wrongful Dismissal and Employment Contracts

We regularly advise on employment contracts. This includes their interpretation and administration, termination of employment, settlement of cases, court litigation of wrongful dismissal cases and, where appropriate, alternative dispute resolution of wrongful dismissal cases. We have considerable experience in drafting contracts of employment, as well as executive compensation packages, employment policies and practices and termination letters.

McCarthy Tétrault’s Labour and Employment Group has the experience and expertise to assist you with all the complexities of labour and employment law that affect your business. This is our strength and we’ll give you hands-on support.
Privacy

Minding your business.
Privacy. It’s our business.

Our Privacy Group advises on privacy compliance obligations in national and international jurisdictions.

Our lawyers are on top of the latest judicial and policy changes regarding the use and control of data in the public, private and not-for-profit sectors. Since much of this legislation is driven from consumer concern, we advise clients on how to meet and exceed industry standards for personal information protection. We work with our multinational clients to address the specific challenge of complying with laws in various jurisdictions and implementing industry codes of conduct.

We are well-versed and widely-published on all aspects of privacy law. Recently, McCarthy Tétrault lawyers co-authored The Law of Privacy in Canada (Carswell), one of foremost publications on privacy law in Canada, and have contributed chapters on Canadian privacy law to Data Protection Laws of the World (Sweet and Maxwell).

Using our comprehensive knowledge base, we work with clients from the initial assessment phases of their practices and policies through their adjustments to ensure compliance with industry standards and provincial, federal and international regulations. We also advise clients regarding requests, complaints, regulatory interventions and court actions related to privacy matters.

Our Clients

Our client base of major corporate, governmental and not-for-profit organizations reflects the breadth of our group, comprised of some of the country’s most respected lawyers, working seamlessly across practice areas at Canada’s premier law firm.

We serve clients in all areas of business, including banking, insurance, manufacturing and pharmaceutical. We also represent information technology providers, municipalities, educational and medical institutions. Our clients are concerned about and aware of increased restrictions on the commercial use of data and their need to protect against unwarranted intrusions.

How We Can Help

We can help you build and maintain a cost-effective all-encompassing privacy programme for your firm, assessing existing conditions, developing policies and procedures, and helping you maintain a competitive edge by setting high standards for privacy policies.

We are ideally situated to provide practical advice on data transfer across borders, as well as matters such as website compliance, access rights, human resources systems, confidentiality agreements, privacy audits and requests for information. We can also keep you current on existing and emerging laws on privacy audits, credit reporting, government access to electronic records and other issues that may affect your organization.
Our lawyers tailor their services to meet the size and specific needs of your company, with an understanding of employee expectations. We work with diligence and focus to ensure best practices around issues of notice, consent, access rights and data security in a range of fields, such as:

- computer law;
- technology;
- financial services;
- intellectual property;
- health;
- labour and employment;
- business; and
- litigation.

In addition, our lawyers provide representation before arbitrators, government tribunals and the courts on privacy law matters.

McCarthy Tétrault’s Privacy Group works with you to ensure that you meet the needs of your organization and your clients. We provide the tools you need to excel in response to the changing nature of privacy law in the 21st century.
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Human Rights
You’re in the right hands. Ours.
McCarthy Tétrault: Your Partner in Human Rights

Human rights issues are serious concerns for today’s businesses. Allegations of human rights violations can damage a corporation’s hard-earned reputation for years to come. Human rights complaints that escalate to the Ontario Human Rights Tribunal or the civil courts can be extremely costly. And the time and energy spent in fighting human rights complaints can be both draining and disruptive.

Today’s individuals are not only aware of their human rights, but are increasingly sophisticated in the use of legal remedies to enforce them. That’s why Ontario’s businesses need to place their human rights issues in the hands of knowledgeable advisors. McCarthy Tétrault’s Human Rights lawyers have your business — and its human rights concerns — well in hand.

We have many years of experience litigating human rights issues, and have appeared before the Ontario Human Rights Tribunal and the courts, defending businesses against human rights complaints. One of our partners is also a part-time member of the Ontario Human Rights Tribunal, giving our group unique knowledge of the Tribunal’s practices and procedures. Whether your business operates in a unionized or non-unionized environment, we have the expertise required in order to resolve all of your human rights concerns.

Our human rights lawyers don’t just litigate human rights complaints. We take pride in assisting businesses, on an ongoing basis, in developing policies and practices.

We Defend a Wide Variety of Allegations

We advise our clients on human rights issues in all relevant areas, including the provision of services, goods and facilities, occupancy of accommodation, the right to contract and employment. We defend against all types of harassment and discrimination allegations, including race, sex, sexual orientation, age and disability.

McCarthy Tétrault’s Human Rights lawyers are a natural choice to manage your business’ human rights concerns, whether related to employment or not.

Clients Who Use Our Services

Our clients come from a variety of sectors and have a range of legal needs. We regularly advise businesses in the automotive, food and beverage, manufacturing, information technology consulting, pharmaceutical, property management and public sector industries, amongst others, in all matters pertaining to human rights. We:

- develop proactive policies and procedures for businesses;
- design and present human rights training seminars;
- advise employers regarding disability management;
- advise businesses regarding human rights in the arbitration context;
- represent businesses dealing with human rights complaints and allegations of human rights violations in the context of wrongful dismissal suits; and
- defend businesses against complaints at the Ontario Human Rights Commission.

Preventative Measures

Our human rights lawyers don’t just litigate human rights complaints. We take pride in assisting businesses, on an ongoing basis, in developing policies and practices. In the context of employment, for example, we help companies develop respect in the workplace policies to ensure that employees are knowledgeable and respectful of others’ human rights.
Through such measures, our clients enjoy a more cohesive workforce and face fewer complaints of human rights violations.

In addition to developing policies and practices targeted to issues of human rights, we also conduct on-site human rights training for our clients’ employees. Our on-site training sessions are considered an invaluable component in the toolkit of many of Ontario’s top businesses.

You Need Us Now More Than Ever

On December 4, 2006, the Ontario Government passed Bill 107, an Act to Amend the Human Rights Code, which enacts several changes to the Ontario Human Rights Code. Bill 107 radically changes the way in which human rights complaints are dealt with in Ontario, and is expected to significantly increase the volume of complaints filed with the Ontario Human Rights Tribunal.

Bill 107 has major implications for business, as it provides complainants with direct access to a hearing before the Tribunal and significantly increases the Tribunal’s powers regarding damages. It also allows complainants to sue in civil court for alleged human rights violations.

Although Bill 107 is not expected to come into force for some time, businesses in Ontario must act now to review and update existing human rights practices and policies, and to implement preventative measures.

Contact Us Now

With the recent passage of Bill 107, your business can’t afford to delay — call the McCarthy Tétrault Human Rights lawyers today — and get your business in the right hands.

Although Bill 107 is not expected to come into force for some time, businesses in Ontario must act now.
Immigration

Opening borders.
Providing direction through complex immigration law.

With the increasingly global economy, international companies need to be able to relocate employees wherever their skills are required. Canadian employers may need to obtain the services of foreign nationals with qualifications not easily available within Canada’s labour force. Foreign investors may need to obtain authorization to work in Canada.

McCarthy Tétrault’s Immigration Group helps companies and individuals by developing effective strategies that take into consideration the legal aspects as well as the personal nature of migration.

McCarthy Tétrault is the largest full-service law firm in Canada. With close to 700 lawyers in offices across Canada as well as London, U.K., McCarthy Tétrault is recognized as a leader in the Canadian legal profession. Our Immigration Group has considerable experience providing advice on a wide range of business immigration matters. Members of the group include practitioners with extensive knowledge of immigration-related matters as well as individuals who were formerly with Immigration Canada.

We assist clients in acquiring temporary status as well as securing and maintaining Canadian permanent residence, Canadian citizenship and obtaining Canadian citizenship certificates and passports. Members of the group advise on the fiscal, custom and tax issues that may arise in transfer situations. We assist clients in applying for government approval to overcome inadmissibility problems based on health or criminal issues.

McCarthy Tétrault’s Immigration Group works with immigration authorities to ensure the most efficient processing possible for workers arriving from overseas. Working in collaboration with immigration officials, we will propose arrangements that will meet the expectations of the governments involved.

Our Clients

Our Immigration Group’s client base includes major entertainment and sports companies, leading Canadian companies in the fields of engineering, mining, high tech and financial services.

How We Can Help

Our practice offers a wealth of experience in all aspects of immigration law and related matters, including:

- Obtaining and extending employment authorizations pursuant to the North American Free Trade Agreement (NAFTA), the General Agreement on Trade in Services (GATS) and the general regulations under the Immigration Act.
- Assisting clients in obtaining Human Resources and Social Development Canada (HRSDC) employment validations.
- Applying for employment authorizations, student authorizations and visitor records for the dependants of temporary foreign workers.
• Applying for permanent residence.
• Applying for Canadian citizenship.
• Advising on and assisting with immigration procedures in the province of Québec.
• Providing advice respecting special provincial programs in various provinces.
• Advising Canadian companies on requirements when hiring a foreign national.
• Facilitating the entry of foreign nationals into Canada to market, negotiate, purchase and sell goods and services to Canadian corporations and individuals.
• Advising on the legal aspects of the transfer of employees as well as the practical considerations of employment authorizations for spouses, student authorizations for spouses and/or children, schooling, housing and facilitating the adaptation of new employees to a new locale.
• Assisting transferred employees with family relocation, including registration of their children in schools.
• Advising on customs and sales tax issues arising in transfer situations, including personal property and pets.
• Advising on income tax issues, including sophisticated tax planning both before and after immigration to Canada.
• Advising on business aspects of permanent resident applications for entrepreneurs and investors.

We advise on income tax issues, including sophisticated tax planning both before and after immigration to Canada.
The Year in Review

Michael Ford & Erika Ringseis

Introduction

Alberta is the proud owner of one of the hottest economies in the global market. With the growing economy comes many interesting and important labour and employment law issues. As discussed in greater detail below, courts on all levels and tribunals within the busy province have examined cases in the areas of dismissal, privacy, occupational health and safety and human rights. We provide a brief review of the top employment-related decisions in Alberta, as well as relevant and interesting decisions arising out of other jurisdictions, and the Supreme Court.

The Employment Relationship

Employee vs. Independent Contractor

A non-competition clause between the parties will assist in determinations as to whether an exclusive employment relationship was intended. In this case, the individual was subject to some measure of control, could not sub-contract, had no chance of profit or risk of loss, used the employer’s equipment and had a non-competition clause in the contract. All of these factors pointed to an employment relationship.

If the terms of employment are framed in terms of offering a party a job that would take them through their anticipated retirement, this factor will favour the finding of an employee designation. The employer failed to prove that this was an “off-hand remark” instead of a negotiated term.

Wages and Benefits

Where evidence clearly demonstrates a mutual agreement amongst entrepreneurs in a business to not take a salary for their services, no agreement entitling them to compensation will be inferred by the Court.

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1 The authors are grateful for the assistance of Nick Leeson and Maeghan Toews in the drafting of this paper.
If the structure of an employee’s bonus package is tied to the performance of subsidiaries of an employer, those subsidiaries will be equally liable for their payment.5

Adoptive parents are not entitled to maternity leave benefits. The Court has held that there is a statutory distinction in favour of pregnant women for the allowance of maternity benefits that is not equally extended to adoptive parents.6 Adoptive parents are deemed to be adequately granted reasonable pay for leave via parental benefits.

**Employer Liabilities**

A student employed by a car dealership accidently accelerated in reverse while moving a car on the lot, smashing into two other vehicles. The Defendant employer sued for the damages (after dismissing the employee). The Court dismissed the case and noted that there is an implied agreement between the parties that the employer bear the risk of any damage that might be caused by carelessness of an employee in the course of their employment.7

An employer will not be held vicariously liable for employee’s acts that are committed outside the scope of their employment and for their own personal gain.8

Remember, however, that employers are liable for employee’s acts committed within the scope of their employment. A recent example was evident in a human rights complaint: the management of a night club was held to be ultimately responsible for the actions of their staff, who discriminated against the complainants on the basis of race, colour, pace of origin and religious beliefs when they were denied entry to the club.9

**Occupational Health & Safety**

It is statutorily mandated under the *Occupational Health and Safety Act* that employers implement proper safeguards for ensuring worker safety. Where an employer fails or neglects to establish clear, explicable rules to train and supervise its staff adequately, liability may be incurred.10 Further, an employer may not rely upon an employee’s failure to follow company procedures and protocols as a means of discharging its obligations.11

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Where a worker is injured in the course of his or her employment and deficiencies of workplace safety standards are alleged, an employer will be required to provide documents which inform any reference to the mechanical specifications alleged in the charges. Further, an employer will be required to particularize the specific persons working for it who were deemed to have made errors.\(^\text{12}\)

A defendant employer was fined $100,000, plus a 15% provincial surcharge, where an employee was severely electrocuted as a result of the employer’s failure to eliminate or control a well-known hazard. Neither the remorsefulness of the employer or their previously unblemished worker safety record was found to be sufficient mitigation to alleviate them from liability.\(^\text{13}\) Likewise, the Court held an employer liable for substantial damages, including a $195,000 payment to be made to the Manufacturers Health and Safety Association, where an employee was killed in an incident involving high-risk work and preventative measures were found to be insufficient.\(^\text{14}\) The employer was liable despite the likely carelessness of the employee, which was revealed in an autopsy report showing the use of a cannabis substance near the time of the accident.

The Supreme Court has stated that an employee’s expression of concern over their safety without explicit refusal to work does not engage the statutory provision protecting a worker from discriminatory action.\(^\text{15}\)

**Workers’ Compensation**

A farmer driving a tractor trailer was killed while in the process of hauling a load of hay. The *Workers’ Compensation Act* is not applicable to farming operations. However, the Court held that it is the activity that is the key to determining whether or not the Act is applicable, not the nature of the product that is being transported; thus, the Act was found to apply.\(^\text{16}\)

The Board found that where an employee begins work-related travel, the coverage of the Worker Compensation Act begins and continues throughout the entire trip; accordingly, travel in the course of employment does not end with the completion of the task. For employers, it is important to note that the Board held that it was immaterial whether or not there was evidence as to whether the employee knew he was carrying out work-related purposes in their travel: that which governs is the knowledge of the employer, not that of the employee. Thus, the relevant inquiry is one of whether or not the

\(^{12}\) R. v. IGL Canada (Western) Ltd., (2007) CarswellAlta 1277, ABPC 268  
\(^{13}\) R. v. Carmacks Enterprises Ltd., (2007) ABPC 348, CarswellAlta 1772  
employee was engaged in the performance of a work-related errand at the time of their injury, and whether his vehicle was indispensable to the completion of that task. 17

The Board has further confirmed that an employment relationship is not a prerequisite for deeming someone a worker under the Act. More specifically, an Albertan university student was held to be a “worker” for the purposes of the Act, barring the pursuit of legal action against a university for injuries incurred when a lighting fixture fell on her while reading in a university library. 18

A worker’s claim to the Workers Compensation Board for a brain injury was denied, and the worker then complained to the Commission that he was discriminated against on the basis of mental disability. Upon judicial review, the Court decided that the Workers Compensation Act gave the Board exclusive jurisdiction over all issues arising from the Act, so the Commission had no jurisdiction over the dispute. 19

**Human Rights**

**Proving Disability**

A nurse’s claim that a disability made her work schedule difficult and that her employer would not accommodate her disability was rejected on the grounds that she did not prove the existence of a disability. The nurse did not provide all information requested, and what she did provide just indicated that she had numerous unspecified medical problems. The union’s application for judicial review was dismissed, as the Board’s decision used the correct legal definition of the term “disability” and did not improperly shift the burden of proving the disability to the employee. 20

A seasonal employee complained he was discriminated against on the basis of physical disability when he was not re-hired after developing cancer and undergoing treatment. The burden was on the Complainant to demonstrate *prima facie* discrimination and the question of whether his cancer amounted to a disability was discussed by the Panel. The Panel stated that cancer does not qualify as an on-going disability after achieving successful treatment or remission of the disease, and when determining whether a given illness amounts to a disability, certain factors need to be taken into account, including the severity, permanence and persistence of the condition. Because the employer had a policy that an employee would not be recommended for re-hire after four absences, as well as the fact that the employee’s cancer was in remission when he returned to work and he did not inform his employer of any restrictions associated with his cancer, the Panel found that the Complainant had

19 Alberta (Workers Compensation Board) v. W. (D.) 2007 ABQB 585
20 U.N.A., Local 33 v. Capital Health Authority 2008 ABQB 126
not demonstrated that he was discriminated against in his employment. This decision has been appealed to the Court of Queen’s Bench.  

**Accommodation**

After returning to work from disability leave, a police officer proposed to work in a new position that would be less straining to his back injury. After three months of working the new position, he was told he could no longer be accommodated in that way. The Human Rights Commission decided against the officer, and on appeal the Commission’s decision was deemed rational, as the officer’s termination of employment was based on medical evidence that he could not perform his duties as a police officer.

A medical secretary who took a leave of absence due to a nervous breakdown, and was subsequently involved in a car accident just prior to the end of her rehabilitation period, was terminated from her employment due to her prolonged absence. This case went to the Supreme Court of Canada, who ultimately decided in favour of the hospital, finding that a duty to accommodate exists when an employer applies a standard that is prejudicial to an individual employee based on certain qualities that are protected in human rights legislation. The employer must establish that the purpose of the standard was rationally connected to the performance of the job, that the standard was adopted in good faith belief that it was needed for the fulfilment of that purpose and that the standard was reasonably necessary. The relevant clause at issue in this case stated that employees would lose their employment after the 36th month of absence due to illness, and the Court concluded that it was correct to include all the events building up to the termination in the analysis.

In a Saskatchewan case involving an employee who was offered a position in a different department with a loss of seniority after developing tendonitis, the Arbitration Board held that the employer met its duty to accommodate the employee by transferring her with no need to provide benefits based on her seniority. On appeal, the Arbitration Board’s decision was affirmed, as the impact of transferring the employee with her seniority intact may have resulted in a disruption in the workplace affecting employee morale and the conduct of the employer’s business, which could amount to undue hardship. Leave to appeal the decision was recently denied.

In another case, an employee argued his employer, the City, failed to accommodate his physical disability. The City’s accommodation policy did not provide for transfers to a position that would be considered a promotion, and other positions were not offered to the employee because he lacked the physical capacity to safely do the work. The complaint was dismissed by the Panel, and they found that

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21 Michael David Berridge v. City of Calgary (Alberta Human Rights Panel, September 5, 2007)
22 Corbiere v. Wikwemikong Tribal Police Services Board 2007 FCA 97
24 U.F.C.W., Local 1400 v. Westfair Foods Ltd. 289 Sask. R. 274
the City had actually accommodated the Complainant’s disability to the point of undue hardship. This Panel decision has been appealed to the Court of Queen’s Bench.  

An Alberta Human Rights Panel found in favour of a Complainant who alleged discrimination on the basis of mental illness against his employer as a factor in his termination. The employer claimed that the Complainant was terminated due to a poor attitude and difficulty getting along with his co-workers, which are traits consistent with the symptoms of the Complainant’s illness. The Panel found that the employer had not accommodated the Complainant’s disability to the point of undue hardship.

Duress

A Complainant signed a severance agreement, but felt that he did so under emotional and financial duress. The agreement was found to be valid and enforceable, as the Complainant did not meet the burden set out in Chow v. Mobil Oil. The following factors were taken into consideration by the Panel: the language of the release, the existence of independent legal advice, duress, undue influence, unconscionable conduct, and the Complainant’s knowledge of his human rights, as well as any other consideration including lack of capacity, timing, mutual mistake, forgery or fraud.

Alcohol and Drug Testing

Pre-employment Testing

The Chiasson v. Kellogg Brown & Root (Chiasson) decision we discussed on last year was upheld by the Alberta Court of Appeal. The case involved an admitted casual user of marijuana being terminated from his employment after failing a pre-employment drug and alcohol test. Mr. Chiasson was hired by KBR on the condition that he pass a drug and alcohol test. After failing the test, Mr. Chiasson admitted smoking marijuana five days before he was tested. Chiasson was subsequently fired.

The Court confirmed that Mr. Chiasson was a self-admitted recreational user of marijuana but was not suffering from a drug addiction. The Court also noted that Mr. Chiasson’s termination was not based on the perception by the employer that he was drug-addicted. Discrimination based upon perceptions can be a violation of human rights legislation. Because there was no perception by the employer that Mr. Chiasson was drug-addicted, there was no basis to assert discrimination on the basis of a perceived disability.

27 Brad McMow v. Coverall Pipeline Construction Ltd., (November 20, 2007)
This case will help employers to argue:

- that pre-hiring alcohol and drug tests for safety-sensitive positions are justified in appropriate cases; and
- a recreational alcohol/drug user is not protected under human rights legislation if he or she tests positive in a pre-hiring drug test.

Remember though, a job applicant or employee who is legitimately addicted must be accommodated.

**Site Access Testing**

Another Alberta case has upheld site access drug testing instituted by a contractor to meet its customer’s alcohol and drug use policy. The policy was valid because it was universal, the worksite was dangerous and hazardous, and there were no other means to deal with the safety risk created by alcohol or drug use. The Arbitration Panel noted evidence that:

- drug testing after six safety incidents had resulted in four positive tests;
- peer and supervisory observation of impairment was unreliable;
- introduction of testing had led to significant improvements in safety on other construction sites; and
- the testing was used in conjunction with an assessment and counselling.\(^{28}\)

After failing a pre-access drug and alcohol test, the Complainant in another case was asked to attend an assessment to determine the extent of the Complainant’s drug use. After refusing to attend the assessment, the Complainant’s employment was terminated and he complained of discrimination. The Panel dismissed the complaint, holding that the Complainant was not discriminated against (he denied having a drug dependency and thus did not have a physical disability under human rights regimes) and that his rejection of the offer of assessment was what led to his termination.\(^{29}\)

**Random Testing**

Meanwhile, an Airport Authority had less success in upholding a policy calling for alcohol and drug testing on both a targeted and random basis. The employer had the right to introduce such a policy because of the safety sensitive nature of the workplace and the need to protect the public and other employees. However, the policy provisions calling for random drug testing by urinalysis were ordered to

\(^{28}\) Bantrell Constructors Co., [2007] A.G.A.A. No. 33 (Smith and Armstrong; Johnson dissenting)

\(^{29}\) Donald Luka v. Lockerbie & Hole Inc. and Syncrude Canada Ltd., (Alberta Human Rights Panel, February 15, 2008)
be removed. They constituted an excessive invasion of privacy when considered against the fact that they cannot measure for present impairment, but only past use.\(^{30}\)

**Refusal to Test**

In a case where an employee was laid off a few days after refusing to submit to drug and alcohol testing, the Human Rights Panel concluded that there was no evidence linking the employee’s refusal to test with the termination of employment. Because the drug and alcohol policy at the centre of the complaint was never completely implemented by the employer and was not the reason behind the employee’s lay off, the Panel did not have to decide whether the drug and alcohol policy was justifiable under ss. 7(3) and 11 of the *Human Rights, Citizenship and Multiculturalism Act*. On appeal, the Court concluded that there was no reviewable error in the Panel’s decision.\(^{31}\)

**Discrimination in Hiring**

After receiving two complaints from an applicant for a management training position with the federal government that he was discriminated against, the Canadian Human Rights Commission informed the applicant that the commission would recommend that the complaint not be dealt with because more than one year had elapsed between the date of the event and the filing of the last complaint. The subsequent application for judicial review was denied and the Federal Court of Appeal stated that the commission provided adequate reasons when it refused to extend the time for an applicant to file a second complaint.\(^{32}\)

Leave to appeal was recently denied to Canada Post workers who allege that they were discriminated against in the hiring of permanent positions, based on their age. The Commission determined that the complaints should be dismissed because there was a *bona fide* occupational requirement pursuant to s. 15 of the *Canadian Human Rights Act*. In their application for judicial review, the workers filed affidavits, parts of which were stricken because they contained hearsay, opinion and argument.\(^{33}\) The same one year requirement exists for Alberta Human Rights complaints.

**Jokes in the Workplace**

A joking and teasing atmosphere was found not to diminish the discriminatory effect of comments and conduct based on race, colour and ancestry in the workplace. The employer’s failure to act while the employees were engaging in this conduct was found to contribute to the poisoned workplace

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\(^{30}\) Greater Toronto Airports Authority, [2007] C.L.A.D. No. 243 (Devlin)

\(^{31}\) Grey v. Albian Sands Energy Inc. 2007 ABQB 466

\(^{32}\) Cohen v. Canada (Attorney General) 2007 FCA 190

\(^{33}\) Bastide c. Canada (Procureur general) [2006] 2 F.C.R. 637
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atmosphere. Even though there was a policy document in place regarding issues of discriminatory conduct, the Panel did not regard the document as a “living document.”

Human Rights Remedies

An employee who was discriminated against in setting the amount of her salary, based on sex, was entitled to compensation for her lost income and expenses resulting from the discriminatory conduct of her employer, as well as solicitor-client costs.

After their awards were varied on appeal, two teachers who filed complaints with the Human Rights and Citizenship Commission alleging discrimination by the Board of Education based on gender, were granted leave to appeal the decision of the Chambers Judge with respect to the calculation of pre-judgment interest.

Privacy

Improper Disclosure of Information

An Organization was recently found to have contravened sections 7 and 19 of the Personal Information Protection Act (PIPA) when an employee of the Organization e-mailed a copy of the Complainant’s termination letter to a prospective employee. An order was made for the Organization to cease disclosing the Complainant’s personal information contrary to PIPA.

The Adjudicator in a recent case found that the publication of the Complainants’ names and places of work by the Alberta Teachers’ Association in a news article was contrary to sections 7 and 19 of PIPA.

The disclosure of an alleged theft at a store committed by the Complainant to the Complainant’s employer, resulting in the termination of the Complainant’s employment, was found to be a violation of s. 7 of PIPA. It was further held that s. 7 of PIPA did not violate the s. 2(b) Charter rights of the store, allowing for freedom of expression.

Requesting Access to Information

The Adjudicator found that the Organization that was requested by the Applicant to provide all of the personal information it possessed about him, made every reasonable effort to locate the personal

36 Jahelka v. Alberta (Human Rights & Citizenship Commission) 2008 ABCA 82
37 Alberta Office of the Information and Privacy Commissioner (February 14, 2008), Order P2007-005, Point Centric Inc.
38 Alberta Office of the Information and Privacy Commissioner (March 13, 2008), Order P2007-014, Alberta Teachers’ Association
39 Canada Safeway Ltd. v. Shineton 2007 ABQB 773
information and assist the Applicant as accurately and completely as reasonably possible, as required by section 27 of PIPA. However, the six months it took for the Organization to provide the information exceeded the 45-day time limit set out in section 28(1) of the Act.40

In a case before the Office of the Privacy Commissioner of Canada, a previous client of a law firm requested the personal information the firm held about him, and it later came to light that the firm had lost the file. The Assistant Privacy Commissioner found this loss to be unacceptable and recommended that the firm implement privacy policies and procedures as well as third parties working on behalf of the firm.41

**Time-line for Inquiry by Commissioner**

Section 50(5) of PIPA, regarding the timeline in which the Commissioner must conduct an inquiry, was found to be a mandatory section, resulting in the loss of jurisdiction of the Commissioner in a case involving pre-employment alcohol and drug testing for potential employees. It was further held that finding s. 50(5) to be mandatory was not contrary to the public interest.42

In a more recent case, an Organization raised an objection to the jurisdiction of the adjudicator on the basis that the timelines set out in section 50(5) of PIPA had not been met. However, the Adjudicator found that the timelines had been met and that even if they had not, in the circumstances of that case the legislature would not have intended that a loss of jurisdiction should result because that would leave the Complainants with no remedy for the breach of their privacy rights.43

**Classification of “Personal Content”**

The Federal Court of Appeal recently held that the Applications Judge in a case regarding applications for tapes and transcripts of air traffic control communications erred in finding that the sole purpose of the communications was to evaluate job performance. The Court found that the possibility of such eventual use could not transform the communications into personal information, when the information had no personal content.44

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41 Office of the Privacy Commissioner of Canada, Commissioner’s Findings, PIPEDA Case Summary #377
43 Alberta Office of the Information and Privacy Commissioner (March 31, 2008), Order P2007-010, United Food and Commercial Workers, Local 401
44 *Canada (Information Commissioner) v. Canadian Transportation Accident Investigation & Safety Board*, [2007] 1 F.C.R. 203
The Office of the Privacy Commissioner of Canada worked with an airline company to gain a fuller understanding of the definition of “personal information” when a customer became disgruntled at the airline’s response to his request for the personal information they had about him.45

Surveillance

In another case that came before the Office of the Privacy Commissioner of Canada, an employee’s washroom visits were monitored by his employer without his knowledge or consent. The employer then used this information for disciplinary purposes. The Assistant Privacy Commissioner found that the employer could not rely on any exceptions to consent found in the Personal Information Protection and Electronic Documents Act (PIPEDA), as the employer lacked evidentiary support for their belief that there had been a breach of an agreement by the employee, and they had not exhausted all of the less invasive measures.46

Remedies and Damages

In assessing general and punitive damages against an employer, the Court has made it clear that obligations of good faith and equitable treatment do not exist outside the context of dismissal.47 Tort damages may arise, however.

A stock option grant will not be read into a severance agreement that addresses only “annual salary.” If parties wish to include stock options in this manner it must be explicitly stated in the employment contract.48

The Court has held that, where the failure to disclose was inadvertent and the employee was in a position to access the information themselves, an employer’s failure to provide an employee with complete particulars of their stock option plan will not constitute a breach of its duty of full and fair disclosure.49

45 Office of the Privacy Commissioner of Canada, Commissioner’s Findings, PIPEDA Case Summary #370
46 Office of the Privacy Commissioner of Canada, Commissioner’s Findings, PIPEDA Case Summary #379
48 Garner v. Devon Canada Corp., (2007) 63 C.C.P.B. 1, CarswellAlta 508
Termination of Employment

What Constitutes “Just Cause”

The termination of non-union employees for just cause remains difficult. For example, one time errors in judgment, short of misconduct or dishonesty, are not sufficient to result in reason for dismissal. The Court emphasized this point recently where Wallace Damages for bad faith were awarded to an employee who was summarily dismissed by her employer for assisting a former employee in entering the employer’s premises outside of business hours.50

An employer cannot rely upon an employee’s lateness or tardiness as constituting just cause for their dismissal unless the unacceptability of this behaviour was brought to their attention and a reasonable opportunity for correction was afforded.51 However, where the unacceptability of an employee’s conduct has been made clear and the employee has been warned of the consequences for not seeking its rectification, just cause for dismissal may be found.52

Confirmed allegations of sexual harassment may be sufficient cause for the dismissal of an employee. This may include activities such as the sharing of inappropriate websites depicting material of a violent or sexually explicit nature. Moreover, prior participation and allowance of such activities does not preclude a complainant from revoking their consent to such behaviour.53 However, an employer’s policy in this regard must be clear, consistent and proportionate to the transgression that is being remedied. Essentially, in determining whether or not the harassment irreconcilably undermined the employment relationship so far as to warrant dismissal, the behaviour must be properly contextualized in order to assess its cumulative effect.54

Employers should exercise extreme caution in making dismissal decisions with regards to employee’s requiring accommodation. Wrongful dismissal decisions not in accords with the employer’s duty to accommodate may result in findings of bad faith, resulting in the award of Wallace damages.55

52 Dawson v. Bridge Brand Food Services Ltd., (2007) ABQB 15, CarswellAlta 48
55 Keays v. Honda Canada Inc., (2007) 368 N.R. 393, CarswellOnt 1874 , granted leave to appeal to SCC, which has been heard but no decision yet rendered.
Procedure on Dismissal

The Court has recently held that an adjudicator does not possess jurisdiction to inquire as to the true reasons for the dismissal of a government employee dismissed with proper notice.56 Although employees often demand reasons for dismissal, there is no true legal obligation to provide a reason.

Constructive Dismissal

The Court has held that a change in employment benefits does not, in and of itself, equate to constructive dismissal. Nor does a disagreement between the employer and employee about the calculation of bonuses necessarily infer this result.57 A change to the terms of the employment contract must amount to a substantial alteration of the contract of employment if it is to trigger a finding of constructive dismissal.58

An employer does not possess a unilateral right to change a contract or attempt to make such a change by forcing an employee to either accept new terms or resign. Where an employer takes this approach, it may constitute constructive dismissal and subject the employer to a damages claim for wrongful dismissal.59

To avoid this result, where an employee makes it clear to an employer that they are rejecting new terms that are being proposed, the employer may respond by terminating the relationship with proper notice and offering re-employment on the new terms. However, if an employer does not take this course of action and permits the employee to continue to fulfill their position, the employee is entitled to insist upon adherence to the original terms.60

A company attempted to divulge itself of assets in the face of industry fluctuations affecting the stock option value for two employees. This did not create an inference of constructive dismissal. The employees then spoiled the employment relationship by exercising the stock options, knowingly to the detriment of their employer. The exercise of stock options in this manner, although legal, may lead to a justification for dismissal. Ultimately, inferences of constructive dismissal must be properly contextualized by taking into account the complete employment relationship as it existed between the parties.61

56 New Brunswick (Board of Management) v. Dunsmuir, (2008) 64 C.C.E.L. (3d) 1, SCC 9
59 Hummel v. Treaty 7 Urban Indian Housing Authority, (2007) CarswellAlta 547
60 Wronko v. Western Inventory Service Ltd., (2008) CarswellOnt 2350, ONCA 327
Sexual harassment by a supervisor may be sufficient to constitute the constructive dismissal of an employee. This results in the potential for damages to be awarded against the employer equal to the deemed notice period, as well as possible Wallace damages.62

**Dismissed or Quit?**

In a recent wrongful dismissal case, the central issue was whether the employee had quit or been dismissed. The employee had taken stress leave and then obtained employment with a direct competitor. The court accepted the evidence of the employer that the employee was treated fairly and the position remained open for the employee until the employer learned of his new job.63

**Mitigation of Wrongful Dismissal Damages**

The Supreme Court has recently held that there is no principled reason to treat constructive dismissal and wrongful dismissal cases differently in terms of mitigation. This conclusion is premised upon the view that the key element in both types of cases is that the employer has terminated the employment contract without cause. In neither case is the employer justifying the termination on misconduct or incompetence by the employee.64

Moreover, the Court has found there to be very little practical difference between terminating an employee with notice and terminating an employee without notice but then offering the worker a new contract of employment. In this way, the Court seems to suggest that, absent bad faith or other extenuating circumstances, employers are not required to financially compensate an employee simply because they have terminated the employment contract. Along these lines, the Court has stated that an objective test is to be used in determining whether or not a reasonable person in the employee’s position would return to work for the terminating employer, thereby mitigating damages.65

It is clear that employer’s now have greater flexibility and discretion in seeking to limit the costs of breaching contracts of employment with employees. This recent direction of the Court serves to substantiate the underlying premise of the law in this regard which is that, the function of wrongful dismissal actions is to be primarily one of compensating employees for their resulting loss and not of punishing employers for their wrongdoing.66

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64 Evans v. Teamsters Local Union No. 31, (2008) SCC 20
65 Ibid.
66 Ibid.
Employment Standards and the Common Law

An employee’s wrongful dismissal claim was summarily dismissed because his employment agreement stated that he would be entitled to advance notice or severance pay in accordance with employment standards legislation. As he had received the minimum provided by the legislation, the case was dismissed. The Court of Appeal\(^\text{67}\) overturned the decision, however, and noted that s. 3(1) of the Employment Standards Code expressly provides that nothing in the Act affects any civil remedy of an employee. The Court of Appeal determined that the agreement did not, on its face, confine the employee to minimum notice according to the Code. On the contrary, the choice of language left open to the employee the ability to pursue an action, in accordance with the Employment Standards Code. This case suggests that careful drafting of employment contracts is critical.

Fiduciary and Other Common Law Duties

A recent Alberta decision found that a former employee was a fiduciary, and therefore owed the employer duties beyond a regular employee upon resignation. The employer was granted an injunction to prevent the former employee from soliciting employees, business opportunities and customers for six (6) months, although he was not required to turn down future work from the former employer’s customers.\(^\text{68}\)

Two non-fiduciary employees left a company separately and ended up both working for a direct competitor in the flag making business. Each of the employees took a customer list from their former employer with them to the new employer, which contained contact information of suppliers and customers as well as information concerning pricing, discounts, client preferences and sales history. Further, the new employer breached copyright legislation by copying the brochures of the former employer. Ultimately, the employees were each fined $7,500 for the misuse of confidential property and the damages for breach of copyright were $3,000. A further $1,000 was awarded as punitive damages against one employee. The new employer was deemed to be vicariously liable for all damages.\(^\text{69}\)

Absent any restrictive terms in the employment contract, no duty to not compete unfairly with a former employer exists; however, the duty of confidentiality precludes employees from taking valuable information from their former employer for the use of a competitor business.\(^\text{70}\)


Where an employee resigns without providing an employer with adequate notice, there is a fiduciary obligation precluding them from the solicitation of business from their former employer for a reasonable notice period.\textsuperscript{71}

**Restrictive Covenants**

A reasonable non-competition clause that is required to afford adequate protection to an employer’s business will be enforceable; however, where damages for such a breach are excessive a judicial determination of actual damages may be necessary.\textsuperscript{72}

The Court will not extend the term of a restrictive covenant beyond that set out in the contract between the parties.\textsuperscript{73}

**The Union Workplace**

**Union Membership**

Union membership in Canada grew by a little less than 10\% in 2007, but the labour force grew by 18\%, continuing a downward trend in union density. Union members now make up 30.3\% of the Canadian workforce as a whole, but only about 17\% in the private sector.

**Technology**

After a layoff at a home for the aged, an employee set up a website intended to allow former co-workers to keep in touch. But the website was accessible to anyone on the internet. The employee was terminated for disclosing personal information about residents and insubordinate comments about management. The Arbitrator found the employee’s comments to be insolent, disrespectful and contemptuous of management, and an attempt to undermine management’s reputation and authority. Personal information of residents was also disclosed in violation of the confidentiality agreement. The termination was upheld.\textsuperscript{74}

A College Faculty member was terminated for inappropriate sexual relationships with students. The employer had some evidence of these relationships and then searched the computer provided by the College to the employee. The employee had a personal hotmail account on the College computer that provided further evidence. The Arbitration Board admitted the email evidence from the hotmail account, noting that the employee’s right to privacy regarding the employer’s computer was not

\textsuperscript{71} *Torcana Valve Services Inc. v. Anderson*, (2007) A.J. No. 589, CarswellAlta 693

\textsuperscript{72} *Community Credit Union Ltd. v. Ast*, (2007) CarswellAlta 177, ABQB 46

\textsuperscript{73} *Dreco Energy Services Ltd. v. Wenzel*, (2008) CarswellAlta 193

\textsuperscript{74} *Chatham-Kent (Municipality)*, [2007] O.L.A.A. No. 135 (Williamson)
absolute, it was reasonable to have searched the hotmail account, there were no less intrusive means available, and the search did not violate the Criminal Code or privacy legislation. (Notwithstanding, the employee was reinstated to employment for other reasons.)75

The employer had a biometric hand scanner system to identify employees who were allowed access to the employer’s systems. Some employees objected on religious grounds that measurements of their bodies could not be used, and they were terminated. The Arbitrator ruled in favour of the grievors and found the alternative of using the biometric scanner with a swipe card and password would not impose an undue hardship on the employer.76

**Damages in Arbitration**

The trend continued in 2007 of Arbitrators choosing to award damages in lieu of reinstatement. Again, arbitrators are confirming that the common law assessment of damages in lieu of reasonable notice is not sufficient. In a case from Ontario, the Arbitrator awarded 1-1/4 months for each year of service plus 15% of that amount for loss of benefits, plus interest.77

**Absenteeism**

An employee had been fired and reinstated on strict terms which he met until the end of term of the agreement. He relapsed into poor attendance again and was fired a second time. His poor attendance record was attributed to his addiction to alcohol and cocaine. He was reinstated on permanent terms and conditions similar to those that had assisted him previously.78

But, evidence of use of cocaine, without evidence of dependence or addiction, is not sufficient to excuse continuing absenteeism.79

**Criminal Charges and Right to Remain Silent**

The sinking of the Queen of the North prompted BC Ferries to establish a Divisional Inquiry Panel. Two crew members refused to cooperate with the Inquiry based on legal advice. They were suspended without pay and the suspensions were upheld. The employees were insubordinate in refusing the clear instructions of their employer. The right to remain silent was outweighed in this case by the nature of the employer’s business interests. The employer had a right to require an explanation for what

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75 *Lethbridge College*, [2007] A.G.A.A. No. 67 (Ponak and Sway; Franklin dissenting)
77 *Cassellholme Home for the Aged*, [2007] O.L.A.A. No. 102 (Slotnick)
78 *Canada Post Corp.*, [2007] C.L.A.D. No. 105 (Blasina)
79 *Peelle Co.*, [2007] O.L.A.A. No. 41 (Craven)
happened and to have that explanation provided in a public forum so it could make full public disclosure.\textsuperscript{80}

A truck driver was charged with possession of drugs and indecent assault. On advice from his criminal lawyer, he refused to tell his employer the full nature of the charges against him. Since the employer had the onus to investigate and to determine if there was an explanation and a connection to work, it was able to suspend the employee and it was up to the employee to decide if he would provide further information for the employer to make an informed decision.\textsuperscript{81}

**Breach of Agreement for Decertification**

In 1984, the Carpenters Union agreed with an employer in Nova Scotia to allow it to be decertified and never to apply for certification again. In 1997, the Union applied for certification. The Employer raised the 1984 agreement and finally convinced the Union to withdraw its application in 2000, but not before the employer had incurred costs of about $28,000 to fight the application. The Nova Scotia Supreme Court ordered the Union to pay those costs, plus $25,000 in court costs, and granted an injunction to prohibit a certification attempt in the future.\textsuperscript{82} This is a useful case for all employers facing the re-certification push by a union.

**Just Cause for Termination – Close But No Cigar**

Termination of non-union employees for just cause remains difficult. The following BC case is just one illustration of the point. The employee continued to use a company gas card when he knew or ought to have known that he was supposed to turn it in. But the employer did not make it clear when, where or how it was to be turned in, and the Court was not convinced the employee knew that continued use was equivalent to theft.\textsuperscript{83}

**Judicial Review**

The Supreme Court has held that, while the Labour Code clearly contemplates calling on arbitrators to interpret and apply legislation in order to settle grievances in prompt, final and binding manner, it does not follow that the question of compatibility of conflicting legislative provisions was intended to be within exclusive purview of a grievance arbitrator. Ultimately, the strong privative clause in the

\textsuperscript{80} British Columbia Ferry Services Inc., [2007] B.C.C.A.A.A. No. 45 (Foley), application for review dismissed: BCLRB No. B5/2008

\textsuperscript{81} Lafarge Canada Inc., [2007] O.L.A.A. No. 76 (Carrier)

\textsuperscript{82} Armour Group Ltd. v. United Brotherhood of Carpenters & Joiners of America, Local 83, 2007 NSSC 98 and 2007 NSSC 337

\textsuperscript{83} Strauss v. Albrico Services (1982) Ltd., 2007 BCSC 197 (Metzger, J.)
Labour Code does not prevail over pure questions of law that are outside of an arbitrator’s special knowledge of labour and employment law.\textsuperscript{84}

**Concurrent Jurisdiction**

In a case where an employee was terminated and then filed a complaint of discrimination with the human rights commission, the arbitration board assumed exclusive jurisdiction on the basis that the discrimination could not be separated from the termination. Upon judicial review, the Court rejected the board’s claim to exclusive jurisdiction over all human rights issues arising in unionized workplaces, and stated that even though the Code expressed a legislative preference that disputes be resolved through arbitration, more explicit language was needed to oust the jurisdiction of the commission.\textsuperscript{85}

In a similar case, the Alberta Court of Appeal confirmed that the board and commission have concurrent jurisdiction and acknowledged that there is a preference for arbitrators to hear employer-union disputes. The Court also recognized that the discrimination raised in the complaint was before the board as part of the termination grievance, so having the claim proceed in that forum would not result in the loss of the employee’s right to have the complaint heard.\textsuperscript{86}

In a federal case involving the competing jurisdictions of the Canadian Human Rights Commission and the *Parliamentary Employment and Staff Relations Act*, the Federal Court of Appeal decided that the employee’s complaint was grievable under s. 62 of the Act and did not fall within the statutorily defined exceptions to which the Act did not exclusively apply.\textsuperscript{87}

Due to her sick leave being exhausted and a denial by her insurance company of further disability benefits, the complainant in a case before the Alberta Human Rights Panel received notice that her employment would be terminated. The hospital that employed her brought an application to determine whether the panel has jurisdiction to hear the case. The application was dismissed and it was held that the panel has concurrent jurisdiction to hear the complaint because the legislative intent of the Act gave no exclusive jurisdiction to either a labour arbitration board or the commission. Because the issue was never heard by an arbitration board (the complainant’s grievance was denied and did not proceed to arbitration) the commission had jurisdiction to hear the complaint and was the appropriate forum to do so.\textsuperscript{88}

\textsuperscript{84} Lévis (Ville) c. Côté, (2007) 1 S.C.R. 591
\textsuperscript{85} A.T.U., Local 583 v. Calgary (City) 2007 ABCA 121
\textsuperscript{86} Calgary Health Region v. Alberta (Human Rights & Citizenship Commission), 2007 ABCA 120
\textsuperscript{87} Dupéré v. Canada (House of Commons) 2007 FCA 180
\textsuperscript{88} Marilyn Small v. Caritas Health Group, (Alberta Human Rights Panel, September 5, 2007)
Federal Replacement Workers

The NDP, the Bloc and certain Liberal MPs continue to push for a prohibition on using replacement workers during labour disputes coming under federal labour law. There are two private member’s bills currently before the House - C-236 and C-415.

These bills are virtually identical to efforts made over the last several years. They copy the Québec law which is a much broader prohibition than we have in BC. Québec’s experience is that they continue to have the most and the longest strikes in Canada - the very things that replacement worker prohibitions are supposed to reduce.

When the Liberals were in power with a majority, they quickly disposed of these efforts by NDP and Bloc MPs. But it seems that their experience in opposition has convinced at least some Liberal MPs that what was always bad policy before is now an important legislative initiative.

These bills will die on the order paper if there is a Spring election, but otherwise they have a chance of passing unless sufficient numbers of Liberals will side with the Conservatives. That should be a concern to all employers, whether or not you operate in the federal jurisdiction. Just think of every business’s dependence on federally regulated services such as telecommunications, interprovincial transportation, the docks, and banking.

Conclusion

From privacy to safety to drug testing, labour and employment issues have continued to arise for Alberta employers. The rest of the papers in this program provide further elaboration on hot topics.
Introduction

Issues raised by computer usage, the internet, e-mail, Blackberries, laptops, instant messaging, cell phones, monitoring, surveillance, biometric data, employee blogging, e-discovery and document retention are creating new challenges for employers. These new challenges necessitate a balancing of employee privacy rights and free speech with management rights and concerns regarding productivity and inappropriate usage of technology. Today employees are extremely technologically astute and employers are required to keep up with the technology, understand the risks and protect their organization against inappropriate usage.

Technology Usage

Duties of Employees

- Employees are required to follow employer rules and policies such as e-mail and internet usage policies and cell phone policies;
- Unauthorized or improper usage is not permitted and employers can discipline and discharge for violations of policy;
- Employees owe a duty of loyalty to their employer. Breach of this duty could include harmful speech, insubordination, disparagement and disclosure of confidential information; and
- Rules of conduct and policies prohibiting harassment, discrimination and release of IP or other confidential information must be followed.

It is well-established that unauthorized computer usage can result in discipline and even discharge of employees. For example, in *Telus Communications Inc. v. Telecommunications Workers Union (Madsen)*, Arbitrator Sims upheld a termination on the basis of theft of company time and unauthorized use of company assets in a case involving an employee who managed a personal travel business from his office at Telus.
In some U.S. states, the right to discipline for inappropriate usage has developed into a positive duty on employers to investigate and stop criminal conduct. In Doe v. XYC Corp., an accountant at the company’s headquarters was accessing pornographic internet sites at work. The company monitored computer usage and the IT personnel were aware of the employee’s activities. A co-worker also complained about the employee shielding his computer when she walked into his work area. The company admonished the employee for visiting pornographic sites but no further action was taken. The employee said he would stop but resumed the activity a few months later. Although his supervisor knew about it, he did nothing. The company was then served with a search warrant and the results of the search revealed that the employee had child pornography on his work computer. The employee admitted to downloading numerous pornographic images and uploading nude photos of his 10 year old stepdaughter to a child pornography website while at work. The child’s mother sued the company for harm caused to her daughter on the basis that the company knew or ought to have known the employee was using the company’s computer to engage in child pornography activities and had a duty to investigate and stop the misconduct and report it to the police. The appellate court ruled that an employer who is on notice that an employee is using workplace computers to access child pornography or other criminal activity has a duty to investigate and to take action to stop the activity.

If Canadian courts adopt the reasoning of this case, it will have important implications for all employers. Even in the absence of any similar case law in Canada, it is prudent for employers to implement and enforce an appropriate computer usage policy, investigate suspected violations and take appropriate action against the employee for breaches.

**Privacy**

**Employees Have a Limited Right to Privacy in the Workplace**

This right can be found in federal or provincial statutes such as Personal Information Protection and Electronic Documents Act (PIPEDA) and Personal Information Protection Act (PIPA), the common law and the Canadian Charter of Rights and Freedoms. Privacy is also increasingly recognized as an important value in our society.

Subject to limited exceptions, personal information about an individual may not be collected, used or disclosed without the knowledge and consent of the individual. Consent must be “informed,” meaning that an organization must, on or before collecting personal information, identify the purposes for which the information will be used and disclosed. The organization must disclose contact information for a person within the organization who can answer questions about the collection. Consent may be obtained orally or in writing and may be implied (including by way of “opt-out” consent) in some

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3 Superior Court of New Jersey (Appellate Division) No. A-209-04T2, 2005
4 Alberta PIPA, s. 13(1); B.C. PIPA, s. 10(1).
circumstances, depending upon the sensitivity of the information. Where information is particularly sensitive, such as medical or financial information, express consent for the collection, use and disclosure of that information may be required.\(^5\)

The Alberta PIPA and the B.C. PIPA specifically addressed the unique issues posed by the employment relationship. “Employee personal information” in B.C. and “personal employee information” in Alberta are distinguished from “personal information” generally. In B.C., “employee personal information” is defined as personal information about an individual that is collected, used or disclosed solely for purposes which are reasonably required to establish, manage or terminate the employment relationship between the organization and the individual, including a volunteer relationship\(^6\). In Alberta, “personal employee information” means personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating an employment relationship or volunteer work relationship\(^7\). Both Acts emphasize that “employee personal information” and “personal employee information” do not include personal information that is not about an individual’s employment\(^8\) or is unrelated to that relationship\(^9\).

An employer may collect, use and disclose employee personal information without the consent of the employee as long as it is reasonable for the purpose of establishing, managing or terminating an employment relationship. However, before an organization collects, uses or discloses employee personal information without consent, the organization must:

- notify the employee that it will be collecting, using and disclosing the information; and
- identify the purposes for which the information will be collected, used and disclosed.\(^10\)

Under PIPA and PIPEDA, before an organization collects, uses or discloses personal information, the organization must:

- notify the employee of the collection, use and disclosure;
- identify the purpose for which the information will be used, collected and disclosed;
- ensure that the overall purpose is reasonable; and

\(^5\) Alberta PIPA, s. 8(3); B.C. PIPA, s. 8(3).
\(^6\) B.C. PIPA, s. 1.
\(^7\) Alberta PIPA, s. 1.
\(^8\) B.C. PIPA, s. 1.
\(^9\) Alberta PIPA, s. 1.
\(^10\) Alberta PIPA, s. 15(3), s. 18(3) and s. 21(3); B.C. PIPA, s. 13(3), s. 16(3) and s. 19(3).
• Obtain consent - either deemed, express or “opt out”.

**Investigation Exception**

Under PIPA, an employer may collect, use and disclose information without consent to investigate a breach of an agreement. The employer must demonstrate that:

- the investigation is based on a reasonable belief the employment agreement has been breached;
- it is an on-going investigation into a specific allegation; and
- notification would compromise accuracy or availability of the information.

**Workplace Monitoring and Surveillance**

**Disclosed, Non-Surreptitious Surveillance**

Four common factors have been considered by Arbitrators and the Federal Privacy Commissioner in the analysis of what is reasonable video surveillance:

1. **Is the surveillance necessary for a legitimate or reasonable business interest?** Legitimate business interests often include loss prevention, and safety or security risks.

2. **Is the information collected only that necessary to achieve the intended purpose?** The scope of surveillance will be reasonable only if it is restricted to what is necessary for achieving the expressed purpose.

3. **To what extent is employee privacy affected?** Surveillance in areas of productivity or where employees have a reasonable expectation of privacy is usually held to be unreasonable, unless there is a serious, significant business interest at stake. Where employees have a low expectation of privacy, such as at entrance/exit areas, video surveillance may be reasonable for less pressing business purposes.

4. **Were alternatives considered and will they be effective?** Video surveillance is seen as a significant step or “last resort”. If there are other less privacy-intrusive ways of effectively achieving the same purpose, then it may be unreasonable to use video surveillance instead of

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11 This section originally appeared as an article: “Workplace Monitoring and Surveillance” by Christopher McHardy, Tina Giesbrecht and Peter Brady, March 11, 2005.
those alternatives. However, an organization may not be required to use inefficient or costly alternatives, where all the other requirements of reasonableness and necessity are met.

These factors were considered by the Federal Court of Canada in its June 11, 2004 decision in *Eastmond v. Canadian Pacific Railway*. The application before the Federal Court was based on facts which were the subject of a complaint to the federal Privacy Commissioner. Canadian Pacific Railway installed six digital video surveillance cameras at various locations in its Toronto rail yard for the purpose of reducing vandalism and theft and minimizing threats to staff safety. The cameras were fixed, did not zoom and only recorded 48-hour periods. Employees were informed of the existence of the system, its purposes and camera locations. Productivity was not monitored and shields were installed or the camera position changed if cameras were inadvertently trained on working areas.

The Federal Privacy Commissioner applied a four-part test to determine the reasonableness of the video cameras in the circumstances. He asked:

1. Is the measure demonstrably necessary to meet a specific need?
2. Is it likely to be effective in meeting that need?
3. Is the loss of privacy proportional to the benefits gained?
4. Is there a less privacy-intrusive way of achieving the same end?

The Privacy Commissioner found that, although there was a potential problem, the railway had provided insufficient proof that a real and specific need existed to reduce vandalism, theft and improve the safety of employees. The Commissioner was not convinced that the cameras were a deterrent and speculated that signs warning of surveillance alone may have deterred would-be vandals. The Commissioner found that the benefit was not proportional to the loss of privacy felt by employees and was concerned that the mere presence of cameras had given rise to the perception among employees of “being watched”. Finally, he held that there were less privacy-intrusive ways of effectively reducing vandalism that were not sufficiently explored, such as better lighting.

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12 *Eastmond v. Canadian Pacific Railway* 2004 FC 852 [“Eastmond”].
14 *Eastmond* at para. 13.
15 Case Summary #114.
16 *Eastmond* at para. 14.
17 *Eastmond* at para. 14.
The Federal Court disagreed. Noting that all parties had urged the adoption of the Privacy Commissioner’s four-part test, the Court stated that it was “prepared to take into account and be guided by those factors”.18 The Court went on to say that PIPEDA mandates a balancing of interests, by naming the competing interests at stake in the purpose clause of PIPEDA.19 The Court stated that “the factors which the Privacy Commissioner took into account in this case may not necessarily be relevant in other contexts”.20

The Court in Eastmond suggested that the “four-part test” is not a stringent test for the appropriateness of surveillance but instead lists important factors to be considered in balancing competing interests. The reasonableness of surveillance must be determined contextually, looking at the why, how, when and where collection takes place.21 The Court reviewed previous arbitral jurisprudence on workplace surveillance and emphasized a contextual and reasonable balancing of interests as the “test”, not a list of required elements.

The reasonableness of the video surveillance was evaluated using the four factors and the Court found that:

1. Canadian Pacific proved that there was a clear history of vandalism, theft and other minor crimes in the rail yard. Preventing it in the future was held to be a reasonable purpose under PIPEDA.22

2. The Court found, on a balance of probabilities, that surveillance was effective at preventing vandalism, theft and security risks. It did not agree that signs warning of the surveillance alone might have been an effective deterrent, stating that “warning signs and cameras go hand in hand — you cannot have one without the other.”23

3. The loss of privacy was held to be low and proportional to the benefit gained by Canadian Pacific.24 The images recorded were viewed only upon a reported incident. Information was

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18 Eastmond at para. 127.
19 Eastmond at para. 129. Section 3 of PIPEDA states: “The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances”.
20 Eastmond at para. 130.
21 Eastmond at para. 131.
22 Eastmond at paras. 177, 178.
23 Eastmond at para. 179.
24 Eastmond at paras. 180, 181.
kept secure and viewed only by the manager or the Canadian Pacific police. The images were recorded in “public places” where the individuals had a low expectation of privacy.

4. Canadian Pacific considered alternatives and demonstrated that, given its extensive operations over a wide area, fencing and security guards were not cost-effective and would be disruptive.25

On balance, Canadian Pacific’s use of video surveillance in the workplace was reasonable: its purpose was appropriate and the use of the camera fit reasonably within that purpose.

The Federal Court’s analysis in Eastmond is similar to that in arbitral decisions on video surveillance in the workplace. Prior to the enactment of personal information protection legislation, Arbitrators generally considered a number of factors in balancing employees’ right to privacy and employers’ right to protect its business interests.

Arbitral Jurisprudence

A recent arbitration decision dealing with the issue of non-surreptitious surveillance is International Longshore and Warehouse Union Ship and Dock Foreman, Local 514 v. Fraser Surrey Docks Limited.26 This case, a case involving the dismissal of a head foreman after video surveillance caught him stealing gasoline from the company’s pumps, dealt with both the admissibility of video surveillance evidence and the coercion of witnesses in the arbitral process.

At the preliminary hearing, the Union brought an application for an order excluding the video surveillance. The Union argued that it was inadmissible because there was no reasonable basis to conduct the surveillance and because the employer could have achieved its objectives by less privacy-invasive means. The issue before the Arbitrator was not whether the Employer was entitled to place the worksite under video surveillance generally (following 9-11, the Canada Border Services Agency required that cameras be installed), the issue was whether the Employer was justified in using its video surveillance system in the manner it did. In the first instance, the Employer had caused a camera to follow the Grievor’s truck after a manager saw it entering the site with garbage bags in the back, and in the second instance, footage was taken via a movable camera that was fixed on the gas pumps due to concerns about the theft of gas.

The Arbitrator found that the decision to alter the course of the cameras gave rise to a requirement to justify each instance of surveillance. The Arbitrator concluded that each instance of surveillance was justified and that there were no other reasonable alternatives. It was found that there was a relatively

25 Eastmond at para. 182.
low level of privacy infringement given that the area was already under 24 hour surveillance and employees were aware of the surveillance.

Finding that the *Eastmond* test was satisfied and that the PIPEDA tests were satisfied, the Arbitrator ruled that the evidence was admissible.

Next the Arbitrator had to consider whether the Employer had been denied a fair hearing. The Employer argued the Union interfered with a potential witness by threatening Union discipline or some other adverse consequence. The Employer submitted that, in light of the effect on the potential witness’s evidence, it had been denied a fair hearing, such that the only appropriate remedy was dismissal of the grievance. Ultimately the Arbitrator found that Union had destroyed the opportunity for a fair hearing. The Arbitrator was clear in his message:

“A party cannot be allowed to achieve a victory in adjudication by using coercive means to affect the evidence. The rule of law exists to replace the rule of force. Adjudication must be fair in order to be legitimate. If it becomes a contest into who can coerce the witnesses, it is no longer adjudication at all. It is not the replacement of the rule of force with the rule of law; it is the former continuing under the guise of the latter.”

As a result, the Employer’s preliminary application was granted; pursuant to s.60(1)(a.4) of the Canada Labour Code and the natural justice right to a fair hearing, the grievance was dismissed.

**Surreptitious Surveillance**

Arbitrators have drawn a bright line between surreptitious surveillance and surveillance by cameras whose locations and purposes are known to employees.27

Surveillance without consent or notification is permitted under the Alberta PIPA and B.C. PIPA only if it falls under a “no consent” exception.28 Most arbitral jurisprudence and decisions under PIPEDA focus on surreptitious surveillance in the course of investigations.

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27 *Eastmond* at para. 132.
28 Alberta PIPA, s. 14, s. 17 and s. 20; B.C. PIPA, s. 12(1), s. 15(1) and s. 18(1).
Surveillance without consent or notification is contemplated under the legislation if it is reasonable for the purposes of an investigation, which includes investigating a breach of an agreement. The OIPCBC Discussion Paper proposes that if an employer engages in surreptitious monitoring, it must demonstrate that:

- the investigation is based on a reasonable belief that the employment agreement has been breached;
- there is an ongoing investigation into a specific allegation; and
- notification would compromise the accuracy or availability of the personal information collected.

**PIPEDA Findings**

The Federal Privacy Commissioner has stated that surreptitious video surveillance should only be taken as a last resort, even in an investigation. The employer must:

- initiate surveillance based on substantial evidence of wrongdoing;
- first try less privacy-invasive ways of gathering the required information; and
- make the decision to engage in surreptitious surveillance of an employee at a senior management level.

In Case Summary #269, an employee reported a number of work-related injuries in the course of his employment. The employee continued to work in positions consistent with his physical limitations but the employer became suspicious of his health claims. He was frequently absent and failed to provide the company with updated medical assessments, despite verbal and written requests. Finally, an independent medical assessment indicated that he might be malingering. The employer commenced

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29 Alberta PIPA, s. 1, s. 14(d), s. 17(d) and s. 20(m); B.C. PIPA, s. 1; s; 12(1)(c), s. 15(1)(c) and s. 18(1)(c).
30 “OIPCBC Discussion Paper” at 3.1.2.
31 “OIPCBC Discussion Paper” at 3.1.
32 Anecdotes do not qualify as “substantial evidence”: Case Summary #268.
33 Case Summaries #268 and #269.
34 Case Summaries #268 and #269.
surreptitious surveillance of the employee to determine if he was being truthful about his physical limitations. After reviewing videotape showing the employee performing activities that contradicted his claims of incapacity, the employer concluded that the employee was not being truthful.

Emphasizing that video surveillance should only be used as a last resort in an employee investigation, the Assistant Privacy Commissioner found that the employer had substantial evidence of malingering prior to engaging in surveillance. The employer had “reasonable and probable cause” to believe the employee was violating the employment contract. The employee was uncooperative and the employer was unable to get the information it required in a less privacy-invasive manner. The Assistant Commissioner held that the video surveillance was reasonable but noted that the decision to engage in surreptitious video surveillance of an employee should be made by senior management.

Case Summary #26836 also considered the reasonableness of surreptitious surveillance in an investigation. A manager of a company engaged in air travel attached a voice recording device to the underside of a table in the smoking lounge. Both employees and customers used the smoking lounge, but at this particular time, the manager expected to record only the conversations of certain employees. The manager suspected the employees of wrongdoing, but evidence was obtained only after the surveillance had taken place. The Assistant Privacy Commissioner found that, since the voice recording had been erased by one of the complainants, it was not proved that there was a collection of personal information. However, the Assistant Commissioner stated in obiter that, if the information had been recorded, the investigation would not have been reasonable under PIPEDA. She stated that an organization must have “substantial evidence to support the suspicion that the employee is engaged in wrongdoing or that the relationship of trust has been broken, must be able to show that it has exhausted all other means of obtaining the information that it required in less privacy-invasive ways, and must limit the collection to the purposes to the greatest extent possible.”37 There was, at the time of the recording, no substantial evidence of wrongdoing, only suspicion by the supervisor and “anecdotes”. There were less privacy-intrusive methods of investigating the incidents. Furthermore, the recording was highly indiscriminate, taking place in a room accessible to many other individuals. The Assistant Commissioner stated that a decision to conduct surreptitious surveillance of employees in an investigation should be made at a very senior level of management.


37 Case Summary #268, “Further Considerations”.


Arbitral Jurisprudence

Similarly, arbitral jurisprudence has generally considered surreptitious surveillance to be reasonable if:

- there is a substantial problem;
- there is a strong possibility that surveillance will be effective; and
- there is no reasonable alternative to surreptitious surveillance.

Notably, the factors used by Arbitrators to assess surreptitious surveillance are essentially the same as those considered by Arbitrators to assess non-surreptitious surveillance; the difference lies in the higher threshold for reasonableness when the surveillance is surreptitious. In the recent adjudication of a complaint of unjust dismissal under the *Canada Labour Code* in *Ross v. Rosedale Transport Ltd.*[^39^], the adjudicator analysed the reasonableness of surreptitious surveillance of an employee under PIPEDA. The employee had worked as a driver for nine years and was described as a “good employee” with no prior disciplinary or adverse work record.[^41^] The employee sustained a back injury at work and was subsequently accommodated by the employer in clerical and administrative positions. As time progressed, however, the supervisor suspected that the employee was malingering. Four months after his injury, and still working in the accommodated position, the employee took a vacation during which time he and his family were moving. The supervisor hoped to obtain video surveillance evidence that the employee was malingering by video taping the move. The surveillance recorded the employee moving furniture, which appeared contrary to his claims of injury. The employee alleged that the surreptitious surveillance collected his personal information without his consent and was therefore contrary to PIPEDA. The adjudicator stated that general arbitral principles on surreptitious video surveillance used prior to the enactment of PIPEDA are also expressed in the circumstances set out in section 7(1), which permits collection of personal information without knowledge or consent.[^42^] The adjudicator analysed the reasonableness of the investigation using those general arbitral principles. The adjudicator found that the surveillance was not reasonable for the purpose of investigating Ross’ injury. There was no evidence of dishonesty prior to the initiation of surveillance, only suspicion on the part of the employer.[^43^] The adjudicator held that the employer had other ways to verify the employee’s injuries rather than engaging in surreptitious surveillance, such as asking for an

[^38^]: Unisource at para. 48.
[^40^]: Ross.
[^41^]: Ross at para. 6.
[^42^]: Ross at para. 34.
[^43^]: Ross at para. 35.
independent medical assessment. The adjudicator found that the employer’s surveillance was like “casting an electronic web” to see if the employer could catch something. The investigation by surreptitious surveillance was not reasonable and was inadmissible to prove cause for dismissal.\footnote{Ross at para. 36.}

Although a reasonable purpose and reasonable scope will always be part of the test for reasonableness under personal information protection legislation, the analysis will differ between surreptitious and non-surreptitious surveillance of employees. There will likely continue to be a greater threshold than for non-surreptitious surveillance, requiring evidence of a substantial problem and a greater evaluation of alternatives.

**Collection of Biometric Data - Voice Prints**

**Turner v. Telus (Federal Court, 2007)**\footnote{2007 F.C.A. 21}

A group of employees complained that they were being forced to consent to the collection of biometric information - their voice prints. Telus wanted to use voice prints for access to its business applications and tracking absenteeism. Their objective was to improve efficiency, reduce costs and improve safety.

The Assistant Commissioner of Privacy found that there was no violation of PIPEDA and that:

- The technology was more efficient and cost effective than other technologies. Both of these reasons were rational goals in a competitive market;
- Voice passwords were needed to ensure security;
- Voice prints were not unduly invasive;
- There was an appropriate balance between employee’s right to privacy and employer’s needs;
- A reasonable person would likely view the company’s purposes as appropriate; and
- The company had informed the employees of the purpose and had appropriate safeguards in place.

The Federal Court recently upheld the decision.
Biometric Data - Hand and Finger Scans

Cascadia Terminal and the Grain Workers’ Union, Local 333 (Ready, 2004)\(^{46}\)

Hand prints were found acceptable for payroll and attendance purposes. The employer had the right to move from manual timesheets to biometric hand recognition. The employer argued that the manual system was fraught with problems and inaccuracies and that the advantages of the hand print system included more accurate payroll records and verification of who was in the plant at all times, for safety purposes. The union opposed the system on the basis of invasion of privacy and risk of disease spreading. The Arbitrator dismissed these arguments as the union failed to substantiate them with any evidence.

Canada Safeway and UFCW Local 401 (Ponak, 2005)\(^{47}\)

The employer started to use hand scans in order to improve time and attendance management, eliminate “buddy punching” and tricking the time management system. The Arbitrator found this was a reasonable and defensible business decision and that there was a limited intrusion on employee privacy based on:

- an assessment of the method used to collect the information;
- the type of personal information retained;
- the potential for the information to be used for purposes other than those intended; and
- the method of storage and destruction of the personal information.

IKO Industries and United Steelworkers, Local 8580 (Tims, 2005)\(^{48}\)

In this case, the use of finger scans of employees was not permitted. The Arbitrator found that the employer’s interest in efficiency and cost savings did not outweigh the privacy interests of employees for these reasons:

- there was no evidence of security concerns; and
- the scan was unduly invasive.

\(^{46}\) 123 L.A.C. (4th) 403
\(^{47}\) 145 L.A.C. (4th) 1
\(^{48}\) 140 L.A.C. (4th) 393
Tips for Employers

Collection of Personal, Medical and Biometric Data

- Establish comprehensive policy addressing what expectations employees should and should not have regarding privacy;
- Describe measures which are or may be taken to collect, use and disclose employee personal information;
- Describe which measures are or may be taken to monitor employee activities;
- Ensure the policy statement describes the purpose of collection of data, surveillance and monitoring such as monitoring appropriate uses of equipment and resources, security, safety;
- Obtain employee’s consent - express, implied or “opt-out”; and
- If using video surveillance, first consider less intrusive ways to achieve purpose and ensure grounds are reasonable.

Social Media Sites - To Ban or Not to Ban

Arguments for Restricting Access

The main concern employers have when it comes to social media sites such as Facebook and LinkedIn is the potential impact on employee productivity. A study conducted last year by Dr. Richard Cullen, president of Australian internet security firm Surfcontrol, estimated that if just one employee spent an hour on Facebook a day it could cost a company $6,000 a year. The latest internet craze, Facebook, which now boasts more than 70 million users worldwide, could be costing a business with a sizeable workforce millions or even billions of dollars in lost time and productivity.

Although productivity seems to be the primary concern, there is also considerable concern that the information being posted by employees on Facebook and LinkedIn could be used to infiltrate their employer’s computer networks. The fact that social media site users readily hand out personally identifying information to complete strangers puts them at great risk of identity theft and in line to receive spam and targeted malware attacks.

Some employers have decided not to deal with the problem lying down. Last year, the Province of Ontario barred government staff from accessing the Facebook website from their workplace terminals. When workers tried to log on to their accounts early last May, they were greeted with “access denied” messages on their screens in the same way as YouTube, pornography and gambling sites have been blocked on Provincial computers.
Arguments Against Restricting Access

One argument against restricting access is that by completely banning social media sites employers are in effect sending a message to staff that they cannot be trusted. And what employee wants to work in an environment where they feel their employer does not trust them? Banning any site may be sending existing employees the wrong message.

Another argument against restricting access to social media sites is that if your employees are not wasting time on a social media sites, they will waste time on something else like smoking, texting on their cell phones or chatting with other employees. Even the best, most productive employees cannot work a full eight hour shift without any idle time.

Thirdly, by banning social media sites employers may be passing up valuable opportunities to take advantage of the benefits that social media sites have to offer. Such opportunities include setting up a Facebook group to facilitate corporate event organization; setting up an internal blog to communicate company news to employees; setting up podcams; and developing internal wikis, just to name a few.

Solution?

Perhaps the best option is to take the middle ground. Rather than put sweeping prohibitions in place employers can set up formal policies for acceptable use of social media sites in the workplace. Employers are advised to create policies which are clearly stated, frequently evaluated, and distributed to everyone. Policies should clearly set an expectation of appropriate use of company time and they should state what the consequences of breaking the policy are.

Employers stand to benefit from attempting to understand the changing nature of relationship development today and consider ways that will enable employees to use sites like Facebook. Siemans, Dow Chemical, Nestle and Microsoft are just a few of the big name companies which have found ways to embrace the new technology instead of running from it.

The best advice that can be given to employers wishing to embrace the social media frenzy is do your homework. Employers should consider whether using a public site such as Facebook as the corporate social network would be preferable to buying a commercial product that offers similar functions, but that also adds the protection of being within the corporate firewall.
Background Checks

“Googling” Prospective Employees

Human resource practitioners and others are using electronic means to perform background checks. Similarly, prospective employees are doing their own background checks on potential employers by search for blogs and articles on-line. Employers should be cognizant of the following issues:

- Be careful about discrimination on unlawful grounds, mistaken identity, collection, use and disclosure of personal information not relevant to employment relationship;
- Remember all background checks must meet the reasonable test;
- Under PIPA, organizations are permitted to collect, use and disclose information without consent solely for the purposes of establishing, managing or terminating the employment or volunteer work relationship;
- Be wary of collecting information you do not need; and
- Be wary of using information which may not be accurate.

A recent Alberta Privacy Commissioner decision concluded that personal credit information was not to be reasonably required by an employer. The Commissioner found that managing own credit and finances does not necessarily correlated with managing finances in employment context.

The New Frontier: Employee Blogs

It is estimated that there are over 45 million “web logs” and that this number is doubling every six months. Employee blogs can be positive and are often used by prospective job candidates to research employers. Employee blogs can also be negative. They can be crude, rude, spontaneous and often have a confessional quality. At their worst, they can be defamatory, hurtful, discriminatory and breach company policies and hurt a company’s reputation.

A recent arbitration decision confirmed that employees can be dismissed for work-related blogging activities. In this case, an administrative employee in the Alberta Public Service was terminated after her employer found her blog which contained unflattering comments about a number of her co-workers (who were identified by pseudonyms) and management.

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49 P205 0 IR - 008
The Board found that while the Grievor had a right to create personal blogs and was entitled to her opinions about the people with whom she worked, publicly displaying those opinions may have consequences within an employment relationship. The Board was satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-workers, and denigrating administrative processes, engaged in serious misconduct that irreparably severed the employment relationship. The Board ruled that the discharge was justified and therefore, the grievance was denied.

**Risks for Employee and Employer**

- Defamation Claims - against co-workers, managers, suppliers, customers, clients;
- Harassment Claims - co-workers; and
- Disclosure of Confidential Information, Trade Secrets could cause employer economic damage.

**Employee Coaching and Discipline**

- Be fair but firm if problems arise with the use of technology;
- Emphasize the company’s policy, concerns with the employee's computer usage or blog;
- Advise the employee usage will be monitored and that further violations will result in more serious discipline including termination for cause; and
- Educate employee as to personal risks for defamation, harassment, breach of duty of loyalty, and breach of confidentiality.

**Firing a Blogger**

Many “Internet celebrities” are employees fired from well-known employers such Delta Airlines, Microsoft, Google, Starbucks and the Manitoba Health System. These employers became aware of content on employee blogs which they objected to and fired the employees, many of whom have sued. Can an employer fire an employee for blogging? If a blog contains information that breaches a confidentiality agreement or reveals trade secrets an employer will likely be justified in terminating an employee. Similarly, an employer can take action against an employee who is blogging on company time, particularly if this is a violation of a written policy on computer usage. If the content of the blog breaches the employee's duty of loyalty to the employer or defames individuals, discipline will also be justified and if the breach is serious enough, discharge for cause may be justified.

Before disciplining or terminating a blogger, consider whether such action might violate an employment or union agreement or whether your actions could be construed as discrimination or retaliation for protected employee activity, including whistle blowing and freedom of speech.
Many bloggers have continued to blog after termination, some have even written books, and continue to draw attention to their former employers. This potential fallout is a consideration which should be taken into account by the employer and the employer should ensure that the employee is treated fairly in the manner of discipline and/or discharge and that it does not breach its obligation of good faith. If a settlement agreement is entered into with a former employee blogger, the employer may wish to include strong confidentiality language preventing the individual from disclosing the terms of the settlement and disparaging the employer.

**Tips for Employers**

- Set up internal mechanisms for employee communication and to bring issues forward internally before heading to the internet;
- Consider internal blog to pass on information, obtain employee comments;
- Put controls on blog content and remove objectionable material;
- Deal with discipline/dismissal fairly;
- Ensure settlement agreement and release contain strong confidentiality language;
- Protect intellectual property and confidential company information with proper agreements, policies and if violated, enforce them; and
- Develop a formal technology policy and provide training to all employees.

**Blackberries**

Employers may soon need to rethink their expectation that employees be available via BlackBerry virtually 24-7.

In the United States, legal experts warn that a new wave of overtime litigation can be expected. It is believed that we will start to see employees bringing lawsuits against their employers claiming overtime for time spent on BlackBerrys.

A similar trend could take hold in Canada. Prudent employers may wish to start thinking about policies dealing with Blackberry use. Options include adding terms regarding BlackBerry use to employment contracts and banning the use of Blackberrys during certain times of the day.
E-Discovery and Record Retention

Electronic discovery and issues of record retention have become big issues since Enron and other high-profile cases where corporate records were destroyed. The preservation and management of employer records is fundamental for statutory and other legal purposes. If an employer is involved in a lawsuit, civil procedure rules in each province impose a positive obligation on a litigant to disclose all relevant documents that are, or once were, in its possession and power.

Record Retention

The failure to preserve documents can result in severe sanctions from the Courts for contempt. This obligation exists in respect of pending litigation but generally prudent to bear this obligation in mind once litigation is reasonably anticipated. In the United States, a separate tort resulting in independent liability for the destruction of documents has begun to emerge. A “record” includes paper documents and documents in their electronic form together with their metadata and must be relevant to the issue at hand. It is very important that an employer develop a formal record retention policy and that its management and IT professionals are educated in the policy and the legal issues.

Litigation Hold

If an organization becomes aware of potential litigation, a “litigation hold” ought to be implemented respecting all relevant records. This includes advising individuals outside of the organization who may possess such documents to retain the records to ensure they are not modified or deleted. Individuals within the organization should be advised regarding their obligations to retain and preserve relevant records. It is recommended that an individual in the organization be designated as responsible to ensure compliance who can later testify as to the effective implementation of the hold. If litigation is contemplated, any programs or procedures for the automatic deletion of computer files and records, including e-mails, which pertain to the litigation should be suspended and the organization should retain all records, in every form including personal computers of employees, Blackberry records, Mail servers, intranet and internet servers, dictation tapes and machines, back up and archive systems, external computer resources provided by service providers, etc.

Conclusion

Using Technology to Your Advantage

- Aside from business and operational needs, technology has also increased employer ability to analyze business, monitor productivity, safety and security;
- Develop clear policies and enforce them consistently;
- Encourage employee input - company blogs; and
- Technology preserves evidence and can be useful in gathering information for litigation.
Introduction

Investigations and inspections by government officials occur in various employment contexts, including privacy, human rights and occupational health and safety. This paper is designed to keep you apprised of the current topics of interest in the law of occupational health and safety and provide you with the information necessary to handle an Occupational Health and Safety (OH&S) inspection, investigation and/or prosecution. The principles, however, are applicable to investigations in all employment contexts.

Part one examines the implications of the first conviction under Bill C-45. Part two examines the legal privileges that attaches to internal investigation reports conducted by employers following a workplace accident. Part three examines the scope of powers afforded to Occupational Health and Safety Officers during an inspection and investigation.

Part 1: Whatever Happened to the Westray Bill?

On March 31, 2004, workplace safety became a matter for both criminal and Occupational Health and Safety (OH&S) regulatory enforcement. In the wake of the Westray mine disaster, Bill C-45, “An Act to Amend the Criminal Code (Criminal Liability of Organizations),” was drafted to expand the scope of those who can be charged with a criminal offence as a result of an occupational health and safety accident as well as the type of conduct that can attract such liability. Furthermore, the amendments broadened the penalties for non-compliance by increasing maximum fines and creating new penalties for companies, including a penalty of “corporate probation” that may impose terms such as providing restitution to victims, publishing information about the offence in the media, and implementing mandatory policies and procedures.

What is Bill C-45?

Prior to Bill C-45, corporations were largely immune from criminal prosecutions, because a corporation could only be convicted of a crime if a senior director or officer (a member of the collective directing mind of the corporation) participated or took part in the offence for the benefit of the corporation.

Under Bill C-45, “organizations”, which by definition includes corporations, partnerships and trade unions, could be prosecuted and ultimately held criminally liable for the actions, or negligence, of not only senior directors or officers, but also their employees, agents, contractors. Thus, the class of
individuals for whose criminal actions or negligence a corporation may be held criminally liable was widely expanded.

Furthermore, Bill C-45 established a specific duty under the Criminal Code which held organizations accountable for health and safety violations. That duty is set out in section 217.1 of the Criminal Code and provides as follows:

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

The underlying purpose of section 217.1 was to serve clear notice to all employers and their respective directors, officers, general managers, operations managers, production managers and to any one who takes it upon himself or herself to direct the performance of another individual’s work to take all reasonable precautions to prevent a workplace injury and, specifically, to ensure that health and safety procedures, policies and regulations are observed.

Section 217.1 does not, nor is it intended to, supplant workers’, supervisors’ or employers’ health and safety obligations and potential liability under provincial laws, including Alberta’s Occupational Health and Safety Act (OHSA). Bill C-45 simply sought to expand the regulation of health and safety in the workplace and casts a larger net on the identity of individuals who could be prosecuted for health and safety violations. Of course, Bill C-45 also serves as additional deterrence.

Criminal Negligence Under Bill C-45

Simply stated, Bill C-45 requires that employers take steps to provide a safe workplace for their workers. Section 22.1 of the amended Criminal Code provides that an organization is a party to an offence that requires the prosecution to prove negligence, if:

(a) It was acting within the scope of its authority:

(i) That a “representative” of an organization, while acting within the scope of his/her authority, is a party to an offence; or

(ii) More than one “representative” of an organization, acting within the scope of his/her authority, have carried out separate actions, which, if done by one person, would have rendered that person a party to the offence.

(b) The senior officer who is responsible for the aspect of the organization’s activities that is relevant to the offence departs - or the senior officers, collectively, depart - markedly from the standard of care that, in the circumstances, could reasonably
be expected to prevent a representative of the organization from being a party to the offence.

Section 22.1 provides that an organization is responsible for the negligent acts or omissions of its representative and the conduct of two or more representatives can be combined to constitute the offence. It is not therefore necessary that a single representative commit the entire act.

It is important to note that not every departure from the standard of care by a senior officer will result in criminal liability for negligence; the departure must be “marked.” This, arguably, requires a significant departure from the standard of care, such as a complete disregard for or indifference to the duty. What constitutes a marked departure from the standard of care will, of course, turn on the facts of each case.

**Intentional Offences Under Bill C-45**

Section 22.2 of the amended *Criminal Code* deals with offences requiring some level of intention or knowledge to satisfy the *mens rea* requirement or mental element of an offence. In order for an organization to be held liable, the prosecution must show that one of its senior officers, acting within authority, and with the intent at least in part to benefit the organization:

- Is party to the offence;

- With the appropriate *mens rea* directs another representative to commit the act specified in the offence; or

- Knowing that another representative is about to be a part to the offence, does not take reasonable measures to intervene.

**Penalties Under Bill C-45**

Fines payable by organizations for summary conviction offences were increased from $25,000 to a maximum of $100,000. There is no maximum fine for indictable offences. Courts have already made it clear in the case of large corporations that fines should not be so low as to amount to a “licensing fee.”

Bill C-45 also provided the possibility of a probationary order against an organization that could set terms such as restitution, publication, and requiring the development and publication of health and safety policies.

In sentencing an organization, the Court is instructed to consider a broad range of factors including whether the organization gained any advantage because of the offence, whether the organization
attempted to conceal assets, the costs of investigation and prosecution, and measures taken by the organization to reduce the likelihood of recurrence.

**Does Bill C-45 Have Any Teeth?**

Prior to the introduction of Bill C-45, Canadian Courts did not have a long history of dealing with workplace accidents under the *Criminal Code*. In most cases, corporate and individual criminal charges arising from workplace safety matters largely resulted in acquittals. As such, the Bill C-45 amendments justifiably received widespread attention in the employer community because its whole purpose was to make it easier to bring criminal charges for serious breaches of workplace safety standards.

It has been nearly four years since the enactment of Bill C-45 and many observers were beginning to suspect that Crown Prosecutors did not want to pursue these types of criminal charges. However, just when it appeared that Bill C-45 had no teeth, a Quebec company, Transpavé, plead guilty to criminal negligence charges arising from a 2005 workplace death in Quebec.

The accident that prompted the corporate criminal charges against Transpavé occurred in October 2005 when a young employee was crushed by heavy machinery when he tried to remove a blockage in a jammed stacking machine. Quebec’s workplace safety enforcement body, La Commission de la Sante et de la Securite du Travail (the CSST), along with the police, conducted a broad investigation of the accident. The CSST identified the following as some of the contributing factors:

- Though the machinery was equipped with a safety device or guarding system, the safety device was disabled at the time of the accident and for most of the two years prior to the death;
- The company did not have an adequate program to ensure that the safety device was operational;
- The company had not provided adequate safety and hazard awareness training, nor had it implemented procedures to address the hazards. As a result, the employee was unaware of the dangers his actions posed.

Although Transpavé initially indicated that it would defend against the charges, the company ultimately plead guilty in December of 2007. At the sentencing hearing in February 2008, counsel for both the prosecution and the convicted company suggested to the Court that an appropriate fine for the offence would be $100,000. The recommended amount of $100,000 was based on several factors, including the relatively small size of the company (approximately 100 employees) and the significant

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1 For example, on March 3, 2005, the Bill C-45 charge against Mr. Fantini was withdrawn because he pleaded guilty to three of the eight offences under the OHSA.

investments by the company to make safety improvements since the fatality (in excess of $500,000). The Court also considered the guilty plea of Transpavé which spared the victim’s family and coworkers a prolonged hearing and drawn-out trial.

The Court ultimately imposed the recommended fine of $100,000 and also mandated that Transpavé pay a “victim surcharge” of $10,000 under section 737 of the Criminal Code. Victim surcharges are monetary penalties added on to a jail sentence or fine. The money is used by the provinces to fund programs that provide assistance and services to the victims of crime.

**Implications of Transpavé**

It remains to be seen whether this case will pave the way for an increased number of OH&S related criminal prosecutions. Furthermore, because Transpavé plead guilty, this case did not really shed any light on how the Court would assess whether an organization is guilty of criminal negligence in the OH&S context.

In spite of the foregoing uncertainties, Transpavé has shed some light on how an organization will be sentenced under the Criminal Code. While a $110,000 penalty would not be high for a fatality conviction under the Alberta OHSA, the amount of the fine was considerable in Quebec and was influenced by the small size of the company. Larger organizations could expect significantly greater fines in similar situations. This is particularly true where the accidents have been largely publicized.

**Due Diligence and Bill C-45**

Although it is still uncertain what the lasting implications of the Transpavé case will be, it is certain that employers can no longer ignore Bill C-45. As such, employers must remain vigilant in ensuring that their workplace OH&S policies and procedures are compliant with the court developed due diligence standards to avoid criminal and regulatory prosecutions.

Due diligence, in the health and safety context, means that employers shall take all reasonable precautions to prevent injuries or accidents in the workplace. Where a violation has occurred, the prosecutor needs only prove that the defendant committed the prohibited act. It is then solely up to the defendant to establish that they acted in a duly diligent manner in complying with the law.

The Supreme Court has stated that reasonable care can be proven if the employer can show a “proper system” to prevent the commission of the violation and that steps were taken to ensure the “effective operation” of that system. Whether the defence is successful will depend on the efforts the defendant had made to prevent that specific violation and the complete and available documentation of those efforts. As such, to exercise due diligence, an employer must implement a plan to identify possible

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workplace hazards and carry out the appropriate corrective action to prevent accidents or injuries arising from these hazards.

The conditions for establishing due diligence includes several criteria:

- The employer must have in place written OH&S policies, practices, and procedures. These policies, etc. would demonstrate and document that the employer carried out workplace safety audits, identified hazardous practices and hazardous conditions and made necessary changes to correct these conditions, and provided employees with information to enable them to work safely.

- The employer should implement proper oversight mechanisms for planning jobs. This includes detailed instructions, monitoring and follow up procedures.

- The employer must provide the appropriate training and education to the employees so that they understand and carry out their work according to the established policies practices, and procedures.

- The employer must train the supervisors to ensure they are competent persons, as defined in legislation.

- The employer must monitor the workplace and ensure that employees are following the policies, practices and procedures. Written documentation of progressive disciplining for breaches of safety rules is considered due diligence.

- There are obviously many requirements for the employer but workers also have responsibilities. They have a duty to take reasonable care to ensure the safety of themselves and their coworkers - this includes following safe work practices and complying with regulations.

- The employer should have an accident investigation and reporting system in place. Employees should be encouraged to report "near misses" and these should be investigated also. Incorporating information from these investigations into revised, improved policies, practices and procedures will also establish the employer is practicing due diligence.

- The employer should document, in writing, all of the above steps: this will give the employer a history of how the company's occupational health and safety program has progressed over time. Second, it will provide up-to-date documentation that can be used as a defense to charges in case an accident occurs despite an employer's due diligence efforts.

- Organizations must ensure that there is proper oversight of compliance with OH&S statutes. Organizations should implement inspection programs to ensure that safety mechanisms are operational, and ensure that there are work procedures that adequately address identified
hazards present in the workplace. Organizations must provide adequate safety and hazard awareness training, both of which should be reviewed and evaluated by management on a regular basis.

All of the foregoing elements of a “due diligence program” must be in effect before any accident or injury occurs. Due diligence begins well before the prosecution commences. Any actions taken following a particular incident which has led to a prosecution may lead to a reduction in the penalty (but has nothing to do with establishing the due diligence defence). As such, employers must ensure that appropriate preventative steps are established, and that implementation of such steps occurs at all levels of their organization.

Part 2: Protecting Internal Investigation Reports

The importance of conducting an incident investigation promptly after a workplace accident, injury or fatality cannot be over-emphasized. The purpose of the investigation is not to find fault, but rather to identify the root causes of the incident and develop suitable corrective actions to prevent a recurrence. In particular, the benefits of conducting such investigations include:

- **Due Diligence**: By investigating an incident, a company can demonstrate due diligence, which may limit liability in a subsequent prosecution;

- **Fact Finding**: The Company can learn exactly what went wrong and why. The process can also identify imminent danger, causes, unsafe work practices and uncontrolled hazards;

- **Prevention**: By conducting an investigation, companies can implement corrective actions so that a similar incident can be avoided in the future;

- **Information**: Can provide needed information for insurance claims;

- **Protection**: Might prevent criminal charges against the company if third party liability is identified during the course of the investigation.

By conducting your own investigation first, you may be able to root out problems before they are uncovered by government investigators. Moreover, if you can show good internal review procedures, you may be able to avoid or at least limit the examination by outside agencies.

**Protect the Internal Investigation Reports**

While conducting an internal investigation is advisable and often necessary from the perspective of maintaining the employer’s due diligence, such investigations can give rise to certain legal risks for the employer. One such risk is that in a subsequent prosecution of the employer under health and safety
legislation, the prosecution may try to use any negative conclusions in an internal investigation as evidence against the employer.

That is precisely what happened in the case of Bruce Power, who disclosed an internal investigation report (the Report) to their union, Power Workers Union (PWU). However, despite this fact, the Ontario Superior Court of Justice recently dismissed an appeal by the Crown to allow the admission of the Report into evidence at a trial under the *Occupational Health and Safety Act* (OHSA). The Court held that the Report was covered by solicitor-client and litigation privilege and that neither privilege had been waived by Bruce Power. Accordingly, the Report could not be used as evidence against Bruce Power at trial.

**The Bruce Power Case**

This case arises out of OH&S charges filed against Bruce Power in its capacity as “constructor,” and two supervisors in connection with the serious injury of a worker at the Bruce “B” Power Generating Station in 2004.

Immediately after the workplace injury occurred, Bruce Power sought legal advice from its external counsel, a specialist in occupational health and safety law (External Counsel). External Counsel advised Bruce Power to conduct an internal investigation into the incident and to prepare a report for her review. She further advised Bruce Power to claim solicitor-client privilege and litigation privilege over the report.

Bruce Power’s Accident Review Panel (the Panel), which was made up of both management and PWU representatives, conducted an investigation and prepared the Report. All members of the Panel were told not to release the Report to any third party and to destroy their copies. While the Ministry of Labour was aware that the Report existed, it did not formally request its production during the course of its independent investigation.

A few months after the Report was created, External Counsel released the Report to the PWU and the Society of Energy Professionals (the Society) for the limited purpose of the education of their members. External Counsel again asserted a claim of privilege and confidentiality with regard to the Report.

Shortly thereafter, one of the PWU Panel representatives provided a copy of the Report to the Ministry of Labour, an act for which he was subsequently disciplined. The Ministry then attempted to have the Report entered into evidence at the trial. In response, Bruce Power re-asserted their claims of solicitor-client and litigation privilege over the Report and argued that such claims had not been waived by virtue of the release of the Report to the PWU and the Society. The Justice of the Peace agreed with Bruce Power and ordered a stay of the proceedings.
The ruling of the Justice of the Peace on the privilege issue was upheld by the Ontario Superior Court of Justice on the basis that the Report had been prepared in contemplation of litigation. However, the Superior Court reduced the remedy from a stay of the proceedings to an order excluding the Report from evidence at the subsequent trial.

**The Cloak of Solicitor-Client and Litigation Privilege**

Solicitor-client privilege is based on the necessity to ensure confidentiality in respect of communications between lawyer and client. Litigation privilege, on the other hand, serves to protect communications made or documents created for the dominant purpose of assisting the client in litigation.

With regard to the issue of solicitor-client privilege, the Superior Court held that the evidence before the Justice of the Peace supported the finding that External Counsel had been retained by Bruce Power and therefore a solicitor-client relationship was in place at the time the Report was created.

In determining whether there was a valid claim of litigation privilege, the Superior Court looked to the dominant purpose test and stated that the real issue before them was:

"Whether this [Report] was created to assist [External Counsel] in anticipation of Ministry charges, or whether it was to determine the root cause of the accident and to offer recommendations to Bruce Power Inc. and the unions or professional employees to avoid a similar accident in the future as required by existing protocol."

The Superior Court held that while the Report was clearly focused on providing information and the educational value in the Report was obvious, it was not unreasonable for the Justice of the Peace to have determined that the dominant purpose of the Report was to assist External Counsel in defending its clients. As such, the Superior Court upheld the ruling that:

“The ‘preponderance’ of evidence supported a finding that the substantial and dominant purpose of the [Report] was to obtain the advice of legal counsel and to assist in the preparation of a defence in respect of anticipated litigation arising out of this workplace accident."

**Waiver (or Lack Thereof) of Solicitor-Client and Litigation Privilege**

The second issue before the Superior Court was whether the Justice of the Peace erred in her decision that the solicitor-client/litigation privilege had not been waived despite External Counsel’s release of the Report to the PWU and the Society.

Generally, waiver of solicitor-client privilege is established by demonstrating that the client (who holds the privilege) knew of the existence of the privilege and voluntarily demonstrated an intention to waive that privilege.
On the other hand, litigation privilege may generally be waived where all or part of the information in the document or communication in question is imparted to a third party. However, litigation privilege is not waived where a document or communication is provided to a third party who is "closely aligned" with the litigant at the time the information was disclosed to that third party.

On the issue of solicitor-client privilege, the Justice of the Peace held that the intention of External Counsel in releasing the Report was clearly limited to the use of the document for educational purposes without intending any greater waiver of privilege. As such, she held that there had been no waiver — this decision was upheld by the Superior Court.

On the issue of litigation privilege, the Superior Court held that it was reasonable to assume that at the time the Report was prepared and provided to the PWU and the Society, members of the PWU and the Society were also potential defendants. As such, those potential defendants were closely aligned with Bruce Power as they had "a common purpose in defending anticipated litigation." Therefore, the Superior Court held that litigation privilege had not been waived.

Remedy

The Justice of the Peace, in finding that there had been no waiver over the claims of solicitor-client or litigation privilege, decided that the appropriate remedy was a stay of proceedings, a fairly severe remedy given that it precludes the case from being heard on the merits. The Superior Court allowed the appeal on this point and held that this case did not present "the clearest of [circumstances] in which the only appropriate remedy was to enter a stay of proceedings."

The Superior Court focused on the "strong public interest in having matters of occupational health and safety determined on the merits" and the fact that there was insufficient evidence to demonstrate there had been any improper motive on the part of the Ministry in obtaining the Report. In the end, the Superior Court decided that the appropriate remedy in this case, especially given that the Ministry of Labour had assigned a new Crown to the case who had not read the Report, was to order an exclusion of the Report from the evidence. They further ordered that the copy of the Report in the Superior Court's possession be sealed.

Precautionary Measures to Maintain Privilege over Internal Investigations Reports

While it remains to be seen whether the decision of the Superior Court will be appealed, this case has significant, positive implications for the ability of an employer to assert a claim of privilege over internal reports prepared in the wake of a workplace accident or injury.

In order to ensure these internal reports remain privileged, the following steps should be taken:

1. When it is determined that an internal investigation report is appropriate, the commissioning of the report should be done by legal counsel for the employer (preferably external counsel).
2. When the report is commissioned, it should be made clear to all parties involved that the report is being prepared in anticipation of potential litigation relating to the workplace accident/injury and that the investigation and the subsequent report are subject to solicitor-client privilege, litigation privilege, and confidentiality.

3. Disclosure of the report should only be done through, and with the advice of, legal counsel to the employer.

4. If disclosure of the report is necessary, it must be for an expressly defined, limited purpose (e.g. the education of stake-holders such as the unions).

5. If legal counsel decides that disclosure of the report should occur, the recipient of that disclosure must be expressly advised:
   (a) Of the limited purpose for which they are receiving the report; and
   (b) That the disclosure does not constitute a waiver of the solicitor-client or litigation privilege claimed over the report.

Part 3: The Rights and Powers of an OH&S Officer

The difference between a health and safety “inspection” and “investigation” is often unclear because the same OH&S Officers who perform inspections also engage in investigations. However, understanding which hat the OH&S Officer is wearing is crucial to determining the limits of the Officer’s powers.

Rights and Powers of OH&S Officers

OH&S Officers in Alberta visit places of employment to detect unsafe or unhealthy working conditions, and ensure compliance with laws and regulations governing workplace safety. An Officer whose purpose in attending a workplace is to carry out compliance inspections is entitled to enter into or on any work site and inspect that work site or project without prior authorization. Furthermore, for the purpose of ensuring regulatory compliance, these Officers can exercise significant powers. The scope of this power includes the ability to:

- Require the production of any records (save and except medical reports), books, plans or other documents that relate to the health or safety of workers and may examine them, make copies of them or remove them temporarily for the purpose of making copies;

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4 Alb. OHSA, sec. 8(a).
• Inspect, seize or take samples of any material, product, tool, appliance or equipment being produced, used or found in or on the work site that is being inspected. However, the Officer is required to give the person a receipt and return those items once they have served their purpose;

• Make tests and take photographs or recordings in respect of any work site;

• Interview and obtain statements from persons at the work site;⁵

• For the purposes of determining the cause of an accident, seize or take samples of any substance, material, product, tool, appliance or equipment that was present at, involved in or related to the accident. However, the Officer is required to give the person a receipt and return those items once they have served their purpose.⁶

During a compliance inspection, not only may the Officer enter the workplace or project without prior authorization and exercise the powers outlined above, but if anyone interferes or attempts to interfere with the Officer in the exercise of those powers, a Director of Inspection may apply to the Court of Queen’s Bench for an order restraining that person from preventing or interfering with the Officer in the exercise of those powers.⁷ In short, during compliance inspection the employer must not only grant access to the Officer but must also cooperate and assist them.

Where is the Charter?

During the course of a compliance inspection basic rights under the Charter of Rights and Freedoms (“Charter”) are not engaged. For instance, an Officer can attend the workplace and compel production of documents without reasonable and probable ground for doing so without running afoul of the right to be secure against unreasonable search and seizure under section 8 the Charter. Furthermore, at trial an accused cannot be compelled to be a witness at his or her own trial as per section 11(c) of the Charter. However, regulatory regimes, like the Alberta OHSA, compel individuals to answer questions of Officers who are carrying out compliance inspections.⁸ Courts have held that this requirement does not violate the 11(c) Charter rights of the employee.⁹ Furthermore, as there is no arrest or detention at that point, the Officer does not need to caution the employee as to his or her right to remain silent as per sections 7 and 11(c) of the Charter.

⁵ Alb. OHSA, sec. 8.
⁶ Alb. OHSA, sec. 19(3) and (4).
⁷ Alb. OHSA, sec. 8(4).
⁸ Alb. OHSA, sec. 8(1)(e).
Until quite recently the issue of whether an employee has the right to have counsel present during a compliance interview was an unresolved question. However, a 2005 case of the Alberta Court of Queen’s Bench seems to suggest that this Charter right is also not triggered during an interview with a OH&S Officer where the purpose is not to determine penal liability.

**The Ebsworth Case**\(^{10}\)

On March 17, 2004, a worker witnessed the death of another employee in an accident at a workplace north of Standard, Alberta. Shortly after the accident, two occupational health and safety officials who had appeared on the day of the accident to collect physical evidence returned to interview the worker and other employees pursuant to the provincial OHSA.

Section 19(2) of the Act provides that “[e]very person present at an accident when it occurred or who has information relating to the accident shall, on the request of an officer, provide to the officer any information respecting the accident that the officer requests.”

Section 19(5) provides that “[a]ny statement given under this section is not admissible in evidence for any purpose in a trial, public inquiry under the *Fatality Inquiries Act* or any other proceeding except to prove (a) non-compliance with this section; or (b) a contravention of section 41(3).” Section 41(3), in turn, states that “[a] person who knowingly makes any false statement or knowingly gives false information to an officer or a peace officer engaged in an inspection or investigation under ... s.19 is guilty of an offence and liable to a fine of not more than $1,000 or to imprisonment for a term not exceeding 6 months or to both fine and imprisonment.”

The worker and five other employees retained counsel to sit in on their interviews with the occupational health and safety officers. The officers agreed to this, though the lawyer was not allowed to speak or to tape record the interviews. When the officers subsequently asked the worker to come to a second interview, they had by that time decided, on the advice of a Crown prosecutor, against allowing the presence of counsel at any interviews. They declined to provide the worker with copies of his original written or oral statements for review prior to his second interview, and they said that his counsel could not be present.

The worker applied to the Alberta Court of Queen’s Bench for an injunction enjoining the Alberta government from interviewing him in the absence of counsel. Before the Court, the worker argued that, because there was no express authority under the Act for an occupational health and safety officer to exclude counsel from a witness interview, any attempt by an officer to do so exceeded his jurisdiction.

The worker further argued that prohibiting witnesses from having legal counsel present during an investigative interview was unconstitutional because it violated both s.7 of the Charter, which guarantees the right to life, liberty and security of the person, and s.10, which provides that “[e]veryone has the right on arrest or detention … (b) to retain and instruct counsel without delay.” He submitted that, because he was compelled under the Act to appear before the officers and answer their questions, under threat of legal sanctions if he refused, this was tantamount to detention.

In its response, the government denied that the worker had been detained in violation of s.10 of the Charter. It likewise disputed that s.7 of the Charter was engaged in any way because there was no imminent jeopardy whatsoever to the worker’s liberty. The government argued that s.19(5) of OHSA created a regulatory scheme in which people were encouraged by broad immunity to be forthcoming and honest in the course of an investigation, and an individual could be in jeopardy under the Act only for refusing to provide information or for failing to tell the truth. Because the worker was not charged with any offence, the government argued, he was not in any jeopardy, and the injunction proceedings were premature.

Alberta Court of Queen’s Bench Judge Gerald Verville dismissed the application for an injunction, finding that the officers were acting within their statutory powers in refusing the presence of counsel and that the worker was not in any jeopardy that would trigger the protections provided by s.7 or 10 of the Charter.

With regard to the authority of occupational health and safety officers to deny the presence of counsel, Judge Verville noted that “[i]n Irvine v. Canada (Restrictive Trade Practices Commission)11, the Supreme Court held that an investigative body must have control of its own procedure, and where the legislation in question did not expressly provide a right to cross-examine witnesses and the duty of fairness did not require it, the hearing officer could refuse to permit cross-examination…. Similarly here the [occupational health and safety] officers have the right to control their procedures, as long as they do not conflict with the OHSA.”

The judge concluded that, “[i]f the legislation expressly stated that a person may request that someone accompany him, OHS officers could not exclude legal counsel, but that does not mean that, where the legislation is silent, the OHS officers have no ability to set their own procedure for investigations.”

As for the Charter arguments, Verville rejected the contention that requiring the worker to answer questions pursuant to s.19(2) of OHSA was tantamount to detaining him, because “the facts here do not demonstrate an adversarial and coercive relationship between the state and the [worker].” Determining that the protections under s.10 of the Charter therefore did not apply, the judge likewise concluded that “the [worker’s] rights under s.7 have not been engaged since there is no real or

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imminent deprivation of liberty. “ Even if there were some risk to the worker’s liberty if he failed to provide a statement or made a false statement, Verville added, “[i]n these circumstances the principles of fundamental justice do not require that his legal counsel be present during the interview, nor does it involve a right to silence.”

The employee has appealed this decision to the Alberta Court of Appeal.

**When are Charter Rights Finally Triggered?**

At some point during the compliance inspection it may transpire that the purpose of the inquiry is no longer to determine whether or not there is a regulatory compliance but is, instead, to determine whether or not there is penal liability. Once that inquiry has shifted Charter rights are fully engaged.

While Judge Verville was of the view that there was no real or imminent risk to the worker’s liberty in the Ebsworth case, he acknowledged that, where the purpose of an agency seeking to compel a witness to testify is to determine penal liability, the individual’s s.7 right to liberty would then be engaged.

In *British Columbia Securities Commission v. Branch*¹², the Supreme Court of Canada addressed the issue of whether an individual who might subsequently be charged with a criminal or quasi-criminal offence could be compelled to give evidence in an investigation. Ruling that the appropriate test was whether the predominant purpose was to obtain incriminating evidence against the individual rather than a legitimate public purpose, the Court noted that “any test to determine compellability must take into account that if the witness is compelled, he or she will be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection.” Citing the Supreme Court’s ruling, Verville observed in the Ebsworth case: “[T]he dominant purpose of requiring the Applicant to provide information is not to incriminate him, but to obtain information necessary to determine the cause of a workplace accident. Further, if there were subsequent proceedings he would be protected by the derivative use immunity in s.7 of the Charter.”

**What is the Predominant Purpose of the OH&S Officer’s Visit?**

The presence of Charter rights are significant for employers who want to avoid producing evidence during an OH&S investigation that can later be used against them in a prosecution. As such, employers must be aware of when the predominant purpose of an inquiry is no longer a compliance inspection, but rather is an inquiry into the determination of penal liability. The factors that the Courts have considered in making such a determination include, but are not limited to, such questions as:

- Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?

• Was the general conduct of the authorities such that it was consistent with the pursuit of a
criminal investigation?

• Had the auditor transferred his or her files and materials to the officers?

• Was the conduct of the auditor such that he or she was effectively acting as an agent for the
officers?

• Does it appear that the officers intended to use the auditory as their agent in the collection of
evidence?

• Is the evidence sought relevant to taxpayer liability generally? Or is the evidence relevant only
to the taxpayer’s penal liability?

• Are there any other circumstances or factors that can lead the trial judge to the conclusion
that the compliance audit had in reality become a criminal investigation?\textsuperscript{13}

In other words, the courts will assess the facts gathered by the Officer and determine at what point
during their inquires he or she ought to have reasonably known that a offence had been committed.

**Practical Steps in Dealing with an OH&S Officer**

As can be seen from the above discussion, the question of what role is being played by an OH&S Officer
and the scope of his or her powers to compel you to provide information can often be unclear. As such,
it is important to have procedures in place. Unfortunately, there is no one list of rules that can be
applied in all cases. However, we do have some general suggestions that may help you deal with an
Officer’s visit.

**Before an Officer Arrives**

• Designate one contact person at each location.

• Develop procedures for dealing with inspectors and train staff in those procedures.

• Maintain a separate file for material over which you wish to claim solicitor/client privilege.

• Keep in-house or outside legal counsel apprised of any situations that may increase the
likelihood of an inspection.

When an Officer Arrives

- Immediately contact the designated contact person.

- Check the officer’s identification.

- Ask the officer what the purpose of his or her visit is. Is it a general audit or a more specific investigation? Are they investigating in aid of a possible prosecution?

- Consider immediately contacting legal counsel.

- Have someone (hopefully the designated contact person) accompany the officer at all times.

- Be careful not to obstruct the investigation. However, you may be able to make alternate arrangements for the time and date of the inspection.

- Keep notes of everything the officer does and says in his or her visit.

- Remember that anything you say, even if you think it is “off the record” may be recorded by the officer and used against the employer or you later.

- Keep a record of all documents and other items taken by the officer.

- Cooperate in any interviews but consider asking the inspector to return later to conduct the interviews. This will give legal counsel an opportunity to meet with any persons to be interviewed before the interview.

- Request that legal counsel or another employer representative be present in any interviews.

- Ensure that everyone answers all interview questions fully and honestly.

- If the officer has a search warrant, immediately contact legal counsel and ask the officer to wait until your legal counsel has arrived. Although officers have no obligation to wait, most will.

- If you have any objections to anything the officer is doing, note your objections on paper but do not attempt to obstruct the search.

- Do not underestimate the importance of an officer’s visit. Information gathered by an officer could form the basis for a prosecution down the road. Everything you say or do during an investigation is therefore very important.
Conclusion

The foregoing is designed to keep you apprised of the current topics of interest in the OH&S field and provide you with the information necessary to handle an OSHA inspection, investigation and/or prosecution. The principals are applicable to government investigations in other areas, including privacy and human rights. We would be pleased to assist you in exploring ways to minimize any such liability, either proactively through advanced preparation of procedures or reactively in response to an inspection or investigation that is already underway or completed.
Privacy Law Update: Complying with Privacy Legislation, “Best Practices” and Current Issues

Tina Giesbrecht & Michael Ford

The Current Privacy Law Landscape in Canada

Overview

Currently, there is a patchwork of privacy legislation across Canada applying to different organizations in varying degrees. In all Canadian jurisdictions, there is some form of privacy legislation that protects the confidentiality of personal information and limits the manner in which private sector organizations may collect, use, disclose and retain personal information in the course of their commercial activities and, in some jurisdictions, in relation to their employees.

Federal Private-Sector Privacy Legislation

On January 1, 2001, the first privacy legislation applicable to private-sector organizations in Canada came into force - the Personal Information Protection and Electronic Documents Act (PIPEDA).

Between January 1, 2001 and December 31, 2003, PIPEDA applied only to private-sector organizations which fell within the definition of a “federal work, undertaking or business” under Canada’s Constitution Act, 1982 (e.g. banking institutions, airlines, railways and telecommunications companies). With respect to these types of organizations, PIPEDA applies to personal information collected, used and disclosed:

- in the course of their commercial activities; and
- in relation to their employees.

On January 1, 2004, PIPEDA’s scope expanded to apply to provincially-regulated organizations in relation to personal information collected, used and disclosed by such organizations in the course of their commercial activities. PIPEDA will continue to apply to personal information collected, used and disclosed by provincially-regulated organizations in the course of their commercial activities unless and until a Province in which such an organization is located or is otherwise subject to the laws of such Province, passes legislation “substantially similar” to PIPEDA.

1 The authors thank the assistance of Gerald Griffiths, Trevor Lawson, Daniel Pugen and Barbara McIsaac for their able assistance in preparing this paper.
Notably, PIPEDA does not apply to any provincially-regulated organizations with respect to personal information collected, used and disclosed in relation to their employees, even if a Province in which such an organization is located does not enact privacy legislation which is “substantially similar” to PIPEDA.²

**Provincial Private-Sector Privacy Legislation**

Currently, there are only three provinces in Canada that have enacted generally applicable private-sector privacy legislation:

1. An *act respecting the protection of personal information in the private sector* (“Quebec PIPA”). Quebec PIPA came into force in 1994.
2. Alberta’s *Personal Information Protection Act* (“Alberta PIPA”). Alberta PIPA came into force on January 1, 2004; and

Under Section 26(2)(b) of PIPEDA, the Governor in Council is empowered to exempt provincially-regulated organizations from the application of PIPEDA if they operate within a Province where legislation is declared “substantially similar” to PIPEDA. Quebec PIPA, Alberta PIPA and B.C. PIPA have all been declared “substantially similar” by the Governor in Council. Although the underlying policy and goal is generally the same, there are specific differences between the privacy legislation passed by these provinces which must be taken into account when developing privacy policies.

**Principles Underlying Canadian Private-Sector Privacy Legislation**

The federal and provincial privacy legislation described above is premised on the fundamental principle that an organization cannot collect, use or disclose personal information about an identifiable individual without the knowledge and consent of that individual, subject to the limited exceptions described within the privacy legislation (e.g. for use in a legal proceeding).

The term “personal information” is broadly defined in Canadian privacy legislation as including any information about an identifiable individual, or information which allows an individual to be identified, but does not generally include business contact information (i.e., name, title, business address,

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² The gap in the applicability of PIPEDA to employee personal information, although not expressly stated in PIPEDA (but confirmed by the federal Privacy Commissioner), is rooted in the constitutional division of powers between the federal and provincial levels of government in Canada. The federal government does not have the constitutional power to legislate provincially-regulated employers with respect to matters relating to their employees.
telephone, facsimile, and e-mail address). Interestingly, “business contact information” is not excluded from the definition of “personal information” under the Quebec PIPA. There are other variations of, exceptions to and exclusions from the definition of “personal information” set out in Canadian privacy legislation which must be taken into account when developing privacy policies.

There are ten guiding principles which are described in PIPEDA and which must underlie any provincial privacy legislation before it will be declared “substantially similar” to PIPEDA. These principles should also underlie any privacy policies.

These ten principles are as follows:

1. Accountability
   
   - Organizations are responsible for all personal information within their control and must designate an individual (or individuals) to oversee compliance with applicable privacy legislation. This includes implementing policies and procedures, and training employees to protect personal information, and responding to complaints that may arise.

   - Organizations remain responsible for all personal information in their custody or under their control, including where the organization engages a service provider to act on behalf of the organization.

2. Identifying Purposes
   
   - Organizations must identify the purposes for which they intend to use and disclose personal information at or before the time of collection, including the use of previously collected information for a new purpose that is not otherwise permitted or required by law. The purposes must reflect what a “reasonable person” would consider appropriate under the circumstances.

3. Consent
   
   - Knowledge and consent are generally required for the collection, use, or disclosure of all personal information. There are certain exceptions, such as when required by law, for the purpose of collecting a debt, investigating a breach of an agreement, or in cases of emergency, etc.
• Consent may be provided after collection, but it must always be obtained before use, with the exception of certain circumstances.  

• Purposes must be clearly stated and organizations must make a reasonable effort to ensure they are understood.

• Depending upon the circumstances, consent and disclosure may be implied or deemed rather than express.

• Individuals can withdraw their consent at any time, subject to legal or contractual restrictions (e.g. employment agreements) and reasonable notice, and organizations must inform the individual of the likely consequences of withdrawing consent.

4. Limiting Collection

• The amount and type of information collected must be limited to what is necessary for the reasonable purposes identified to the individual, and by fair and lawful means.

5. Limiting Use, Disclosure, and Retention

• Personal information can only be used and disclosed for the reasonable identified purposes for which it was collected with the consent of the individual or as permitted by the applicable privacy legislation or required by another law.

• Separate legal entities, even if they are related corporate affiliates, are considered to be third parties. Thus, transfers of personal information between affiliates that are separate legal entities are considered to be disclosures to a third party.

• Personal information must be retained only as long as necessary to fulfil the identified purposes and is no longer needed for legal or business purposes. Formal guidelines and procedures are required for information destruction.

6. Accuracy

• Organizations must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of the organization is accurate and complete, particularly when used to make a decision about an individual. See also the “Individual Access” principle below.

3 notably significant exceptions for employee personal information under the Alberta PIPA and B.C. PIPA.
7. Safeguards

- Organizations must protect personal information by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction.

8. Openness

- Organizations must make information about their personal information policies and practices readily available upon request, including the name or title of each person accountable for compliance with the privacy legislation, and the process for requesting access to personal information or making a complaint.

9. Individual Access

- Subject to some exceptions, individuals have a right to examine their personal information and challenge its accuracy and completeness.

10. Challenging Compliance

- Individuals have the right to make a complaint to an organization, and if not satisfied with the response, may escalate the complaint or any other decision, act or failure to act by an organization to the appropriate Privacy Commissioner. The Privacy Commissioner will then notify the organization and will either seek to settle the matter or conduct an inquiry.

- Orders made by the Privacy Commissioners are final, and organizations are under a duty to comply.

**Steps Required to Ensure Compliance with Federal and Provincial Privacy Legislation/“Best Practices”**

This section will discuss the measures to be followed by organizations implementing privacy policies and practices to comply with applicable privacy legislation.

**Appoint a “Privacy Officer” or “Privacy Committee”**

Organizations must designate an individual or individuals to be responsible for personal information handling practices. These duties may be further delegated to one or more individuals. Many organizations satisfy this requirement by creating the position of “Privacy Officer” or a “Privacy Committee” comprised of representatives from areas of the business which are involved in the collection, use, disclosure and retention of personal information (e.g. purchasing, sales, records
management, information technology and human resources). The name or title and business contact information of the responsible individual(s) must be made readily available upon request.

In the initial stages, the individual(s) responsible for privacy compliance will assist in:

- undertaking a privacy audit (discussed below);
- implementing policies and procedures designed to protect personal information (discussed below);
- establishing policies and procedures to receive and respond to complaints and inquiries;
- training staff and communicating information about the applicable privacy policies and practices; and
- developing and making available information to explain privacy policies and procedures.

Organizations will also need to build in processes for dealing with requests for access to personal information, and for interacting with Privacy Commissioners in the event of an investigation.

The ongoing role of the Privacy Officer or Privacy Committee will be to analyze privacy issues and implement action plans in circumstances where the organization is not compliant with applicable Canadian privacy legislation. The Privacy Officer or Privacy Committee should also be responsible for acting as a champion for privacy protection within the organization and for ensuring that privacy issues are taken into account when considering new or amended business processes.

**Undertake a Privacy Audit**

In order to accurately assess: (a) what personal information an organization collects, uses, discloses and retains; (b) how, why and where such personal information is collected, used, disclosed and/or retained; and (c) to whom such personal information is disclosed, an organization is required to undertake an audit of its current personal information handling practices, both in relation to its commercial activities and in relation to its employees.

In the course of completing the privacy audit, an organization’s Privacy Officer or Privacy Committee should:

- identify all of the personal information currently held by the organization;
- ascertain where this personal information is kept, whether in paper files or in electronic databases;
- identify why the personal information is collected and how it is being used;
• identify whether any information other than personal information could be collected which would serve the purpose for which the personal information is collected;

• identify any third parties from whom the personal information is collected, if not directly from individuals;

• identify any third parties to whom the personal information is disclosed or transferred;

• identify who within the organization has access to the personal information and why;

• ensure that any personal information collected by the organization is collected for purposes which are reasonable in the circumstances;

• ensure that the purposes for which the personal information is collected are communicated when the information is collected;

• ensure that individuals have provided their informed consent to the collection of their personal information and for any subsequent use or disclosure of that personal information; and

• ensure that the personal information collected by the organization is accurate, complete, up-to-date and secured in a manner appropriate in all the circumstances, with regard to the sensitivity of the personal information obtained.

**Develop and Implement Privacy Policies**

Once the privacy audit is complete, the organization should use the information gathered through the audit process to develop:

• an “external” privacy policy - applicable to personal information it collects, uses, discloses and retains in the course of its commercial activities; and

• an “internal” privacy policy - applicable to its employees.

The privacy policies developed by the organization must reflect the ten privacy principles described above. Accordingly, such policies must:

• identify the types of personal information collected, used and disclosed by the organization;

• identify the purposes for which such personal information is collected, used and disclosed by the organization;

• identify the third parties to whom the organization may disclose the personal information, and why such personal information is disclosed to these third parties;
• identify the security safeguards which the organization has in place in order to ensure the security and confidentiality of the personal information;

• advise individuals as to how they may obtain access to their personal information and as to how they may withdraw their consent to the collection, use, retention or disclosure of their personal information; and

• advise individuals as to how they can make inquiries regarding the organization’s personal information handling practices and the personal information held by the organization.

Once developed, the privacy policies will have to be made readily accessible. As noted above, one of the obligations imposed by applicable Canadian privacy legislation is to make readily available to individuals specific information about the policies and practices that the organization has adopted with respect to the management of personal information, including:

• the name or title and the address of the person(s) who is/are accountable for the organization’s privacy policies and practices and to whom complaints or inquiries can be forwarded;

• the means of requesting access to personal information held by the organization; and

• a copy of any brochures or other information that explain the organization’s policies and practices.

**Develop and Implement Safeguards**

Organizations are required to make reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction of personal information. As an example, PIPEDA states that the methods of protection may vary according to the sensitivity of the information, and should include:

• physical measures, for example, locked filing cabinets and restricted access to offices;

• organizational measures, for example, security clearances and limiting access on a need-to-know basis; and

• technological measures, for example, the use of passwords and encryption.

**Develop and Implement Policy for Responding to Privacy Inquires**

Organizations are also required to establish a process whereby an individual can obtain access to his or her personal information that is held by the organization.
This can be achieved by providing employees involved in receiving and responding to requests for access to personal information with written guidelines as to the procedure for dealing with such requests. The guidelines should include:

- an outline of the organization’s policy with respect to responding to privacy inquiries, specific requests for access to personal information, and complaints; and
- time-lines for responding to such inquiries, requests and complaints.

**Train Staff and Roll-Out Privacy Policies**

Once the privacy policies and procedures described above are ready for implementation, any staff who are or may be involved in the collection, use or disclosure of personal information, or who may be required to respond to an individual’s inquiry regarding the handling of their personal information by the organization, or regarding the organization’s general personal information handling practices, should receive training regarding the organization’s privacy policies and procedures.

In addition, the organization should ensure that its employees, suppliers, customers, etc. are made aware of the organization’s privacy policies.

**Monitoring**

Following the implementation of these policies and procedures, an organization will also be required to review them on a periodic basis in order to ensure that they remain accurate, complete, up-to-date and compliant with applicable Canadian privacy legislation.

**Current Privacy Issues: A Right to Privacy?**

Even in the absence of privacy legislation in provinces such as Ontario with respect to the collection, use and disclosure of employee personal information, some legal right of privacy may still exist in both unionized and non-unionized workplaces. Recognizing advancements in technology and public sentiment over the perceived erosion of individual privacy rights, the law is developing to provide increasing levels of privacy for individuals. Below we will discuss some current issues concerning an employee’s right to privacy.

**Common Law Right to Privacy**

At present, there is no right to privacy recognized under the common law. Historically, in order to find that there had been a breach of privacy, courts needed to find a tort or offence (e.g. trespass and nuisance) in order for there to be a valid cause of action. However, the case law in this area is developing and courts are coming increasingly close to finding that a common law tort of breach of
privacy or a right to privacy exists on its own. Most recently, a series of employment law cases have suggested that a self-standing common law right to privacy may exist.

In two recent cases before the Ontario Superior Court of Justice, an employer moved to have the pleadings struck and the case dismissed on the basis that there was no cause of action, as there was no self-standing right to privacy. In both cases, the Court held that it was not fully settled that such a right to privacy did not exist. Consequently, the Court refused to strike out the statement of claim and dismiss the action.

It is important to note that Canadian law requires that a claim should not be struck or dismissed simply because it is “novel”. These cases therefore stand for the proposition that such a cause of action may exist and do not necessarily mean that the courts have openly recognized such a common law right to privacy.

However, the commentary in two of the three employment cases suggests that such a right may exist. In Somwar v. McDonald’s Restaurants of Canada Limited, Justice Stinson followed the development of the law and noted that technological advances and other factors have created an increased need for a right to privacy. Justice Stinson further noted that while the Charter does not apply in this instance that Charter values ought to be applied in the development of the common law. Justice Stinson then went on to state that “the time has come to recognize invasion of privacy as a tort in its own right”.

Similarly, in Shred-Tech Corp. v. Viveen, Justice Gordon relied partly on the McDonald’s case in holding that the “recognition of such a tort in law is a logical result of the acknowledgement of privacy rights. There must be a remedy available for the breach of any right.”

As a result of these cases, it appears likely that an Ontario Court may eventually conclude that a common law right to privacy exists. In collecting information from or about job applicants and current employees, employers must ensure that they collect, use, disclose and retain personal information regarding employees in a way that is least likely to violate any potential right to privacy. In this regard, employers are advised to follow the “best practices” described above. If an employee can show that he or she suffered actual damage, an employer may be liable to compensate the employee for that damage. The McDonald’s case provides some guidance in this regard, as it lays out four potential criteria for a finding of a breach of privacy:

1. There must be something in the nature of prying or intrusion.

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6 Ibid. at Para 31
8 Ibid. at para 30.
2. Intrusion must be something which would be offensive or objectionable to a reasonable person.

3. The thing into which there is prying or intrusion must be, and be entitled to be, private.

4. The interest protected is primarily a mental one, which fills in the gaps left by other torts (e.g. trespass, nuisance, intentional infliction of mental distress). It is likely that where a traditional tort can protect any potential privacy interests, that tort will still be found to have been committed rather than the tort of breach of privacy.

Given the trend reflected in these recent cases, it is more important than ever for all employers and organizations to implement the “best practices” noted above.

**Video Surveillance**

Labour arbitrators (in unionized workplaces) and privacy commissioners have on many occasions been required to decide as to the admissibility of surveillance evidence.

Arbitrators are split as to when such evidence may be admitted. Arbitrators have found that such evidence is admissible:

- when it is relevant and reliable; and
- when it was collected reasonably and for a reasonable purpose.

The first line of arbitral decisions holds that the principles of natural justice require that any evidence relevant to an issue before a court or tribunal ought to be heard. In these cases, the approach of the courts is taken. It is largely irrelevant what evidence was collected or how the information was collected. Arbitrators are simply concerned with whether the evidence is relevant and reliable to decide the issue before them. This line of arbitral decisions suggest that particularly where no other evidence is available and the evidence is absolutely necessary, then such surveillance evidence will be admissible.\(^9\) Many of these cases have also noted that there exists no right to privacy (even in the unionized setting). As one arbitrator noted, there is “no right to privacy” in Ontario and, barring the existence of such a right, there is nothing prohibiting the surveillance of employees.\(^10\)

The second line of arbitral decisions (which make up the majority and which are applied by privacy commissioners under privacy legislation) have held that video surveillance evidence should only be admitted where it would be reasonable to do so and where the surveillance was conducted in a reasonable manner. These cases have adopted various tests, which involve deciding whether (in all the

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\(^10\) *Canadian Timken Limited* (2001), 98 L.A.C. (4th) 129 (Welling)
circumstances) the intrusion into the privacy of the employee was reasonable. A common list of factors considered by arbitrators and privacy commissioners is as follows:

- Is the surveillance necessary for a legitimate or reasonable business interest? Legitimate business interests often include loss prevention, safety and security risks, or investigating employee abuse of sick/disability leave.

- Is the information collected only that which is necessary to achieve the intended purpose? The surveillance should be limited in time and scope to only what is necessary.

- To what extent is employee privacy affected? This will include an examination of the length of time the employee was under surveillance, the type of surveillance equipment used, and the location of the surveillance. Surveillance in areas where employees have a reasonable expectation of privacy (e.g. employee rest areas or lunchrooms) is usually held to be unreasonable, unless there is a serious, significant business interest at stake. Where employees have a low expectation of privacy (e.g. in public), video surveillance may be reasonable for less pressing business purposes.

- Were other alternatives open to the company to obtain the evidence it sought? If there are less privacy-intrusive ways of effectively achieving the same purpose, then it may be unreasonable to use video surveillance. The employer should exhaust all alternatives.

Despite the two approaches, by taking the following steps, employers may increase the likelihood that such evidence will be admissible in an arbitration setting and not in breach of applicable privacy legislation:

- wait until a reasonable justification for surveillance has been established;

- collect concrete usable evidence which suggests an employee is being dishonest or that there are legitimate business interests which must be protected (e.g. production and safety issues);

- exhaust all alternatives to surveillance;

- choose the least intrusive form of surveillance as possible; and

- conduct the surveillance only to the minimum extent necessary.

**Video Surveillance Guidelines Issued by Privacy Commissioners**

The Federal, British Columbia and Alberta Privacy Commissioners have jointly issued new guidelines for the use of video surveillance by private sector organizations. While recognizing that private sector organizations do have certain legitimate reasons to use video surveillance techniques, the
Commissioners note that (i) privacy laws impose restrictions on the collection, use and disclosure of personal information, and (ii) video surveillance involves the collection of personal information.

The guidelines are directed to organizations subject to the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which applies to organizations carrying out commercial activities in all provinces except B.C., Alberta and Québec; to all organizations carrying out commercial activities where personal information is transmitted across an international or provincial border, no matter where the organization is located; and to the employment relationship between federally regulated organizations such as banks, airlines and railway companies and their employees.

The guidelines are also directed to organizations that are subject to the B.C. and Alberta *Personal Information Protection Acts*.

Under these legislative regimes, the key legal test for the collection, use or disclosure of personal information is that these should be reasonable in the circumstances and done only with the consent of the individual involved.

The guidelines list 10 factors to contemplate when considering using video surveillance and when implementing a video surveillance plan:

1. Determine whether a less privacy-invasive alternative to video surveillance would meet your needs.
2. Establish the business reason for conducting video surveillance and use video surveillance only for that reason.
3. Develop a policy on the use of video surveillance.
4. Limit the use and viewing range of cameras as much as possible.
5. Inform the public that video surveillance is taking place.
6. Store any recorded images in a secure location, with limited access, and destroy them when they are no longer required for business purposes.
7. Be ready to answer questions from the public. Individuals have the right to know who is watching them and why, as well as what information is being captured and what is being done with recorded images.
8. Give individuals access to information about themselves. This includes video images.
9. Educate camera operators about the obligation to protect the privacy of individuals.
Complying with Privacy Legislation, “Best Practices” and Current Issues

10. Periodically evaluate the need for video surveillance.

Email and Internet Surveillance

The law with respect to email and internet surveillance is also somewhat unclear. However, similar concepts with respect to an employee’s reasonable expectation of privacy in the workplace will be considered.

Where there is an internet and email use policy in place which provides that such use will be monitored and where email is sent using work equipment on work time, there is likely no expectation of privacy and the email communication and internet use can be monitored. The policy acts as a consent to such monitoring. There can be no expectation of privacy, particularly where an employee explicitly agrees to the terms of the policy before first using the employer’s computer. It is important to ensure that employees know of such internet policies. However, some arbitrators have held that, lack of knowledge of the policy will not assist an employee where the internet use is such that common sense would suggest that the employee not use the internet or email in such a manner.11

It is less clear that there is an expectation of privacy when employees send email at work via non-work email accounts (e.g. g-mail, yahoo, hotmail). In those cases, the employee may still have an expectation of privacy given that the employee uses a private password and is using his or her own email.

Email on a non-work account, which is sent outside of work time likely cannot be monitored, as there is an expectation of privacy.

Therefore, the ability to monitor such communication largely depends upon when the employee is being monitored (e.g. during working hours), how that employee is being monitored (e.g. pursuant to a policy with the employee’s consent) and what is being monitored (e.g. emails from the employee’s business address).

In a recent complaint to the federal Privacy Commissioner,12 a government employee complained about the employer’s “online statement” which indicated that the employer may monitor his use of the internet and e-mail. The complainant argued that the use of email should receive the same privacy considerations as the telephone and that monitoring email violated his privacy rights. The employer argued that its email was a corporate communications tool provided to employees for the purpose of conducting official government business. The policy provided for limited personal use when it complied with the employer’s policies and where employee performance was not adversely affected. The Privacy Commissioner found that the complaint was “not well-founded” and noted that the employer’s policy was...

11 Consumers Gas v. Communications, Energy and Paperworkers Union, unreported, August 5, 1999 (Kirkwood) at para. 71.
displayed “fairness and transparency by informing its employees of its monitoring practices through the online statement, and by making the electronic network policy guidelines readily available on its intranet.” Employees therefore had “clear expectations of the level of privacy they can expect from the employer.”

To avoid uncertainties, employers should provide for internet and email use policies. Moreover, specific consent should be obtained from employees prior to commencing work on an employer’s computer or over the employer’s network.

Facebook

Facebook is a social networking website that allows “friends” to post messages, pictures and other attachments on a “wall” for other users to see and comment on. A user’s “wall” is visible to anyone with the ability to see the user’s “full profile”, and different users’ “wall” posts show up in an individual’s “news feed”. Private discussions can also be conducted via Facebook by sending messages to a person’s inbox similar to email. There are also settings on Facebook which allow users to make their profile “private”. As a large amount of information about one’s “friends” is transmitted to one’s “news feed” (and since many users do not set up their “privacy” settings to only let “friends” see their “profile”), it is very easy to stay in touch with (or to investigate) one’s “friends” or other Facebook members.

Use of Facebook at Work

Just as an employer can limit access to other types of websites to ensure its employees remain productive, an employer may similarly restrict access to Facebook while an employee is at work.

Privacy Issues

The recent phenomenon of new modes of communication such as Facebook raises potential privacy issues. As an example, the posting of information on the web presents the possibility for obtaining information about job candidates and employees alike. While we know of no cases that have dealt with this issue to date, it is possible that Facebook and other social network websites may be subject to rules similar to those applied in the field of email and video surveillance evidence by arbitrators and privacy commissioners. Thus, it can be expected that the use of information collected through mediums such as Facebook by employers may be allowed where there is no expectation of privacy.

The type of privacy that an individual can expect will likely depend upon whether they have kept their information public or restricted access using privacy settings. With respect to an employee’s expectation of privacy, the following is worth noting:

- It could be argued that just as in the email surveillance field, where such materials are accessed at work on work computes, there can be no reasonable expectation of privacy.
• However, it can equally be argued that where Facebook is accessed by password there remains an expectation of privacy that is not disturbed by the fact that it is accessed at work.\textsuperscript{13}

• Facebook is arguably more of a public form of communication than email. As a result, particularly where information is posted without limiting who has access to that information, it can be argued that there is no reasonable expectation of privacy. It is arguably similar to cases where employers have monitored employee behaviour outside of work. As such, it is more likely that information accessed by any user of Facebook is not subject to any expectation of privacy.

• Perhaps a more complicated issue is the use of Facebook information which a user of Facebook has not made available to the general public but that the user has made accessible to a limited group of people (i.e. a small group of “friends”). In these situations, it is arguable that the user has an expectation of privacy similar to that of an individual in his or her home or away from work. The use of a password of another or even the monitoring of someone else’s Facebook account in that situation could amount to a breach of privacy and any evidence collected in that manner might be inadmissible in an arbitration hearing on the same basis that other video or private investigator evidence has been deemed inadmissible in the unionized setting.

It remains to be seen just how arbitrators and privacy commissioners will deal with information and evidence gathered by employers via Facebook. In the meantime, employers can protect themselves by creating internet use policies and by obtaining clear consent from employees to monitor the use of company computers.

**Biometric Hand Scanners**

An employee’s “right to privacy” in the unionized setting has recently been applied by arbitrators in determining whether an employer can implement a biometric hand scanner system in its workplace.

Biometric type systems (such as the biometric hand scanners) involve taking a part of the body, such as a hand, and treating it as the distinctive feature of the individual concerned for identification purposes. The system is effective from a security and identification standpoint because each person’s hand is sufficiently distinct (like a fingerprint) to ensure that only those individuals whose hand measurements “match up” with a hand measurement already recorded in the system will gain access.

Biometric scanners work by taking a measurement of the employee’s hand and then converting the information into a binary template or a mathematical formula against which each employee’s hand can be matched against when it is subsequently scanned on the scanner. The hand scanners usually only store the mathematical formulae and not the actual handprints.

\textsuperscript{13} This line of reasoning is similar to how many labour arbitration cases have dealt with email use.
In British Columbia, Quebec, and Alberta, as the biometric scanners are storing an employee’s “personal information”, privacy legislation applies. As a result, employers will only be permitted to enact such systems in these provinces where it can demonstrate (in Alberta and British Columbia) that it is reasonable or (in Quebec) necessary to do so. An adjudicator will balance the employer’s legitimate business needs, the manner with which the information is collected and stored, the intrusiveness of the scanners, and the employee’s “right to privacy” in making such a determination.

In Quebec, employers must obtain the employee’s consent to enact biometric scanners. Moreover, if the biometric system creates a database of biometric measurements and characteristics (which is likely), the employer must obtain the prior approval from the Quebec government body overseeing the application of Quebec privacy and information technology legislation.

Although there is no privacy legislation in Ontario, unions in Ontario workplaces have challenged the employers’ right to install biometric scanners, claiming that the scanners violate an employee’s “privacy rights” in the workplace. Although there have been arbitration decisions both upholding and dismissing these grievances, some arbitrators have found that there is a “right to privacy” in unionized workplaces, which must be balanced against the employer’s legitimate business and security interests. Arbitrators will therefore examine the reason for the introduction of the biometric scanners (i.e. security reasons, to curb time fraud, to increase productivity) in determining their legitimacy in the workplace. Similar to the cases on video surveillance, arbitrators will also examine whether less-intrusive means were exhausted or evaluated before the introduction of biometric scanners. Most importantly though, arbitrators will look to see whether the union has brought forth any evidence as to how and why the biometric scanners infringe upon an employee’s “right to privacy”. In this sense, biometric scanners will not automatically violate an employee’s “privacy” as a matter of course.

Finally, some arbitrators (particularly in Alberta and British Columbia in applying privacy legislation) have found that, because the hand scanners: (a) are not physically intrusive; and (b) store information as a number or formula which reveals nothing about the employee’s character, the personal information collected and retained by the hand scanning system falls at the “low end of the scale” with respect to the intrusion into employee privacy. As a result, the employer will only have to show some legitimate business purpose for enacting the hand scanners to overcome an employee’s “privacy right.”

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14 Unions have also successfully challenged the legitimacy of biometric scanners in the workplace by arguing that forcing employees to use the biometric scanner contrary to their religious belief is contrary to the Human Rights Code as discrimination on the basis of creed. See: 407 ETR Concession Company Limited (2007) CanLII 1857 (ON L.A.)
16 Canada Safeway Ltd. (2005), 145 L.A.C. (4th) 1 (Ponak)
GPS in Company Vehicles

Another area of concern for arbitrators and privacy commissioners concerns the use of Global Positioning Satellite (GPS) systems in company vehicles. GPS systems are able to monitor the whereabouts of a company vehicle using satellite technology. Given the potential for monitoring or conducting surveillance of employees who use company vehicles during the course of their duties, many of the principles noted above are equally applicable to adjudicators concerning this issue. As an example, arbitrators and privacy commissioners will look at the business justification or interest sought to be protected by the use of GPS and whether the use of GPS is limited in scope to only what is necessary. Moreover, if the employee is in a unionized facility, an arbitrator will evaluate whether the employee has a reasonable expectation of privacy.17

In a recent federal Privacy Commissioner case18, the Privacy Commissioner was troubled by the possibility that GPS could be used as a surveillance device. However, the employer had a policy to limit the use of the GPS to situations involving a complaint from the public, an internal concern, or an issue relating to productivity. Moreover, the employer’s stated purposes for using GPS (e.g. improving dispatch, ensuring the safety of employees and the public, locating lost vehicles) were found to be acceptable. While the case may generally suggest that employers would not have the right to use GPS to constantly monitor their workforce (especially if the purpose is to ensure productivity), in this case the Privacy Commissioner was satisfied the system would be used to manage employees only in “limited, exceptional and defined circumstances.” The Privacy Commissioner commented that the use of GPS as an employee surveillance tool may be acceptable in certain situations, which are defined and communicated to employees beforehand in an employer policy. Moreover, the information collected by the use of GPS should only be used for its defined purpose.

Conclusion

Privacy law is a developing field and no more so than with respect to employee “privacy rights” in the workplace. In Quebec, Alberta and British Columbia specific privacy legislation has enshrined “privacy rights” for employees and has restricted an employer’s ability to collect, use and disclose employee personal information without employee consent. In Ontario, recent case-law has suggested that non-unionized employees may have a right to privacy that is actionable in the courts. The majority of cases in the unionized setting with respect to biometric scanners and video surveillance have demonstrated that employees do have “privacy rights” in the workplace which must be balanced against an employer’s legitimate business interests.

17 As an example, an employee may have a reasonable expectation of privacy when the use of the company vehicle is not during working hours.

18 PIPEDA Case Summary #351
It is prudent to follow best practices in protecting and respecting employee privacy and employee personal information, and a specific and detailed policy on email and internet use can protect employers and create certainty as to an employee’s obligations. Employers should continue to monitor developments in this area of the law and should review their existing privacy policies and procedures.
Goodbye and Good Luck: The Obligations of Departing Employees

Erika Ringseis & Donovan Plomp

Introduction

In Alberta’s superheated economy, employers are no strangers to competition for human resources. Enormous effort is devoted to recruiting and retaining talent in organisations at every level. With the increased opportunities afforded employees in this hot job market, employers face the challenge of protecting their rights and interests when the time comes for an employee to move on.

This paper includes an overview of the duties of departing employees as well as the legal processes for enforcement of these duties by former employers. It includes a discussion of the practical steps that employers can take to minimize risk and potential harm from competition by former employees, including the use of effective restrictive covenants in employment agreements, the protection of intellectual property, and appropriate resignation procedures. Finally, it discusses the enforcement of restrictive covenants and employee obligations.

What are the Duties Owed by Departing Employees to Their Former Employer?

The law provides that departing employees are free to compete with their former employers subject only to the post-termination obligations included in their employment contract and any duties which they otherwise owe by operation of common law.

Duties Owed Pursuant to Common Law

Employees owe certain duties to their employer by operation of common law, called common law duties. First, employees must provide reasonable notice of their intention to resign, just as employers must provide reasonable notice of termination. What is “reasonable” depends on the particular circumstances of the case.

Common law duties also include the following:

1. The duty of loyalty and good faith.

1 The authors wish to thank Earl Phillips and Michelle Lawrence for their assistance on earlier versions of this paper.
2. The duty to maintain the confidentiality of the former employer’s confidential business information.

3. The duty of fiduciary employees not to solicit customers with whom they enjoy a special relationship nor take maturing business opportunities of the former employer.

**Duty of Loyalty and Good Faith**

All employees are subject to a common law duty of loyalty and good faith. They are obliged to be honest in their dealings with their employer and avoid any activity which puts them in a conflict of interest.

It is a breach of the duty of loyalty and good faith for an employee to compete with the employer, whether by working for a competitor or developing a competing business, at any time during the currency of the employment relationship.

This duty does not survive the termination of the employment relationship. Departing employees are generally free to compete with their former employers subject only to the post-termination common law and contractual duties described below.

**Duty Not to Compete “Unfairly”**

In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*², the Supreme Court of Canada recently heard an appeal from the British Columbia Court of Appeal regarding whether employees have a common law duty not to compete “unfairly” with their employers post-termination. At the time of writing, the Supreme Court of Canada had not released its decision, but the issue is important for employers who do not have restrictive covenants preventing competition by employees following termination.

The branch manager, investment advisors and their assistants in two branches of RBC Dominion Securities (RBC) left their employment to accept positions offered to them at Merrill Lynch. Their mass departure, without notice, caused the near collapse of the branch. They took with them confidential client records, which were later returned to RBC. Their employment contracts with RBC did not contain non-compete covenants.

RBC sued Merrill Lynch and its former employees. The trial judge found that the former employees, among other things, breached their contractual duties not to compete unfairly with RBC by:

(a) failing to give reasonable notice;

(b) attempting to move clients to Merrill Lynch before RBC knew of the employees’ departure, and could protect its relationship with those clients; and

(c) removing confidential client records several days in advance of resigning to facilitate the transfer of clients to Merrill Lynch.

The trial judge awarded damages which included damages for loss of profits based on the breach of the employees’ duty not to compete “unfairly”.

On appeal, the Court of Appeal held that there is no such thing as an obligation not to compete “unfairly” on the part of a departing employee, and reversed the trial judge’s award of damages for loss of profits against the employees beyond a 2.5 week notice period.

Employers await the decision of the Supreme Court of Canada to determine whether it will find employees have an obligation not to compete unfairly following termination.

**Duty of Confidence**

Employees are obliged pursuant to the common law duty of confidence not to make use of or disclose the confidential business information of their employer. This duty exists during employment and continues after termination for so long as the information of the former employer remains confidential.

In assessing whether particular information is confidential business information, the courts will consider:

- the extent to which the information is known outside of the business;
- the extent to which the information is known by employees and others involved in the business;
- the extent of measures taken to guard the secrecy of the information;
- the value of the information to the business and to its competitors;
- the amount of effort or money expended in developing the information;
- the ease or difficulty with which the information can be properly acquired or duplicated by others; and
- whether the confider and the confidee treat the information as confidential.

Any ambiguity as to scope or categories of information which an employer considers confidential ought to be addressed by including express confidentiality provisions, including comprehensive definitions of what constitutes confidential business information in the employment contract.
In a recent Alberta decision, two employees left a company separately and ended up both working for a direct competitor in the flag making business. Each of the employees took a customer list from their former employer with them to the new employer, which contained contact information of suppliers and customers as well as information concerning pricing, discounts, client preferences and sales history. Further, the new employer breached copyright legislation by copying the brochures of the former employer. Ultimately, the employees were each fined $7,500 for the misuse of confidential property and the damages for breach of copyright were $3,000. A further $1,000 was awarded as punitive damages against one employee. The new employer was deemed to be vicariously liable for all damages.3

Fiduciary Duty

Certain employees may be considered to hold a special position of trust and are therefore “fiduciaries” of the employer. Typically, directors and officers are considered to be fiduciaries, as are certain senior management employees. Also, employees who perform work of a type that involves the employer placing a considerable amount of trust in them may be considered fiduciaries.

Fiduciaries are subject to additional post-termination duties at common law. These include:

(a) a duty not to solicit clients of the former employer with whom the fiduciary enjoys a special relationship; and

(b) a duty not to take any maturing business opportunities of the former employer.

A fiduciary employee is a “key” employee and in this way is distinct from other “mere” employees.

The title that an employee has within an employer’s organization, however, is not determinative. A case by case analysis is necessary. On this point, Mr. Justice Dickson wrote in the 1984 decision of the Supreme Court of Canada in Guerin v. The Queen:

...it is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary... should not be considered closed.

Guerin v. the Queen [1984] 2 S.C.R. 335 per Dickson J.

This can be a high threshold to meet, and employers should not rely on an assumption that an employee is a fiduciary. For example, in Firemaster Oilfield Services Ltd. v. Safety Boss (Canada)

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The Obligations of Departing Employees

(1993) Ltd., the Alberta Court of Queen’s Bench dealt with a claim against an employee who had been his employer’s only salesman in the Calgary market.

The employee did not meet the traditional tests of a fiduciary. The employee had not supervised anyone, did not hire, fire or evaluate sales staff, did not chair weekly meetings and did not approve the sales staff’s expenses. In addition, the employee was not authorised to issue bids or provide discounts. He did not have secret or unique information and did not have the authority to make his own office arrangements.

The fact that he was the only salesman in the Calgary market was held to be less important than the fact that someone higher up in the company made the decision of how many sales staff to have in that area. The court found that the departing employee’s function of sending and receiving leads to the field, conveying information from head office to clients about bids and discounts, conveying bids to clients and networking with clients was insufficient to make him a key employee subject to fiduciary obligations.

A more recent Alberta decision found a fiduciary relationship, as the employee was part of a small group that discussed the ongoing business operations. Although he did not have a “top management” title, the employee was a fiduciary, and therefore owed the employer duties beyond a regular employee upon resignation. After the employee breached his fiduciary obligations, the employer was granted an injunction to prevent the former employee from soliciting employees, business opportunities and customers for six (6) months, although he was not required to turn down future work from the former employer’s customers.

Whether or not an employee is a fiduciary will depend on the extent to which the employee has the ability unilaterally to exercise power and discretion so as to affect the employer’s legal and practical interests and the extent of any corresponding vulnerability on the part of the employer to the exercise of that power and discretion. Express restrictive covenants may offer greater protection for employers, and these are discussed below.

Duties Owed Pursuant to Contract

The common law duty of confidence and fiduciary duty offer some protections against post-employment competitive activities by departing employees. However, in certain circumstances, the employer may be particularly vulnerable. For instance:

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4 Firemaster Oilfield Services Ltd. v. Safety Boss (Canada)(1993) Ltd., 2000 ABQB 929
The employee may have or be expected to develop special relationships of confidence and trust with the employer’s personnel, such that the employer will be vulnerable to the employee soliciting or influencing others to terminate their employment;

the employee may have or be expected to develop special relationships of confidence and trust with the employer’s customers or suppliers, and thus be at risk if the employee solicits them or attempts to divert business opportunities; or

the employee may have or be expected to obtain confidential business information of such significance and sensitivity that the employer will be vulnerable to the employee making use of or disclosing this information to others.

In such circumstances, the former employer ought to consider contractual restrictions on post-employment activities.

Restrictive Covenants - Types

Employers and employees may include in their employment contracts express restraints or limitations on an employee’s ability to engage in post-termination competitive activities. These obligations are known as restrictive covenants.

There are three common categories of restrictive covenants, which are described in greater detail below:

1. Non-competition clauses;
2. Non-solicitation of employees clauses; and

Non-Competition

The broadest form of restrictive covenant is the Non-Competition Covenant. It is intended to limit generally the departing employee’s ability to engage in competitive activities.

The following is an example of a Non Competition covenant:

Employee shall not, without the prior written consent of Company, at any time during the term of this Agreement and for a period of [insert time period] thereafter, either individually or in partnership or jointly or in conjunction with or for the benefit of any person or in any other manner whatsoever, within [insert geographic area], carry on or be engaged in or be concerned with or interested in or advise or provide any consulting services for any person or entity that produces, markets, sells or otherwise deals in
products or services directly competitive with the products or services produced, marketed, sold, licensed or otherwise dealt in by Company, or with those products or services Company contemplated producing, marketing, licensing or selling while Employee was in its employ.

**Non-Solicitation of Employees**

A Non-Solicitation of Employees covenant is a covenant designed to limit a departing employee’s ability to solicit or influence other employees to terminate their employment with the former employer. Its aim is to prevent the departing employee from taking advantage of his or her relationships with other employees to the detriment of the former employer.

The following is an example of a Non-Solicitation of Employees covenant:

Employee agrees that during the term of this Agreement, and for a period of [insert time period] thereafter, Employee shall not, without the prior written consent of Company, induce or attempt to influence, directly or indirectly, an employee of Company to leave the employ of Company and shall not recruit, employ or carry on business with, directly or indirectly, any employee of Company that has left the employ of Company within the past six months.

**Non-Solicitation of Customers**

A Non-Solicitation of Customers covenant operates so as to prohibit the solicitation by the departing employee of the customers of the former employer for a period of time following the termination of employment. It is intended to prevent the departing employee from taking advantage of any relationships of confidence and trust which he or she developed with these clients to the employer’s detriment.

The following is an example of a Non-Solicitation of Customers covenant:

Employee shall not, without the prior written consent of Company, at any time during the term of this Agreement and for a period of [insert time period] thereafter, either individually or in partnership or jointly or in conjunction with or for the benefit of any person, solicit, endeavour to solicit, canvass or deal with any person who was a customer of Company and for which Employee performed any services on behalf of Company within the period of [insert time period] prior to the date of such termination, for the purpose of selling or supplying to that person any products or services which are competitive with the products or services sold or supplied by Company.
In cases where the departing employee has relationships of confidence and trust with suppliers, the former employer may wish to expand the Non-Solicitation covenant to include post-employment solicitation of suppliers as well as customers.

**Restrictive Covenants - Reasonableness**

Restrictive covenants are restraints on trade and therefore unenforceable unless the former employer can show that they are reasonably necessary to protect legitimate business interests. These interests have been defined by the courts to include confidential information, trade secrets, business connections and goodwill.

In assessing the reasonableness of a restrictive covenant, the courts will consider the nature of the business interest being protected, the duration, activity and geographic scope of the restraint, and the public interest generally. They also will consider the language of the restrictive covenant itself so as to ensure that it is clear and unambiguous.

The determination of reasonableness is dependent on the facts of each particular case. Great care should be taken in the drafting of restrictive covenants and they should not be a standard “add-on” to every employment contract.

Historically, the courts refused to enforce restrictive covenants against a departing employee if any aspect of the restraint was more than reasonably necessary to protect the former employer’s legitimate business interests. More recently, as described below, the courts have upheld restrictive covenants on a partial basis.

**Re-writing the Covenant - Notional Severance**

Recently in British Columbia, the courts have expressed a willingness in certain cases to overlook some problematic aspects of the restrictive covenant and to enforce it to the extent the court considers reasonable. This practice is called *notional severance* and depends on the parties clearly expressing their intention in the contract in question to have the court make such a decision.6

However, the Court of Appeal in Alberta has rejected this approach. In *Globex Foreign Exchange Corporation v. Kelcher*7, the court concluded:

> Employers should not be permitted to draft unreasonably broad restrictive covenants with the expectation that ... the court will simply re-write the clause so as to make it enforceable.

As a result, employers in Alberta need to be particularly cautious about drafting restrictive covenants because if such covenants are found to be unreasonable in any way, they will be struck out completely. The one exception to this general statement is with respect to ladder covenants, which have been upheld in Alberta although dismissed in other jurisdictions.

Re-writing the Covenant - Ladder Covenants

Alberta is unique in its acceptance of “ladder” or “Russian doll” covenants, which provide the Courts an opportunity to play a role in defining what is reasonable in the circumstances. Although other jurisdictions have suggested that such clauses involve inappropriate levels of judicial involvement in contract drafting, the ladder covenant was upheld in a recent Court of Queen's Bench decision. In the Ast case, the contract between the Community Credit Union Ltd. and a financial planner, Mr. Ast, indicated that Mr. Ast would not engage in certain activities within a certain area during the “Prohibited Period.” Both the area and the time were ladder covenants. For example, Mr. Ast’s contract defined Prohibited Period as:

(a) five (5) years from the date of termination of the Consulting Agreement or any renewal thereof;
(b) four (4) years from the date of termination of the Consulting Agreement or any renewal thereof;
(c) three (3) years from the date of termination of the Consulting Agreement or any renewal thereof;
(d) two (2) years from the date of termination of the Consulting Agreement or any renewal thereof;
(e) one (1) year from the date of termination of the Consulting Agreement or any renewal thereof.

The contract then contained the following provision:

It is agreed between [Ast] and Family First that the definition of “Prohibited Period” … produces a separate and distinct covenant of the Planner … for each period included in such definition; so that if any such covenants (being less than all of them) are determined to be vague or unenforceable as a consequence of that period being too long, then such determination shall not affect or impair the validity of any of the remaining covenants.

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The Court upheld this restrictive covenant and held that Mr. Ast could not compete against Community Credit Union Ltd. for a period of one year, the shortest time frame provided by the ladder. This case was not appealed and other recent cases have not challenged such ladder covenants. Given that the British Columbia courts have made strong statements that the courts should not make an agreement for the parties that they have been unable to make for themselves, we could see some future developments in this area of the law. Accordingly, restrictive covenants should be carefully drafted to protect employers, especially where employers use the same language for employees in different provinces.

For practical advice on the drafting of restrictive covenants, employers are encouraged to consult the checklist contained as an appendix to this paper.

**Resignation Provisions**

As an alternative to restrictive covenants, or in addition to them, a former employer may seek to protect itself from post-employment competition by including in the employment contract strict resignation provisions, including what has become known as *garden leave provisions*.

A garden leave provision gives the employer the option of requiring an employer to stay at home for the duration of a specified notice period. Although the employer is required to pay the employee’s wages and benefits during the notice period, the employee has a corresponding obligation not to engage in any competitive activity for this time. As the name suggests, the employee is expected to do little more than work on his or her garden.

Garden leave provisions delay the start time for any post-termination competition which the departing employee might have planned and help to limit economic harm. The former employer has the opportunity during the notice period to secure its confidential business information, hire a replacement and strengthen relationships with any business contacts who previously dealt exclusively with the departing employee.

**Ownership of Inventions**

The employer is generally the owner of all inventions, improvements and ideas developed by an employee in the course of the employment. However, employees have certain rights as against the employer pursuant to various provisions in copyright, trade mark and patent law.

It is important, therefore, for any employer engaged in product development, or relying on inventions and unique innovations in its business, to include express provisions in their employment contracts which clarify the employer’s rights and the employee’s corresponding obligations.
These provisions should, at a minimum, include the following:

- a statement of the employer’s rights in the employee’s efforts;
- a requirement that the employee report all ideas and inventions in the course of employment; and
- a requirement that the employee cooperate in assigning ownership to the employer and in applying for protections such as patents, trade marks and copyright.

What are the Options and Legal Processes Available for Enforcing the Duties Owed by Departing Employees to Their Former Employers?

The options available to former employers for the enforcement of duties owed to them by departing employees, whether these duties are imposed by contract or common law, include:

- demanding compliance; and
- commencing litigation either in the courts or by way of arbitration.

With respect to the latter, the means by which the former employer proceeds will depend in large part on the ends being sought:

1. If the former employer seeks compensation or damages for losses suffered as a result of the wrongful conduct of a departing employee, the former employer can commence litigation in the courts or, if the employment contract includes an arbitration clause, in an arbitration before a private third party arbitrator.

2. If the former employer seeks compliance by the departing employee with his or her duties, either on an interim basis pending the trial of an action or for an extended period of time thereafter, the former employer must apply to court for an injunction requiring the departing employee to cease all wrongful conduct.

A recent Alberta case illustrates the process of enforcing restrictive covenants. The Plaintiff former employer commenced litigation in 2002, claiming, among other things, that the Defendants were in breach of contractual duties of non-solicitation of employees, non-solicitation of customers and non-competition. At the same time, the former employer brought an application for an interlocutory injunction to enjoin the defendants from breaching the restrictive covenants. At the Court of Queen’s Bench, the application for an interlocutory injunction was dismissed, but this decision was reversed by

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the Court of Appeal. The Defendants applied to narrow the terms of the interlocutory injunction but were denied. In 2008, the Plaintiff sought to extend the terms of the injunction but was denied. Thus, four years after the initial action commenced, the interlocutory injunction has run its course and the trial is scheduled to last four months, commencing in the fall of 2008.

Test on an Application for an Interim Injunction

Many cases require quick action by the former employer to prevent a departing employee from starting his or her own business or joining the business of a competitor. In such cases, it may be necessary for the former employer to apply to the court for an interim injunction. An injunction is a court order prohibiting a party from engaging in wrongful conduct. An interim injunction is an injunction which subsists for a finite period of time or up to the date of trial.

In order to succeed in an application for an interim injunction against a departing employee, the former employer must present sufficient evidence to satisfy a court that:

• there is a serious question to be tried;

• the former employer would suffer irreparable harm as a result of the departing employee’s wrongful conduct; and

• the balance of convenience favours the granting of the injunction.

Serious Question to be Tried

It is not necessary for an applicant to show that the claim will likely succeed. It need only show that the claim is not frivolous or vexatious and that there is a serious question to be tried.

In cases where the granting of an injunction will effectively dispose of the issues between the parties, the court will hold the applicant to a higher standard. In those cases, the applicant must establish a strong prima facie case. Likewise, in cases involving claims of defamation where the effect of the injunction would be to restrain free speech, the courts will grant an injunction only in the clearest of cases.

Irreparable Harm

The applicant must show that it would suffer irreparable harm if its application for an interim injunction was not granted.
The Supreme Court of Canada described the concept of irreparable harm in its 1994 decision in *R.J.R. MacDonald Inc. v. Canada (A.G.)* as follows:

‘Irreparable’ refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include... where one party will suffer permanent market loss or irrevocable damage to its business reputation.


**Balance of Convenience**

The court will weigh the effect on the former employer of not granting the injunction against the effect on the former employee or new employer of granting the injunction.

This part of the test is often determinative of the application. Where there is potential for irreparable harm to both parties, the court will seek a just and equitable balance. Preference will often be given to the status quo, with the court acting against the party who has disturbed it.

**Ex Parte Application**

An application for an injunction can be brought without notice to the departing employee if the urgency of the situation requires it. This is called an *ex parte* application.

The burden on *ex parte* applications is higher than the burden imposed on applicants who come before the court after giving notice of their application to the departing employee. An applicant proceeding *ex parte* must persuade the court that there is extraordinary urgency. The applicant also must provide full and frank disclosure of all material facts in its possession, including any evidence which favours the departing employee. Failure to do so can result in the injunction being set aside regardless of the merits of the application.

**Undertaking as to Damages**

In most cases, the applicant will be required to provide an undertaking to compensate the departing employee for any damages which he or she suffers as a result of the injunction in the event it is later determined that the undertaking ought not to have been granted. A former employer would be liable pursuant to such an undertaking if the case against the departing employee proceeds to trial and is dismissed.
Arbitration Option

Employers should carefully consider requiring disputes under employment contracts to be decided by arbitration. There are advantages and disadvantages to arbitration. The appropriateness of arbitration as a form of dispute resolution in cases involving departing employees will depend on the particular circumstances of the employment relationship and the industry in which the parties operate.

Employers who elect to include arbitration clauses must take care to ensure that they are properly drafted and that they include an express carve out provision which would allow the former employer to apply to the court for an interim injunction, if required to protect their legitimate business interests.

Atkinson Rule

A former employer generally will not be permitted to enforce contractual or fiduciary duties otherwise owed to it by a departing employee if the former employer terminates the employment relationship without cause and without notice. This is known as Atkinson Rule. Employers ought to keep this rule in mind when considering how best to handle the termination of its key employees.

What Steps can an Employer take to Minimize the Risk and Potential Harm from Competition by Former Employees?

Litigation is often the only effective means by which a former employer can enforce the duties owed to it by departing employees and in doing so protect its business interests. Swift and forceful action, whether that be through a court proceeding or arbitration, can serve to deter other employees from engaging in similar wrongful activity. However, litigation is time-consuming and expensive, both in terms of the costs that a former employer could expect to pay to its legal team and in terms of the internal human resources that must be committed to the case.

Former employers can seek to minimize the risk of wrongful competitive activity by departing employees, and therefore avoid litigation, by taking the following preventive measures:

1. Approach standard form employment agreements with a high degree of caution. Appropriate time and consideration ought to be given to the terms of the written employment agreement at the outset of the employment relationship and ought to be reassessed at regular intervals throughout the employment relationship so as to ensure the ongoing suitability and enforceability of restrictive covenants and confidentiality provisions.

2. Audit existing employment agreements, especially those in place with key employees, to determine whether the restrictive covenants and confidentiality provisions continue to be appropriate and enforceable. Legal advice should be sought before any changes are made as a failure on the part of an employer to provide new consideration could render them enforceable.
3. Ensure that all new and existing employment contracts provide for notional severance or a ladder covenant, depending on the circumstance so as to permit the court to modify restrictive covenants so that they are reasonable and enforceable.

4. Ensure that consideration is given to whether the resignation provisions of new and existing employment contracts can be enhanced through, for example, the inclusion of a garden leave provision.

5. Adopt business practices which operate to protect trade relationships and trade secrets. For example, maintain multiple contacts with clients so that the loss of a single employee is not fatal to the overall relationship, and limit access to confidential business information to identified “need-to-know” employees only.

6. Adopt policies for the management and protection of confidential business information which are simple and easily comprehensible, and train employees on these policies at the time they are hired and on a regular basis thereafter.

7. Monitor employee compliance with such policies, including, if appropriate, through the use of technology which scans outgoing messages for release of confidential information and mandatory processes for accessing confidential information that cannot be circumvented.

The object of these steps is to minimize the risk and potential harm from competition by the departing employee. Ideally, litigation would not be necessary as the former employer’s vulnerability to the misuse or disclosure of confidential business information by the departing employee would be limited and the departing employee would be impaired in his or her ability to otherwise compete to the detriment of the former employer.

**A Final Word**

*Protection* - of intellectual property, key customer relationships, and the other vital aspects of your business - and *prevention* - of the actions of former employees that can be most damaging - are the keys. To the extent you can improve protection and take preventive measures, the more likely you are to secure the employer’s business interests and avoid the costly process and inherent risks of litigation.

Once you understand what you need to protect, and in those cases where the preventive measures are not enough, it is important to consistently enforce the restrictive covenants and other contractual and common law rights and remedies available. Anything less will undermine the integrity and enforceability of your contracts and policies, no matter how carefully crafted.
Appendix: A Checklist of Considerations for the Drafting of Restrictive Covenants

Non-Solicitation of Employees

Is the former employer, by reason of the relationships which the departing employee is expected to develop with other employees, vulnerable to the departing employee inducing or influencing its employees to terminate their employment with the former employer?

- If so, for what period of time is the former employer reasonably expected to be vulnerable, taking into account the nature of the industry and the particular circumstances of the former employer, including for instance its usual employment attrition?

- If not, a Non-Solicitation of Employees covenant is unnecessary and ought not to be included in the employment agreement.

Non-Solicitation of Customers

Is the former employer, by reason of the relationships which the departing employee is expected to develop with existing and prospective customers, vulnerable to the departing employee inducing or influencing these customers to not do business with the former employer?

- If so:
  
  (a) For what period of time is the former employer reasonably expected to be vulnerable taking into account the nature of the industry and the particular circumstances of the former employer, including for instance customer mobility and business cycles?

  (b) How long is it expected for another employee to develop similar relationships with these customers?

  (c) Which customers are at risk? It may be sufficient to limit the restraint to only those customers with whom the departing employee had direct dealings.

- If not, a Non-Solicitation of Customers covenant is unnecessary and ought not to be included in the employment agreement.
Non-Competition

Is the former employer, by reason of the relationships which departing employee is expected to develop and the trade secrets which he or she is expected to have access to, vulnerable to competitive activity by the departing employee?

- If so:
  
  (a) For what period of time is the former employer vulnerable? In considering this question, it is important to remember that the courts rarely enforce restrictive covenants which extend beyond a period of two years and that non-competition covenants of such duration are typically enforced only against senior management.

  (b) What is the geographic area in which the former employer is vulnerable? Is it limited to a particular city or sales region? If so, how can that geographic area best be described so that there is no uncertainty as to its limits?

  (c) What particular activity on the part of the departing employee is the former employer expected to be vulnerable? Is it any activity which is generally competitive with the business of the former employer or a particular activity or business operation?

  (d) Is the scope of the restraint fair, taking into account all of the circumstances? Can the former employer protect its business interests by a lesser form of covenant such as, for example, a non-solicitation covenant?

- If not, a Non-Competition covenant is unnecessary and ought not to be included in the employment agreement.