
THE EMPLOYMENT LAW REVIEW

FIFTH EDITION

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

THE EMPLOYMENT LAW REVIEW

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THE EMPLOYMENT LAW REVIEW

Fifth Edition

Editor
ERIKA C COLLINS

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EDITOR'S PREFACE

It is hard to believe that we have now published the fifth edition of *The Employment Law Review*. When we published the first edition of this book five years ago, I noted my belief that a book of this sort was long overdue given the importance to multinational corporations of understanding and complying with the laws of the various jurisdictions in which they operate. It has given me great pleasure to see the past editions of this book used over the last several years for just this purpose – as a tool to aid practitioners and human resources professionals in identifying issues that may present challenges to their clients and companies. The various editions of this book have highlighted changes in the laws of many jurisdictions over the past few years, making even clearer the need for a consolidated and up-to-date reference guide of this sort.

My practice in 2013 included a notable uptick in M&A activity – a welcome development after several relatively flat years in this area following the financial crisis. For this reason, we've opted to include once again a general-interest chapter in this book on addressing employment issues in cross-border mergers and acquisitions. It is our hope that this chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals in conducting due diligence and providing other employment-related support in connection with cross-border M&A deals.

This year I have also experienced an increasing number of clients considering or revising their company's social media and mobile device management policies, and have noted a particular increase in the number of organisations that are moving toward 'bring your own device' programmes. One of the general-interest chapters in this edition addresses issues for consideration by multinational employers in rolling out policies of this sort. This issue is particularly timely as more and more jurisdictions pass or are beginning to consider privacy legislation that places significant restrictions on the processing of employee personal data.

Finally, the third general-interest chapter addresses diversity initiatives (both legislative and corporate), as this issue continues to be a hot topic for global employers.

In addition to these three general-interest chapters, the fifth edition of *The Employment Law Review* includes 50 country-specific chapters. This edition has once again

been the product of excellent collaboration. I wish to thank our publisher, particularly Katherine Jablonowska, Adam Myers, Gideon Roberton and Eve Ryle-Hodges, for their hard work and continued support. I also wish to thank all of our contributors, as well as my associate, Michelle Gyves, for their efforts to bring this edition to fruition.

Erika C Collins

Proskauer Rose LLP

New York

February 2014

Chapter 9

CANADA

Erin R Kuzz, Jennifer Hodgins and Curtis Armstrong¹

I INTRODUCTION

Canada is a federal state comprised of a central federal government, 10 provincial governments (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan) and three northern territories (Northwest Territories, Nunavut and Yukon). The federal government has legislative jurisdiction over matters affecting the country as a whole (i.e., immigration, criminal law, international trade, aeronautics, etc.), while the provinces hold legislative jurisdiction over matters such as property, contracts, natural resources, education, and health care. The territories exercise powers delegated by the parliament of Canada and have jurisdiction over some of the same matters as the provinces.

Employment and labour relations for the majority of private enterprises in Canada fall under the authority of the respective provincial or territorial governments. In each province, territory and at the federal level there are numerous statutes governing employment and labour relations. In addition, all jurisdictions other than Quebec are subject to the common law or judge-made law. Quebec is Canada's only civil law jurisdiction and it applies the Civil Code of Quebec.²

i Federal legislation

The Canada Labour Code³ applies to federal works and undertakings (which include inter-provincial transportation, telecommunications, postal services, banking and federal government services), as well as enterprises that are 'integral' to a federal work or

1 Erin R Kuzz is a founding partner and Jennifer Hodgins and Curtis Armstrong are associates at Sherrard Kuzz LLP.

2 LRQ, Chapter C-1991.

3 RSC 1985, Chapter L-2.

undertaking. The Canada Labour Code addresses employment standards (hours of work, vacation, holidays, leave, termination, layoff, dismissal, wages, pay and deductions), harassment, labour relations, and health and safety, etc. The Canadian Human Rights Act⁴ governs issues relating to human rights and discrimination. The Employment Equity Act,⁵ which applies to federally regulated enterprises that employ 100 or more workers, addresses systemic barriers faced by historically disadvantaged groups.

In addition, some federal legislation applies regardless of whether an enterprise is federally or provincially regulated, such as the Canada Pension Plan⁶ (provides qualified individuals with pension benefits upon retirement) and the Employment Insurance Act⁷ (provides income to qualified individuals during periods of unemployment).

ii Provincial and territorial legislation

Each province and territory has its own legislation setting minimum standards regarding wages, hours of work, and notice entitlements upon termination, occupational health and safety (including workplace violence and harassment),⁸ workplace safety and insurance, human rights and discrimination,⁹ the process of unionisation and the administration of collective bargaining agreements in unionised workplaces.¹⁰

In several jurisdictions there is also pay equity legislation intended to address systemic gender discrimination that results in jobs typically performed by females being lower paid than comparable jobs typically performed by males.

The Accessibility for Ontarians with Disabilities Act, 2005¹¹ was enacted in 2005 with the goal of making Ontario fully accessible to persons with disabilities by 2025. This legislation phases-in certain accessibility requirements for provincially regulated employers with respect to the provision of goods, services, and facilities. Organisations providing goods and services to the public are already subject to the Customer Service Standard and private sector organisations with one or more employees will be subject to employment standards as of either 1 January 2016 (if the organisation employs more than 50 employees) or 1 January 2017 (if the organisation employs between 1 and 49

4 RSC 1985, Chapter H-6.

5 SC 1995, Chapter 44.

6 RSC 1985, Chapter C-8. Quebec employers deduct Quebec Pension Plan (QPP) contributions instead of CPP contributions.

7 SC 1996, Chapter 23.

8 Jurisdictions with specific workplace violence-prevention legislation are the federal jurisdiction, Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan.

9 Every jurisdiction has human rights legislation prohibiting discrimination in employment on prescribed grounds, including but not limited to age, religion, gender, sexual orientation and disability, which includes drug and alcohol addiction. Sexual harassment is considered prohibited discrimination.

10 Labour relations in the territories are governed by the legislation for the federal sector: the Canada Labour Code, RSC 1985, Chapter L-2.

11 2005, SO 2005, Chapter 11.

employees). Obligations for an employer under these employment standards include developing policies and procedures related to accessibility and accommodation, training staff, and ensuring recruitment practices are accessible to persons with disabilities. Manitoba is considering similar legislation.

iii Ministries and departments

Each jurisdiction in Canada has a government ministry or department tasked with administering workplace laws.¹² These ministries and departments oversee adjudicative boards and tribunals created to enforce and address non-compliance with employment and labour statutes. Many workplace disputes are therefore addressed outside the court system.

II YEAR IN REVIEW

i Changing labour landscape

In 2013 Canada witnessed the merger of two of the country's largest labour unions. The Canadian Auto Workers Union merged with the Communications Energy and Paper Workers Union of Canada to create Unifor, now the largest private sector union in Canada. This merger was seen as an attempt by the Canadian labour movement to increase its power and bargaining strength in light of declining unionisation rates in Canada. In 2012 31.5 per cent of Canadian workers belonged to a union, down from 33.8 per cent in 1997.¹³ In the private sector alone, union membership declined from 21.9 per cent in 1997¹⁴ to 16.0 per cent in 2011.¹⁵

-
- 12 Human Resources and Skills Development Canada; Alberta Ministry of Human Services; British Columbia Ministry of Jobs, Tourism, and Skills Training and Responsible for Labour; Manitoba Ministry of Family Services and Labour; New Brunswick Ministry of Post-Secondary Education, Training and Labour; Newfoundland Labour Relations Agency; Northwest Territories Department of Education, Culture and Employment; Nova Scotia Ministry of Labour and Advanced Education; Ontario Ministry of Labour; PEI Department of Environment, Labour and Justice; Québec Commission des normes du travail; Saskatchewan Ministry of Labour Relations and Workplace Safety; Yukon Department of Community Services.
- 13 Human Resources and Skills Development Canada, 'Work – Unionization Rates', *Indicators of Well-being in Canada*, www4.hrsdc.gc.ca/3ndic.1t.4r@-eng.jsp?iid=17 (Retrieved 10 September 2013).
- 14 Ernest B Akyeampong, 'A statistical portrait of the trade union movement', *Statistics Canada: Perspectives* (Winter 1997), Catalogue No. 75-001-XPE, www.statcan.gc.ca/studies-etudes/75-001/archive/e-pdf/3386-eng.pdf.
- 15 Sharanjit Uppal, 'Unionization 2011', *Statistics Canada: Perspectives on Labour and Income*, (26 October 2011), Catalogue No. 75-001-X, www.statcan.gc.ca/pub/75-001-x/2011004/article/11579-eng.pdf.

ii Unpaid internships

There has been increasing attention paid to unpaid internships. Proponents of the practice see it as a means for workers to gain practical experience needed to secure paid employment, while critics argue it is a means by which employers receive unpaid work from (typically) young people seeking a path to paid employment and career advancement.

Increased awareness is likely the result of the country's 14.3 per cent rate of unemployment for individuals under the age 25, more than double that of workers aged 25 and older,¹⁶ which represents the largest gap since 1977.¹⁷

III SIGNIFICANT CASES

i Drug and alcohol testing in the workplace

In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* (2013), the Supreme Court of Canada struck down as unreasonable mandatory, random alcohol testing of employees in safety sensitive positions.

Irving Pulp and Paper Ltd (Irving) operates a unionised paper mill in New Brunswick. In response to alcohol issues in the workplace Irving unilaterally adopted a drug and alcohol policy requiring 10 per cent of employees classified as working in 'safety sensitive' positions to be randomly selected for unannounced breathalyser testing for alcohol. A positive test would lead to disciplinary action, up to and including dismissal.

The random testing policy was struck down as being a significant encroachment into employee privacy that was 'out of proportion to any benefit'. The Court held that a dangerous workplace is not automatic justification for random testing. Additional factors must be present, including for example: reasonable grounds to believe an employee is impaired while on duty; a workplace accident or near miss justifying post-incident testing; or an employee returning to work after treatment for substance abuse so that the testing protocol is part of a 'return-to-work' programme.

ii Evidence of a workplace problem of alcohol abuse

While this case addressed random drug and alcohol testing in the context of a unionised workplace where unilateral employer actions are often held to a 'reasonableness' standard, it is expected that the Court's decision could have broad implications both in unionised and non-unionised settings.

iii The duty to mitigate where termination entitlement is fixed

Under the common law, an employee whose employment is being terminated without cause must be provided with 'reasonable notice' of that termination or pay in lieu of

16 André Bernard, 'Unemployment Dynamics Among Canada's Youth', *Statistics Canada: Economic Insights* (11 June 2013), Catalogue No.: 11-626-XXWE, www.statcan.gc.ca/pub/11-626-x/11-626-x2013024-eng.pdf.

17 Ibid.

notice. To determine the period of reasonable notice a Canadian court will look at certain characteristics of the employment including the employee's position, length of service, age, and re-employment prospects. If reasonable notice is not provided, damages will be owing to the employee sufficient to place him or her in the position he or she would have been in but for the unlawful termination. However, an employee has a duty to mitigate his or her loss by making reasonable efforts to secure alternative employment.

To avoid the uncertainty inherent in the judicial determination of reasonable notice, employers can enter into an employment agreement that predetermines the employee's notice entitlement upon termination (discussed in more detail below).

In *Bowes v. Goss Power Products Ltd* (2012), Ontario's highest court held that a terminated employee who is subject to an employment contract that dictates his entitlement upon termination, but is silent as to the obligation to mitigate, will not be required to mitigate.

The employment contract between Mr Bowes and Goss Power stated that the employer could terminate the contract without cause by providing a specified amount of notice or pay in lieu. The contract was silent as to Mr Bowes' duty to mitigate. However, the termination letter Goss Power gave to Mr Bowes stated he would receive the six months' salary owed under his contract, subject to mitigation.

Two weeks following his termination Mr Bowes obtained another job, effectively mitigating his loss. Goss Power ceased paying the salary continuance (beyond the three week minimum period required by the applicable employment standards legislation).

The Court of Appeal held that an employee does not have an automatic duty to mitigate if the employment contract fixes the termination notice period and does not explicitly require mitigation as the parties have contracted out of the 'reasonable notice' approach to which mitigation principles apply.

iv Duty to accommodate on the basis of family status:

Most human rights statutes in Canada prohibit discrimination in employment on the basis of 'family status' (often defined as the status of being in a parent-and-child relationship).¹⁸ This can include non-biological parent-child relationships and may also include close familial relationships as well as associated obligations such as childcare and eldercare. However, courts and tribunals across Canada have diverged with respect to the scope of this protection and how it applies to a parent's standard childcare obligations. The decision of the *Federal Court in Johnstone v. Canada* (2013) represents a recent judicial pronouncement on the issue.

Both Ms Johnstone and her husband worked irregular rotating shifts as officers for the Canada Border Services Agency (CBSA). Following the birth of their children, Ms Johnstone and her husband made a number of 'family' decisions which resulted in her request that she retain her full-time status but be scheduled on fixed day shifts. CBSA

18 This is the definition in Ontario's Human Rights Code, RSO 1990, Chapter H.19. A broader definition of 'family status' can be found in the Alberta Human Rights Act, RSA 2000, Chapter A-25.5 at Section 44(1), where it is defined as 'the status of being related to another person by blood, marriage or adoption.'

refused Ms Johnstone's request relying on its unwritten policy that fixed daytime shifts were limited to part-time employees. Ms Johnstone was offered part-time employment on a fixed-shift basis, but this meant she would no longer be eligible for certain benefits extended only to full-time employees. She rejected the offer and filed a human rights claim alleging CBSA had failed to meet its duty to accommodate.

CBSA argued the protected ground of family status did not include standard childcare obligations, particularly where Ms Johnstone's childcare issues were the result of choices she and her husband made despite knowing that CBSA employees served a 24-hour, seven-day-a-week operation requiring irregular rotating shifts.

The initial Tribunal decision found that Ms Johnstone had established discrimination on the basis of family status as CBSA's refusal to accommodate her scheduling request prevented her from taking advantage of various employment opportunities. On appeal, the Federal Court acknowledged that 'not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence'¹⁹ and an employer's duty to accommodate will only be triggered where the obligation is 'one of substance' and the employee has made an effort at self-accommodation by trying to 'reconcile family obligations with work obligations'. However, because CBSA rejected Ms Johnstone's request without considering the merits of her specific circumstances (relying instead on an unwritten policy) the CBSA could not justify its decision, confirming that the process of accommodation is often as important as a result.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

In Canada a written employment contract is not a requirement of law and absent a written employment contract certain employment terms will be deemed to be the parties' contractual obligations to one another (e.g., common law reasonable notice). A properly crafted and implemented employment contract (including the appropriate consideration or exchange of something of value) can significantly limit an employer's employment-related liabilities.

Terms typically found in an employment contract include term of employment, wages, hours of work, duties and responsibilities, confidentiality, and rights and obligations upon termination. Employment standards legislation in each Canadian jurisdiction prescribes certain employment 'minimums' out of which the parties may not contract. A contract that provides less than an employee's minimum entitlements under employment standards legislation will generally be found to be unenforceable.

An employment contract can be for a fixed or indefinite term. In a fixed-term contract, the employment relationship is intended to last for a defined period of time or until a specified task or project is completed. At the end of the term, the employment relationship ends without any obligation on the part of the employer to provide

19 At paragraph 120, citing the Tribunal in *Johnstone v. Canada Border Service Agency* (2010) CHRT 20 at Paragraph 220.

the employee with notice of termination or pay in lieu. In determining whether an employment contract is for a fixed or indefinite term a court will look at the language of the contract as well as the nature of the employment relationship. In some circumstances courts have held an employee whose employment relationship was governed by a series of consecutive fixed-term contracts was actually in an employment relationship of an indefinite term.²⁰

In a unionised workplace, an employee's terms and conditions of employment are set out in a collective agreement negotiated between the union representing the employee (together with other employees in the bargaining unit) and the employer.

ii Probationary period

A probationary period is permissible in Canada. However, unless the employment contract clearly sets out the existence of the probation period and specifies what, if any, period of notice is required in the event of the employee's termination, a probationary period does not automatically supplant the employer's common law notice obligations to the employee.

A collective agreement may similarly provide for a 'probationary period'.

iii Establishing a presence

A foreign enterprise may enter into an employment relationship with an individual in Canada without officially registering to carry on business in Canada. However, if a foreign enterprise hires an employee to work in Canada the employment relationship will generally be subject to the employment and labour laws of the Canadian jurisdiction in which the employee works. Taxes are deducted at source in Canada so an enterprise must withhold taxes from an employee's pay cheque and remit them as required to the appropriate tax authority.

V RESTRICTIVE COVENANTS

Canadian courts have severely limited the circumstances in which a restrictive covenant, such as a non-competition or non-solicitation language, is enforceable. Courts consider these provisions to be a restraint on trade. Restrictive covenants must be reasonable, both as between the parties themselves and with respect to the broader public interest in not limiting trade. A court will only enforce a restrictive covenant if it represents the minimal degree of restriction required to protect an employer's legitimate business interests.

Where a court finds a restrictive covenant is overly broad (temporally, geographically, or in the activity it purports to limit), ambiguous (such as identifying a geographic area that does not exist), or is overly restrictive, a court will strike down the

20 For example, see *Ceccol v. Ontario Gymnastic Federation* (2001) where the Court of Appeal for Ontario held that an employee who had been employed on a series of one-year contracts for more than 15 years was actually in a contract of employment of indefinite duration, entitling the employee to common law notice of termination.

restrictive covenant rather than read down its scope or amend or remove the offending provision. In other words, there is no ‘blue pencilling’ in Canada.

VI WAGES

i Working time

Employment standards legislation sets out the standard hours of work in a day and a week. In some jurisdictions, employment standards legislation sets out the maximum number of hours that can be worked in a week, a day, or both. In the Northwest Territories and Nunavut, this is 60 hours in a week and 10 hours in a day. In Ontario and federally, this is 48 hours in a week and eight hours in day. In Saskatchewan, this is 44 hours in a week. In Alberta, this is 12 hours in a day.²¹ Employees are also entitled to a meal break or rest period after working a prescribed number of hours.

Exceptions exist for some management and professional job categories.

ii Overtime

Employment standards legislation in every jurisdiction requires an employee to be paid overtime when he or she works greater than a prescribed number of hours in a week or day. Some jurisdictions also contemplate daily overtime.²²

The overtime rate is 1.5 times the employee’s regular wage rate, except in Newfoundland and Labrador and New Brunswick where it is 1.5 times the minimum wage rate.²³ In some jurisdictions, an employer and employee can agree to replace overtime earnings with 1.5 hours of paid time off work for each hour of overtime worked.

Certain jurisdictions also allow an employer and employee to enter into an ‘averaging agreement’ whereby an employee and employer average the number of hours worked over a certain number of weeks for the purposes of determining overtime pay entitlement.

Exceptions exist for some management and professional job categories, or for individuals who make a certain wage rate or have substantial control over their working hours.

VII FOREIGN WORKERS

An employer may bring a foreign national to work in Canada, and Canadian law distinguishes between workers who are required to apply for a work permit and those

21 In Ontario, Alberta, and Saskatchewan, as well as in the federal jurisdiction, an employee can agree to work a greater maximum number of hours in a day and in a week.

22 In Nova Scotia and Prince Edward Island, overtime rates must be paid for hours worked after 48 hours in a week, while in New Brunswick, Alberta, and Ontario, overtime rates must be paid for hours worked over 44 hours in a week.

23 In these provinces, if an employee’s regular wage rate is greater than 1.5 times the minimum wage rate then the employee will not receive any extra pay for working overtime hours.

who are not.²⁴ The most common category of permit-exempt workers is 'business visitor': a foreign national who visits Canada temporarily to look for new business or advance existing business. For example, a worker supervising after-sale service or participating in an enterprise's training can enter Canada without engaging the permit process.

The majority of foreign nationals working in Canada require a work permit and a 'labour market opinion' (LMO) identifying the impact a foreign worker will have on the Canadian labour market. An employer must apply for the LMO before hiring a foreign worker. A positive LMO is dependent on the employer showing it made efforts to hire a Canadian first, is offering wages consistent with comparable market wages, and is offering working conditions which meet legislated standards. Some workers are exempt from the LMO requirement including those from areas covered by certain free trade agreements, or with managerial or specialised skills in an intra-company transfer.²⁵

VIII GLOBAL POLICIES

To ensure employee conduct does not breach an employer's statutory obligations an employer must govern workplace behaviour through policies.

For example, legislative regimes in every jurisdiction require an employer to maintain a safe and discrimination free workplace.²⁶ Ontario's Occupational Health and Safety Act defines particular workplace behaviour as unsafe and an employer can face liability for the unsafe behaviour of a worker.²⁷ Likewise, Ontario's Human Rights Code²⁸ protects workers from discrimination in employment on prohibited grounds, and an employer can face liability for the discriminatory act of an employee.²⁹ To avoid liability in such situations, an employer is required to show it took reasonable precautions to prevent unsafe or discriminatory misconduct. Such precautions may include communicating limits on workplace behaviour through a written policy, and enforcing that policy through disciplinary measures.

An employer is generally not required to file workplace rules with government authorities. However, some legislation allows for government inspection of the workplace, during which inspectors will expect to see required policies, training and notices in place.

24 For a list of permit-exempt workers see Citizenship and Immigration Canada's website at www.cic.gc.ca/english/work/apply-who-nopermit.asp.

25 For a full list of employees exempt from LMOs, see Citizenship and Immigration Canada's website at: www.cic.gc.ca/english/work/apply-who-permit.asp and www.cic.gc.ca/english/work/special-business.asp.

26 Under Canadian human rights legislation, illegal discrimination is the act of treating someone differently based on an enumerated characteristic, such as age, religion, gender, sexual orientation or disability. In Canada, drug and alcohol addiction is considered a disability, and is thus a protected characteristic. Also, in Canada sexual harassment is considered discrimination.

27 Occupational Health and Safety Act, RSO 1990, Chapter O.1 at Section 25 and Section 66.

28 Human Rights Code, RSO 1990, Chapter H.19.

29 Human Rights Code, RSO 1990, Chapter H.19 at Section 46.3.

An employer's enforcement mechanisms for workplace standards need not be spelled out directly in the employment contract but it is recommended that compliance with workplace policies is referenced in any written employment contract as a condition of employment.

IX TRANSLATION

Quebec is the only province with language legislation affecting private sector workplaces.³⁰ Written communications must be in French, including offers of employment, employment contracts, policies and publicly displayed signs. Additional translation is permitted and an employment contract may be written in English if both parties agree. A collective agreement must be written and filed with the province in French, though it may be translated into another language. Any enterprise with 50 or more employees must register with the government for a 'francisation' certificate and participate in a process of encouraging the use of French in the workplace.³¹

X EMPLOYEE REPRESENTATION

Each Canadian jurisdiction has legislation governing the relationship between employers and unions that permits most employee to join a trade union and participate in its lawful activities.

A union is either voluntarily recognised by the employer to represent the employee or it is certified by the appropriate authority. If sufficient support is demonstrated through collection of union cards or a representation vote³² the union will be certified as a representative of a defined group of employees. Throughout this process an employer must refrain from action that may be found to intimidate, threaten or unduly influence an employee regarding his or her decision to join a union. In most jurisdictions an employer is permitted to express its view on unionisation so long as such communication does not offend these statutory restraints. In Manitoba an employer is obliged to remain neutral during the certification process.

Every Canadian jurisdiction imposes an obligation upon the employer and union to negotiate a collective agreement in good faith.³³ A collective agreement may not

30 Charter of the French Language, RSQ, Chapter C-11.

31 Charter of the French Language, RSQ, Chapter C-11 at Section 139–140.

32 Jurisdictions allowing for certification based solely on signed union membership cards are the federal jurisdiction, Manitoba, New Brunswick, Prince Edward Island, Quebec, and Saskatchewan. In Ontario card-based certification may be awarded for bargaining units in the construction industry. Jurisdictions which require a vote among the members of a proposed bargaining unit before granting certification are Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, and Ontario.

33 Canada Labour Code, RSC 1985, Chapter L-2, Section 50(a); Labour Relations Code, RSA 2000, Chapter L-1, Section 60(1); Labour Relations Code, RSBC 1996, Chapter 244, Section 11(1) and Section 47; Labour Relations Act, CCSM Chapter L10, Section 62 and Section

provide for rights and obligations that fall below statutory minimums set out in human rights, health and safety or employment standards legislation. A collective agreement will contain a mechanism for resolving disputes about its interpretation or administration through an adjudicative mechanism.

XI DATA PROTECTION

i Requirements for registration

In Canada there are only four jurisdictions that have legislation governing the collection, use or disclosure of 'personal information' concerning employees: federal,³⁴ British Columbia,³⁵ Alberta³⁶ and Quebec.³⁷ Manitoba has adopted privacy legislation, which is not yet in force at the time of writing.³⁸

Personal information is any information about an identifiable individual and includes age, personal contact information, income, evaluations, credit records, etc. Federal privacy legislation, as well as that in British Columbia, Alberta and Quebec, generally operate in the same manner to protect the privacy of personal information, requiring the disclosure of the purpose for the collection, and use and disclosure only as is consistent with that purpose. Personal information must be safeguarded with security appropriate to the sensitivity of that information, including appropriate policies, physical security, electronic barriers and employee training and employees must be given access to and the ability to correct inaccurate information.

The privacy legislation in British Columbia, Alberta and Quebec has minor variations from the federal legislation. For example, in British Columbia and Alberta an employer does not require an employee's consent to the collection, use or disclosure of information required in establishing, managing or terminating the employment relationship, but must receive consent for the collection, use and disclosure of personal information unrelated to the employment relationship.

63(1); Industrial Relations Act, RSNB 1973, Chapter I-4, Section 1(1), definition 'collective bargaining' and Section 32; Labour Relations Act, RSNL 1990, Chapter L-1, Section 71; Trade Union Act, RSNS 1989, Chapter 475, Section 35; Labour Relations Act, 1995, SO 1995, Chapter 1, Schedule A, Section 17; Labour Act, RSPEI 1988, Chapter L-1, Section 22; Labour Code, RSQ, Chapter C-27, Section 53; Trade Union Act, RSS 1978, Chapter T-17, Section 2(b).

34 Personal Information Protection and Electronic Documents Act, SC 2000, Chapter 5.

35 Personal Information Protection Act, SBC 2003, Chapter 63.

36 Personal Information Protection Act, SA 2003, Chapter P-6.5.

37 An Act respecting the Protection of personal information in the private sector, RSQ, Chapter P-39.1.

38 The Personal Information Protection and Identity Theft Prevention Act, CCSM Chapter P33.7 was adopted unanimously by Manitoba's legislature on September 12, 2013 and received Royal Assent on 13 September 2013. The date of its coming into force will be determined by proclamation at a later date.

ii Cross-border data transfer

The privacy regimes described above address transfer of personal information on an organisation-to-organisation basis rather than a state-to-state basis. An employer is permitted to transfer (as distinct from ‘disclose’) personal information across an international or domestic border for processing (for example, processing payroll information through a third party) but responsibility for the security of information remains with the organisation that collected it.

iii Sensitive data

As described above, PIPEDA and similar privacy legislation require that sensitive information be safeguarded with security appropriate to the sensitivity of that information. While the legislation itself generally does not enumerate categories of sensitive information, federal and provincial authorities have identified examples of sensitive information to include medical history, financial data, racial or ethnic origin, political opinions, religious beliefs, trade union membership and sexual orientation. When dealing with information that might, in the circumstances, be considered particularly sensitive, organisations are expected to take additional precautions to prevent use or disclosure outside the scope of the purposes consented to. Protections for sensitive information could include restricting access to a ‘need to know’ basis or using encryption to prevent theft, loss or accidental disclosure during electronic transfer.

Personal information of a medical nature, often called ‘personal health information’, is the subject of specialised privacy legislation in most jurisdictions. This legislation is distinct from PIPEDA and similar provincial privacy regimes, and in general does not apply to the employment relationship. Rather, this legislation addresses the special circumstances of information collection, use and disclosure encountered by organisations who would normally be in possession of personal health information in the course of medical treatment or in the administration of health-care systems.

iv Background checks

An employer is permitted to perform a background check on an employee or prospective employee. However, the information requested and obtained may engage privacy and human rights laws. Human rights legislation in several jurisdictions prohibits discrimination on the basis of information that might be revealed in a credit or criminal record check such as a criminal conviction for which the individual has received a pardon. In some jurisdictions, an employer may require employee consent to collect and use the information, and must safeguard the information appropriately.³⁹

³⁹ In British Columbia and Alberta an employer does not require consent for the collection of information reasonably required in establishing the employment relationship. However, an employer is required to provide a candidate with notice that such information will be collected, and to describe the purpose of that collection.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Canada's laws of dismissal reflect statute and the common law, and distinguish between a unionised and non-unionised workplace.

In a non-unionised workplace an employee can be dismissed without cause so long as dismissal is not a violation of human rights legislation or reprisal for exercising a workplace right and so long as the appropriate notice or pay in lieu is provided. However, there are exceptions. In Nova Scotia, an employee with more than 10 years of service may only be terminated for just cause. The same is true in Quebec for an employee with two or more years of service. In a federally regulated workplace, a non-managerial employee with at least 12 months of service who believes he or she was terminated without just cause may seek reinstatement or seek damages in lieu.

In a unionised workplace an employee cannot be dismissed without just cause.

ii Where no just cause: notice of termination

Employment standards legislation in each jurisdiction in Canada prescribes the minimum statutory notice required at the time of termination where there is not just cause to terminate employment. Notice under these statutory schemes generally ranges between one and eight weeks, depending on the employee's length of service. In addition, Ontario and the federal jurisdiction require provision of severance pay or an enhanced period of notice where certain conditions are satisfied.⁴⁰ In Ontario it is required that the employer continue benefit plan contributions throughout the period of notice the terminated employee would have been entitled to had he or she remained employed during the appropriate notice period.⁴¹

As noted above, unless there is in place a properly drafted and implemented employment contract limiting the employee's notice entitlement, the employer must provide reasonable or common law notice of termination (or pay in lieu). This includes and is not in addition to statutory notice requirements.

Common law or civil law reasonable notice is often substantially greater than a legislated minimum notice period and generally reaches a maximum of 24 months. As described earlier in this chapter, Canadian courts apply a highly individualised analysis to determining the appropriate notice period. In calculating damages where an employee

40 In the federal jurisdiction, Section 235 of the Canada Labour Code, RSC 1985, Chapter L-2 provides that an employee who has completed 12 consecutive months of employment is entitled, in addition to notice of termination or pay in lieu of notice, to either two days' wages for each completed year of employment or to a total of five days' wages, whichever is greater. In Ontario sections 63-65 of the Employment Standards Act, 2000, SO 2000, Chapter 41 provide that in addition to notice of termination or pay in lieu of notice, an employee with five years of service or more whose employment is terminated is entitled to severance pay if the employer meets certain criteria. The severance pay entitlement in Ontario is a week's wages for every year of service, to a maximum of 26 weeks.

41 Employment Standards Act, 2000, SO 2000, Chapter 41 at Section, 61(1)(b).

is terminated without appropriate notice, courts attempt to place the employee in the position he or she would have been in if allowed to work throughout the notice period. As a result, the payment required in lieu of notice may extend beyond base wages and benefits payments to include compensation for overtime, commissions, bonuses, stock options and fringe benefits such as cars, club memberships, etc.

iii Just cause

Where an employer has 'just cause' to terminate a worker's employment, it may dismiss the employee without notice or pay in lieu, statutory or otherwise. This is a very high standard that will ordinarily only be met where an employee's conduct is so egregious that it is deemed to have: (1) violated an essential condition of the employment contract; or (2) violated the employer's trust, which is at the core of the employment relationship.

iv Constructive dismissal

Where an employer unilaterally changes a significant term or condition of employment and adjudicator may conclude that the employer's actions indicate that it no longer intends to be bound by the terms of the employment agreement and that, from a legal perspective, the employer has terminated the employment of the employee. Where an employee believes he or she has been constructively dismissed the employee may resign and bring an action for damages in lieu of reasonable notice.

Where an employee alleges constructive dismissal, he or she is obliged to take reasonable steps to mitigate any loss. This may include accepting continued employment with the employer where the employer offers similar remuneration and working conditions and where the employer has not created such a hostile or humiliating work environment such that no reasonable individual could be required to continue to attend work.

v Government notification

Where a dismissed employee is eligible to participate in Canada's 'Employment Insurance' programme, the employer is required to provide to the federal government and employee a record of employment detailing the employee's insurable earnings and hours and the reason for the dismissal.

An employer must generally notify a union of the dismissal of an employee, though the requirement to provide, and manner of, this communication varies depending on the collective agreement.

vi Redundancies

Elimination of employees for lack of work is generally referred to as a 'lay-off' which may be either temporary or permanent. Where a lay-off is permanent it is deemed a termination and the relevant employer obligations arise.

In a unionised context, the lay-off procedure is determined by the collective agreement, including notice to be provided to employees and the union. A unionised employee generally retains the right to the position from which he or she was laid off for a period determined either by a collective agreement or legislation.

In a non-union context, employment standards legislation in most jurisdictions allows an employer to lay off an employee for a prescribed period of time without

triggering termination entitlements. However, the common law in some provinces treats a temporary lay-off as a constructive dismissal entitling the employee to notice or pay in lieu, as the continued attendance of an employee at the place of work, for pay, is central to the employer–employee relationship. It is advisable to consider whether a term allowing for a lay-off should be included in the employment contract to avoid claims of constructive dismissal.

An employer may be obliged to notify a government agency in the event a group of employees is permanently laid off within a short period of time.⁴²

XIII TRANSFER OF BUSINESS

Legislation, as well as the common and civil law, provide for the survival of certain employment rights following the sale or transfer of a business. In a unionised context this means a new employer assumes the place of the former employer, administering the collective agreement and bargaining future agreements, and employees retain their rights and status under the collective agreement.⁴³ In a non-unionised context an employee retains his or her statutory rights and service continues to be recognised for the purpose of statutory and common law reasonable notice.⁴⁴

Whether a sale or transfer of a business has occurred typically depends on whether the essence of a functioning economic vehicle has been transferred and labour arbitrators and boards in Canada have developed tests to determine this.

42 For example, in British Columbia Section 64 of the Employment Standards Act, RSBC 1996, Chapter 113 where 50 or more employees are terminated from a single location in any two-month period, the employer must provide written notice to all affected employees, their union (if any) and to the Minister.

In Ontario, Section 58 of the Employment Standards Act, 2000, SO 2000, Chapter 41 provides where 50 or more employees are terminated at the employer's establishment within the same four-week period, the employer must provide the Director of Employment Standards with notice.

43 See Canada Labour Code, RSC 1985, Chapter L-2, Sections 44–46; Labour Relations Code, RSA 2000, Chapter L-1, Section 46; Labour Relations Code, RSBC 1996, Chapter 244, Section 35; Labour Relations Act, RSM 1987, Chapter L10, Section 56(1); Industrial Relations Act, RSNB 1973, Chapter I-4, Section 60; Labour Relations Act, RSNL 1990, Chapter L-1, Section 93; Trade Union Act, RSNS 1989, Chapter 475, Section 31; Labour Relations Act, 1995, SO 1995, Chapter 1, Schedule. A, Section 69; Labour Act, RSPEI 1988, Chapter L-1, Section 39; Labour Code, RSQ, Chapter C-27, Sections 45–46; Trade Union Act, RSS 1978, Chapter T-17, Sections 37–37.2.

44 Legislation in all Canadian jurisdictions provides for continuity of employment after a sale of business for the purpose of statutory employment benefits. However, there are variations in how such continuity of employment provisions operate. Ontario's legislation also provides for continuity of employment for employees of an employer providing services such as cleaning, food services, parking or security to building owners.

XIV OUTLOOK

In recent years Canadian courts and tribunals have increasingly been called upon to address an employee's right to privacy in the workplace. In 2012, the Court of Appeal for Ontario released its decision in *Jones v. Tsige* (2012), which established a new common law tort of invasion of privacy. The coming year may see the common law of privacy develop further with the possibility of wider application of a civil tort for invasion of privacy. Further, we will see how courts and tribunals apply the Supreme Court of Canada's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* (2013), with respect to workplace drug and alcohol testing to balance worker privacy with an employer's duty to ensure safety in the workplace.

With respect to accessibility and accommodation for disabilities in the workplace, the phasing-in of the Accessibility for Ontarians with Disabilities Act in Ontario and the development of accessibility legislation in Manitoba is a sign that Canadian jurisdictions will focus on becoming more inclusive to persons with disabilities.

Furthermore, in early 2013, the Mental Health Commission of Canada and its partner organisations launched a non-binding but influential national standard for psychological health and safety in the workplace, making Canada an international leader on this issue.

On the labour front, Canadian labour law will likely see important developments following the implementation of new or proposed legislation restricting union rights.⁴⁵ Constitutional protections for the right to strike will be addressed in a Saskatchewan case that will be heard by the Supreme Court in the coming year.⁴⁶

45 Many jurisdictions in Canada have introduced labour legislation limiting the scope of collective bargaining and union activity. For example, in 2012 the Ontario government passed the Putting Students First Act, 2012, SO 2012, Chapter 11 which froze compensation for teachers and required government approval of all collective agreements negotiated between school boards and most staff. In May 2013 the legislature of Saskatchewan adopted the Saskatchewan Employment Act which will, when in force, amend many pieces of employment and labour legislation. Among other things, it increases the categories of employees ineligible to join a union, delays strikes and lockouts by requiring a cooling off period after negotiations reach an impasse, requires 48-hour notice of strikes, and allows employers to identify an offer as a 'final' offer, obliging bargaining unit members to vote on it.

46 The Supreme Court of Canada recently granted leave to hear an appeal from the judgment of the Court of Appeal for Saskatchewan in *R. v. Saskatchewan Federation of Labour* (2013). In that case the Saskatchewan Federation of Labour challenged as unconstitutional Saskatchewan's changes to the Trade Union Act, RSS 1978, Chapter T-17, which restricted the ability of public sector workers to engage in strike activity.

Appendix 1

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Erin Kuzz is a founding member of Sherrard Kuzz LLP, a law firm representing the interests of employers in all employment and labour matters. Having practised employment and labour law for her entire career, Erin has earned a reputation for practical, results-oriented advice. She has been recognised as a leading employment and labour lawyer by both Lexpert and Chambers Global. Sherrard Kuzz has also been named one of *Canadian Lawyer's* 'Top Ten Canadian Labour and Employment Boutiques'.

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Widely published, Erin has written extensively about labour and employment issues. She is a frequent public speaker and national conference chair, and is contacted consistently by media for comments on current labour or employment matters. In addition to frequent guest lecturing, she has also taught at both York University and the University of Toronto. Her commitment to education has led the Law Society of Upper Canada to engage Erin to write the bar admission licensing examination study materials for labour law.

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