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September 2012

employment and labour newsletter

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# "*you can't have your cake and eat it too*": the duty to mitigate in employment agreements

by Dave J.G. McKechnie and George Waggott

The Ontario Court of Appeal has released a decision finding that a dismissed employee did not have an obligation to mitigate damages from the loss of his employment when he had an employment agreement that stipulated what he would receive if he was dismissed without cause.

In *Bowes v. Goss Power Products Ltd.*,[1] the parties negotiated a severance provision in the employment agreement which provided for six months of notice, or pay in lieu, if Bowes' employment was terminated without cause. After Bowes was dismissed without cause, he found employment two weeks later at the same salary. The employer ceased paying him the contractual six months of notice as it believed Bowes had mitigated any damages arising from the loss of his employment.

Bowes brought an application seeking to enforce the terms of the contract. The application judge found against Bowes, holding that there is a duty on an employee to mitigate the loss of his employment even if there was a contract that set out what the employee would receive upon dismissal. Consistent with the previous jurisprudence, the application judge found that the duty to mitigate applied unless the contract relieved the employee of the duty to mitigate.

In overturning the application judge's decision, the five judge panel of the Ontario Court of Appeal held that by agreeing to a fixed notice period, the parties have contracted out of the common law concept of

damages in lieu of notice, where the duty to mitigate arises. Instead, the parties have negotiated a liquidated damages clause or contractual sum that is not subject to the duty to mitigate.

In coming to this conclusion, the Court found that it would be unfair to permit an employer to raise the issue of mitigation after the employee has been terminated. The employer has ousted the common law by fixing an amount to be provided upon dismissal and cannot then seek to lower its contractual exposure if the employee obtains new employment after dismissal.

## what this means for employers

There are many advantages to defining in advance the amount of notice, or pay in lieu, an employee will receive if the employee is dismissed without cause. It allows the parties to determine the amount of notice, how it will be calculated and paid, and most importantly removes the need to resort to litigation to determine what would be considered reasonable notice. By reversing the previous jurisprudence in Ontario, the Court of Appeal's decision requires employers to either expressly deal with mitigation in the employment agreement or lose the ability to claim a reduction based on mitigation. Employers should review their employment agreements to ensure that mitigation is dealt with in the termination provision.

[1] 2012 ONCA 425, released on June 21, 2012

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# overtime class actions given the green light

by George Waggott, Jennifer Bond and
Samia Hussein, summer law student

On June 26, 2012, the Ontario Court of Appeal released three key rulings on overtime class actions.[1] In the three unanimous decisions, the Court of Appeal gave the go ahead for class action proceedings against two Canadian banks, CIBC and Scotiabank. The certification of a third class proceeding, against Canadian National Railway, was dismissed.

*Fresco and Fulawka* are two class proceedings which arose from claims that bank employees were not being compensated for overtime hours. Both cases raise similar allegations that the employer's policies for receiving overtime compensation were more restrictive than the statutory requirements.

In *Fresco*, which was a claim was brought by Dana Fresco, a former CIBC customer service representative on behalf of approximately 31,000 CIBC employees, the Court of Appeal overturned the decision of the lower court and granted certification. Whereas the lower court ruling denied certification based on a perceived lack of common issues, the Court of Appeal held that on a plain reading of the requirements for overtime pay under the *Canada Labour Code*, the employer's overtime policy was insufficient. Therefore, according to the Court the plaintiff met the threshold under the Ontario *Class Proceedings Act* by demonstrating that "it is not plain and obvious that its action will fail."

The same result was reached in *Fulawka*, a case brought by Cindy Fulawka on behalf of more than 5,000 Scotiabank sales employees. As was the case in *Fresco*, the Court of Appeal was prepared to grant certification on grounds that there were allegedly systemic issues, shared by all class members, with Scotiabank's overtime policies. In this regard, the Court of Appeal held that, although all of the allegations were as yet unproven, determining the terms of the employment contract of class members was a common issue.

In both decisions, the plaintiffs were able to demonstrate that sufficient common issues existed within the class, which is likely the biggest hurdle in class action proceedings. Where there are individual issues within the class that require extensive individual determinations, class proceedings no longer become the most efficient way for resolving these disputes.

The proliferation of individual issues was the very reason that certification was denied in the Court's third decision in McCracken which was released at the same time. *McCracken* was brought by former CN employee, Michael McCracken, and was a "misclassification case" where the plaintiff alleged that more than 1,500 employees were wrongly classified as exercising management functions when they did not. Misclassification cases have traditionally been thought of as being more amenable to a class proceeding. According to the Court of Appeal in *McCracken*, this is only true where the similarity of job duties performed by class members provides the element of commonality. The extent to which this prevents employee class actions involving workers from a number of different jobs remains uncertain.

The required level of commonality was not met in *McCracken*, with the Court of Appeal determining that more is required than simply showing that some members of the class have similar claims. The Court of Appeal was not convinced that class members had the same job functions and duties. For example, there was evidence that some class members did in fact exercise managerial functions, such as hiring and firing, and thus were rightfully categorized as management. Therefore, a class action proceeding would fail to overcome the substantial individual issues within the class.

When taken together, these decisions make significant inroads on clarifying the required elements on overtime class action certification and the strategies for employers responding to such claims.

[1] *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443, ("*Fulawka*"); *McCracken v Canadian National Railway Company*, 2012 ONCA 445 ("*McCracken*"); *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444 ("*Fresco*")

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# Ontario's austerity measures and the limits of Charter protected bargaining rights

by George Waggott and Lai-King Hum

The recommendations of the Drummond Report, released earlier this year, have guided the Ontario provincial government's recent public sector austerity measures. After months of unsuccessful negotiation with its teacher unions, on August 16, 2012, Ontario announced the *Putting Students First Act*, 2012 (PSFA). The provincial legislature has been recalled for the introduction of this bill on August 27, with the aim to pass it by August 31, when the current collective agreements expire.

The PFSA, if passed, would include an imposed wage freeze and a prohibition against any strikes or lock-outs for a two-year period on virtually all Ontario public sector teachers and support workers. School boards and local bargaining units of teachers and support staff would have until the end of the year to sign local agreements consistent with the priorities reflected in the Memorandum of Understanding reached between the government and the Ontario English Catholic Teachers' Association (OECTA).

To date, three unions, representing approximately 45,000 workers (the OECTA, and two unions of Francophone teachers and other school support workers) have accepted the agreement, but only three of 72 school boards have signed on. The largest teacher unions, representing more than 130,000 public educators, the Elementary Teachers Federation of Ontario, and the Ontario Secondary School Teachers Federation, along with the Canadian Union of Public Employees, representing 55,000 school support workers, have refused, vowing instead to launch a constitutional challenge to the Supreme Court of Canada to protect their collective bargaining rights.

The battle lines are drawn: on one side, an austerity-minded government, with the general support of the public, and on the other, the labour unions, relying upon bargaining rights which they claim are protected by the Canadian Charter of Rights and Freedoms. The unions look to the failure of similar legislation in British Columbia to survive a Charter challenge to the Supreme Court of Canada, which ruled in favour of the unions. Similar battle lines have been drawn between the government and Ontario's doctors. The doctors filed a Charter challenge in July 2012.

However, there are limits to Charter protected bargaining rights. If the PSFA is passed and there is a Charter challenge, the Ontario government will likely argue that a key distinction between the ill-fated British Columbia legislation and the proposed Ontario legislation is the latter's extended months-long negotiations which preceded its enactment.

The imposition of public sector wage freezes or caps tends to be aligned with public opinion and current austerity measures, but the Charter exists precisely to protect against what may be merely fiscally expedient and reflective of public sentiment. The teacher unions correctly refer to the right to bargain collectively which is protected under the Charter, and correctly demand that governments must pay heed to those rights. However,

these teacher unions will also have to carefully consider that the right to bargain, while protected, is also limited.

The Supreme Court of Canada has confirmed that the right to collective bargaining is a "limited" right to a bargaining process, and is not a right or guarantee to any certain substantive or economic outcome or to any particular model of labour relations or any specific bargaining method. Highlights of more recent cases that clarified the limitations on the Charter enshrined right to bargain collectively in the public sector, are as follows:

- Reliance cannot be placed on section 2(d) of the Charter to achieve or maintain a bargaining process that maximizes or preserves a union's particular collective bargaining interests or existing bargaining structures;
- Section 2(d) of the Charter is not breached if the requirements of "good faith negotiation and consultation" have been preserved and followed during the process by which the legislation was enacted; even if a breach of section 2(d) is found, the legislation may be reasonably and demonstrably justified in a free and democratic society and thereby saved under section 1 of the Charter; and
- Although section 2(d) of the Charter may be violated if legislation effectively prevents any meaningful discussion and consultation between the parties where the government's fiscal position is sufficiently serious, a temporary suspension of the full range of collective bargaining "to facilitate a multi-faceted economic response to a crisis affecting the financial well-being of the public" may be justified.

Our view is that the following framework will apply to the current Ontario provincial government's ability to shape bargaining mandates with its teacher unions, or with any other public sector unions:

- As has long been the case, employer bargaining teams in many situations will continue to be tasked with a restraint mandate.
- Provided the Charter right to a bargaining process is respected, and subject to prevailing economic conditions, governments can be expected to continue to insist on restraint mandates.
- The appropriateness of particular bargaining positions and the related justifications for any proposals, will continue to be driven by the unique circumstances of a particular set of labour negotiations.
- The traditional labour law obligation to bargain in good faith will continue to apply.

No amount of legislation will be effective in doing away with the ongoing obligation to meet with relevant unions, make candid presentations to justify relevant proposals, and consider any union proposals in good faith. However, if after the appropriate parameters are adhered to in good faith and no agreement is reached, the provincial government's PFSA, if passed, may be justified. This will be particularly the case if "the deal" is not legislated and instead, government is obliging the parties to bargain a zero cost increase renewal agreement.

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# the clash between government restraint and the charter rights of labour: where do we stand?

by David McInnes and George Waggott

Although Canada's economy continues its fragile recovery, governments across the country must nonetheless operate in an environment of fiscal restraint, all of which brings an increased focus to public sector and other nationally-prominent labour disputes.

It is fair to say that there is a degree of uncertainty and confusion about the ability of governments to mandate bargaining outcomes which are consistent with and required by present day economic realities. Although "net-zero" or similarly restrictive bargaining mandates may be precisely aligned with public opinion and may also represent what is required to be done as a matter of public policy, there can at times be a failure to understand or appreciate the importance of respecting the legally-mandated process of collective bargaining.

As a starting point, unions quite correctly refer to the right to bargain collectively which is now protected under the *Canadian Charter of Rights and Freedoms*. In the seminal decision in *Health Services and Support-Facilities Subsector Bargaining Assn.* v. *British Columbia* 2007 SCC 27 ("*B.C. Health Services*"), the Supreme Court of Canada ("SCC") affirmed that section 2(d) of the Charter constitutionally protects the right of employees and unions to engage, in association, in collective bargaining on fundamental workplace issues.

*B.C. Health Services* involved a successful challenge to labour legislation enacted by the British Columbia government as part of a process intended to manage escalating health care costs. As enacted, the legislation removed certain key collective agreement protections, including those restricting the ability of health sector employers to contract out work.

In holding that the B.C. legislation violated section 2(d) of the *Charter*, the SCC confirmed the constitutional right to collective bargaining, which, at its most basic, must include a process of good faith bargaining and consultation with the employer and the right to exchange bargaining proposals. However, the SCC also confirmed that the right to collective bargaining is a "limited" right to a bargaining process, and is not a right or guarantee to any certain substantive or economic outcome or to any particular model of labour relations or any specific bargaining method.

The limitations on the extent to which the *Charter* enshrines the right to bargain collectively were made abundantly clear in the more recent SCC decision in *Ontario (Attorney General)* v. *Fraser*, 2011 SCC 20 ("*Fraser*") which involved a challenge to the Ontario labour legislation applicable to agricultural workers.

In upholding the constitutional validity of the Ontario legislation, which provides for more limited union and employee rights for agricultural workers, the SCC

confirmed that although section 2(d) of the *Charter* guarantees a meaningful process for collective bargaining, it does not guarantee any particular model of collective bargaining or any particular outcome. Instead, the SCC in Fraser emphasized that the bargaining rights protected by the *Charter* grant workers the constitutional right to make collective representations and to have their collective representations considered in good faith by the employer. The SCC in Fraser stated that "[i]n every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals".

In two companion cases where McMillan LLP was counsel, the B.C. Labour Relations Board ("BCLRB"), adopting the SCC decisions in *BC Health Services* and *Fraser*, confirmed that a trade union does not have any constitutional right to a particular model of collective bargaining. In its decisions in *Emergency and Health Services Commission –and– the Government of the Province of British Columbia –and– Ambulance Paramedics of British Columbia, CUPE, Local 873*, BCLRB No. B197/2011, and *Health Employers Association of British Columbia –and– Emergency Health Services Commission*, BCLRB No. B198/2011, the BCLRB rejected a union Charter challenge to the placement of the Ambulance Paramedics Union within one of the statutory multi-union health sector bargaining units. The BCLRB confirmed that reliance cannot be placed on section 2(d) of the *Charter* to achieve or maintain a bargaining process that maximizes or preserves a union's particular collective bargaining interests or existing bargaining structures.

Two recently decided cases, one from British Columbia and the other from Ontario, are instructive in further delineating the extent to which governments may be able to mandate economic outcomes in the collective bargaining process.

In *Federal Government Dockyard Trades & Labour Council* v. *Attorney General of Canada* 2011 BCSC 1210, the B.C. Supreme Court held that the *Expenditure Restraint Act*, which had the effect of nullifying an arbitrated wage increase applicable to certain federal employees, did not result in a breach of section 2(d) of the *Charter*. The relevant legislation was saved because the requirements of "good faith negotiation and consultation" had been preserved and were followed during the process by which the legislation was enacted. Additionally, the Court held that, if a breach of section 2(d) had been found, the legislation would have been reasonably and demonstrably justified in a free and democratic society and thereby saved under section 1 of the *Charter*.

The constitutionality of the same *Expenditure Restraint Act* was also considered in *Assn. of Justice Counsel* v. *Canada (Attorney General)*, 2011 ONSC 6435. At issue was the constitutionality of a legislated cap on wages. The Ontario Superior Court of Justice held that, in the circumstances, the legislated wage cap violated section 2(d) of the *Charter*, since the legislation had the effect of preventing any meaningful discussion and consultation between the parties on the issue of wages.

Nonetheless, the Court was persuaded that, for certain years in which the wage cap applied under the legislation, the federal government's fiscal position was sufficiently serious to justify a temporary suspension of

the full range of collective bargaining "to facilitate a multi-faceted economic response to a crisis affecting the financial well-being of the public". Put differently, depending on the context, and even in the face of the *Charter* rights of union, governments may be able to provide appropriate justification for wages to be frozen or other components of a bargaining mandate to be constrained.

Based the relevant decisions, our view is that the following framework will apply to government efforts to shape bargaining mandates:

1. As has long been the case, employer bargaining teams in many situations will continue to be tasked with a restraint mandate.
2. Provided the Charter right to a bargaining process is respected, and subject to prevailing economic conditions, governments can be expected to continue to insist on restraint mandates.
3. The appropriateness of particular bargaining positions, and the related justifications for any proposals, will continue to be driven by the unique circumstances of a particular set of labour negotiations.
4. The traditional labour law obligation to bargain in good faith will continue to apply.
5. No amount of legislation will be effective in doing away with the ongoing obligation to meet with relevant unions, make candid presentations to justify relevant proposals, and consider any union proposals in good faith.

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# work permit processing in light of visa office closures

by David Elenbaas

The federal government's recent decision to close the visa and immigration sections of various Canadian Embassies, High Commissions and Consulates including those in Tokyo, Berlin and Buffalo, may have a dramatic effect on processing times for Japanese, German, U.S. and other foreign nationals seeking a work permit in Canada.

Processing formerly done at the Canadian Embassy in Tokyo will now take place at the Embassy in Manila. Processing which previously occurred in Berlin will now be handled out of the Embassy in Vienna. Work permit applications that were submitted in Buffalo are now to be submitted at the Consulates in New York or Los Angeles, depending on the applicant's residence. Some additional delay should be expected.

However, it is important to know that Japanese, German and U.S. citizens are exempt from the requirement of having a visa to enter Canada. As well as citizens of other visa exempt countries, they are able to apply for their work permits at any port of entry into Canada, including an international airport, pursuant to R198 of the *Immigration and Refugee Protection Act Regulations*. A list of visa exempt and visa required countries can be found at Citizenship and Immigration Canada's website www.cic.gc.ca.

In order to gain admission at a port of entry it is important that the foreign worker have in his/her possession the documents necessary to enable the examining officer to determine the worker's eligibility for a work permit. Normally a labour market opinion (LMO) issued by Human Resources and Skills Development Canada (HRSDC) is a pre-condition to obtaining a work permit. However, there are several LMO exemptions including intra-company transferees (with at least one year of service in the organization) with specialized knowledge or who are employed at a senior managerial or executive level, as well as professionals under the North American Free Trade Agreement (NAFTA).

Assuming the foreign worker is visa exempt and not otherwise criminally or medically inadmissible, we recommend the worker have the following documents in his/her possession when applying for a work permit at the port of entry:

- a valid passport
- a labour market opinion issued by HRSDC (if the position is not LMO exempt)
- an employer support letter detailing the employer's business, history, relationship to the foreign worker's employer abroad, a detailed description of the position in Canada and the worker's qualifications and job history
- any other background documents needed to support the application, such as a resume and copies of degrees or diplomas, in the case of a NAFTA professional for example

- a Use of a Representative form (IMM 5476) if the foreign worker has the assistance of a representative, such as an immigration lawyer.

There is no work permit application form used at the port of entry nor are photographs required. Of course processing fees continue to apply. Family members can be dealt with in the same fashion if accompanying the principal applicant at the initial port of entry admission or at a later date. It should also be noted that the spouse of a foreign worker who has obtained a work permit in a National Occupational Classification position at skill levels O, A or B (primarily managerial, professional, technical or skilled trades positions) may herself/himself obtain an open work permit to be employed in Canada if desired.

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# focus on "accepting" or "anti-bullying" in schools?

by Lai-King Hum

As of May 3, 2012, Bill 13, *Accepting Schools Act, 2011*, has passed second reading, and referred to the Standing Committee on Social Policy. Bill 14, the *Anti-Bullying Act, 2012*, a parallel private member's bill, was ordered re instated at the Standing Committee on Social Policy, also to be considered in the public debates. Central to both bills is the introduction of amendments to the *Education Act*, aimed at addressing bullying in the public school system, though each has a markedly different focus. Dates for public hearings have been scheduled for clause-by-clause discussion of the bills.

The Liberal government's introduction of Bill 13 came soon after Ontario witnessed the tragic suicides of two of its pupils in the late fall of 2011: 15 year old James Hubley in Ottawa, and 11-year old Mitchell Wilson in Pickering. Both had experienced bullying at school, James because he was openly gay, and Mitchell partly due to his physical disability. James' desire to start a Rainbow Club at his high school to promote acceptance of others had also been met by derision from other students. Premier McGuinty has stated that the deaths of James and Mitchell were in his mind when Bill 13 was introduced.

The focus of Bill 13 is the creation of safer and more accepting school environments, and more particularly, the provision of specific support for at risk youth identified as lesbian, gay, bisexual, transgendered, transsexual, two spirited, intersexed, queer and questioning ("LGBTTIQ"). Details of the proposed changes that Bill 13 would make to the *Education Act* include:

- An amendment to the *Education Act* to include a definition of bullying;
- The requirement that school boards promote a positive school environment which is inclusive and accepting of all pupils, and supports the activities and organizations of pupils promoting gender equity, anti racism, understanding and respect for people with disabilities, and people of all sexual orientations and gender identities, including groups with the name gay-straight alliance ("GSA") or another name;
- More severe consequences, including suspension and expulsion, for bullying and other activities by pupils motivated by bias, prejudice or hate in schools;
- A proclamation that the third week in November is Bullying Awareness and Prevention Week;
- The requirement that boards entering into agreements with organizations using the school premises must include a term in the agreement that the organization must follow standards consistent with the provincial code of conduct established by the Minister;
- Further requirement that boards develop policies and guidelines, including supports to pupils, on progressive discipline, bullying prevention and intervention, as well as develop and implement equity and inclusive education policies; and

- An additional requirement that boards report on progress with respect to the goal of creating a positive school climate for all pupils.

The same day that Bill 13 was introduced, the minority Conservative government responded with a private member's bill.[1] Bill 14, the *Anti-Bullying Act*, 2011, does not refer to GSAs, the promotion of a positive school environment, nor acceptance of pupils of all backgrounds.

It focuses instead on a strong and all-encompassing anti-bullying message, with no specific mention of LGBTTIQ people (or any other group).

Bill 14 also differs from Bill 13 in a few significant areas:

- It acknowledges that bullying is often a group activity, which Bill 13 does not, and that both the bully and the victim of bullying need to be addressed;
- It stipulates accountability for keeping statistics, including mandatory reporting by principals to school boards of all incidents of bullying, for the purpose of long-term tracking of incidents and progress;
- It does not highlight any particular groups of pupils that tend to be victims of bullying, but stresses instead a "safe and inclusive learning environment";
- It references and parallels recently passed legislation, Bill 168, dealing with workplace violence and harassment amendments to Ontario's health and safety legislation, addressing bullying in the workplace; and
- It does not require school boards to adopt policies promoting a positive school environment inclusive and accepting of all pupils and promoting the prevention of bullying, nor does it require school boards to develop and implement any equity and inclusive education policy.

The most vocal criticism against Bill 13 has come from the Catholic groups and parents, as well as growing support from other religious groups, concerned about the right to religious and parental freedom.

The protests over Bill 13 have been focused almost entirely upon a concern over the mandating of GSAs where demanded by any pupil, and how this compromises religious teaching and/or family values. There is also some concern over a possible burden placed on school boards to vigilantly monitor the conduct of third parties that use or lease space from public schools. This concern is highlighted by recent media reports of a York Region police investigation of complaints over anti-Jewish teachings at a Muslim Sunday school renting space in a Toronto public high school.

The Minister of Education, Laurel Broten, has stated that the best parts of Bill 14 will be incorporated into Bill 13. Such a compromise is unlikely to alleviate those opposed to a core part of Bill 13: the creation and promotion of school environments that are accepting of LGBTTIG people.

The government's aim is to have Bill 13, possibly with parts of Bill 14 incorporated, passed in time for the 2012-2013 school year. School boards and other education stakeholders are counseled to seek advice regarding the scope of these new obligations.

[1] Bill 14 was sponsored by Elizabeth Witmer, the recently resigned MPP for Kitchener-Waterloo. Lisa MacLeod, member for Nepean-Carleton, has been designated as the new member sponsoring Bill 14.

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# employees are required to disclose confidential medical information for accommodation purposes

by George Waggott and Paul Boshyk

A recent Ontario arbitral award is reshaping the way employers and employees must approach the legal duty to accommodate employees with disabilities in the workplace.

Entrenched in both federal and provincial human rights legislation, the duty to accommodate imposes a legal obligation on employers to accommodate employees with disabilities unless such accommodation would cause undue hardship on the part of the employer. In *Complex Services Inc v Ontario Public Service Employees Union*[1] ("*Complex Services*"), released earlier this year, a board of arbitration opined that the duty to accommodate also requires employees to disclose confidential medical information regarding their disability to employers in order to help facilitate the accommodation process.

In *Complex Services*, a casino employee brought a grievance against her employer for allegedly failing to properly accommodate her disability upon her return from a lengthy medical leave of absence. Although the employee sought numerous forms of accommodation as part of a proposed return to work plan, she failed to provide her employer with supporting medical documentation and ultimately refused to disclose the exact nature of her disability (though she did vaguely describe it as a "mental illness"). The employee also refused to meet with an independent medical examiner for the legitimate specified purpose of accommodating her disability.

Following numerous failed attempts by the employer to clarify the nature of her disability and ascertain the associated limitations, the employee was placed on a second medical leave of absence until the employer could be sure that she was fit for employment and able to be safely accommodated. The employee subsequently brought her grievance seeking reinstatement and an order that her employer "create an accommodation and return to work policy and procedure."

In dismissing the grievance, the board of arbitration held that an employer must be able to satisfy itself that an employee who seeks a return to work following an illness or injury is able to do so safely and with the appropriate form of accommodation. The board explained that it is not possible for an employment accommodation to proceed properly unless the employer has at least some information respecting the nature of the disability – particularly in cases where the disability is a mental illness. Accordingly there is a positive duty on employees to provide medical information required by the employer in order to facilitate an accommodated return to work. Indeed no employer can be faulted if an employee fails or refuses to provide the information that is necessary to establish the form and extent of accommodation required in the circumstances.

Exactly what needs to be disclosed by the employee will depend on the facts of each case. Based on past case law, however, disclosure of the following information will generally be required for accommodation purposes:

1. the nature of the illness and how it manifests as a disability, together with any work-related restrictions;
2. whether the disability is permanent or temporary in addition to the anticipated time frame for improvement;
3. the restrictions or limitations that flow from the disability, particularly as they relate to the employee's duties and responsibilities;
4. the basis for the medical conclusions, including the examinations or tests performed (but not necessarily the test results or clinical notes made in that respect); and
5. the treatment, including medication (and possible side effects), which may impact the employee's ability to perform their job, or interact with management, other employees, and customers.

The board of arbitration also held that employees have an obligation to permit an independent medical review of their confidential medical information for the specified purpose of accommodating disabilities in the workplace. The board elaborated that employers must be allowed to review the employee's medical information with a medical specialist or expert in order to ensure that the disability is properly accommodated.

It is important to note that although personal medical information is generally considered private and confidential, an employee's right to privacy is not absolute. According to the board, an employee seeking accommodation cannot thwart her employer's attempts to provide such accommodation by keeping her confidential medical information entirely private. The board also commented that the emerging tort of "intrusion upon seclusion" (established in the recent Ontario Court of Appeal decision *Jones v Tsige*) in no way alters an employer's right to compel the disclosure of confidential information where such disclosure is required or permitted by law. However an employee is only required to disclose the least amount of confidential medical information that is necessary in order to enable appropriate accommodation.

The duty to accommodate is a reciprocal concept; the employer and employee must work together in order to establish appropriate accommodation. An employer is not obliged to accept an employee's subjective perspective as to what amounts to appropriate or "perfect" accommodation. Indeed no employee is entitled to a superior accommodation arrangement "merely because that is what [the employee] wants or thinks is best."

The board did caution, however, that while an employer may legitimately refuse to allow an employee to continue or return to work (as well as deny the employee benefits) until the necessary confidential medical information or other relevant information is provided, an employer may not discipline an employee for failing to hold up the employee's end of the accommodation bargain.

[1] 2012 CanLII 8645 (ON LA)

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September 2012

employment and labour newsletter

# pension claims in employee termination cases

by Mark Rowbotham and George Waggott

## A. introduction

In Canada, when an employment relationship is terminated without cause, the employer must provide the terminated employee with reasonable notice or pay in lieu of notice. Employment standards legislation is in place to protect employees by way of minimum notice requirements. Legislation is supplemented by common law to further protect employees with the goal of putting the employee in the position that she would have been if she had worked through the notice period. Employment contracts are also used to provide certainty around the employment relationship, including with respect to obligations and entitlements at the time of termination of employment.

This paper will look at material employer obligations, specifically with respect to registered pension plans in the province of Ontario, that may arise when terminating an employee. Registered pension plans are highly regulated, complex and can be, from a dollar perspective, a significant part of an employee's compensation. In order to limit liability, an employer needs to fully understand the implications of terminating an employee who is a member of a registered pension plan.

## B. termination notice entitlements

### *1. Employment Standards Act (statutory notice)*

The *Ontario Employment Standards Act*[1] ("ESA") provides minimum standards that employers must follow when terminating employees without cause in Ontario. Employees may have greater rights under common law or contract, but at a minimum, the ESA notice must be provided.

Section 57 of the ESA sets out the statutory notice period requirements which range from one to eight weeks, based on the terminated employee's years of service. Subject to certain listed exceptions, section 64 of the ESA requires additional "severance pay" of up to 26 weeks in cases of terminations of employees who have 5 or more years of service with the employer and where the employer has a payroll of $2,500,000 or more, or the employer has terminated 50 or more employees in a 6 month period because all or a part of the employer's business has closed.

Employee benefits must be continued during the statutory notice period. Section 60(1)(c) (working notice) and section 61(1)(b) (pay in lieu of notice) of the ESA require employers to continue benefit accruals and to make all benefit contributions that are necessary to maintain a terminated employee's benefits until the end of the statutory notice period provided for in section 57 of the ESA. If the pension or benefit plan in question requires employee contributions, the employee contributions must also be made in order to attract the required employer contributions.

Since the terms of many benefit plans require an employment relationship and often "active" employment status, section 62(1) of the ESA deems employees to be actively employed during the statutory notice period. This deeming of active employment status preserves the terminated employees rights to participation in employee

benefit plans and also allows an employee to comply with the *Income Tax Act* (Canada)[2] (the "ITA") requirements for continued employment with respect to registered pension plans, as discussed below.

## 2. Income Tax Act

All pension plans must be registered under the ITA in order to be considered tax-exempt. The ITA rules limit the amount of contributions that can be made and service that can be recognized under a registered pension plan which ultimately regulates the amount of benefits that can be tax sheltered and paid from a registered pension plan. Where pension plans are registered under the ITA, the Canada Revenue Agency is responsible for ensuring that the plan is administered in accordance with ITA requirements. One basic but very important ITA rule to remember is the requirement that an employee be employed and be receiving compensation in order to accrue pension benefits. That is, if an employee or former employee's income is considered "employment income" under the ITA and this income continues for the notice period (whether statutory or common law), then accruals and contributions may continue throughout the notice period. What is considered "employment" is a question of fact in each case, however, employment does not have to be active employment. This ITA rule is important, because in the event of an actual termination of employment without proper notice, any damages that relate to pension accruals or pension contributions cannot be paid out of the pension plan but must be paid from employer general revenues, which can be an unexpected and significant budget expense.

## 3. common law (reasonable notice)

### *(a) damages for pension loss*

Employers in Canada are also required to provide "common-law" notice which is over and above what is required under legislation. Common law is judge made law and is based on precedent. Certain terms and conditions of employment are implied by common law. One such implied term is the requirement to provide reasonable notice of termination or pay in lieu of notice. There is no fixed formula used in calculating a reasonable notice period but a number of factors, such as age, length of service, and job position, are taken into account. (Note that although Quebec is a civil law jurisdiction, many of the same principles apply in this specific area).

With respect to pension entitlements on termination, where actual notice is given, the employee remains employed and as a result pension accruals or contributions would continue as before. Where an employee is terminated without reasonable notice, damages in respect of the benefits the employee would have otherwise received during the notice period would need to be determined.

For defined contribution pension plans, the calculation of damages which correspond to the notice period is relatively straight forward: the amount of the employer contributions that would have otherwise been made during the notice period, and possibly the investment return that would have otherwise been earned on those contributions.

For defined benefit pension plans, the calculation of notice damages is more difficult. Courts have historically addressed defined benefit pension loss in a variety of manners but the case law has now developed to the

point where employers can be reasonably certain about their obligations.

In *King v Gulf Canada Ltd.*,[3] the court was very clear in highlighting that it is not the pension contributions that must be assessed as damages but rather the loss in value of the pension benefit itself. In other words, damages in the case of a defined benefit plan are the difference between the value of the pension at the end of the reasonable notice period and the value of the pension at the commencement of the reasonable notice period.

*(b) gross-up of pension related notice damages*

For defined benefit pension plans, the tax payable with respect to a lump sum damages award for pension loss is generally greater than the amount of tax payable on periodic retirement payments. Consequently, the courts have considered whether awards should be "grossed-up" for tax in order to put the terminated employee into the same position as he or she would have been if the pension benefit was payable over time.

In *Dowling v Ontario (Workplace Safety and Insurance Board),*[4] the Ontario Court of Appeal stated that a gross-up can correctly offset the additional tax liability that the dismissed employee would incur from the receipt of a lump sum payment as opposed to instalments over time. In ordering a gross-up, the court held as follows:

*To* fail to take into account the adverse tax consequences occasioned by a change in the timing of their receipt would be to restrict a person from realizing the full benefit of the damages awarded in a wrongful dismissal case.[5]

As a result, damage awards for wrongful dismissal may be grossed-up so that the after-tax benefits do not reduce a terminated employee's net lawful entitlements.[6]

For defined contribution plans, the same tax issue does not exist, since the employer is simply providing contributions that likely can be tax sheltered in the terminated employee's personal registered retirement plan.

### 4. employment contract

In general, obligations concerning a termination of employment can be governed by a private employment contract, so long as the minimum statutory requirements described above are met. The existence of a contract, if drafted correctly, can provide clarity around matters such as notice entitlements and limit the employer's liability. However, in complex areas, such as employee benefit accruals and participation, poorly drafted employment contracts, and collateral documents such as benefit plans and benefit communications, can create significant confusion and the potential for unexpected cost. A leading example of the latter situation is found in *Taggart v Canada Life Insurance Co.*,[7] where the Ontario Court of Appeal ruled that the pension plan at issue was, at best, ambiguous, and certainly insufficient to disentitle an employee from a damages claim for the loss of pension benefits during the common law reasonable notice period.

Taggart was employed for 30 years at Canada Life before he was terminated as a result of a corporate restructuring. Taggart was offered 24 months notice, comprised of two months working notice and 22 months pay in lieu of notice. Pension accruals were only offered for the two months of working notice because the Canada Life pension plan restricted accruals to periods of active employment. This action denied Taggart the opportunity of retiring early with an unreduced pension, which he would have qualified for if he had been

provided with accruals for the full notice period. Canada Life relied on language in the pension plan text that prohibited pension benefits from being used to increase dismissal damages or from being used to enlarge employee rights.

The Court of Appeal decided in favour of Taggart, holding that payment in lieu of notice must fully compensate an employee for any benefits they would have earned during the notice period. The Court of Appeal further indicated that in order to counter an employee's claim, the pension plan must explicitly state that the employee is disentitled to damages for loss of pension accruals during the notice period. In this particular case, the Court of Appeal found that the Canada Life pension plan restrictions did not meet that standard.

## C. communication obligations

Employers and benefit plan administrators have statutory and common law duties to communicate relevant information to employees. This positive duty is especially important when employees are vulnerable and dependant on the employer for information, as is usually the case with employees who have been terminated. Liability can arise if communication is incomplete or inaccurate and an employee relies on this information to his or her detriment.

### 1. statutory requirements

The administrator of a registered pension plan is required by the *Pension Benefits Act*[8] (Ontario) ("PBA") to provide a terminating member with a written statement outlining the benefits, rights and obligations of the member, no later than 30 days after termination.[9] The termination statement for a member who is entitled to a deferred benefit must contain, among other things, the plan name, member's name and date of birth, years of credited employment, benefits payable, transfer value, transfer options, and the time period for exercising transfer options. It should be noted that an "administrator," as defined by the PBA, may or may not be the employer[10] since this role is sometimes designated to professional third parties with specialized skills and knowledge.

### 2. capital accumulation plans guidelines

In 2004, the Joint Forum of Financial Market Regulators released the Guidelines for Capital Accumulation Plans ("CAP Guidelines"). These guidelines, which apply to all capital accumulation plans, including defined contribution registered pension plans, do not have the weight of law but they are widely followed.[11] Section 7.2.1 of the CAP Guidelines addresses the communication requirements to departing members. Upon a member's termination of employment, retirement or death, the sponsor should inform the member (or the member's beneficiary or personal representative) of his or her options, the actions the member must take and the corresponding deadlines, the default options if no action is taken, and the impact of termination on each of the member's investment options.[12]

### 3. common law

Pension plan administrators also face common law disclosure duties to communicate relevant and accurate information to employees in a timely manner. The importance of this duty is demonstrated in Allison v Noranda Inc.[13] The plaintiff, Allison, was terminated without cause and given two "separation pay" options. The first option was to take a lump sum payment with the employment ending on the date when the notice of termination was issued. The second option was to become an inactive employee and take salary continuation payments for the full notice period. The

employer did not advise Allison of the consequences of electing a lump sum or salary continuation, namely that the the value of the two options was quite different. If Allison took the salary continuation option, his retirement benefit would be significantly larger ($887 per month vs. $302 per month) by virtue of his ability to accrue eligible service during the notice period. The New Brunswick Court of Appeal stated the following:

Surely, an employer is under an obligation to make sufficient disclosure to enable an employee to make an informed decision in cases where the employer asks an employee to make an election with respect to separation pay options that impact significantly on pension benefits. I say this because pension information is of a specialized nature and in the present case, within the control of Noranda as administrator of the pension scheme.[14]

## D. recent amendments to the PBA

Ontario Bill 236, Pension Benefits Amendment Act , 2010 (SO 2010, c 9), received Royal Assent on May 18, 2010. Certain amendments to the PBA came into effect immediately upon Royal Assent, while others will come into effect on future dates. The two central changes to the PBA that will affect terminated employees who are members of Ontario registered pension plans are immediate vesting and expanded grow-in rights for terminations without cause.

### *1. immediate vesting*

Vesting refers to a pension plan member's entitlement to the pension provided by employer contributions. Upon proclamation, a Bill 236 amendment to the PBA will eliminate the two-year vesting period for members' pension benefits and provides that all members will be immediately vested upon becoming a member in a registered pension plan. This means that employers will no longer have to determine whether a departing employee would have vested within his or her notice period if he or she had remained employed. The result is that all members of pension plans are entitled to pension benefits at the termination of their employment. This change will likely increase the costs to employers, especially if the employee turnover rate is high.

### *2. expanded grow-in rights*

Grow-in rights allow defined benefit plan members who meet the eligibility requirements to "grow-in" to enhanced retirement benefits (if a plan provided for enhanced benefits) even though they do not qualify for the enhanced benefits at the time employment was terminated. For instance, if a member of a defined benefit pension plan had 55 points (age plus years of service) at the time of termination, that member could grow-in to an unreduced pension, which may be available at age 60. Prior to the Bill 236 amendment to the PBA, grow-in rights existed only when a pension plan was fully or partially wound-up.

Under the amended PBA, all employees terminated without cause will be eligible for grow-in benefits, regardless of whether the pension plan is wound-up or not. The eligibility requirement for a member continues to be the attainment of 55 points at the time of employment termination. Consequently, if an employee is terminated prior to achieving the requirements for enhanced pension benefits, but otherwise has 55 points at the time of termination of employment, the employee can grow-in to the enhanced benefits.

There are three notable situations where the expanded grow-in rule does not apply. These are found in section 56(1) of Bill 236, which amends section 74(1) of the PBA.

First, section 74(1)(2) of the amended PBA states:

> This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:
> ...
> 2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012....

Since "employer's termination of the member's employment" is required, employees who resign will not qualify for grow-in benefits.

Second, section 74(1.1) of the amended PBA provides:

> (1.1) Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

Accordingly, if a member is terminated for "wilful misconduct," then the employee is not entitled to enhanced benefits. Termination for "wilful misconduct" is not equivalent to termination for "just cause." The former is an employment standards statutory concept, while the latter is defined by common law. In *Oosterbosch v FAG Aerospace,*[15] the employee was terminated pursuant to a progressive discipline policy following unsatisfactory work performance and falsification of records. The Court agreed with the employer in finding just cause for termination. However, the Court did not agree with the employer that the employee's behavior amounted to "willful misconduct, disobedience or willful neglect." Although the employee's behaviour appeared to constitute persistent misconduct, it was not found by the Court to be intentional, which would be a necessary finding when concluding behavior is willful. Based on this approach to "wilful misconduct," it appears that this exception will be a difficult one to rely on.

Third, section 74(2.1) of the amended PBA provides authority to jointly sponsored and multi-employer pension plans to opt out of providing grow-in benefits to their members.

The statutory changes regarding grow-in benefits will make more employees eligible for enhanced benefits and, as a result, will increase the cost to employers with defined benefit plans. Employers will need to think about these enhanced benefits when structuring termination packages.

Although the new grow-in rules do not take effect until July 1, 2012, they directly affect termination considerations today. For example, if an employee is terminated prior to June 30, 2012, but his or her notice period extends beyond July 1, 2012, then the employee may be entitled to claim grow-in benefits.

## E. conclusion

In order for employees to protect their pension entitlements and for employers to avoid liability, it is important that both sides understand their rights and obligations upon a termination of employment.

Employers should continue benefits through a statutory notice period. Employers should also be aware that employees are generally entitled to damages for lost pension accruals during the reasonable common law period, and that damages awarded by courts may be grossed-up. Where drafting or reviewing an employment contract to limit liability or provide clarity, the language used should be clear and unambiguous.

Employers and other pension plan administrators must ensure that they disclose all material information to departing employees. This communication must be accurate, complete, and timely in order to limit exposure to claims.

Recent amendments to the PBA call for immediate vesting and expanded grow-in rights for employees. Employers will need to take these changes into account when terminating employees who are members of registered pension plans.

Administration of pension and retirement arrangements is complex and this complexity is very apparent when terminating an employee. Overlooking pension obligations when terminating an employee can have unexpected and costly implications.

[1] *Employment Standards Act*, 2000, SO 2000, c 41 [ESA].

[2] *Income Tax Act*, RSC 1985, c.1 (5th Supp) [ITA].

[3] *King v Gulf Canada Limited*, (unreported), January 31, 1989, Doc. York 218856/84 (Ont Dist Ct), affirmed (1992), 60 OAC 139.

[4] *Dowling v Ontario (Workplace Safety and Insurance Board)* (2004), 246 DLR (4th) 65 (ONCA).

[5] *Ibid* at para 77.

[6] Wrongful dismissal damages may also be grossed-up where the award is for a benefit that would otherwise be non-taxable. See *Alcatel Canada Inc v Egan* (2006), 47 CCEL (3d) 87 (ONCA).

[7] *Taggart v Canada Life Insurance Co*, [2006] OJ No 310 (CA).

[8] *Pension Benefits Act*, RSO 1990 [PBA].

[9] RSO 1990, c P8, s 28.; *Pension Benefits Act*, RSO 1990. Regulation 909, ss 41-44.

[10] RSO 1990, c P8, s 8(1).

[11] Canadian Association of Pension Supervisory Authorities, *Guideline No. 3: Guidelines for Capital Accumulation Plans*, May 28, 2004.

[12] *Ibid* s 7.2.1.

[13] *Allison v Noranda*, 2001 NBCA 67, 619 APR 211.

[14] *Ibid* at 289-90.

[15] Oosterbosch v FAG Aerospace, 2011 ONSC 1538.

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# doing business in Canada: some key differences in employment and labo(u)r law in Canada and U.S.

by Lai-King Hum

"Strange all this difference should be
'Twixt Tweedledum and Tweedledee."

Canada and the United States resemble each other closely: to the global family, the two are close cousins, if not siblings, sharing political and economic ties as well as similar laws in many areas. However, quite apart from our distinct spelling traditions, the course of political, social, and economic history in Canada and the U.S. has resulted in employment and labour relations that are rather different. These important differences are relevant to the significant flow of cross-border business, generally from south to north.

Any American company contemplating or carrying on business in Canada should be aware of the following key differences when it comes to the hiring, managing and termination of employees in Canada.

## a. regulatory regimes

American legislative jurisdiction over employment and labour is for the most part shared among three levels of government: federal, state and local, with considerable overlap. At first blush, the overlapping jurisdictions seem quite complicated.

By contrast, legislative jurisdiction over employment and labour in Canada is simply divided between the provincial and federal governments, with each distinct in its own sphere. A significant majority of

employers fall under provincial jurisdiction, with the federal government having jurisdiction over certain limited specific federal undertakings, including inter-provincial transportation, telecommunications and banking. There is no overlap between the two. Approximately 85-90% of Canadian employees work in provincially-regulated employment.

Employment and labour law at either provincial or federal levels is also governed by the common law in Canada, and, in the case of Québec, which is a civil law jurisdiction, the common law as codified in the *Civil Code of Québec*.

## b. minimum employment standards

Freedom of contract is largely attenuated in employment and labour relations by prescriptive legislation aimed at redressing the imbalance of bargaining power between employers and employees. Both federal and provincial statutes have been enacted that mandate certain minimum standards and entitlements for employees. Enforced by administrative tribunals, every employer must comply with these standards, or face possible penal

sanctions for their breach. There is no contracting out of these minimum standards.

Under these statutes, employees are guaranteed certain minimal entitlements, including minimum wages, hours of work, overtime pay, vacations and vacation pay, statutory holidays, pregnancy and parental leave, and significantly, notice of termination of employment, or pay in lieu, and in some cases, additional severance pay. There are also provisions, aimed at protecting jobs, that are triggered in the event of the sale of a business.

Significantly, the American categories of "exempt" and "non exempt" employees are not applicable in Canada. Salaried employees, as opposed to those on wages, are typically exempt from overtime pay in the U.S. There is no such distinction anywhere in Canada. Except for true executive or managerial employees in Canada, all other employees are entitled to overtime pay. Determining whether someone is truly a manager or an executive is based on an analysis of their actual job duties.

## c. labour relations

Of the two countries, Canada is by far the more union-friendly. The average total unionization rate between 2006 and 2010 in the U.S. is 13.1%, compared to 31.5% for Canada, more than double for the same period.[1]

The highest unionization rate is in the province of Québec. It has 39.7% of the employment workforce unionized, as well as the most restrictive labour relation laws (or the most progressive, depending on your point of view) anywhere in North America.[2] It also is unique among the larger jurisdictions in not requiring a secret ballot for certification (a secret ballot decreases the chances of unions being successful on applications for certification).

Labour relations legislation in Canada generally reflects a pro union bias. One important instance of this bias is with respect to successor rights. Under U.S. law, an acquiring employer does not necessarily inherit the predecessor collective agreement or its duty to bargain. In Canada, on a sale or transfer of a business, the default position is to assume the union has the right to carry over the collective agreement and the bargaining rights to the acquiring employer.

Further, unlike the limited interpretation of "freedom of association" found in the U.S. Bill of Rights, courts in Canada have interpreted its Charter of Rights and Freedoms to include protection for the right to join a union to bargain collectively, and a duty of employers to bargain in good faith.

## d. terminating employees

"Employment at will"? Many Canadian employers are envious of the application of the American doctrine of "at will" employment, whereby American employers can terminate employees at will, subject to the terms of any written agreement, certain exceptions recognized in various states and so long as the termination does not violate anti-discrimination laws. American employers, on the other hand, are sometimes shocked to learn that the same cannot be done anywhere in Canada where, regardless of whether any written agreement exists, a contractual employer/employee relationship is implied by law. Minimum notice periods, or pay in lieu of such notice, are prescribed by statute in every Canadian jurisdiction, and reasonable notice is also implied in common law.

To limit liability, Canadian employers may oblige new hires to agree that on termination, only the minimum entitlements to notice or pay in lieu under employment legislation apply. However, unless agreed to at the time of hiring, or as part of a carefully structured agreement, and subject to the inability to contract out of the statutory minimums, the common law further requires that an employer provide "reasonable notice" of termination of employment. Employees must generally bring an action in court to recover common law damages for failure to provide reasonable notice. Depending on various factors, that notice could go as high as 24 months, and even higher if egregious circumstances exist.

The province of Québec goes one step further in employee protection: no employee can agree in advance to his or her entitlement to reasonable notice of termination of employment under the *Civil Code of Québec*. As such, the notice or compensatory indemnity in lieu of notice must be determined at the time of termination of employment.

To add to the American shock at Canadian protective legislation, non management employees under federal jurisdiction, as well as non management employees in the province of Québec (after two years' service), may seek the remedy of reinstatement if no just cause for the termination of their employment is found.

## e. restrictive covenants

American law recognizes the doctrine of "inevitable disclosure", whereby an employer can use trade secret law to enjoin a former employee from working in a job that would inevitably result in the use of trade secrets. Canadian law does not recognize this doctrine.

In addition, post-employment restrictive covenants binding a former employee not to compete or solicit are restrictively interpreted by Canadian courts. They will only be upheld if the restrictive covenant is reasonable in duration and scope, and the covenants represent the minimum protections which are necessary to protect the employer's legitimate business interests.

The *Civil Code of Québec* goes further: an employer may not avail himself of a stipulation of non-competition if the employee has been terminated without a serious reason (i.e. for cause) or if he has himself given the employee such a reason for terminating the employment relationship.[3]

## f. employment litigation

Employment litigation counsel in the United States may be surprised to learn that jury trials are rare in Canada; that lawyers' fees are generally recoverable from the losing party in every action at between about thirty to seventy-five per cent of the prevailing party's actual legal costs; and the threat of a class action is more limited in Canada than it is in the United States for employment matters. Because of the costs recovery aspect of litigation, plaintiff counsel, unlike those in the United States, tend to be a little more cautious in initiating actions. Defence counsel may also be less inclined to engage in "scorched earth" litigation tactics.

Further, any award of punitive damages in Canada pales in comparison to those awarded to American litigants. Employers not engaged in egregious conduct generally need not worry about an award of substantial punitive damages.

Developing strategies to deal with employment litigation requires taking these differences into account.

## g. Québec: a distinct legal system, language and culture

There are unique challenges for Americans who want to do business in Québec. First, there are French language requirements for any company conducting business in that province, all monitored by the Office québécois de la langue française. Employers with more than 100 employees have an obligation to form a francization committee and, where necessary, undergo a "francization program"; there is also a registration obligation for most employers with more than 50 employers and an obligation to transmit an analysis of their linguistic situation to the Office. Second, paramount in the employment and labour context is the right of all workers in Québec to communicate to their employer in French and a prohibition against employers making a language other than French a job requirement, unless the nature of the duties requires that knowledge.

As such, special considerations in Québec require counsel familiar with the unique context in which employment and labour laws operate in the province.

## conclusion

Although in many ways similar, there is a considerable difference in focus between the United States and Canada as it pertains to employment and labour relations. In essence, Canadian law presumes the vulnerability of employees, and provides protections and minimum standards with which all employers must comply. Through American eyes, Canada has a strong employee or labour bias that is less evident in the United States. American law stresses instead a higher level of contractual liberty, and fewer prescribed standards.

Americans doing business in Canada require employees. Thus, they need to conduct the hiring, and then managing and sometimes terminating, of these employees. There are also special challenges related to labour relations in Canada. Rather than risk exposure to penal sanctions, workforce disruptions, and/or lawsuits, local employment and labour lawyers should be consulted before embarking on cross-border business with your northern neighbour.

[1] According to the Fraser Institute's "Measuring the Labour Markets in Canada and the United States", 2011 Edition.

[2] *Ibid*. See also "Union Certification: Developing a level playing field for labour relations in Quebec". Marcel Boyer, Montreal Economic Institute, September 2009.

[3] Article 2095, *Civil Code of Quebec*.

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