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Managing the Workplace

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Update and Supplement

Recent Developments in Workplace Law

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Introduction

Over the past year, there have been many important developments in labour and employment, pensions and benefits, occupational health and safety and workers' compensation and privacy law. Recent Developments in Workplace Law is Heenan Blaikie's annual publication designed to summarize these key developments and it serves as a supplement to the Managing the Workplace Seminar Series, a series of complimentary breakfast seminars hosted by our Ontario Labour and Employment practice group. For more information on Managing the Workplace or to register for a seminar, please visit http://managingtheworkplace.com/.

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Employment Law

DISABILITY OR ILLNESS MATTERS IN FRUSTRATION OF EMPLOYMENT CONTRACT CASES

The Ontario Divisional Court this year shed some further light onto the issue of frustration of employment contracts in *Cowie v. Great Blue Heron Casino.*[1] ("*Cowie*")

The Divisional Court specifically overturned a trial decision which found that the elements necessary to find frustration of contract did not exist where a security guard's continued employment was made illegal by a change in the law. The employee had worked for the employer since 2000. In 2007, new legislation called the *Private Security and Investigative Services Act, 2005* came into effect, requiring that all security guards receive a licence under the legislation. The legislation also provided that no person could receive a licence if they had a criminal record. The employee applied for the licence and his application was rejected because he had a criminal record relating to the crime of breaking and entering. The employer subsequently terminated the security guard's employment without any notice or payment in lieu of notice on the basis that the contract had become frustrated.

The Divisional Court found that the employee was not entitled to any payments and clarified the test for frustration of contract in employment contract cases. The court specifically found that where an employee is unable to perform his or her contractual obligations as a direct result of a change in the law that renders their continued employment illegal, the employment contract is automatically frustrated at the time that the law takes effect.

Determining frustration of contract in these circumstances differs significantly from situations involving employees who suffer from a disability. An employer that has an employee who suffers from a disability may spend years accommodating the employee before an employment contract is deemed to have been frustrated. Further, determining that a contract has become frustrated requires a careful assessment as to whether an employee's condition prevents the performance of the essential functions of the employee's job for a period of time such that it can be deemed that the employment contract can no longer be fulfilled. The challenge is to determine at what point the employment contract becomes frustrated by the disability. This ultimately requires a case-by-case assessment which takes into account the severity of the disability, when or if recovery is expected, and the length of service of the employee. Employers often struggle with this analysis.

Cowie differentiates between frustration arising from disability and frustration arising from a change in the law which renders an employee's continued employment illegal. The court's finding makes it clear that where continued employment would be illegal, employers are not required to carry out a comprehensive assessment and may terminate an employee on the basis of frustration when the employee's continued employment becomes illegal. This decision is potentially good news to employers given the fact that when frustration of contract is established, employers are not liable for termination payments at common law or under employment standards legislation.

REVISITING FACTORS RELEVANT TO DETERMINING REASONABLE NOTICE

The Ontario Court of Appeal's decision in *Love v. Acuity Investment Management Inc.*[2] ("*Love*") clarifies that all relevant factors of an employee's employment must be considered when determining what constitutes reasonable notice of termination at common law and no one factor, like short service, should be given undue weight.

In this case, a senior vice-president was dismissed without cause after ten months of employment. He sued for wrongful dismissal and was awarded five months' pay in lieu of notice. The employee appealed on the basis that the notice period was too short considering the nature and character of his employment. The Court of Appeal agreed and increased the award to nine months. The Court of Appeal held that the trial judge had erred by placing disproportionate weight on the employee's short length of service, underemphasizing the importance of the character of the employee's employment, and failing to consider the availability of similar employment.

The Court of Appeal's decision makes it clear that a proper determination of appropriate notice payments for an employee requires a careful assessment of all relevant factors provided for in the Ontario High Court's seminal decision in *Bardal v. The Globe & Mail Ltd.*[3] This case, used by various courts across the country as the starting point for determining appropriate notice on termination, provided that reasonable notice must be determined on a case-by-case basis taking into account the character of employment, the length of service of an employee, the age of the employee and the availability of similar employment having regard to the individual's experience, training and qualifications.

The Court of Appeal's decision in *Love* emphasizes that there is no simple formulaic method that can be used to determine the reasonable notice period; rather, employers must carefully consider each case based on the factors enunciated in *Bardal*.

DAMAGES AND TREATMENT OF DISABLED EMPLOYEES

The Ontario Superior Court of Justice's decision in *Altman v. Steve's Music Store Inc*.[4] ("*Altman*") should serve as a warning to employers about the significant damages that may be awarded when an employer mistreats an employee who suffers from a disability. In this case, a music store employee with 31 years' service was diagnosed with cancer and required significant medical leave. She subsequently returned to work on a reduced hour schedule. The music store then sent a letter to the employee stating that if she did not return to work on a full time basis her employment would be terminated without notice or pay in lieu of notice. Fearing she would lose her job, the employee returned to work and suffered a relapse that required a further leave of absence. The employer terminated her employment without notice or pay in lieu of notice.

The Superior Court found that the employer's treatment of the employee was both callous and insensitive and awarded the employee a notice period of 22 months. The court also ordered the employer to pay $35,000 for a breach of duty to deal in good faith as well as $20,000 in punitive damages.

Altman should serve as a sharp reminder of the importance of carefully managing employees who are absent due to illness or disability and that the manner in which an employer conducts itself can result in damages should the treatment be deemed inappropriate or otherwise insensitive in nature.

NO SUMMARY JUDGMENT FOR EMPLOYER IN WRONGFUL DISMISSAL CASE

The Ontario Superior Court's decision in *McKinstry v. Stone*[5] ("*McKinstry*") has provided further insight into the appropriateness of summary judgment in cases where the issue to be determined is the amount of reasonable notice of termination to which an employee is entitled following his or her termination. While summary judgment has become increasingly common to expedite judgment in wrongful dismissal cases, *McKinstry* makes it clear that courts will not grant summary judgment where there is insufficient evidence to make a final determination.

In *McKinstry*, the court rejected an employer's motion for summary judgment because the employment agreement referred to a "policy booklet" and "standard code of ethics guide," which were not produced at the motion. The court stated that the defendant had the burden of proving that the employee was paid his full legal entitlement and was required to produce the employment agreement and all documents incorporated into that agreement in order to properly interpret the termination provisions in the employment contract.

McKinstry presents challenges in bringing a motion for summary judgment where an employment agreement makes references to other documents. Although termination provisions in an employment contract may appear to be clear, they may be rendered sufficiently ambiguous as a result of

peripheral documentation. *McKinstry* serves as a reminder that summary judgment in cases involving the provision of reasonable notice will not always be granted and that courts will often refuse to make a final determination under this process where it appears either that the issue is too complex and/or that it requires further evidence that has not yet been provided.

Ontario Provincial Labour Law

STRIKE-RELATED CASE LAW: MEANING OF "MET AND BARGAINED" EXPANDED

In *City of Hamilton v. United Brotherhood of Carpenters and Joiners of America, Local 18,*[6] the Ontario Labour Relations Board considered the timing of the appointment of a conciliation officer under Ontario's *Labour Relations Act, 1995*.

In that case, the employer and the union's president left each other several voicemail messages in an attempt to schedule bargaining dates prior to the expiration of the governing collective agreement. The two also spoke once by telephone (for about five to seven minutes) at which time the union indicated that it would be seeking to negotiate a wage increase. The parties failed to meet in person prior to their collective agreement's expiry and, shortly thereafter, the employer asked the Minister of Labour to appoint a conciliation officer pursuant to subsection 18(2) of Ontario's *Labour Relations Act, 1995* which states that the Minister may appoint a conciliation officer after the union and the employer have "met and bargained." The Minister referred the question of whether an officer ought to be appointed under these circumstances to the Board.

The Board found that the union had in fact tabled an offer over the phone and that the short phone call qualified as having "met and bargained" within the meaning of the subsection 18(2) of the Ontario's *Labour Relations Act,1995* even though the parties had not met in person or engaged in traditional methods of bargaining. The Board noted that technological advancements have created new ways for parties to meet and bargain and the fact that no physical meeting had taken place was not necessarily determinative of the issue. In some cases (such as this one), a physical meeting of the parties was not required for purposes of the *Labour Relations Act, 1995*.

UNION REPRESENTATION DURING DISCIPLINARY MEETINGS

In *Ornge and O.P.S.E.U., Local 505 (Champeau),*[7] a communications officer for an emergency air ambulance service was suspected of posting confidential patient information on a public blog. The employer summoned the officer to attend a meeting about "confidentiality" less than one day later and assigned a union representative to attend with him. The collective agreement provided that 24 hours' notice of a disciplinary meeting would be provided to an employee "where possible," including notice of the "purpose" of the meeting and the employee's entitlement to union representation.

Following the meeting, discipline was imposed and subsequently grieved by the union. The union raised a preliminary objection at the grievance arbitration. It argued that the discipline was void from the beginning because 24 hours' notice had not been given to the employee, he had not been notified of the disciplinary nature of the meeting, and he was not permitted to pick his preferred union representative to attend the meeting.

Arbitrator Monteith dismissed the union's preliminary objection. He determined that the grievor was informed of the subject of the meeting and that a union representative had been provided and these facts were sufficient to put the grievor on notice that the meeting was disciplinary in nature. Under such circumstances, the arbitrator found that the onus was on the grievor to seek clarification of the purpose of the meeting if he was unsure. The arbitrator also determined that because the employer honestly believed that the posting of confidential client information was very serious, and in light of the wording of the notice provision, the employer was not required to provide 24 hours' notice of the meeting to the grievor. Finally, the arbitrator concluded that the employer was entitled to appoint a union representative on the grievor's behalf because the collective agreement did not specifically prohibit it or expressly give the grievor the right to select a representative and in any event, the grievor was aware of the

identity of the representative selected by the employer prior to the meeting and he did not object.

THE INTERACTION BETWEEN COLLECTIVE AGREEMENTS AND EMPLOYMENT STANDARDS ENTITLEMENTS

Several arbitration awards issued last year dealt with the interaction of minimum standards legislation, such as the *Employment Standards Act, 2000* ("*ESA*"), with various collective agreement entitlements.

In *Salaried Employees' Alliance of Canada v. General Dynamics Canada*,[8] Arbitrator Baxter examined the severance rights of an employee who had worked for General Dynamics for 13 years, resigned his employment, returned to work at General Dynamics a few years later, and worked until he was laid off six years later. The company's collective agreement provided employees with three weeks of severance for each year worked. By contrast, subsection 65(2) of the *ESA* provides employees who are entitled to severance with one week of pay for *all* periods of service with the employer. The periods need not be continuous.

The grievor was paid three weeks' pay per year for each of the six years of his second period of employment in accordance with the collective agreement. The union grieved, arguing that the grievor was owed three weeks of severance as per the collective agreement for all 19 years of service accumulated as per the *ESA*.

The arbitrator dismissed the grievance. He held that an employee cannot "cherry pick" the elements of the *ESA* and the collective agreement that apply to him in order to gain a more generous severance payment. The arbitrator held that the severance provisions of the collective agreement applied in their entirety because they provided a greater right or benefit in the amount of severance to be provided per year of service. The arbitrator held that the employee was not entitled to severance for all the years of his service because the collective agreement did not contain clear language that would have allowed rehired employees to regain previous benefits.

A similar conclusion was reached in *Spruce Falls Inc. v. United Steelworkers Local 1-2995*[9] in which the union sought to incorporate the *ESA* calculation of "years of employment" into the collective agreement's severance regime. In determining whether the collective agreement was a greater right or benefit that displaced the *ESA*, the arbitrator considered the collective agreement's severance benefit as a whole (that is, the total compensation to the employee) rather than each individual feature of the scheme and conclude that while the *ESA* and collective agreement regimes may interact, "they do not cross-pollinate."

Giving further support to the pragmatic approach of looking at collective agreement severance schemes as a whole, rather than examining each individual element that flows into the total calculation is Arbitrator Albertyn's award in *Zehr's Markets*.[10] In this case, the arbitrator noted that the fact that a small percentage of employees fell below the *ESA* minimum standards was not sufficient to undermine the collective agreement regime. In this case, the collective agreement provided a greater right or benefit in terms of holiday pay to most employees than they would have received under the *ESA*. However, a small group of part-time employees (approximately 8% of all employees) did not receive holiday pay for Family Day pursuant to the collective agreement but would have under the *ESA*. The union argued that this group was not receiving the greater right or benefit provided for and ought to receive pay for the holiday. The arbitrator disagreed. He noted that the collective agreement's holiday provisions provided a greater right or benefit to 92% of the employees and it ought to govern the employment relationship. The arbitrator was not deterred by the theoretical possibility that some employees could be left with less than that mandated by the *ESA.* The Ontario Divisional Court upheld the arbitrator's decision as reasonable.

On a somewhat related issue, in *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1451 v. Kitchener Frame Ltd.,*[11] the Ontario Divisional Court upheld a decision by Arbitrator Knopf that employers do not need to provide *ESA* severance pay where an employee receives unreduced pension benefits at early retirement based on the commuted value of a pension. In this case, employees received unreduced "early retirement" pension benefits, including future service credits, when the employer closed a plant.

Under section 58 of the *ESA*, employees who retire on a "reduced pension benefit" are entitled to severance pay, whereas those who receive an "actuarially unreduced" pension are not. Arbitrator Knopf, in reviewing the commuted value calculation used to determine the grievors' pensions, found that these had not been reduced; rather, the pension benefits issued included all the benefits the employees would have received had the workplace not closed and dismissed the grievance. The court upheld this approach and found that additional severance amounts under the *ESA* were not owing.

TORONTO TRANSIT COMMISSION LABOUR DISPUTES RESOLUTION ACT, 2011

Spurred by fears of a transit strike, the Ontario government passed the *Toronto Transit Commission Labour Disputes Resolution Act, 2011,*[12] which bans strikes by Toronto Transit Commission (TTC) workers. Queen's Park expedited the legislation, passing it on March 30, 2011, the day before the TTC's collective agreement was set to expire.

The legislation prohibits both strikes and lockouts, and introduces a binding interest arbitration scheme. The legislation offers two procedural options in relation to the arbitration mechanism: final offer selection or mediation-arbitration by a single arbitrator selected by the parties. If the parties cannot agree to an arbitrator, the arbitrator will be selected by the Ministry of Labour.

Federal Labour Law

THE SUPREME COURT OF CANADA NARROWS THE SCOPE OF CONSTITUTIONALLY PROTECTED COLLECTIVE BARGAINING

On April 29, 2011, the Supreme Court of Canada released its long-awaited decision in *Ontario (Attorney General) v. Fraser* ("*Fraser*").[13] In *Fraser,* the United Food and Commercial Workers' Union ("UFCW") challenged the constitutionality of the exclusion of agricultural workers from Ontario's *Labour Relations Act, 1995* ("*LRA*")[14] and their inclusion in the *Agricultural Employees Protection Act, 2002* ("*AEPA*").[15] The *LRA* is Ontario's general collective bargaining statute. It sets out the statutory framework within which most Ontario workers can unionize and collectively bargain. The *AEPA* is an agricultural labour relations statute, applicable only to farm workers and farm owners in Ontario. The *AEPA* differs from the *LRA* and indeed, most labour relations statutes throughout Canada, including Part I of the *Canada Labour Code* ("*Code*"),[16] in significant ways. Most notably, the *AEPA* does not compel farm employers to collectively bargain with their employees or a union, but instead, facilitates a process of dialogue and consultation.

In the *Fraser* case, the Supreme Court of Canada held that the *AEPA* was constitutional and that it did not violate the *Canadian Charter of Rights and Freedoms*'[17] ("*Charter*") freedom of association guarantee. The Court held that freedom of association under the *Charter* does not require Canadian governments to extend to all workers throughout the country the core elements of collective bargaining statutes in Canada (*e.g.,* compelled collective bargaining with a union, representation of employees at a particular worksite by one union only, and the availability of strikes, lockouts and grievance arbitration). In *Fraser,* the Court clarified that collective bargaining is not a stand alone constitutional right, but instead, is a derivative component of freedom of association under section 2(d) of the *Charter*. The Court further clarified that the *Charter's* freedom of association guarantee protects a concept of collective bargaining that is very limited and is principally a process whereby workers are able to make collective representations and employers are required to consider those representations in good faith. In every situation where it is alleged that the government has violated a worker's freedom of association by interfering with collective bargaining, the question which must be determined is whether the impugned law or state action makes it *impossible* for the worker to act collectively with others to achieve workplace goals.

Background to Fraser

To fully understand the Supreme Court of Canada's *Fraser* decision, it is helpful to first understand the legislative and judicial history of the case. The *Fraser* case is unusual in that there was more than a ten year lead up to the Supreme Court of Canada's decision.

Agricultural workers in Ontario were excluded from all forms of labour relations legislation until 1994, when Ontario's NDP government passed the *Agricultural Labour Relations Act, 1994* ("*ALRA*").[18] For the first time in Ontario, the *ALRA* gave agricultural workers the right to unionize and collectively bargain. The *ALRA* was a very short-lived statute. The newly elected Progressive Conservative government repealed the legislation in 1995.

Following the repeal of the *ALRA,* the UFCW commenced the *Dunmore v. Ontario (Attorney General)*[19] ("*Dunmore*") litigation, which challenged the constitutionality of the exclusion of Ontario's agricultural workers from all forms of labour relations legislation, including the *LRA*. The Court allowed the UFCW's challenge. The Court held that because of farm workers' particular vulnerability, they were unable

to meaningfully exercise their *Charter*-protected right to freedom of association without a labour relations statute that affirmatively recognized their right to associate and make collective representations to employers. The Court stopped well short of extending constitutional protection to the collective bargaining.

In response to *Dunmore,* the Ontario Legislature enacted the *AEPA.* The *AEPA* extends the following five freedoms to agricultural workers:

- The right to form or join an employees' association or union;
- The right to participate in the lawful activities of the employees' association or union;
- The right to assemble;
- The right to make representations to employers, through an employees' association or union, respecting terms and conditions of employment. Employers have a reciprocal obligation to read and acknowledge in writing any written representations that are received and to listen to any oral representations that are made; and
- The right to protection against interference, coercion and discrimination in the exercise of the rights listed in (i) to (iv) above.

Following the enactment of the *AEPA,* the UFCW commenced the *Fraser* litigation. The UFCW alleged that the *AEPA* was constitutionally deficient and that farm workers' freedom of association under section 2(d) of the *Charter* was impinged because it failed to provide farm workers with adequate protections for organizing and collective bargaining. The court of first instance dismissed the UFCW's challenge because the *AEPA* satisfied all of the requirements set out by the Supreme Court of Canada in *Dunmore* for an agricultural specific labour relations statute and the *Charter's* freedom of association guarantee had never been interpreted to protect the activity of collective bargaining.

After the lower court's ruling in *Fraser* was released, the Supreme Court of Canada issued a landmark decision on collective bargaining and freedom of association, called *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* ("*BC Health Services*").[20] In *BC Health Services*, the Supreme Court of Canada overturned decades of its own jurisprudence and held for the first time that the activity of collective bargaining is capable of receiving some protection under the *Charter's* freedom of association guarantee. In *BC Health Services,* the Court held that section 2(d) of the *Charter* required employers to bargain with their workers in good faith on important workplace issues.

The *BC Health Services* decision may epitomize the old legal adage that "bad facts make bad law." The decision arose from highly unusual and extreme facts. In 2002, the British Columbia legislature passed legislation to address a looming health care crisis, which effectively voided negotiated provisions in collective agreements against layoffs and contracting out, and permitted workers to be relocated to new work locations without their consent. Notwithstanding that the government knew that the proposed legislation significantly concerned the affected unions, the government passed the legislation quickly and without consulting the affected groups.

After the Supreme Court of Canada released the *BC Health Services* decision*,* the *Fraser* case was heard by the Ontario Court of Appeal. The Court of Appeal overturned the lower court's ruling on the basis of the *BC Health Services* decision and held that the *AEPA* was constitutionally invalid. The Court of Appeal expressed the view that the *BC Health Services* decision fundamentally altered the legal landscape for union organizing and collective bargaining in Canada and required the Ontario Legislature to enact a labour relations statute applicable to agriculture workers that had the quintessential features of the *LRA,* the *Code* and most other labour relations statutes throughout Canada and the United States. These characteristics are typically referred to together as the "Wagner Act" model of labour relations. In the Court of Appeal's view, the *BC Health Services* decision required the Ontario Legislature to enact a labour relations statute applicable to Ontario's agricultural sector that had the following four features:

- A requirement that only one union selected by majoritarian vote represent workers on a farm;
- A duty upon farmers and unions to bargain in good faith;
- A mechanism to resolve bargaining impasses between a farmer and a union (*e.g.*, strikes/lockouts or binding arbitration); and
- A mechanism to resolve disputes about the interpretation, administration or application of a collective agreement negotiated between a farmer and a union during the life of the agreement (e.g., grievance arbitration).

The Attorney General of Ontario sought and was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court of Canada's Decision in Fraser

The Supreme Court of Canada held that the *AEPA* was constitutional and did not violate the *Charter's* freedom of association guarantee. The Supreme Court stated that the Ontario Court of Appeal overstated the scope of the *Charter*'s freedom of association guarantee when it decided the case. The Court was unequivocal that section 2(d) of the *Charter* does not guarantee a particular model of collective bargaining, such as the Wagner Act model, nor does it guarantee any

aspect of a particular model, such as majoritarian exclusivity (*i.e.,* the representation of all workers at a particular workplace by only one union), the rights to strike and lockout, or grievance arbitration. Rather, the Court clarified that section 2(d) of the *Charter* protects a very limited concept of collective bargaining that includes a right of workers to make collective representations to their employer and to have those representation listened to and considered in good faith. In the Court's view, the *AEPA* satisfies these requirements as the *AEPA* expressly permits workers to make group representations to their employers and impliedly requires employers to listen to or read any representations they receive and to consider those representations in good faith.

The Impact of Fraser

In the *Fraser* case, the Supreme Court clarified that the constitutional protection extended to collective bargaining under the *Charter's* freedom of association guarantee is exceptionally narrow and that only legislation which "makes good faith resolution of workplace issues between employees and their employer *effectively impossible*" [21] will be found to violate the *Charter's* freedom of association guarantee.

The *Fraser* decision may also signal that the constitutional protection first extended to collective bargaining in the *BC Health Services* decision could ultimately be reversed. In the *Fraser* decision, two Supreme Court of Canada justices argued strongly in favour of such a reversal, with a third justice taking a narrow approach that would have an impact on collective bargaining tantamount to a reversal. For its part, the majority hinted that a reversal could possibly occur. The majority wrote that it was premature to declare the constitutional protection afforded to collective bargaining to be unworkable, and that it would be inappropriate to reverse the *BC Health Services* decision in the *Fraser* case since none of the parties or interveners to the appeal asked the Court to order such a remedy.

Perhaps the most significant aspect of the *Fraser* decision is the Court's very strong pronouncement that the *Charter's* freedom of association guarantee does not require legislators to provide workers with a particular model of labour relations (such as the Wagner Act model) or any particular aspect of a labour relations model (such as the right to strike or grievance arbitration). So long as workers are able to make collective representations to their employer and have those representations considered by the employer in good faith, then a violation of section 2(d) of the *Charter* should not be made out. As the *AEPA* demonstrates, the twin constitutional requirements for collective bargaining (*i.e.,* the ability of workers to make group representations and the obligation on employers to consider those representations in good faith) can be satisfied under a labour relations system that differs markedly from the Wagner Act model, which currently dominates throughout North America.

What remains to be determined is exactly what good faith consideration of workers' collective representations requires. Given the Court's *obiter* remarks in the *Fraser* decision, good faith consideration of workers' collective representations will likely require employers to engage in some type of correspondence with workers or their representatives about the demands which are made. The other aspects of good faith consideration, if any, will undoubtedly be determined in the case law to come.

BOARD CLARIFIES EMPLOYER FREE SPEECH AND CRACKS DOWN ON UNION INTIMIDATION

In a unanimous decision, the Canadian Industrial Relations Board (the "CIRB" or "Board") dismissed unfair labour practice complaints filed by the Canada Council of Teamsters (the "Teamsters") against FedEx Ground.[22] The only unfair labour practice complaint the Board upheld was filed by FedEx Ground against the Teamsters for using unlawful tactics during the campaign to suppress employee opposition to the union. The Board's decision is important because it squarely addresses employer free speech and union campaign misconduct, both top-of-mind issues for employers facing union organizing drives.

Employers Can Communicate Views on Unionization

The decision clarifies the Board's approach to employer communication during a union campaign. The CIRB has arguably maintained the most restrictive view on employer communication of any Canadian labour board. That is now no longer the case. With this decision, the Board has brought its jurisprudence in line with most provincial boards, creating a virtually uniform approach.

In this case, the Teamsters alleged that certain employer communications to employees interfered with the union and coerced employees. In affirming the employer's right to communicate its views about unions, the organizing campaign, the certification process, and collective bargaining, the Board

considered provincial labour board decisions and its own jurisprudence to derive the following non-exhaustive principles:

- An employer is entitled to express its views and is not confined to mere platitudes.
- The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the *Canada Labour Code* (the "*Code*").
- The Board must determine whether the employer's conduct deprived employees of the ability to express their true wishes.
- Intimidation, coercion and undue influence in a labour relations context must involve some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association
- The context in which the statements are made and the probable effect on a reasonable employee is important.
- Circulation of written material is the preferable mode of communication, as the written text is less intrusive than captive audience meetings or private discussion with employees.

Applying these principles, the Board concluded that the employer communications did not intimidate or unduly influence any employees, and that the content of each communication was employer free speech protected by section 94(2)(c) of the *Code*.

Unions Must Not Intimidate Opposing Employees

The employer filed a complaint against the Teamsters alleging that the Teamsters violated the *Code* by intimidating employees who did not support the union.

The Board found that the Teamsters "clearly intended to deter" and "silence" employees from "expressing their opinions" through intimidation and coercion. This conduct violated section 96 of the *Code*, and the Board ordered the Teamsters to cease and desist from these activities. We are not aware of another case where the CIRB has sanctioned a union under section 96 of the *Code* for this type of conduct.

Union Misled Employees to Gain Support

Also at issue in the case was a Teamsters press release that the Board found was intentionally designed to mislead employees into believing that the union had been legally recognized to represent the employees when it had not. The Board did not find a *Code* violation because the misleading communication did not, itself, have sufficient force, threat or pressure.

Implications for Employers

This decision has important implications for employers. Employers do not have to sit on the sidelines during a union organizing campaign. The Board will protect free speech and freedom of association, even when those freedoms do not align with the trade union. It is not, of course, open season at the Board on trade unions. Far from it. But this decision reminds us that labour boards can step in to ensure that during an organizing drive, it is not open season on employers and dissenting employees either.

While there is no doubt that this decision will influence future Board cases on employer speech, employers should always seek legal advice prior to issuing communications to employees during an organizing campaign.

Human Rights Law

SUPREME COURT CLARIFIES HUMAN RIGHTS TRIBUNALS' AUTHORITY TO AWARD COSTS

While it is firmly established that a successful party may recover their legal costs from an opposing party in a civil court action, the same cannot be said for proceedings before administrative tribunals. There has been significant debate about whether human rights tribunals, in particular, ought to make awards for legal costs. Some view this as a matter of access to justice, while others see it as an effective deterrent to frivolous and/or vexatious complaints.

The Supreme Court resolved this debate at the federal level when it ruled in the *Mowat* decision[23] that the Canadian Human Rights Tribunal's power to compensate "any expense" suffered by victims of discrimination did not extend to an award of legal costs. Simply put, the court held it was unreasonable to equate "costs," a legal term of art, with "expense."

In this case of questionable merit, the complainant incurred $196,000 in legal fees to achieve an award of merely $4,000 for suffering to feelings or self-respect. The Tribunal concluded

that because the complainant had achieved some measure of success, it was appropriate to issue a costs award of $47,000. The Tribunal relied on policy considerations about access to justice to ground its broad interpretation of "any expense" as providing authority to make the costs award.

The Attorney General appealed to the Federal Court, which upheld the award, and then again to the Federal Court of Appeal, which quashed the award. As a seven-member panel, the Supreme Court unanimously upheld the Federal Court of Appeal's decision.

Among its reasons, the Supreme Court placed significant emphasis on "costs" being a legal term of art recognized across jurisdictions and contexts. It was therefore unreasonable for the Tribunal to infer an authority to award costs from the language "any expense" when legal "costs" had such extensive recognition and specialized meaning. The Supreme Court noted that this view accorded with how provincial legislatures let their respective human rights tribunals know when awards of legal "costs" could be made, if any.[24]

Although limited to the federal context, the Supreme Court's recognition that "costs" is a legal term of art sheds significant clarity on when a party may be liable for the opposing party's legal fees when litigating before an administrative tribunal. This is a crucial factor to consider in litigation.

DEVELOPMENTS IN ONTARIO'S HUMAN RIGHTS ADJUDICATION PROCESS

The Summary Hearing Procedure

Ontario continues to explore its significantly revised human rights adjudication process. Of interest is the Tribunal's increased use of its new summary hearing process, which allows the Tribunal to direct, on its own initiative, that a summary hearing be held and grants either party the right to request a summary hearing on the question of whether the application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the application will succeed. Where the Tribunal finds that there is no reasonable prospect that the application will succeed, the Tribunal will dismiss the application either in whole or in part.

Since the introduction of the summary hearing procedure in July 2010, the summary hearing procedure has proved to be a valuable tool for employers faced with frivolous claims. It provides an expedited and cost-effective mechanism for having groundless claims dismissed before having to expend considerable time and money defending such claims. To date, a significant percentage of summary hearings have, in fact, resulted in the complaint being dismissed in whole or in part.

Furthermore, the Tribunal has offered some helpful commentary for employers that find themselves embroiled in messy human rights litigation involving allegations that have nothing to do with a protected ground of discrimination. In particular, the Tribunal has made it clear that it is not "a panacea for workplace disputes and general allegations of unfairness. [Rather], [t]he Tribunal's authority is to determine whether there has been discrimination on a ground prohibited by the Ontario *Human Rights Code* (the "*Code*") or a reprisal for asserting one's *Code* rights."[25]

Recent Trends in Damages Awards: No Cap on Lost Wages

While there is some uncertainty about trends in Human Rights Tribunal remedial awards, it does appear that the Tribunal is not reluctant to award large amounts of damages that are somewhat remote in nature. In *De Abreo v. Humber Institute of Technology & Advanced Learning*,[26] an employee who had worked for her employer for five months went on medical leave after being diagnosed with cervical cancer. After 11 months leave, she returned to work on an accommodated basis and ultimately worked between 15 and 18 hours per week. Her family doctor provided medical notes indicating that she would be able to increase her hours in the future. Six months after returning to work, the employer advised the employee that she had not returned to full-time work as quickly as anticipated and, on that basis, she could not continue in her accommodated position. Instead, she had three options: she could resign and receive three-months salary in lieu of notice; she could assume a part-time position and pay an increased share of benefits premiums; or, she could assume a one-year part-time contract for higher pay but no benefits or pension. The employee rejected these options and her employment was terminated with three months pay in lieu of notice. At the time of her termination, she had worked for the employer for approximately 21 months.

The Tribunal determined that the employer had not fulfilled its duty to accommodate and found that it was liable to the employee for both general and special damages. The Tribunal awarded general damages of $25,000, which it admitted was at the "high end" of the scale, on the basis that the employee was in a vulnerable position and the employer had acted aggressively and precipitously in determining that accommodation was no longer possible.

The Tribunal also awarded $113,300 in special damages as compensation for lost wages (the equivalent of 20 months

salary). The Tribunal arrived at this figure by measuring the length of time between the date of the employee's termination and the date that the employer eliminated her position, which was approximately 20 months. In quantifying damages in this manner, the Tribunal noted that the *Code* did not cap damages for lost wages and that the appropriate range of compensation in this regard did not have to mirror that in the employment law context.

AGE-RELATED ENTITLEMENTS IN COLLECTIVE AGREEMENTS

Two decisions in the past year address the question of whether collective agreement entitlements based on the age of employees are permissible. In one, the Ontario Labour Relations Board found that allocating a minimum number of bargaining unit positions to older employees violated the *Code*. In the other, an arbitrator found that providing relatively less generous benefits to older workers violated section 15 of the *Charter of Rights and Freedoms*, but constituted a reasonable limit on older employees' constitutional equality rights.

In *International Brotherhood of Electrical Workers, Local 353 v. Black & McDonald Ltd.,*[27] the union grieved the termination of an older employee, arguing that the termination violated a provision of the collective agreement requiring 20 per cent of employees in the bargaining unit to be over the age of 50. In response, the employer argued that the collective agreement provision was unenforceable as it was contrary to the *Code*. The Board agreed with the employer, finding that while there was a legitimate social need to protect older workers, the union did not adequately prove that this group of older employees (in this case, electricians) was in need of special protection.

Meanwhile, in *Ontario Nurses' Association v. Municipality of Chatham-Kent and the Attorney General of Ontario,*[28] Arbitrator Etherington condoned an age-based benefits distinction in a collective agreement noting that it allowed the employer to mitigate the cost of losing the right to impose a mandatory age of retirement.

While the *Code* generally prohibits discrimination on the basis of age, it contains a narrow exception that permits employers to treat employees over 65 differently from younger employees in respect of pension, benefit and insurance entitlements. In this case, ONA filed a policy grievance challenging the constitutionality of this exception in the *Code* as well as provisions in the governing collective agreement that significantly restricted benefits for employees over the age of 65.

Arbitrator Etherington found that both the *Code* and the collective agreement violated older nurses' equality rights under the *Charter*, but upheld both the *Code* and the provision in the collective agreement as a reasonable limit on these rights under section 1 of the *Charter*. In particular, he found any effect that the removal of benefits might have on older employees was not sufficient to outweigh the employers' interests in maintaining a workable benefits scheme.

The decision seems to confirm that despite the emergence of an increasingly robust approach to age discrimination from arbitrators and the courts, the prohibition on age-based distinctions in the workplace is not absolute.

ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005

Customer Service Requirements

Effective January 1, 2012, all people, businesses and organizations that provide goods or services to the public or to other organizations and that have at least one employee (which includes most private sector businesses) will need to comply with the *Accessibility Standards for Customer Service*[29] under the *Accessibility for Ontarians with Disabilities Act, 2005* ("*AODA*").[30] The requirements of the *Accessibility Standards for Customer Service* include:

- Developing customer service policies and procedures for serving people with disabilities.
- Training employees, volunteers and contractors to serve customers with disabilities.
- Having a policy allowing individuals with disabilities to use their own assistive devices (e.g. cane, wheelchair, oxygen tank, etc.) to access the goods and services offered by the business.
- Communicating with an individual with a disability in a manner that takes into account his or her disability.
- Allowing individuals with disabilities to be accompanied by their guide dog or service animal in areas of the organization's premises that are open to the public.
- Inviting customer feedback on the manner that the organization provides goods or services to individuals with disabilities and establishing a process to respond to and address any complaints.

In addition, organizations with more than 20 employees will need to file an annual accessibility report demonstrating the organization's compliance with the new regulatory requirements, and keep certain required records.

Under the *AODA*, inspectors will have the authority to enter the workplace without a search warrant in order to investigate and enforce compliance. Failing to comply or report as

required could result in an order to comply and/or significant monetary penalties ranging from $500 to $15,000 per day. Fines may increase to $100,000 for a corporation and $50,000 for an individual per day for a major contravention by a repeat offender.

Integrated Accessibility Standards

The *Integrated Accessibility Standards*[31] regulation, which provides accessibility standards for employment, information and communications, and transportation, came into force on July 1, 2011. Organizations in the private sector with 50 or more employees must comply with various aspects of the Integrated Standards in stages, with compliance dates ranging from January 1, 2012, to 2021.

Noteworthy provisions of the *Integrated Accessibility Standards* include requirements to develop accessible websites and web content, provide (and notify prospective employees about) accommodations during employee recruitment processes, develop and document individualized accommodation plans for employees with disabilities and return-to-work processes for employees who have been absent from the workplace and require disability-related accommodations, and provide training to employees and volunteers on the *Human Rights Code* as it relates to persons with disabilities and on the *Integrated Accessibility Standards*.

The transportation standards apply to conventional, specialized and other transportation service providers that offer their services to the public (*e.g.*, taxicabs, buses, school buses, ferries and trains). The transportation standards will require transportation service providers, among other things, to develop accessibility plans and increase access for disabled persons in all aspects of service, including fares, priority seating, and, perhaps most consequentially, vehicle design. Deadlines for compliance with the transportation standards begin as early as July 1, 2011.

Occupational Health And Safety And Workers' Compensation Law

BILL 160: *THE OCCUPATIONAL HEALTH AND SAFETY STATUTE LAW AMENDMENT ACT*

Bill 160, the *Occupational Health and Safety Statute Law Amendment Act*, *2011*,[32] received Royal Assent on June 1, 2011, and marks the first legislative component of the Ontario government's implementation of the recommendations of the Expert Panel on Occupational Health and Safety that were released in December 2010.

The amendments enacted by the legislation mark a change in the government's approach to workplace safety, as they shift responsibility for prevention and training from the Workplace Safety Insurance Board ("WSIB") to the Ministry of Labour ("MOL"). The amendments also impact the way in which employers interact with the occupational health and safety regime in Ontario by introducing new actors, new powers, and new standards into the existing framework.

The legislation is in several stages. The first set of amendments came into force on June 1, 2011. They lay the foundation for the new administrative framework by creating the Chief Prevention Officer ("CPO"), and a Prevention Council. The responsibilities of the CPO, who is to be appointed by the Minister, include establishing standards for training and training providers and maintaining a record of workers' training history.

The role of the Prevention Council is to advise the Minister on the appointment of the CPO, and thereafter, to advise the CPO on the exercise of his duties. The Prevention Council will be composed of three groups of representatives appointed by the Minister: trade unions and provincial labour organizations, employers, and, finally, non-unionized workers, the WSIB and other organizations with expertise in occupational health and safety. Organized labour ultimately will be entitled to the same number members as employers on the Prevention Council - a minimum of one third of members.

The legislation also clarifies that compliance with Ministry approved "codes of practice" will constitute compliance with the relevant statutory or regulatory requirement. The converse; however, is not necessarily true as a failure to comply with a code of practice will not constitute an automatic breach of the statute.

Other sections of the legislation are scheduled to come into force no later than April 1, 2012. Among other things, these will increase authority for the co-chairs of a joint health and safety committee, who will be allowed to make written

recommendations to the employer when the committee as a whole cannot reach a consensus. The Minister will also take over the designation of safe workplace associations, medical clinics and training centres, and will set standards that these bodies must meet. The CPO, meanwhile, will establish training and other requirements necessary to become certified joint health and safety committee members.

No date has been set for the implementation of a final group of amendments. The amendments would create a new mechanism for initiating a reprisal complaint that will allow a Ministry inspector to refer a reprisal complaint directly to the Board with the consent of the worker. The amendments would also require employers to implement training for health and safety representatives in compliance with standards prescribed by regulation.

OBLIGATION TO ESTABLISH A JOINT HEALTH AND SAFETY COMMITTEE

Under subsection 9(2) of the *Occupational Health and Safety Act* ("*OHSA*"), an employer must establish a joint health and safety committee where 20 or more workers are regularly employed at a workplace. In January, 2011, the Ontario Court of Appeal, in its decision in *Ontario (Labour) v. United Independent Operators Ltd.,*[33] clarified that both employees and independent contractors count when determining if this threshold has been met.

United Independent Operators Ltd. ("United") was charged with failing to ensure that a joint health and safety committee was established and maintained at the workplace after a contracted truck driver was seriously injured in an accident that occurred at a customer's workplace. United carried on a haulage business with its sole operation being an office at which 11 people were employed. The hauling was performed by truck drivers who were independent contractors. The number of truck drivers engaged by United fluctuated between 30 and 140 depending on the season. The truck drivers would attend at the office from time to time for matters including their initial engagement, to drop off paperwork and receive payment, and to attend safety meetings.

At trial, United took the position that only people in traditional employment relationships, not independent contractors, were to be counted when determining whether the 20 worker threshold to establish a joint health and safety committee had been reached. United's argument was successful at trial and before the first-level appeal court.

However, the Court of Appeal reversed these findings. It held that the independent contractors were "regularly employed," within the meaning of subsection 9(2) of the *OHSA*. In reaching this conclusion, the Court of Appeal separately considered the words "regularly" and "employed". With respect to the word "employed," the court reasoned that, because United was an "employer" as defined by the *OHSA*, the truck drivers must be employed by it. When considering the word "regularly" the court held that it was normal or customary for United to have engaged between 30 and 140 truck drivers which was consistent with the definition of regularly. Therefore, United regularly employed the truck drivers. This interpretation, according to the Court of Appeal, was consistent with the broad and purposive interpretation that is to be given to the *OHSA*. Interestingly, the Court of Appeal did not decide whether the truck drivers were regularly employed at United's workplace. The upshot is that the question of what factors or analysis will be used to determine if workers – whether employees or independent contractors – are regularly employed at a particular workplace remains unanswered as no other case, whether from the courts or the Ontario Labour Relations Board, has considered the issue.

The decision has the potential to impact employers in a wide variety of sectors. This would include those with industrial contractors and with a dispersed workforce indeed, organizations with truck drivers, taxi or limousine drivers, delivery persons, salespersons, consultants, workers who work predominantly from home or otherwise infrequently attend a particular workplace, may all be affected by this decision. As a result, organizations with workers in such positions or work arrangements should consider their obligation to have a JHSC in light of this decision. However, as noted above, there is no current guidance on the factors that will be used to determine whether workers are regularly employed at a particular workplace. In making an assessment, employers may wish to consider factors such as:

- The frequency with which a worker attends a particular workplace;
- The amount of time a worker would spend at a particular workplace as a percentage of the worker's overall duties or working time;
- The reason(s) the worker attends a particular workplace;
- The nature or type of work performed by the worker while at the workplace; and
- The manner in which the organization has arranged its operations.

It appears that the decision in *United* has not resulted in significant proactive enforcement by the Ministry of Labour. However, the decision clarifies that independent contractors must be counted when determining if a JHSC is required at a particular workplace. As such, organizations that may

be affected by this decision would be wise to review their operations in light of this clarification.

OBLIGATION TO REPORT ALL WORKPLACE DEATHS AND CRITICAL INJURIES

The *OHSA* contains specific provisions requiring an employer or constructor to notify the Ministry of Labour of a critical or fatal injury. The breadth of these requirements was considered by the Ontario Divisional Court in *Blue Mountain Resorts Limited v. Ontario (The Ministry of Labour)*.[34] The decision is notable because the court found that an employer or constructor is obligated to report any death or critical injury that occurs at a workplace, even if the injured person is not a worker and no workers are present when the fatality or critical injury happens.

This decision arose after Blue Mountain unsuccessfully appealed an order of the MOL to the Ontario Labour Relations Board. The order at issue found that Blue Mountain had failed to comply with the reporting obligations of the *OHSA* by failing to report the drowning death of a patron in an unsupervised swimming pool. The legislative provision at issue was section 51(1) of the *OHSA,* which requires an employer or constructor to report a death or critical injury to any "person" at a "workplace." The court upheld the Board's determination that a "person" is not limited to a worker and can include a member of the public. The Divisional Court also ruled that the term "workplace" is not limited to areas of the employer's facilities in which workers are present at a given time. Rather, a "workplace," for the purposes of the *OHSA*, is any area where workers work or are present, even for a brief period of time, during the normal course of business operations. On this basis, the Divisional Court held that Blue Mountain was obligated to report the death of a non-worker in the pool.

Further, the court noted that the employer's reporting obligations under section 51(1) were driven by result (*i.e.*, injury or death) rather than the nature of the underlying incident itself. In particular, the court highlighted that the provision uses the phrase "from any cause" in framing when an employer must report a death or critical injury. In other words, *any* incident in a workplace that causes critical injury or death will trigger the reporting obligation. The court acknowledged that this was a potentially far-reaching result but it found that its interpretation was consistent with the goals of the *OHSA*, as any danger to a non-worker might also present a danger to an employee.

Notably, the Divisional Court only dealt with the reporting requirement, as that was the extent of the order issued by the MOL inspector, and did not address the obligation to hold the scene of a fatality or critical injury. Subject to certain exceptions, subsection 51(2) of the *OHSA* requires that the scene of an injury not be disturbed, without the permission of an MOL inspector. Blue Mountain had raised this concern before both the Board and Divisional Court, noting that it would be required to hold the scene of all accidents until released by the MOL. Blue Mountain argued that the requirement to cordon off an accident scene could have a serious impact on their operations. The obligation to hold the scene of an injury has the potential to be more disruptive to the workplace. Without any guidance on this obligation for incidents involving non-workers, employers and constructors must assume that the obligation applies in full, meaning that the scene of an injury will need to be held until released by an MOL inspector.

In light of the potentially onerous obligations placed on employers and constructors, and the potential consequences of failing to comply with them, short of an amendment to the *OHSA* and its regulations or a clear policy directive on this matter from the MOL, prompt consideration must be given to managing this issue. All employers and constructors should have in place incident reporting policies, strategies and procedures. In light of the *Blue Mountain* decision, policies and procedures should be reviewed, and every employer and constructor should be prepared as follows.

Incident reporting requirements should clearly state circumstances in which notice and a written report must be given to the MOL, and be amended to reflect reporting where a "person" is killed or critically injured from any cause at a workplace. They should also state circumstances where the scene should be preserved.

Front-line supervisory personnel in workplaces must know who to notify in the event of a fatal or critical injury, and human resources and health and safety personnel must have contact information for the MOL available in case notice and a report must be provided. Public and private sector organizations who stand to be significantly affected by the amendments, should speak with a regular MOL contact to provide advance notice that increased notifications will be occurring as a result of the *Blue Mountain* decision.

Employers in a sector that will be significantly affected by ongoing incidents potentially giving rise to reporting, should keep in mind that the *Blue Mountain* decision left the door open to a possible argument that a particular event or incident of fatal or critical injury has not occurred at a "workplace." Accident and incident reporting requirements should instruct human resources or OHS personnel to make immediate contact

with a local MOL inspector to inquire as to whether the MOL will require notice, a written report, and the preservation of the scene in circumstances where there may not clearly be a notice and reporting obligation. Inquiries of this nature could potentially be made in circumstances involving an incident that:

- does not involve an employee or contractor of the organization;
- does not arise out of the organization's work or work-related activity;
- did not involve the organizations equipment or vehicles;
- did not occur in a vehicle, building or area where an employee or contractor of the organization works; and
- could not readily have happened to an employee or contractor of the organization.

In some instances in the past, the MOL has ruled, upon receiving a verbal notice, that they do not wish a formal notification or report, or the scene to be preserved, where they determine, from the verbal notice, that the matter does not involve a workplace or work-related issue. Such matters should be left to the discretion of the MOL. If the MOL does not wish notice, a report or the scene to be preserved, the name of the MOL official and detailed notes should be recorded and retained.

Standard letters and reporting forms should be kept available, to ensure that minimum statutory notification and written reporting requirements to the MOL, health and safety committee and trade union, are met.

The final word on this issue has yet to be written as Blue Mountain has appealed the Division Court's decision to the Ontario Court of Appeal. A date has not yet been set for the appeal but it is anticipated that one will be set in the near future.

COURT OF APPEAL SIGNALS POTENTIAL CHANGE IN APPROACH TO STATUTORY INTERPRETATION

Section 56 of the *Industrial Establishments Regulation*[35] under Ontario's *Occupational Health and Safety Act* ("*OHSA*") requires the use of a signaller to guide those who operate a "vehicle, mobile equipment, crane or similar material handling equipment" and do not have a full view of their intended path of travel.

In *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.,* Sheehan's was charged with failing to ensure the use of a signaller after an accident which occurred in its parking lot. One employee was seriously injured while a truck was being moved from one location in the parking lot to another. At the time, the truck did not have a trailer attached to it and was being moved due to construction that was occurring on the parking lot. Two workers were involved in moving the truck, which did not have a rear window, when it became stuck on a pile of aggregate. The injured worker intended to clear the aggregate but there was miscommunication with the worker driving the truck and the injured worker was accidentally run over by the reversing truck.

Sheehan's was acquitted at trial before a Justice of the Peace and the Crown succeeded in its appeal to the Ontario Court of Justice which set aside the acquittal and entered a conviction against Sheehan's. The Court of Appeal for Ontario restored the trial decision, finding that the signaller obligation under section 56 does not apply to vehicles that are not being used to handle materials.

In interpreting section 56, the Court of Appeal recognized that the *OHSA* has to be interpreted broadly to protect workers. However, it also held that this is not the only consideration. It noted that the *OHSA* seeks to achieve "a reasonable level of protection" for workers but does not seek to achieve an entirely risk-free work environment which, in the court's view would be an impossibility. Further, general principles of statutory interpretation required considering the words of section 56 in their entire context and in line with their grammatical and ordinary sense. Having this interpretive approach in mind, the Court of Appeal held that in determining the types of vehicle to which section 56 applied, consideration had to be given to the words "similar material handling equipment", which suggest that section 56 only applies to vehicles that fall within the general class of "material handling equipment". The court found that the involved truck did not fall within the class as its principal function was to transport goods and materials on public highways, in exterior settings over potentially considerable distances.

For the Court of Appeal, if a broader view of the obligation were adopted, "the signaller requirement under section 56 would apply to passenger cars operated in reverse in such everyday locations as shopping centres and plazas or many office building parking lots, so long as the driver's view is even partially obscured." In the Court of Appeal's opinion, "this expansive view of the scope of section 56 would impose a signaller requirement in circumstances far beyond those that are reasonably necessary to protect workers from safety hazards in industrial settings."

What is most remarkable about this decision is the approach taken by the Court of Appeal to interpreting the *OHSA* and its regulations. The court acknowledged that public welfare

legislation, such as the *OHSA*, is to receive a broad and liberal interpretation consistent with its legislative purpose. By accepting Sheehan's argument that the signaller requirement of section 56 only applied when materials were actually being handled, the Court of Appeal has signalled that the broad and liberal approach to interpretation will not automatically displace any other approach or principle of statutory interpretation.

What is also notable about the decision, is that, in restoring the trial decision, the Court of Appeal awarded to Sheehan's $18,000 in costs. In the court's view, because the issues on appeal raised matters of general public interest and importance and Sheehan had succeed at trial and ultimately on appeal, it would be appropriate that Sheehan's receive some contribution towards its legal costs. Sheehan's had asked for $18,000, which the court found to be reasonable. This is notable because it represents an exception to the general rule that, in prosecutions, each party is responsible for its own costs.

CONTROL DETERMINES "CONSTRUCTOR" OF A PROJECT

An appellate decision by the Ontario Court of Justice serves as a strong reminder that the contractual arrangements between parties will not always be treated as determinative of each party's *OHSA* role and obligations. In *R. v. Reid & DeLeye Contractors Ltd.*,[37] the court upheld a trial court decision which found that Reid & DeLeye was the constructor of a project rather than the construction manager it had contracted to be.

In June 2005, Reid & DeLeye contracted with a hotel owner for the construction of a new hotel. Reid & DeLeye contracted to be the construction manager responsible for carrying out certain roles during the pre-construction, construction and post-construction phases. In its role as the construction manager, Reid & DeLeye did not contract with or pay any of the trades that would perform the actual construction work on the hotel. All contracts with the trades were between the hotel and the trade and the hotel paid the trades for their work.

Reid & DeLeye Found to be the "Constructor"

In March, 2006, while the hotel was under construction, a worker employed by a forming contractor suffered a broken right arm and elbow after falling between 3 and 4 feet from the second rung of a scaffold frame. At the time of the fall, the worker was working from the rung adjusting the height of a form-support scaffold. The Ministry of Labour investigated. Reid & DeLeye was charged with failing, as a constructor, to ensure that a scaffold or other work platform was the required width. The forming contractor and it supervisor were also charged and all pursued the matter to trial.

At trial, Reid & DeLeye argued, among other things, that it was not the constructor of the project. Reid & DeLeye noted that it was the hotel owner that had contracted with all of the trades on the project – including the forming contractor – and, on this basis, it was argued, the hotel owner was the constructor of the project because it had contracted with each of the trades on the project. In making this argument, Reid & DeLeye relied on the specific definition of "constructor" in section 1 of the *OHSA*, which defines a constructor as "a person [which includes a corporation] who undertakes a project for an owner and includes an owner who undertakes all or part of the project by himself or by more than one employer". It was Reid & DeLeye's position that, by contracting with all of the trades, the hotel, as owner of the project, had undertaken the project by more than one employer.

Reid & DeLeye's defence was not accepted at trial. The trial court found Reid & DeLeye was the constructer based upon the fact that it had:

- conducted site safety inspections on the project using a site safety checklist;
- enforced its safety violation disciplinary policy against the trades (including against the forming contractor);
- appointed its own employee as project supervisor;
- coordinated payment of the forming contractor; and
- filed the Notice of Project ("NOP") declaring itself to be the constructor.

Further, the court found that based on the contract between the hotel and the forming contractor, Reid & DeLeye assumed overall responsibility for establishing and coordinating safety precautions and programs on the project.

The trial court's findings on the filing of the NOP are of particular note. Reid & DeLeye asserted that it had filed the NOP by mistake because it did not contract with the trades and did not get paid for the trade's work and then pay the trade. The trial court found that the NOP was an admission by Reid & DeLeye that it was the constructor of the project. After considering the contractual documents and all of the functions that Reid & DeLeye carried out on the project, the trial court rejected the assertion that the NOP had been filed by mistake. Further, Reid & DeLeye did not appeal a post-accident order from the Ministry of Labour issued to it as the constructor. This created a presumption that Reid & DeLeye was the constructor and Reid & DeLeye had failed to rebut that presumption.

Ultimately, it was concluded that Reid & DeLeye exercised the highest degree of control over the project, generally, and, in particular, in respect of health and safety. The trial court also noted that, from a policy perspective, it would be inappropriate to find that the hotel was the constructor of the project because they are not sufficiently present and in a position to take steps to ensure the health and safety of workers.

The trial court convicted Reid & DeLeye, the forming contractor and its supervisor. A fine of $50,000 was imposed against Reid & DeLeye.

Appeal Court Confirms "Control Test" Determines who is the "Constructor"

The appeal court dismissed the appeal after finding that the decision of the trial court, on the "constructor" determination, was one that was available on the evidence and reasonable. The appeal court determined the identity of the constructor by following virtually identical reasoning as was applied by the trial court. It reviewed the contracts between Reid & Deleye and the hotel owner and between the hotel owner and the forming contractor. It also considered Reid & DeLeye's on-site conduct as indicative of how the duties and obligations in the contracts were to be interpreted and applied to the parties. In so doing, the appeal court found that Reid & DeLeye was to oversee that safety programs were established and that safe work measures and procedures were implemented by the trades. Reid & DeLeye was to manage the use of scaffolds by the trades and to provide inspection and training with regard to safety issues involving scaffolds. As a result, the appeal court found that Reid & DeLeye had assumed responsibility for safety issues on the project.

The appeal court noted that the *OHSA* and case law is clear that health and safety issues cannot be left in the hands of sub-trades on a project and a constructor must have oversight of these issues. In this case, the owner had entrusted that responsibility to Reid & DeLeye through its contracts.

The appeal court also rejected Reid & DeLeye's argument that the trial court ignored the definition of "constructor" in the *OHSA* because it overlooked that the hotel had contracted with more than one employer. In the appeal court's view, considering all of its responsibilities under the contract with the hotel owner and its activities on site, Reid & DeLeye fell clearly within the definition of "constructor" under the *OHSA*.

The appeal court endorsed the "control test" applied in the past for determining, amongst several parties, who is the constructor for a particular project. The control test arises from the definition of "constructor" under the *OHSA* because the definition contains the phrase "undertakes a project", which suggests "commitment to and control of the project", said the court.[38] Notably, the appeal court reasoned that the "more control a company exerts, the more likely that it is the Constructor".[39]

Lessons from the Decision

There is little case law on the question of how a tribunal or court will determine who is the 'constructor" with the greatest degree of OHS responsibility over a project as between a project owner, general contractor, or other parties (such as a construction manager). Only a few tribunals and courts have commented on this issue to date. Reid & DeLeye confirms that the courts will apply a "control test" to identify the party who has the greatest degree of control over the project and has, therefore, undertaken the project as the constructor.

The decision also shows that the courts will not identify the constructor by mechanically applying the definition of "constructor" in the *OHSA*. In finding that Reid & DeLeye was the constructor of the project, the courts ignored the fact that the hotel owner had contracted with and was paying more than one employer. In that regard, the decision establishes that the control test will, in given circumstances, be used to contextually assess the plain wording of the *OHSA*. The case helpfully confirms that the matter of who is paying the contractors is not determinative of constructor status.

The case serves as a reminder that after a serious workplace issue or incident, the Ministry of Labour will, if necessary, engage in a very detailed review of the circumstances surrounding a project to assess constructor status and responsibility. This will include analyzing contractual documents, financial arrangements, and the actual functions and responsibilities carried out by the parties on the project. If a project owner is exercising a large degree of control (directing safety on the site, issuing permits, or correcting safety infractions, for example), the owner could be found in control of the construction project and thus the constructor. Similarly, if a third party construction manager is found to be exercising significant control, or the greatest degree of control at the project, they may be found to be the constructor. The case serves as a reminder that parties may get more than they bargained for as the contractual agreements between the parties can be displaced by the actual conduct of the parties on the project.

Does that mean that a construction manager will always be the constructor? Not necessarily. However, the Reid &

DeLeye decision does indicate that any party seeking to act as a construction manager must be careful about the amount of control exercised on the project. Steps should be taken to ensure that the services provided, in respect of a project, remain advisory or consultative in nature and do not stray into areas of responsibility belonging to the constructor.

For any party engaging in contracting for a construction project (including an owner, general contractor, contractor, or construction manager), several key considerations ought to be taken into account before embarking upon the project. All of the parties should ensure that:

- the contractual documents specifically indicate who the constructor of the project is (the property owner or another party);
- the party agreeing to take on the constructor role should file the NOP;
- the contractual documents between the owner, any construction manager, and constructor detail the specific services that will be provided by any construction manager and those that will not;
- the contractual documents between the constructor and others performing work on the project accurately reflect the responsibilities undertaken for safety at the project;
- the party identified as constructor takes the lead role in organizing, scheduling and coordinating the project, and in the administration and enforcement of health and safety on the project;
- the constructor is present or available on-site to address health and safety issues; and
- all notices, registrations and records given to or received from the Ministry accurately reflect the identity of the constructor.

In light of this decision, confirming that the more control exerted by a party over a project, the more likely the party is the constructor, organizations should carefully review contractual documents before contracting for construction projects, and have in place contractor management programs to enable them to assess who is the constructor, and ensure ongoing control by a constructor, when contracting for construction projects.

UPDATE ON *CRIMINAL CODE* PROSECUTIONS BASED ON WORKPLACE SAFETY

Following the Westray mine disaster, the Bill C-45 amendments to the Canadian *Criminal Code* were enacted, creating new duties for organizations and persons directing how others do work to prevent bodily harm, new mechanisms to prosecute and convict corporations, and the potential for limitless fines for corporations if prosecuted and convicted of criminal negligence arising from a workplace tragedy.

The question of whether corporations and senior executives ought to be criminally prosecuted in the wake of tragic workplace accidents continues to ignite controversy in Canada and *Criminal Code* prosecutions alleging corporate "criminal negligence" remain rare.

There has been an increase in calls for criminal investigation and enforcement whenever a workplace tragedy occurs. After a workplace fatality in Toronto in October, the Ontario Federation of Labour was quoted as stating "every worker who is killed at work deserves to have their death investigated through the lens of C-45 … their family deserves to know the police have done more than rule out foul play – that they have looked at criminal negligence by the employer as a possible cause".[40] In British Columbia, following conclusions by the Crown that no criminal charges ought to be brought against Weyerhaeuser Company after a 2004 fatality, the United Steelworkers swore a private information charging Weyerhaeuser with criminal negligence causing death, and pressed that case in court in 2011.

However, courts and prosecutors have tempered the apparent expectations about when *Criminal Code* prosecution ought to occur and will be allowed to proceed. The application of the criminal law is appropriate in some instances, but the message in 2011 has been that it will not be applied to every worker death. That message can be seen in the following decisions.

In *R. v. Weyerhaeuser*, the private criminal negligence prosecution commenced by the United Steelworkers in 2010, resulted in formal "process" or charges being issued to the corporation in March, 2011. But after a careful review of the available evidence, the Criminal Justice Branch concluded that while deficiencies existed at the facility, there was no evidence that the company's management knew that the risk leading to the fatality (entry into a hazardous area) was occurring and failed to address the risk as was required for a *Criminal Code* prosecution. The Crown took over the prosecution, undertook a further assessment of the case, and determined that the available evidence did not provide a substantial likelihood of a conviction, and stayed the proceedings against Weyerhaeuser.

In *R. v. Millennium Crane Rentals Ltd.*, charges of criminal negligence causing death commenced by the Crown were also withdrawn in March, 2011. The case arose after a crane tipped or backed into an excavation at a City of Sault Ste. Marie landfill in 2009, causing fatal injuries. Crown Prosecutors in Ontario concluded there was no reasonable prospect of conviction under the *Criminal Code*.

Criminal Code prosecutions continue against a corporation, Metron, and three company representatives following an Ontario incident in which four workers were fatally injured when they fell from a swing stage at a construction project at an apartment building in Toronto in December 2009. Trial dates in the criminal proceeding have been set for 2012.

Based on what has occurred in 2011, it appears that the application of the criminal law to matters of workplace safety will only occur after a considered review of the evidence. Such an approach is consistent with the general approach to criminal negligence which requires that negligent behaviour constitute wanton and reckless disregard for the lives or safety of others in order for such behaviour to be criminal.

Pensions & Benefits Law

FEDERAL GOVERNMENT AND ACTUARY LIABLE IN PENSION SCHEME

The Ontario Court of Appeal released its decision in *Ault v. Canada (Attorney General)*[41] on February 28, 2011. This case concerned an actuarial get-rich-quick scheme under which federal government employees would resign from employment and be hired by a company set up by an actuary, in order to be entitled to a higher pension transfer value from the federal Public Service Superannuation Plan. The employees would resign from the other company as soon as the pension transfer was completed.

In order to reap these supposed benefits, the actuary set up a reciprocal transfer agreement between the federal government and the other company. Under this sort of agreement, the transfer value payable upon termination of employment from the federal government is greater than it otherwise would be. The federal government had concerns about the scheme, as did the Canada Revenue Agency ("CRA") which eventually revoked the registration of the pension plan set up by the actuary. This decision was upheld by the Federal Court of Appeal.

As a result of the revocation of the pension plan, the pension transfers were not permitted. Consequently, the employees who had resigned their positions with the federal government were left without employment and without the amount of pension monies they expected to receive, on the basis of advice from both the federal government and the actuary. The employees brought an action against both parties to recover their losses.

The lower court decided in favour of the employees and apportioned liability 80% on the part of the federal government and 20% on the part of the actuary. The Court of Appeal agreed with the findings of the lower court, but changed the apportionment of liability to 60% on the part of the federal government and 40% on the part of the actuary. The decision provides some useful comments on negligent misrepresentation and fiduciary duties.

The court held that as an employer and a pension plan administrator, the federal government had a duty of care toward the employees and had an obligation to be mindful of the members' interests when administering the pension plan. The court held that the federal government had misrepresented the availability of the reciprocal transfer as a legitimate option. The government had knowledge that there were problems with this vehicle and specifically in respect of the CRA. Senior administrators within the government had not communicated these concerns to the lower level administrators who were the ones dealing directly with the employees. The court also held that the employees relied on these representations by the government.

The court then concluded that the negligent misrepresentations caused the damages suffered by the employees because but for the negligent misrepresentation by the government, the damages would not have been incurred by the employees. In fact, had the government advised the employees about the significant risks involved in the pension transfers that they would not be accepted by the CRA, the employees would not have resigned from government service.

The court also held that the actuary owed fiduciary duties to the employees, even before the employees terminated employment with the federal government. There were the required elements of trust, reliance, confidence and vulnerability in the relationship between the actuary and the employees while they were employed with the federal government. The court also confirmed that a duty of loyalty is inherent to any professional relationship including that of an actuary and his or her client. The court referred to the Rules of Professional Conduct of the Canadian Institute of Actuaries, which specifically prohibit misrepresentations and

create a duty of full and fair disclosure of all direct and indirect compensation to be received in respect of a professional services assignment. Having concluded that the actuary was acting in a fiduciary capacity toward the employees, the court held that the actuary breached those duties when the actuary put its personal and financial interests ahead of those of the employees.

While the facts of this case are unusual, the reasoning of the court concerning negligent misrepresentations and the nature of the fiduciary responsibilities of both pension plan administrators toward plan members and actuaries toward their clients have far-reaching implications.

INDALEX PENSIONS AND CORPORATE INSOLVENCY: ONTARIO COURT OF APPEAL RELEASES SURPRISING DECISION

In *Indalex Limited*,[42] the Ontario Court of Appeal decided that the interests of pension plan beneficiaries rank ahead of those of the debtor-in-possession (DIP) lender in a corporation insolvency.

In this case, Indalex had applied for protection against creditors under the *Companies Creditors Arrangement Act*. The Ontario Superior Court had authorized a loan under a DIP credit agreement and had granted super-priority to the lender over all other interests and trusts. Indalex's parent company in the US also guaranteed this loan. The court later approved a sale of Indalex's assets on a going-concern basis and the Monitor ordered $6.75 million to be placed in reserve to cover deficiencies in two pension plans: a Salaried Plan that had been wound up before the loan, and an Executive Plan that had not been wound up. As a result, the guarantee of Indalex's parent company was called upon to repay the loan to the DIP lender.

The Court of Appeal overturned the lower court decision and found that a deemed trust existed in relation to the Salaried Plan based on section 57(4) of the *Pension Benefits Act*. The court's reasoning was that in the event of a pension plan wind-up, the obligation of the plan sponsor to fund the wind-up deficiency "accrues" as of the wind-up date, even though payments to pay off the deficiency are not "due" and may be spread out over five years. The court considered the application of the deemed trust to the Executive Plan that had not wound up but did not provide an opinion on that point.

The Court of Appeal also found that Indalex, which was both the plan sponsor and plan administrator, had breached its fiduciary duty to pension plan members which arose by virtue of its role as plan administrator under the *Pension Benefits Act*. By applying for protection under the CCAA and granting the lender a super-priority interest, without any notification to plan members, Indalex had ignored its obligations to the plan members and to protecting funding for both plans. As a remedy for the breach of this fiduciary duty, the court also found a constructive trust existed in relation to both plans based on equitable principles. The court criticized Indalex for not addressing the conflict of interest between its role as plan administrator and plan sponsor, but did not offer suggestions about how to resolve this conflict.

This decision has two significant implications for employers: first, as long as this decision stands, creditors are likely to be much less willing to loan money to companies with pension fund deficiencies, and affiliated companies will be less willing to guarantee these loans. Second, employers who are both plan administrator and plan sponsor will be under enhanced scrutiny to ensure that their actions as a corporation do not create a conflict of interest or infringe their fiduciary duty to plan members. An application for leave to appeal to the Supreme Court has been filed.

TWO CAUTIONARY DECISIONS FOR PENSION PLAN ADMINISTRATORS

In the spring of 2011, the Ontario Court of Appeal released two decisions concerning pension plan administration. The issues addressed by the court are precisely those to which every pension plan sponsor, pension committee and pension plan administrator should be alert.

Should Employers Use Customized Administration Forms?

The Ontario *Pension Benefits Act* was amended in 1987 to include a minimum level of protection for spouses of pension plan members in the form of survivor pensions. The "automatic" form of pension payment under a pension plan is a reduced lifetime pension payable to the plan member, with 60% of the amount of the plan member's pension continued to the surviving spouse for the lifetime of the surviving spouse. The legislation also provides for the ability of a pension plan member and the member's spouse to jointly waive payment of the automatic joint and survivor pension. The legislation prescribes a form for the waiver.

In *Smith v. Casco Inc.*,[43] the court considered the validity of a pension benefit waiver form that had been designed by the employer, Casco Inc. In this case, a plan member decided to retire after 39 years of service. In advance of doing so, he signed a pension option election form and selected a lifetime pension with a five-year guarantee of pension payments with

no lifetime survivor pension to his spouse in the event he predeceased his spouse. The member and his spouse had also signed a joint and survivor benefit waiver form under which the lifetime survivor pension for the benefit of the spouse was waived.

According to the finding of facts by the lower court, the plan member brought the waiver form home at lunch and asked his spouse to sign the form so that he could retire. The spouse glanced at the form, but she did not review it and did not understand that she was waiving entitlement to a survivor pension. Unfortunately, the plan member died three years after retirement, leaving only two years of pension payments from the five-year guarantee for the benefit of his surviving spouse.

The court held that the surviving spouse was not bound by the waiver and therefore was entitled to the lifetime survivor pension. The court relied on the Ontario *Interpretation Act* and the Ontario *Legislation Act, 2006*, which replaced the *Interpretation Act*, and which provide that where legislation refers to a prescribed form, deviations are permitted, but only those that do not affect the substance of the form. The court reviewed the customized form, compared it with the prescribed form and concluded that the differences affected the substance of the form. The main difference, according to the court, was that the customized form referred to an entitlement to the 60% joint and survivor pension under the pension plan and then stated that the 60% joint and survivor pension mandated under the legislation would be waived. The prescribed form, being a generic form, refers only to the pension under the legislation. There were other inconsistencies (such as certain statements not being in bold, or the caution to seek independent legal advice being placed immediately prior to the signature line rather than after) that the court held affected the substance of the prescribed form.

The court rendered a similar decision in *Deraps v. Labourers' Pension Fund of Central and Eastern Canada*.[44] In that case, a multi-employer pension plan also used a prescribed form and went so far as to employ an internal pension counsellor. The decision by the court did not hinge on the use of a customized form, but rather that in the counselling session, the internal pension counsellor did not make it clear to the plan member and spouse that if the joint and survivor pension were waived, the spouse would receive nothing upon the death of the member. The court decided in favour of the surviving spouse.

These cases underscore that pension concepts are complex and challenging to communicate to pension plan members and beneficiaries and they are often misunderstood by these individuals. As a result, prescribed forms should be used and any ambiguities between a prescribed form and a customized form will be resolved in favour of the plan member and surviving spouse. No matter what steps a plan sponsor or administrator takes, it might not be sufficient to avoid a court from reaching a conclusion that provides equitable relief to the plan member or surviving spouse.

When is a Termination of Employment Considered to be a Retirement?

The distinction between a termination of employment and a retirement is often ill-defined in pension plan documents. The proper characterization can mean the difference between entitlement to a regular retirement benefit at age 65 or to lucrative subsidized early retirement benefits. This distinction was considered by the Ontario Court of Appeal in *Revios Canada Ltd. v. Creber*.[45]

In this case, the pension plan member, who was an actuary and senior vice-president and therefore very knowledgeable about pension matters, terminated employment at age 52. He participated in a basic defined benefit registered pension plan and an unregistered supplementary pension plan. Under the registered plan, he was entitled to either a pension at age 65 or to an early retirement pension as early as age 55, the value of which would be the actuarial equivalent of the age-65 pension. If the member had terminated employment or retired on or after age 55, he would have been entitled to a full pension without any reduction at age 62 from the registered plan. He would have also been entitled to a pension as early as age 55 with a subsidized early retirement reduction. The supplementary pension plan provided benefits that the registered plan would provide but for the limits under the *Income Tax Act*. The supplementary plan also provided for a full pension at age 62, without reduction. The early retirement subsidy for commencing a pension prior to age 62 was more generous than under the registered plan. The supplementary plan did not adequately distinguish between early retirement and termination of employment; it simply stated that a pension benefit would be payable in full at age 62.

The court examined both plans. It found that the supplementary plan was not a stand-alone document. It was essentially an add-on to the registered plan and for that reason, according to the court, it should be interpreted consistently with the underlying registered plan. The court held that the meaning of "early retirement" should be consistent in both plans, meaning termination of employment on or after age 55. The member was therefore not entitled to an unreduced pension at age 62.

The employer in this case was fortunate that the court interpreted the plans together. In many other decisions, ambiguities of this nature have been resolved in favour of the plan member. This decision highlights the need to draft documents carefully, particularly those provisions that have significant financial implications, such as early retirement benefits. In addition, it is important to properly link documents where one is dependent upon another, in order to remove ambiguity.

FEDERAL GOVERNMENT ANNOUNCES ADJUSTMENTS TO OSFI'S ANNUAL ASSESSMENT

On October 1, 2011, the Federal Government announced changes to the regulations that govern how the Office of the Superintendent of Financial Institutions (OSFI) recovers costs from the pension industry for the administration of the *Pension Benefits Standards Act, 1985* (*PBSA*) through the annual assessment of federally registered private pension plans. For 2010-2011, the total value of assessment was $7.9 million. This amount is collected from the pension industry each year. Each federal pension plan pays an annual fee that is determined by multiplying the plan's "fee base" by the "basic rate." The "fee base" is determined by the number of members in the plan (which, prior to the these amendments, included only active members). The "basic rate" is the dollar amount that, when multiplied by each plan's fee base, covers OSFI's costs for the year. For example, for 2010-2011, the "basic rate" was set at $22.

The proposed changes are designed to "better align annual assessments with OSFI's costs of supervising and regulating pension plans." Notably, there will be no change to the total amount collected to cover OSFI's costs for a year *(i.e.*, the total value of assessment). Rather, the manner in which fees are calculated will be adjusted. As a result, a pension plan may see either an increase or a decrease in its annual assessment.

Most significantly, the new regulations propose to expand the "fee base" by including all plan beneficiaries rather than only active members. In order for the total assessment to remain unchanged, this increase in the fee base will be offset by a decrease in the basic rate. For example, if this change had been implemented for 2010-2011, OSFI would still collect $7.9 million in fees, but the basic rate would have been set at $12 as opposed to $22.

Summary of current and proposed pension assessment calculations

Current formula	Proposed formula
Assessment = fee base **×** basic rate	No change to assessment formula
Fee base includes only ***active*** members	**Fee base** includes ***all*** plan beneficiaries (i.e. active members, deferred vested members, retirees and beneficiaries)
Above 1,000 members, each additional member increases the fee base by 0.5 until the fee base cap is reached	Above 1,000 members, each additional beneficiary increases the fee base by 0.75 until the fee base cap is reached
Minimum plan fee base is 20 (regardless of whether plan has less than 20 members)	**Minimum plan fee** base is 50 beneficiaries (regardless of whether plan has less than 50 members)
Maximum plan fee reached with 19,000 active members	**Maximum plan fee** reached with 26,333 members and beneficiaries
Minimum annual fee: $440 [a]	**Minimum annual fee**: $600 [b]
Maximum annual fee: $220,000 [a]	**Maximum annual fee**: $240,000 [b]

[a] Based on the basic rate of $22 that was applied in 2010–2011.

[b] Reflecting a basic rate of $12 that would have been used if the new formula had been in place in 2010–2011.

The changes to the assessment regulations take effect on April 1, 2012. OSFI will update its reporting forms to accommodate the adjustments to the assessment formula.

Transition provisions will be in place for 2012 as the existing regulations and the new regulations both indicate that the "basic rate" will be published at least 180 days before an assessment is due. However, in order to transition to the new regulations by April 1, 2012, this notice period will be reduced to 60 days in 2012.

Implementing the proposed changes should generate minimal costs for pension plans. Specifically, plan sponsors could incur some modest costs as they would be required to include retirees and other beneficiaries in their reports to OSFI.

However, since plan sponsors maintain this data, such costs should be minimal.

Effects of Changes for Pension Funds

The increase in the fee base cap is of particular interest to larger defined benefit plans as it will likely result in higher costs for these plans. The government has stated that this change is appropriate as these plans can demand significant OSFI resources when problems arise.

Many defined contribution plans will see a decrease in the amount paid.

Also, since the new regulations propose to increase the minimum assessment base to 50 beneficiaries, the smallest plans will pay slightly more than under the old regulations. This increase, however, is modest, as the minimum assessment for the smallest plans will increase from $440 to $600 (based on a $12 basic rate).

There is a natural and well-grounded suspicion whenever governments revise their assessment methodology that there is an underlying motive to gradually increase fees. Time will tell whether total fees will increase under this revised formula.

With the change in the assessment formula to include inactive members and beneficiaries, there may be some incentive for plan sponsors to annualize retired and inactive members in order to reduce the annual fees. The cost saving in some cases could be significant.

It is not particularly fair that larger pension plans should bear an even greater proportion of the total cost than what they are currently responsible for. Pension plans of all sizes can demand OSFI's resources; it depends upon the issues unique to any particular pension plan at a point in time.

Lastly, many plan sponsors question whether it is realistic or good policy for OSFI to administer the *PBSA* on a full cost-recovery basis. Part of the mandate of OSFI is to encourage the establishment and maintenance of registered pension plans. The imposition of onerous annual fees of this nature, in particular, fees of a quarter of a million dollars, can be said to be at odds with OSFI's mandate.

Workplace Privacy Law

EMPLOYEES MAY HAVE A REASONABLE EXPECTATION OF PRIVACY IN A WORK LAPTOP

In *R v. Cole*,[46] the Ontario Court of Appeal considered the extent of an employee's reasonable expectation of privacy in the contents of a work laptop. While this was a *Charter* case that involved the admissibility of evidence discovered during an employer's search of an employee laptop in a criminal proceeding, the decision provides some guidance to employers regarding the reasonableness of a search of an employee's work computer.

In this case, both the police and the school board (the employer) had searched a teacher's work laptop for sexually explicit material. The school board's search was conducted by the school's computer technician acting within the scope of his functions.

The Court of Appeal held that the teacher had a reasonable expectation of privacy in the personal use of the laptop because the school board explicitly allowed employees to use their laptops outside of work hours for personal tasks as well as to store personal information. Moreover, the school board did not have a policy that stated that it retained the right to monitor employee computer use.

However, the Court of Appeal found that the teacher's reasonable expectation of privacy was narrowed in this case because he was aware that the employer's technician had the right to access his laptop for certain maintenance purposes. As a result, while the employee had a general expectation of privacy in the laptop, he couldn't have reasonably expected privacy with respect to the technician's discovery of sexually explicit material. On this narrow basis, the Court of Appeal found that the employer's search of the laptop was reasonable.

While the Court of Appeal's decision reaffirms an employee's underlying expectation of privacy in respect of a workplace computer and the importance of clarity in respect of employer communications and policies regarding privacy expectation, it is most interesting for the court's comments regarding the impact of the technician's "implied right of access" on employee privacy. The Crown has sought leave to appeal the decision to the Supreme Court.

EMPLOYEE BAG SEARCHES

In *Re Maple Leaf Consumer Foods and Schneider's Employee Association,*[47] an employee told a manager that several packages of product had been found in an unusual location and that she believed that a certain employee was planning to steal them. In order to prevent the theft, management arranged for all employees working in that area to be searched as they left work for the day. Employees were asked to open their bags for a visual inspection as they passed through security. Security guards did not touch employees' belongings or detain those who refused to open their bags. Instead, employees were asked to move the contents of their own bags and employees who refused to open their bags had their names recorded. No product was found during the searches.

The Association filed a grievance alleging that the employer had no contractual right to search employees and in any event, the searches were unreasonable as they were more invasive than was necessary to respond to the suspected theft. Arbitrator Jesin dismissed the grievance. He stated that a right to search employees' belongings to prevent theft may be derived from a management rights clause where a policy or practice providing for such searches has been established by the employer and communicated to employees, and the searches are carried out in a fair and non-discriminatory manner. The arbitrator noted that in this case, plant rules prohibiting theft had recently been reissued and communicated to employees and the employer's discipline procedure, which was also communicated to employees, stated that theft and refusing a security inspection were just cause for discipline. The employer had also previously searched employees suspected of theft and while this was the first time the employer had searched an entire shift, the employer had good reason not to search only the suspected employee because of the acrimony between that employee and the employee reporting the impending theft.

The Arbitrator found that the employee searches were contemplated by the employer's policy and were necessary to protect its property in light of a specific and reasonable suspicion that a theft was about to occur. The Arbitrator rejected the Association's argument that the searches were unreasonable as overly invasive because only visual inspections were conducted, no employees were unreasonably detained, and no one was unreasonably or unfairly targeted.

ADMISSIBILITY OF VIDEO TAPE SURVEILLANCE

There continues to be some debate surrounding the appropriate standard for the admission of videotape surveillance into evidence. In *CAW, Local 302 v. Thames Emergency Medical Services*, [48] Arbitrator Rose admitted videotaped surveillance based primarily on the assessment of the relevance of the evidence to the case. The approach differs from another line of arbitration cases in Ontario, which also requires the employer's surveillance to be reasonable and minimally intrusive.[49] The unsettled debate hinges on the interpretation of section 48(12)(f) of the Ontario *Labour Relations Act (1995)* which grants arbitrators the discretion to admit or exclude evidence "whether admissible in a court of law or not." In brief reasons, Arbitrator Rose acknowledged that some arbitrators interpret this provision as requiring a proportionality analysis that balances the employer's business interests against employee privacy. However, he rejected this line of cases on the basis that they focus too heavily on privacy concerns that inappropriately emphasized the evidence's "form over substance." As a result, he held that the relevance of the evidence must be the "primary consideration" and dismissed the union's attempt to exclude it.

While some arbitrators interpret section 48(12)(f) as requiring a proportionality analysis similar to that which would be undertaken by a court, Arbitrator Rose's decision suggest that others still prefer the approach of granting greater flexibility focusing on a relevancy analysis.

Endnotes

1. 2011 ONSC 6357.
2. 2011 ONCA 130
3. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.)
4. 2011 ONSC 1480
5. 011 ONSC 5544.
6. 2011 CLB 4540.
7. [2010] 104 C.L.A.S. 8.
8. 2010] 104 C.L.A.S. 92.
9. As yet unreported, June 13, 2011 (Nelson Roland).
10. [2009] O.L.A.A. No. 63 (Albertyn) application for judicial review dismissed, [2010] O.J. No. 13 (Ont.Div.Ct.).
11. 2010 ONSC 3890.
12. R.S.O. 2011, c. 2.
13. 2011 SCC 20, [2011] 2 SCR 3.
14. *Labour Relations Act, 1995,* S.O. 1995, c. 1.
15. *Agricultural Employees Protection Act, 2002* , S.O. 2002, c. 16.
16. *Canada Labour Code,* R.S.C., 1985, c. L-2.
17. *Canadian Charter of Rights and Freedoms Part I of the Constitution* Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
18. *Agricultural Labour Relations Act,* 1994, S.O. 1994, c. 6, as rep. by *Labour Relations Act,* 1995, S.O. 1995, c. 1, s. 80 (1).
19. 2001 SCC 94, [2001] 3 SCR 1016.
20. 2007 SCC 27, [2007] 2 S.C.R. 391.
21. *Ibid*. at 98. (emphasis added)
22. *FedEx Ground et al. and Canada Council of Teamsters et al.,* (22 November 2011) Toronto, Document No. 294733 (Canada Industrial Relations Board) [currently unreported]
23. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53.
24. Regardless of whether the Supreme Court was correct in stating that the Ontario Human Rights Tribunal is empowered to make its own rules regarding costs under the Statutory Powers Procedures Act in respect of "unreasonable, frivolous or vexatious" complaints, it is important to note that as of writing, no rule has been enacted. In fact, the Ontario Human Rights Tribunal has consistently held that following amendments to the Ontario Human Rights Code in 2008, it has no jurisdiction to make any award in respect of legal costs. See *Dunn v. United Transportation Union, Local 104* for a discussion on this topic.
25. *Reid v. Molson Coors Canada,* 2011 HRTO 427.
26. [2010] O.H.R.T.D. No. 2405.
27. OLRB, October 8, 2010, [unreported].
28. (2010) 202 L.A.C (4th) (Etherington).
29. O.Reg. 429/07.
30. S. O. 2005, c.11.
31. O.Reg. 191/11
32. S.O. 2011, c. 11.
33. 2011 ONCA 33.
34. 2011 ONSC 3057.
35. O. Reg. 851
36. 2011 ONCA 645 (CanLII)
37. (unreported, January 21, 2011, Ont. C.J., Kitchener, Nicklas J.) ["Appeal Decision"].
38. Appeal Decision, supra note 23, at p. 16.
39. Appeal Decision, supra note 23, at p. 16.
40. Canadian Occupational Health and Safety News, October 17, 2011
41. 2011 ONCA 147.
42. 2011 ONCA 265.
43. 2011 ONCA 306.
44. (1999) 179 D.L.R. (4th) 168.
45. 2011 ONCA 338.
46. 2011 ONCA 218.
47. (2011), 197 LAC (4th) 432 (Jesin) (Ontario)
48. [2010] O.L.A.A. No. 315 (Rose).
49. For examples of the reasonableness rule, see *B.M.W.E. v. Canadian Pacific Ltd.,* [1996] C.L.A.D. No. 1207; *Public Services Employees' Union v. Centre for Addiction and Mental Health,* [2004] O.L.A.A. No. 457; *Teamsters, Local 419 v. Securicor Cash Services,* [2004] O.L.A.A. No. 99.

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