

Co-Counsel

McCarthy Tétrault Co-Counsel:
Labour & Employment Quarterly

Volume 3, Issue 3
September 2009

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Welcome to Volume 3, Issue 3 of McCarthy Tétrault's *Labour and Employment Quarterly (LEQ)*.

It's summer as we put this edition together, but we are already busy planning for the fall. We'd like to remind you that our Toronto conference is scheduled for October 23, 2009, followed by our Montréal conference in November 2009. We look forward to seeing many of you there.

Turning to this issue:

In our national article, you can find information about how [workers' compensation](#) can work for employers.

In our Ontario report, we update you on [re-litigation of issues](#) before the Human Rights Tribunal.

Our western article highlights [recent legislative changes in Alberta](#) in human rights, employment standards, and occupational health and safety legislation.

In our Québec report, we continue the theme of rules for [collective dismissals](#), which we wrote about in our last issue, by considering an [exception](#) that may be useful in today's difficult economic times.

In our Immigration Corner, we discuss the relevant considerations regarding [temporary foreign workers](#) in Canada.

We conclude with a Q&A article that addresses some common questions about [social media sites and privacy at work](#).

Finally, we are pleased to provide you with link to our recent e-Alerts and other articles:

- [The Court of Appeal for Ontario confirms Restrictions on Random Drug Tests in Unionized Workplaces](#) by Sunil Kapur and Kelly McDermott
- [Cost-Cutting Measures in Tough Economic Times](#) by André Baril, Nathalie Gagnon, Simon-Pierre Hébert, Rachel Ravary and Jacques Rouse
- [Post Script to the last issue's Recent Lessons: Fair Competition by Former Employees](#) by James Farley

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McCarthy Tétrault is proud of its position as a leader in all areas of law. With offices across Canada, we are able to meet our clients' needs through the strength of an integrated single partnership. Our Labour & Employment Group has the experience and expertise to assist you with all the complexities of labour and employment law that affect your business. According to the *Canadian Legal Expert Directory* and *Guide to the Leading 500 Lawyers in Canada*, our labour & employment lawyers have a reputation for world-class legal experience.

We hope you enjoy our publication.

[Michael Ford](#)

Editor

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National Report

Workers' Compensation can Work for Employers too

Almost every employer in every province pays into a workers' compensation insurance system. This system of no-fault insurance reflects a historic trade-off whereby workers receive the right to benefits and employers receive protection from legal action by injured workers. This protection, or "bar to claims," is central to the workers' compensation system. Without it, employers would likely seek exemptions from paying premiums toward an insurance system that would not, in fact, provide them with insurance.

This article briefly explains how employers can ensure they are protected under the system by being fully aware of "bar to claims" provisions as well as what constitutes a "compensable injury."

Bar to Claims

Every provincial workers' compensation regime contains a provision that prohibits employees from resorting to a claim in lieu of benefits available under the workers' compensation insurance plan. For instance, in Ontario, subsection 26(2) of the *Workplace Safety and Insurance Act, 1997* provides that entitlement to benefits under the insurance plan is in lieu of all claims that a worker, a worker's survivor or a worker's spouse, child or dependant has against the worker's employer or an executive officer of the employer for an accident involving the worker, or an occupational

disease contracted by the worker, while in the employment of the employer.

What Constitutes a *Compensable Injury*?

Despite this statutory protection, employers are often unaware of the breadth of coverage and are unclear as to what constitutes a compensable injury under the applicable provincial workers' compensation legislation. For instance, an assault (including a sexual assault) that arises out of or during the course of employment may be a compensable injury under most workers' compensation systems. In addition, an employer can expect protection from civil actions not only from its workers who sustain a compensable injury, but also from workers of other employers with whom its own workers interact.

Despite this breadth of coverage, many employers fail to identify such incidents as compensable workplace injuries covered by their workers' compensation insurance plan. Failure to make such an identification can have costly consequences. An employer could find itself immersed in a multi-million dollar law suit for vicarious liability arising out of a workplace incident, such as an assault or battery, even though this civil action may be barred by the workers' compensation legislation. An employer can avoid the cost of litigation and any ensuing damages by identifying from the outset that the incident was a compensable workplace injury under the workers' compensation system.

Lessons for Employers

In light of the potential costs associated with such civil actions, employers must properly identify whether a workplace incident constitutes a compensable injury under their applicable workers' compensation system. The following tips should assist you in making this determination:

1. Assess each incident arising out of and during the course of employment to determine whether it could constitute a compensable injury under your provincial workers' compensation legislation. In making this assessment, refer to the legislation and operational policies associated with the legislation and consult with your provincial workers' compensation board.
2. When in doubt about whether an incident is compensable, file the claim with the workers' compensation board within the time periods prescribed and let them make the final determination. Every workers' compensation scheme mandates that compensable injuries arising out of and during the course of employment must be reported in a timely manner. As such, it is better to error on the side of caution.
3. If you are served with a Statement of Claim in a civil action arising from an assault, battery, sexual assault or harassment claim, consult with legal counsel and determine whether the civil action is barred under your provincial workers' compensation legislation.

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Ontario Report

Update on Re-Litigation of Issues before the Human Rights Tribunal of Ontario

In an [earlier article](#), we discussed *Campbell v. Toronto District School Board*, where the Human Rights Tribunal of Ontario considered whether it should hear matters that had already been decided by a different tribunal, body or judicial process. The Tribunal has since issued some further decisions of interest regarding Section 45.1 of the *Ontario Human Rights Code* (the Code), which allows the Tribunal to dismiss a complaint without a hearing. Two of these decisions are discussed below.

Jarvis v. Sheet Metal Workers International Association

In the proceeding before the Tribunal, the employee alleged that the union had discriminated against him on the basis of race in not referring certain jobs to him. The employee had previously made a similar allegation in a proceeding before the Ontario Labour Relations Board (OLRB) under Section 75 of the *Labour Relations Act (LRA)*.

The OLRB held a consultation process to consider the complaint under Section 75 of the *LRA*, which resulted in the complaint being dismissed.

The union claimed before the Tribunal that the OLRB had appropriately dealt with the issues of discrimination and that the

employee's application to the Tribunal should be dismissed under Section 45.1 of the Code.

The Tribunal confirmed the decision from the *Campbell* case and considered two central questions:

- had another proceeding taken place?
- how did that proceeding deal with the substance of the application now before the Tribunal?

The Tribunal quickly determined that the OLRB consultation process was a requisite proceeding, and concluded that the purpose of Section 45.1 was to avoid duplication of proceedings and re-litigation of issues. The Tribunal also concluded it should not consider whether it would have reached the same conclusion as the proceeding in question.

The Tribunal considered several factors in determining whether the allegations had been appropriately dealt with.

1. The Tribunal said that the purpose of the *LRA* was to hold trade unions to certain standards and to ensure employees were treated in a fair manner. The Tribunal noted that Section 75 was, in many respects, broader than the regime contained in the Code. The OLRB's experience and expertise in discrimination in a labour relations environment also supported the application of Section 45.1 to the decision of the OLRB.

2. The Tribunal examined whether the same questions were decided using the application of human rights principles. The Tribunal determined that the questions before the Board included the issues that were now before the Tribunal.
3. The Tribunal considered the process that was applied by the OLRB, noting that various procedural safeguards were in place. The Tribunal also noted that the Board's consultation process was subject to judicial review.

Carlos v. 1174364 Ontario

In this case, the Tribunal was considering a previous decision of the Landlord and Tenant Board. The case was an allegation of discrimination on the grounds of sex. The tenant claimed that her landlord had issued a notice of eviction that contained sexually demeaning comments, and that the landlord had sexually harassed her.

The Tribunal concluded that the claim before the Landlord and Tenant Board did qualify as a proceeding for the purpose of Section 45.1, but said that the issues before it had not been appropriately dealt with.

On reviewing the decision of the Board, the Tribunal noted that there was nothing to suggest the Board had considered the elements of sexual solicitation or harassment. When considering Section 45.1, the Tribunal will review the other proceeding and require something indicating that the proceeding had

analyzed the evidence and applied human rights principles to the allegations or evidence.

The landlord argued before the Tribunal that since the tenant had had the opportunity to raise the issues of sexual solicitation and harassment at the Board, but had not done so, the tenant should be precluded from pursuing these issues at the Tribunal. The Tribunal concluded this argument was inconsistent with the purpose of Section 45.1, which requires the Tribunal to consider whether or not the allegations in question had "appropriately been dealt with."

It will be interesting to see whether the application of Section 45.1 will be unsuccessful where a complainant has deliberately not pursued, at the previous proceeding, some of the allegations before the Tribunal. It is possible the decision in this case was impacted by the scope of the Landlord and Tenant Board where all issues of discrimination and harassment might not be addressed. In contrast, the *Jarvis* case above was dealing with the broad experience of the OLRB, and a statutory regime that arguably had a wider mandate regarding the interaction between unions and employees.

Lessons for Employers

These cases re-affirm the basic approach set out in the *Campbell* decision that the Tribunal will consider two points when determining whether to dismiss a claim under Section 45.1.

1. Had another proceeding taken place?

2. If so, were the allegations before the Tribunal appropriately dealt with in the other proceeding?
 - (a) In deciding whether the other proceeding "appropriately dealt with the substance of the application," the question is not whether the complaint was decided correctly in the other proceeding. The Tribunal does not have to be satisfied that it would have reached the same conclusion.
 - (b) However, some type of examination of the decision from the other proceeding is necessary. This examination requires the Tribunal to consider whether, in essence, the complaint was dealt with in a suitable and proper manner.

Note also that proceedings will not necessarily require all of the due process protections that one would find in the Tribunal or a civil proceeding. Where an employee chooses not to pursue particular allegations that could be raised at the previous proceeding, he or she may not be prevented from raising those points at a later date before the Tribunal.

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Western Report

Recent Legislative Changes in Alberta

In the past few months, Alberta has seen legislative changes in human rights, employment standards and occupational health and safety legislation. This article summarizes key aspects of these changes.

Military Reservist Leave

The Alberta government has made legislative changes in the past year to provide job-protected leaves of absences for reservists working in Alberta. Bill 1 recently amended the *Employment Standards Code, 2000 (ESC)*. The bill came into effect on June 30, 2009. The provincial reservist leave is quite similar to the federal reservist leave created under the *Canada Labour Code* in April 2008. Now all reservists working in Alberta, whether working in federally or provincially regulated workplaces, are potentially entitled to reservist leave. The federal and provincial regimes provide similar entitlements to employees, although the following summary discusses the Alberta legislation.

Employee Entitlement to Reservist Leave

Like other leaves of absences mandated by the *ESC*, military reservist leave is an unpaid, job-protected leave of absence. The *ESC* requires an employee to provide evidence that he or she is entitled to reservist leave. An employee who is a military reservist and who has completed at least twenty-six consecutive weeks of continuous employment with an employer,

either full-time or part-time, is entitled to military reservist leave. Additionally, a reservist is entitled to leave for overseas deployment, deployment to an operation within Canada (in the event of an emergency such as a natural disaster), and training, if these began after June 30, 2009.

Requirement that Employee Gives Notice

The employee must provide at least four weeks' written notice prior to the date the reservist leave is to start. The notice must include the estimated date of return (if the leave is with respect to an operation) or the actual date of return (if the leave is with respect to training). If an employee is unable to advise the employer before beginning his or her leave deployment, he or she must advise the employer as soon as possible after beginning his or her leave. If an employee does not provide written notice of his or her return to work and is on leave for more than four weeks, the employer may postpone the employee's return to work for up to four weeks after the day the employee has advised that he or she is able to return to work. If the reservist has been on leave for less than four weeks, the employer will not have the option of delaying the return date.

Length of Military Reservist Leave of Absence

Leaves of absence for deployment continue as long as the deployment lasts. An employer may not consider the employee to have been terminated after a certain amount of time or impose a time limit on the leave. Reservists are

entitled to up to 20 days of leave each calendar year for training.

Employee's Return to Work at the Conclusion of Military Reservist Leave

As with other leaves of absence under the *ESC*, the employee must be reinstated to the same position he or she held prior to the leave. If the employee's prior position no longer exists, the employer must provide him or her with a comparable position at an equal or higher rate of pay and benefits. If the employer has suspended its business while the employee is on reservist leave and resumes its business within 52 weeks following the end of the leave, the employer must reinstate the employee to the position occupied at the time the leave started or provide the employee with alternative work with no loss of seniority, benefits or pay.

Lessons for Employers

- Reservist leaves may come up on short notice because of the sensitive nature of Canadian forces deployments.
- Regardless of whether you have reservists currently working for your organization, you should review your human resources policies on leaves of absence.
- Collective agreements should be similarly reviewed and revised.
- Similar legislation currently exists at the federal level and at the provincial level in P.E.I., Nova Scotia, Ontario, Manitoba and Saskatchewan. Other provinces are likely to

follow the trend by adopting their own military reservist leave legislation. If you have employees in other jurisdictions, you should consider your obligations across the country.

Human Rights

The Alberta provincial government has made changes to the *Human Rights, Citizenship and Multiculturalism Amendment Act*. Changes include adding sexual orientation as a listed ground for complaint and confirming the rights of parents with regard to the education of their children. Parents or guardians will have the right to exempt their child from courses of study, programs or materials that include subject matter dealing explicitly with religious instruction, sexuality or sexual orientation. It should be noted that this process is already practiced in Alberta schools; this change merely reinforces that right.

Note also that funding has been increased by \$1.7 million (a 26 per cent increase) to provide for the investigation and mediation of complaints in a more timely manner, so you should be prepared for quicker resolutions of complaints made against your organization.

Occupational Health & Safety

The *Occupational Health and Safety (OHS) Code 2009* has replaced the previous 2006 edition and came into effect on July 1, 2009. The majority of the changes reflect increased worksite safety rules. Examples of changes include:

Part 5 – “Confined Spaces” establishes the concept of a “restricted” space with less stringent requirements than a confined space.

Part 14 – “Lifting and Handling Loads” has been expanded to include requirements specific to patient/client/resident handling.

Part 28 – “Working Alone” revises the communication requirement so that it consists of effective electronic system plus regular contact. Previously, the requirement under the OHS Code 2006, was either an effective electronic system *or* regular contact.

You should check whether any of these changes apply to the specific areas in which your organization works.

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Québec Report

The Concept of "Unforeseeable Event" in Collective Dismissals: An Exception that may Prove Useful in Difficult Times

Introduction

In our last edition, we wrote about the [rules](#) for collective dismissals. In this article, we consider an exception that may prove useful in today's difficult economic times.

The provisions of the *Act respecting Labour Standards (LSA)* concerning an employer's failure to comply with the notice periods and indemnities that apply to collective dismissals were discussed in *Commission des normes du travail v. Industries Troie inc.* The Court of Québec ruled in this case that the sudden and significant loss of contracts could constitute, in certain specific circumstances, an unforeseeable event exempting an employer from having to pay a collective dismissal indemnity to dismissed employees.

Collective Dismissal Procedures under the LSA

An employer who, for economic reasons, implements a collective dismissal of not fewer than ten employees in the course of two consecutive months, must give notice to the Minister of Employment and Social Solidarity within eight weeks. If the employer fails to give such notice, or gives insufficient notice, it must pay each dismissed employee an indemnity equal to his or her regular wages for the same

period. To be exempted from the payment of collective dismissal indemnities, the employer must establish a case of a superior force or an unforeseeable event preventing the employer from giving such notice to the Minister within the required time period.

The *LSA* also requires an employer to give individual written notices to each of the dismissed employees. This notice varies from one to eight weeks, depending on the length of continuous service of the employee. Failure to do so will lead to the payment of a compensatory indemnity equal to the period of notice. The employer is exempt from giving this individual notice or from paying the compensatory indemnity only in the case of a superior force, as the concept of unforeseeable event does not apply in the case of an individual dismissal.

It is important to recognize that these two procedures provided for under the *LSA* are not cumulative, although the employee will receive the greater of the indemnities to which he or she is entitled.

The Case of *Industries Troie* and the Unforeseeable Event

In *Industries Troie*, the court had to determine if the sudden and significant loss of contracts constituted a likely event that the employer should normally have been in a position to foresee, considering the information available at the time.

In this case, despite the difficult situation in the clothing industry since 2003, the employer had adopted some measures to achieve stability and steady economic growth. According to the evidence, nothing could have led the employer to predict the quick and radical downturn of orders at the end of the summer of 2004. Regular contracts obtained over the last few years had caused the employer to believe it could maintain its activities. However, in August 2004, an unexpected loss of major contracts caused production of the employer's product, jeans, to be reduced by 5,000 pairs per week. The court found that this constituted an unforeseeable event that a reasonably diligent person in the same circumstances and operating the same type of business would probably not have foreseen.

The employer acted in good faith by immediately giving a notice of dismissal to its employees and by giving them individual notices. The sudden and significant loss of orders prevented the employer from giving the Minister the required 12 weeks' notice before proceeding with the collective dismissal.

Lessons for Employers

Considering that any exception in law must be narrowly construed, and that a loss of or a significant downturn in contracts or orders is often foreseeable by the employer, relief from providing notice to the Minister or a compensatory indemnity to employees in a collective dismissal for an unforeseeable event will not happen very often.

Nevertheless, in certain specific situations, such relief is possible but ultimately depends on the specific facts that led to the unforeseeable event in the first place. In such situations, you must consider if a reasonably diligent person, under the same circumstances and operating the same type of business, would normally have been in a position to foresee this significant loss of contracts or orders, in light of the information available at the time.

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Immigration Corner

Temporary Foreign Workers in Canada

You are the Human Resources Director for a Canadian-based company that has affiliates and subsidiaries in numerous countries. One of your responsibilities is to manage the temporary foreign workers employed by your company in Canada. All individuals are subject to Canadian immigration laws that apply to temporary foreign workers, unless they are either a Canadian citizen or a Canadian permanent resident. Under these laws, every person who participates in employment in Canada requires a work permit. The definition of employment is very broad, and most business travellers to Canada fall into this category.

Working in Canada Temporarily: Relevant Considerations

But when do you require a work permit? The *Foreign Worker Manual* assists in interpreting the *Immigration and Refugee Protection Act* and Citizenship and Immigration Canada's policy with respect to temporary foreign workers. According to the *Manual*, if an individual performs an activity that will result in payment or remuneration, he or she will be considered to be engaging in work. This includes salary or wages paid by an employer to an employee, remuneration or commission received for fulfilling a service contract, or any other situation where a foreign national receives payment for performing a service.

The first step for any employer is to assess whether a foreign-based employee requires a work permit for his or her trip to Canada. Whether the person will be travelling to Canada for two days or two years is not necessarily relevant. What is much more important is the type of activity the person will engage in while in Canada, and the company or people with whom the traveller will interact.

There are some limited categories that exempt the individual from the need to obtain a work permit. These include the North American Free Trade Agreement (NAFTA) Business Visitors and NAFTA After Sales Service Personnel.

Obtaining a Work Permit

If a work permit is necessary for an individual to participate in business activities in Canada, the next step is to determine which category he or she may be eligible under, and where the person is eligible to apply for the permit. This can usually be accomplished by forwarding a copy of the employee's resume and a detailed description of the proposed activities to your immigration lawyer for consideration.

Once the proper route to apply for the work permit has been established, there are other factors to consider to ensure compliance with Canadian immigration legislation. The employee who is travelling to Canada or being transferred may require a special entry document called a temporary resident visa if he or she is a citizen of a prescribed country such

as South Africa or Brazil. This visa must be obtained through a Canadian Consulate in advance and cannot be applied for at the border, otherwise the employee may be refused entry to Canada. This document is required regardless of the purpose of the trip or the duration of the stay in Canada.

Similarly, if the employee has a previous criminal record or serious health problem, he or she may be denied entry to the country. Finally, an individual may be required under certain circumstances to take an “immigration medical examination” prior to travelling to Canada.

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Q&A

Social Media Sites and Privacy at Work

More than ever before, people are connecting with one another online. As a result of the proliferation of social media sites like Facebook®, LinkedIn®, MySpace® and Twitter®, individuals have the ability to create personal profiles and exchange e-mails, pictures, files and instant messages on the Internet. This article addresses some common questions employers ask about social media sites.

- Q. Are social media sites used in the workplace?
- A. Yes. Some employers develop their own internal social media sites to assist employees in working together or for the purpose of sharing company information. In many cases, social media sites are accessed by employees at work for personal reasons.
- Q. Why should you be concerned about employees’ use of social media sites for personal reasons?
- A. One major concern is loss of productivity. A 2007 study by Richard Cullen of SurfControl, an Internet-filtering company, estimates that Facebook® may be costing Australian businesses \$5 billion a year. A second major concern revolves around privacy issues.
- Q. What privacy concerns do social media sites raise for employers?

A. You need to be aware that monitoring potential or existing employees through personal or work-based social media sites may be subject to privacy legislation applicable in your jurisdiction. In British Columbia, for example, employers are restricted in their ability to collect, use and disclose employee personal information without an employee's consent.

Q. How do these privacy concerns manifest themselves?

A. Many employers use Internet search engines, personal websites and blogs to discover information about prospective employees. You should be aware that even publicly available social media site pages may contain inaccurate or outdated personal information. Equally, you must be extremely hesitant about relying upon such information. You should also not use personal information obtained from such sites in a discriminatory manner against prospective employees.

In addition, most employees view their personal social media site pages as private. Employees are often unaware that personal information posted on these sites may be accessible by their employers and co-workers. Any organization that monitors its employees' use of social media sites must ensure that its employees are aware of this practice.

Q. What are the possible consequences to you of inappropriate use of employee personal information on social media sites?

A. An employer that uses an employee's personal information, obtained from a social media site without that employee's consent or in a discriminatory manner, could face privacy or human rights complaints, a workplace grievance under a collective agreement, and negative publicity.

Q. How should you minimize the risks associated with social media sites?

A. Employers should develop and communicate to all employees a clear policy on the appropriate use of social media sites. The policy should cover:

- whether work-based or personal use of social media sites is permissible in the workplace;
- under what circumstances, and when (e.g., unpaid breaks) social media sites may be used;
- a description of acceptable and unacceptable use of social media sites;
- whether the employer monitors social media sites;
- whether privacy legislation applies to the collection, use and disclosure of personal information in the workplace; and

- the consequence of failure to abide by the policy.

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