



# Quarterly HR Law Update

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## Welcome to Spectrum HR Law's Quarterly HR Law Update

Welcome to the inaugural edition of Spectrum HR Law's quarterly summary of legal updates in the HR law area.

At Spectrum HR Law, we know that staying current with the ever-changing landscape of HR law in Canada is critical to managing the legal risks facing your business. Launching this publication is the latest step in our ongoing commitment to providing timely updates on the information that our clients need to know.

We hope you find this publication useful, and we welcome any questions or comments you may have.

With the launch of our new firm in February of this year, the lawyers and staff of Spectrum HR Law have undertaken the task of creating a new type of law firm in Western Canada, one focused solely



on all aspects of HR law. But our belief in this new concept goes much farther.

We are committed to working closely with our clients, to ensure that the service we provide meets with your expectations, not only for quality legal advice, but also for the predictable and cost-effective manner in which we provide that service.

To our existing clients, we sincerely thank you for the confidence and faith you have shown in us. To

those who are not yet clients, we invite you to contact any one of our lawyers to learn more about how Spectrum HR Law is "HR Law Done Differently".

**Chris Brown,**  
**Managing Partner**

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## Sick from Work: Understanding One of the Least Understood Disabilities

In the last few years we have become familiar with terms such as “sick building syndrome,” “20<sup>th</sup> century disease” and “multiple chemical sensitivity,” each of which have now been unified under one condition called “environmental sensitivities” by the Canadian Human Rights Commission. Environmental sensitivities is considered a disability under human rights regimes and recognized by some workers’ compensation boards. Rather than passing off a layer of dust as protection for the wood beneath it, employers are more than ever encouraged to introduce employment policies that respond to the frequency of environmental sensitivities in an effort to reduce their triggers in the workplace and successfully manage their employees’ health and attendance at work.

### *What is an environmental sensitivity?*

Environmental sensitivities can develop gradually after constant exposure to low levels of chemicals or suddenly after major exposure to a chemical spill or environmental disaster. Symptoms are unique and vary but can include headaches, dizziness, fatigue, watery eyes, nasal and sinus congestion, coughing, wheezing, shortness of breath, tightness in the chest and digestive problems. Moulds, dust, chemicals including off gassing from carpets or furnishings, solvents, fragrances and electromagnetic phenomena are among the environmental factors that initiate environmental sensitivities.

This disorder is difficult to diagnose and is often misdiagnosed. Still, approximately 3% of Canadians have been diagnosed with environmental sensitivities. Further, it can coexist with other recognized disabilities such as preexisting psychiatric conditions. Finally, its presence can result in social stigma, denial of accommodation and workplace ridicule, all of which can be linked to additional disabilities, such as personality disorders, depression, anxiety or substance dependence.

### *Proactive Prevention Tips for Employers*

Employers invest time, money and other valuable resources into training their employees and building effective workforces. Environmental sensitivities are known to reduce productivity, diminish work quality and compromise attendance. It is in the best interests of employers to implement measures that may prevent the condition from developing or reduce the impact on those who have the disorder by eliminating triggers in the workplace. Some tips for reducing exposure and promoting healthier workplace environments include:

- Implementing and posting policies such as fragrance-free (perfumes, lotions, colognes, hairspray, etc), no smoking, pesticide free and use of least toxic / scent-free cleaning supplies. It is recommended to work with your company’s occupational health and safety department and/or legal counsel to create these policies.

*“approximately 3% of Canadians have been diagnosed with environmental sensitivities.”*

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- Educate your staff about the policies and the potential harmful effects of non-compliance. Managing a healthy environment requires ongoing commitment of all coworkers.
- Minimize pollutants, chemicals, dampness and mould during construction and renovations. Also, ensure that any potential, unavoidable irritants are used after hours or on weekends when the workplace is empty, with sufficient time to evaporate prior to re-attendance at work.
- Work with building managers to ensure air quality controls and proper ventilations are in place, which includes changing air filters on a regular basis; to ensure proper, non-flickering lighting is used (all of which should be as natural as possible); and, ensure any applicable laws, regulations and building codes are being met.

Policies and procedures may not always be enough to address specific environmental sensitivities and employers will be required to find other methods of accommodation for suffering employees.

Because environmental sensitivities are recognized as a disability, employees with the disorder must be treated with dignity and individually, and accommodated to the point of undue hardship.

Even where the disability was triggered by a pre-existing psychiatric condition, guarantees of non-discrimination and accommodation are still invoked. Employees must be adequately assessed and, particularly because this disorder is so

complex and less understood, there will be instances where it is prudent for the employer to require the employee to undergo an independent medical assessment or for the employer to obtain an expert opinion on the effects of the condition and accommodation methods.

Employers should do their best to implement the best preventative practices and when necessary accommodation measures. Seeking assistance from an occupational health specialist could prove very valuable to the process plus is fortunately accepted as a reasonable step by the law.

It's time to take a look at your workplace and trade your "dust if you must" mantra for a scent, toxin and smoke free policy in a dedicated effort to managing health and safety at work. Remember, working with your building management can also prove to be a very effective tool in preventing environmental sensitivities from developing at work.

### Shana Wolch

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*"trade your 'dust if you must' mantra for a scent, toxin and smoke free policy"*

## Business Immigration Update

On March 16, 2010, Citizenship, Immigration and Multiculturalism Minister Jason Kenney launched consultations to identify Canada's new and emerging labour market needs and how immigration can best respond to them. These consultations will look at worker shortages in trades

and professions across Canada as well as the factors that affect an immigrant's ability to succeed in Canada's work force. The consultations will help develop instructions to immigration officers on which economic immigration applications are eligible for processing. As part of the Action Plan

for Faster Immigration, the first set of instructions was issued in November 2008 as a tool to keep the backlog of applications from growing, to reduce wait times for new applications and to better match new economic applicants to Canada's labour market needs.

## "True Employer" v. "Mere Puppet"

In *Cardinal v. Tribal Chief's Ventures Inc.*, 2010 ABQB 25, the Court warns against confusing the "true employer" concept with an attempt to pierce the corporate veil. Ms. Cardinal was employed by Tribal Chief's Education Foundation. After her termination, Ms. Cardinal sued the Foundation and shareholder Tribal Chief's Ventures (a Tribal Council) for wrongful dismissal. Ms. Cardinal claimed that the two entities had a mutual controlling mind, operated without distinction, and

therefore the Foundation was a "mere puppet" of the Council, her true employer.

Upholding the Master's Summary Judgment decision, the Court concluded that the Council was not the true employer as there was no evidence of an employment relationship between Ms. Cardinal and the Council. The Court also found that a funding relationship between the Council and the Foundation was insufficient to pierce the corporate veil. The Court

confirmed the rarity of doing so in the employment context, and the more appropriate use of the true employer concept: "only an 'employer' can be liable in an action for wrongful dismissal. As such, the approach of the Court is to examine the substance of the employment relationship to determine the identity of the true employer or employers as the case may be. This concept is not to be confused with lifting the corporate veil."

## Amendments to Canadian Refugee System

On March 30, 2010, the Canadian government announced proposed legislation to improve Canada's asylum system, deliver quicker decisions on asylum claims and provide faster protection to those in need. It currently takes an average of 19

months for refugee claims to be heard by the Immigration and Refugee Board of Canada (IRB). The proposed measures would shorten this so that claimants would generally have a hearing at the IRB within 60 days. All eligible asylum claimants would

continue to get a fair hearing by the IRB based on their individual circumstances. Most claimants would also have access to a new appeal process at the IRB including the opportunity, in certain cases, to present new evidence.

*"The proposed measures would shorten this so that claimants would generally have a hearing at the IRB within 60 days."*

## Administrative Roulette: Who Pays the Pension Plan Expenses?

Although pension legislation generally provides little guidance on the subject of pension plan expenses, according to the case law and the position of the Canada Revenue Agency “reasonable administrative, investment and similar expenses are a legitimate cost of the plan” and can, therefore, be paid from the pension fund when so permitted by the pension plan text and trust documents. This approach encourages pension plan administrators to charge reasonable administration expenses back to a pension plan following an appropriate consideration of the circumstances.

Before considering whether there is any impediment to charging a particular expense to a pension fund, a pension plan administrator needs to ascertain (i) whether the pension fund is impressed with a trust in favour of the plan beneficiaries, and if so, (ii) whether the valid terms of the trust permit the payment of expenses from the fund. Making such a determination will require a review and analysis of the historical plan texts and related trust agreements and amendments made to the documents over the lifetime of the pension plan.

When determining whether the payment of an expense from a pension fund is appropriate, plan sponsors, in their capacity as plan administrators, must, in the exercise of fiduciary obligations, consider the following factors in order to determine whether such payment is proper in all the circumstances:

1. Was the expense incurred in relation to the administration of the pension plan?
2. Who was the primary beneficiary of the expense, the plan sponsor or the plan members?
3. Is the expense reasonable and usual for the services provided?

In examining the determinative criteria with respect to pension plan expenses, the Supreme Court of Canada recently upheld an

approach set out by the Ontario Financial Services Tribunal in *Nolan v. Kerry (Canada) Inc.* where it was found that the term “for the exclusive benefit of members” could be interpreted as “for the primary benefit of members”. Consequently, trustee fees, legal fees, investment management fees, audit fees, filing fees and consulting fees incurred, for example, in connection with the implementation of pension plan design changes could be considered as expenses that are for the primary benefit of members.

The Supreme Court further found that “exclusive benefit” language did not mean that only the plan members could benefit from the pension plan as beneficiaries could, arguably, fall outside of that language if it was strictly applied. As such, the Court found that a secondary benefit to others entitled to benefits under a pension plan, or a plan sponsor, could qualify as reasonable in the administration of a pension plan, provided that the primary benefit was experienced by the plan members.

A caveat to the general discussion above is that when paying expenses from a plan fund one must consider any potential adverse consequences. For instance, if a legal opinion is obtained by a plan sponsor consideration needs to be made for the appropriate source of payment. If a legal opinion is paid for directly from plan funds, it is likely that the commissioning plan sponsor would lose any claim to solicitor-client privilege over the contents of the opinion. Generally, where such costs are paid from a trust fund, trust law provides the beneficiaries of the trust the right to disclosure, which means that plan members could claim a right to review the legal opinion. Even where a plan sponsor might otherwise be permitted to charge such costs to the fund, caution should be exercised in doing so owing to the potential loss of privilege.

*“The Supreme Court further found that “exclusive benefit” language did not mean that only the plan members could benefit from the pension plan [...]”*

### Kristin Smith

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## Proposed Changes to Canada’s Temporary Foreign Worker Program

On October 9, 2009, the Canadian Government proposed major changes to regulations pertaining to Canada’s Temporary Foreign Worker Program (“the Program”). These revisions are meant to strengthen protection for temporary foreign workers (“TFWs”), to ensure greater employer compliance with TFW employment agreements, and to underscore that TFWs are meant to be in Canada only for a limited duration to fill labour gaps. Here are some of the highlights of the significant planned changes:

**Genuineness of Employer Offers:** The new regulations would clarify the process and establish factors to be considered in assessing the genuineness of all offers of employment. These factors include whether the offer is made by an employer who is actively engaged in the business in which the offer was made, whether the offer is consistent with the needs of the employer, whether the employer is able to fulfill the terms of the offer, and past compliance of the Canadian employer.

**Employer Eligibility Restrictions:** Currently, there are no enforceable provisions available to hold employers accountable when they have been found to have provided significantly different wages, working conditions or occupations than what was initially offered to a TFW. Under the new regulations, if these breaches occur, the employer will be banned from participating in the TFW Program for a 2-year period. The violating employer’s name and address will also be listed on Citizenship and Immigrations Canada’s website, along with the reasons for their ineligibility.

**Maximum Time Periods for TFWs:** Because the purpose of the Program is to address temporary labour shortages, another proposed change to the regulations

will limit a TFW to only being able to work in Canada for a combined term of 4 years. After these 4 years have been exhausted, the TFW would not be authorized to work in Canada for a period of at least 6 years. There would be a few exceptions, such as whether the work performed created significant social, cultural or economic benefits for Canada, or whether the work was being performed pursuant to an international agreement (e.g. NAFTA). Employers will need to consider what their long-term needs will be much sooner and initiate the permanent residence application process for their TFWs.

**Live-in Caregivers:** requirements for an employer of a live-in caregiver would include providing adequately furnished and private accommodations in the household for a TFW, and the employer demonstrating that he or she has sufficient financial resources to pay the wages offered to the TFW.

**Labour Market Opinion Time Period:** Under the proposed regulations, Human Resources and Skills Development Canada (HRSDC) will be required to state a time period during which its labour market opinions will be in effect. Although these time periods were often stated anyway, it will now become a legal requirement outlined in the regulations.

It is important for Canadian employers to be aware that even a single violation can result in a ban that may impact their ability to employ TFWs to assist their operations. Employers should implement workplace measures to ensure full compliance with immigration processes and policies. Feel free to contact us with any questions you may have.

**Evelyn Ackah**

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*“These revisions are meant to strengthen protection for temporary foreign workers (“TFWs”)”*

*“Canadian employers to be aware that even a single violation can result in a ban that may impact their ability to employ TFWs”*

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## PLEASE JOIN US

Please join us for Spectrum HR Law's May 2010 breakfast and HR law seminar. Discussion topics will include:

- The Latest Business Immigration News
- Evolving Fiduciary Obligations in Pension Administration
- Whistleblowing at Work

Date: Tuesday, May 4  
Time: 7:30 a.m. breakfast, 8:00 – 9:30 a.m. seminar  
Location: Standard Life Tower  
Xchange Conference Centre  
2<sup>nd</sup> Floor (plus 15 level), 639-5<sup>th</sup> Ave. SW

Please RSVP by emailing [rsvp@spectrumhrlaw.com](mailto:rsvp@spectrumhrlaw.com) by Tuesday, April 27.

For more information about Spectrum HR Law please see us online at [www.spectrumhrlaw.com](http://www.spectrumhrlaw.com).



SPECTRUM  
HR LAW

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