



HR Law Update

One Year Old and Growing!

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February 1st marked the one-year anniversary of the launch of Spectrum HR Law! It has been an extremely busy and eventful first year of operation. Our firm, which began with 8 lawyers, 1 paralegal and 2 administrative staff, has now grown to 12 lawyers, 4 paralegals and 5 staff, with thriving offices in both Calgary and Vancouver. And we're not finished yet. Stay tuned for significant announcements of further growth in both cities as our second year unfolds.

We were pleased to host an anniversary celebration and seminar on February 3rd in Calgary. At times like these we believe it is important to stop and reflect on how far our concept for a new firm and a new way to practice HR law has come in a short time. From an initial idea to detailed planning, from opening our doors to full operation, we have been fortunate to have this opportunity to bring our vision to life. Providing strategic counsel in all HR-related legal matters, on a timely and cost-certain basis, is the goal that we work towards every day.

Most importantly, none of what we have accomplished would have been possible without the support and encouragement of our valued clients and many other friends and colleagues. We are truly grateful for your business and the trust you have placed in us.

As our firm continues to grow, we remain committed to building on our vision and to demonstrating that Spectrum HR Law is HR Law Done Differently.

Chris Brown, Managing Partner

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SPECTRUM HAPPENINGS

Chris Brown will be giving an address - "The Real Story - Giving More Canadians More Retirement Options" - to the Economic Club in Toronto on February 25th, and in Calgary on March 8th.

Chris Brown will be speaking on "Recent Developments in Pension Plan Law and ACPM Advocacy Initiatives," at an ACPM BC Regional Council session in Vancouver on March 9th.

Craig Natsuhara will be presenting "Traveling to the 'Other Side' - Updates on Obtaining Canadian Work Permits and Related Issues," on March 10th in Portland, Oregon at the Northwest Regional Immigration Law Conference.

Will Cascadden will be speaking on the topic of constructive dismissal issues at the Human Resources Association of Calgary Legal Conference on March 22nd.

Scott Sweatman will be teaching at the University of British Columbia's Sauder School of Business' "The Responsible Trustee - Introductory Level" in Vancouver on April 18th.

Scott Sweatman will be teaching at the University of British Columbia's Sauder School of Business' "The Responsible Trustee - Intermediate Level" in Vancouver on May 9th.

Colin Galinski and Scott Sweatman co-authored an article on Pension and Benefits Issues Post-Termination and will co-present at the Employment Law CLE May 12-13 in Vancouver.

Scott Sweatman will be a moderator at the Canadian Pension & Benefits Institute's Forum 2011 - The Next Wave on May 20th.

Colin Galinski and Scott Sweatman will be presenting at the Pension CLE on May 25th in Vancouver.

Is Your Organization Ready for April 1st?

In our previous newsletter, we detailed the introduction of new regulations under the *Immigration and Refugee Protection Act*, which will impact employers and temporary foreign workers. In anticipation of the regulatory amendments coming into effect on April 1, 2011, the following are suggestions for ensuring that your organization is prepared:

Before April 1st:

- Implement a corporate immigration policy or update existing policies
- Conduct an internal immigration audit to ensure that employment files for temporary foreign workers are complete and up-to-date
- Identify non-compliance and take corrective action where necessary
- Provide internal training for managers and temporary foreign workers

After April 1st:

- Track employees who fall under the 4-year cap on temporary employment in Canada
- Identify and utilize categories of work permits that are not subject to the 4-year cap wherever possible
- Consider how your organization will transition “capped” temporary foreign workers to permanent status
- Ensure that new temporary foreign workers execute detailed offers of employment, relocation or employment contracts which clearly identify the conditions of employment in Canada
- Keep careful and complete records and conduct internal audits on a regular basis to ensure that your organization is “audit ready” at all times
- Ensure that employees are trained to recognize compliance issues in advance

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Immigration in the News!

A recent access to information request and subsequent media reports have disclosed that the Government of Canada intends to issue 20% fewer permanent resident visas under the Federal Skilled Worker Category in 2011. While the number of visas issued under Provincial Nominee programs is expected to increase, overall the target number of visas issued under the economic classes in 2011 will decrease by 6%. With economic recovery on the horizon and the introduction of the four-year cap on

temporary employment in Canada, this reduction could inhibit Canadian employers' ability to retain key employees from other countries. We also expect this will add to the processing times for applicants under the economic classes. Media reports have placed current wait times at seven to eight months for the federal skilled worker class; however, in our experience recent cases are taking well over a year to finalize.

Specialized Knowledge Workers: A Category Under Threat?

The intra-company transferee work permit category has long been relied upon by multinational companies to transfer highly qualified and specialized employees to their Canadian operations for short-term projects, for full-time employment on a long-term basis (*i.e.*, up to five years), or even on an intermittent basis. Recent decisions at certain Canadian Visa Offices and Temporary Foreign Worker Units, however, may serve to undermine the flexibility of the intra-company transferee category and threaten employers' ability to leverage it as they have in the past.

Specialized knowledge intra-company transferees provide significant economic benefits to Canada through the transfer of their expertise to Canadian businesses. Because they possess specialized knowledge of their employer's products and/or processes, transferees are not considered to be competing for employment with Canadian workers. Canadian employers are therefore exempt from the requirement of having to search the local labour market and obtain a Labour Market Opinion ("LMO") before employing intra-company transferees (as they are required to do with other temporary foreign workers).

The requirements of the specialized knowledge work permit category are clearly enumerated in immigration regulations and immigration policy manuals. An individual is eligible for a work permit if he or she has worked for a multinational company outside of Canada for at least one year in the previous three-year period; is seeking entry to Canada to work for the Canadian parent, subsidiary, branch or affiliate of the multinational company; and will be assuming a position in Canada that requires specialized knowledge and is similar to their overseas employment.

However, in the last several months, certain Temporary Foreign Worker Units in Canada and certain Canadian Visa Offices overseas have been enforcing an internal policy that requires the salaries of specialized knowledge intra-company transferees to be at or above the average wage for their occupation in Canada. Certain Visa Offices are also expecting transferee applicants to be paid directly by the Canadian company during their Canadian assignment rather than staying on home payroll.

The above have always been requirements of an LMO

application, but run contrary to the intent of the intra-company transferee category and are not grounded in law or policy. Multinational employers may not find it practical to put short-term or intermittent transferees on Canadian payroll, and transferees may be reluctant to be removed from their home payroll for reasons such as benefits or seniority. Moreover, wage should not be a primary consideration when determining whether an applicant possesses specialized knowledge.

It is uncertain whether these requirements will be adopted by other Visa Offices, ports of entry or inland Citizenship and Immigration Canada processing centres. In the meantime, employers should be mindful of the potential impact of this new informal policy when preparing to transfer specialized knowledge workers to Canada, and should be prepared for the possibility of having to temporarily increase the salaries of intra-company transferees or to transfer them to Canadian payroll for the duration of their assignments to Canada.

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Inappropriate Off-Duty Conduct: When can Employers take Action?

Social media is increasingly playing a role in employee discipline and termination. The appropriate test to determine whether off-duty conduct warrants discipline (or even termination) is the *Millhaven*¹ test, under which the employer must show that:

1. the conduct of the employee harms the employer's reputation or product;
2. the employee's behaviour renders the employee unable to perform his duties satisfactorily;
3. the employee's behaviour leads to refusal, reluctance or inability of the other employees to work with him;
4. the employee has been guilty of a serious breach of the Criminal Code, thus rendering his conduct injurious to the general reputation of the employer and its employees; or
5. the employee's conduct makes it difficult for the employer to properly and efficiently manage its business and direct its employees.

Even with the above test routinely cited by the courts, there is little certainty as to when it is appropriate to discipline an employee for off-duty conduct. Courts and

arbitrators strive for a balance between the interests of the employer and the private life of the employee. That balance tips in favour of the employer when there is a real connection between the employee's conduct and the legitimate business interests of the employer.

Employers must tread carefully. While the legal test has not changed with the advent of social media, the nature of the conduct under review certainly has – the breadth of public exposure that social media use and abuse provides on its own warrants special consideration in the *Millhaven* analysis. We will see more judicial and arbitral decisions relating to discipline and termination, which rest on social media evidence; this guidance should assist employers with developing standards for monitoring, investigating and ultimately using social media evidence to manage employees.

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¹ *Re Millhaven Fibres Ltd. and Ontario O.C.A.W., Local 9-670*, [1967] O.L.A.A. No. 4, 18 L.A.C. 324 (Anderson)

Did You Know?

- As part of its Road Safety at Work Strategy, Alberta's Occupational Health & Safety body has issued guidelines for safe driving in the workplace. Resources are available online at: <http://employment.alberta.ca/SFW/12577.html>.
- The Ontario legislature is considering Bill 138, *An Act Respecting the Human Resources Professionals Act*, a Private Member's bill designed to update the governing and regulatory framework for Ontario's Human Resources Professionals Association (HRPA). For more information, check out: www.hrpa.ca.
- The federal government hopes to speed up vulnerable sector criminal record checks by encouraging municipal and provincial police forces to buy electronic fingerprint-scanning equipment: <http://edmonton.ctv.ca/servlet/an/local/CTVNews/20110215/background-checks-rcmp-110215/20110215/?hub=EdmontonHome>.
- Bill C-29, *An Act to amend the Personal Information Protection and Electronic Documents Act* (PIPEDA), was again before the House of Commons in October 2010. If made into law, Bill C-29 will, among other things: exclude business contact information from PIPEDA's application; clarify use and disclosure of personal information without consent, including for employee information and for evaluating prospective business transactions (e.g., purchase and sale, and mergers and acquisitions); toughen up consent rules; create exceptions with respect to "work product"; mandate reporting for security breaches relating to personal information; and will explicitly make PIPEDA applicable to candidates for employment. We are awaiting further review.

Case Commentary: *Lavallee v. Siksika Nation,* 2011 ABQB

Justice McIntyre's decision in *Lavallee v. Siksika Nation*, 2011 ABQB 49, was released February 2, 2011. This decision addresses two aspects of employment law that do not often make it to the courts: the validity of an oral, long term, fixed contract and the idea of an intermediate employee/employer relationship, the "dependent contractor".

Dr. Lavallee was terminated from his medical practice with the Siksika Medical Clinic (the "Clinic") after ten years of service. Dr. Lavallee claimed that he had a guarantee to practice at the Clinic until his 70th birthday, a twenty-year term. The Clinic denied that such a guarantee existed.

Justice McIntyre found that there was sufficient evidence to show clear intent by the parties to enter into a fixed, long-term contract, albeit an oral contract. Justice McIntyre accepted that Dr. Lavallee would not have taken the position without the twenty-year guarantee. Dr. Lavallee had an established practice in Fort McMurray and only a "team of horses", *i.e.*, the specific twenty-year commitment (and others), would uproot his career and family.

However, that did not end the story. The Clinic argued that the

contract was not enforceable due to the application of the *Statute of Frauds*, (1677), 29 Car II, c. 3. s. 4, (U.K.) (the "Statute of Frauds").

Under the *Statute of Frauds*, which is still enforceable in Alberta, a contract that is not to be performed within a period of one year from its making must be in writing. The contract between Dr. Lavallee and the Clinic was an oral one. The state of the law was summed up as follows:

The result is that where no definite term of employment is set, or where a term of one year or less is agreed, an oral contract is valid and enforceable. No written contract is necessary. However, if it is for a fixed term and cannot be performed within the year, the courts have generally held it to be unenforceable.

Ultimately, Justice McIntyre found that Dr. Lavallee's oral contract was unenforceable under the *Statute of Frauds*. However, a general employment contract remained and reasonable notice was owed to Dr. Lavallee for early termination. Further, because both parties understood the terms of the contract at its making, the contract was considered in the reasonable notice period analysis.

In another interesting twist, both parties agreed that Dr. Lavallee was not an employee of the Clinic; however, Justice McIntyre found that the relationship did resemble employment at times. It was necessary to examine whether the relationship fell somewhere between an employee and an independent contract – was Dr. Lavallee a "dependent contractor"?

The factors considered were: whether there was an exclusive relationship; the permanence of the engagement; the degree of exclusivity and reliance on the Clinic for work; and the degree of control that the Clinic exercised over Dr. Lavallee.¹

The facts supported a relationship closer to an employee/employer rather than that of an independent contractor: Dr. Lavallee had a long-term relationship with the Clinic, under the impression that he would be there long term; the Clinic provided the work space and supplies he needed to perform his job; he relied on the nurses at the Clinic; and his relationship with the Clinic was semi-exclusive. As a dependent contractor, Dr. Lavallee was entitled to a reasonable notice period of twelve months.

This case is most notable for employers whose workforce includes independent contractors. Depending on the actual "on the ground" relationship between the parties, what an employer thinks is an independent relationship, with minimal termination obligations, may in fact be a dependant relationship, with significant termination consequences. Regularly review your contracts – be sure that your organization is protected.

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¹ *Lepenkova v. Ivanov* (2007), C.C.E.L. (3d) 303 (Ont. Sup. Ct. Just), varied on other grounds at [2009 ONCA 526 \(CanLII\)](#); *Marbry v. Avrecan International Inc.*, [1999 BCCA 172 \(CanLII\)](#); *JKC Enterprises Ltd. v. Woolworth Canada Inc.*, 2001 ABQB 791; *Carter v. Bell & Sons (Canada Ltd.)* (1935), [1936] 2 D.L.R. 438 (Ont. C.A.).

Financial Literacy and Retirement Planning: A Case for Better Education or Increased Regulation?

Discussions regarding pension reform in Canada frequently reference the benefit of enhancing individual financial literacy. The principle underlying the goal of improving the financial understanding of Canadians is that better informed individuals are more likely to make the decisions necessary to optimize their retirement incomes. In the context of the trend to convert defined benefit pension plans to defined contribution pension plans, with the dizzying array of investment options offered to individual plan members, there is considerable support for developing better tools for understanding investment choices. To illustrate, Standard Life recently launched online videos that explain pension statements in every-day language, the goal being to enhance individuals' understanding of the choices available to them and to encourage retirement planning.¹

The 2008 report of the Alberta-BC Joint Expert Panel on Pension Standards ("JEPPS") recommended a more comprehensive system for enhancing financial literacy. The JEPPS report proposed that financial literacy programs be established in high school curricula and in the adult population generally in order to facilitate not only individual retirement planning, but every-day financial well-being as well.

Less than a year after the release of the JEPPS report, and amid growing national concern regarding the financial literacy of Canadians, the federal government appointed a Task Force on Financial Literacy (the "Task Force"). The Task Force gathered input from a large number of stakeholders, and released its report in December 2010. The report put forward a definition of financial literacy as "having the knowledge, skills and confidence to make responsible financial decisions," and concluded that financial literacy is a "necessity in today's world" to ensure the financial well-being of Canadians.²

The Task Force identified five priorities that underpin its National Strategy on Financial Literacy: (i) shared responsibility; (ii) leadership and collaboration; (iii) lifelong learning; (iv) delivery and promotion; and (v) accountability. Ultimately, the Task Force identified a need to strengthen financial literacy with efforts from a wide range of stakeholders, including "individuals, families, governments, educators, financial services

providers, employers, labour organizations, businesses and voluntary organizations."³

While there appears to be a general consensus regarding the importance of financial literacy initiatives across Canada, a December 2010 research paper by Saul Schwartz of the Institute for Research on Public Policy calls such initiatives into question.⁴ Mr. Schwartz reviews evidence on the connection between education and better retirement outcomes, and suggests that financial literacy should be only a part of the solution rather than the stakeholders' sole focus.

In Mr. Schwartz's view, the limited positive effect of financial education requires government to take greater responsibility in regulating the financial industry. Mr. Schwartz argues that Canadians' financial literacy can truly be improved only through better protections against risky products and convoluted financial services. This would be achieved by increased government regulation, including creating a national agency to regulate the financial industry and protect consumers; ensuring the provision of impartial third-party advice; and implementing mechanisms in private pension plans such as automatic contribution-rate escalation.⁵

The fact is that generally Canadians are not making well-informed decisions concerning their future financial stability. Whether they are overwhelmed by the available financial information, or by the intricacies of financial investment, Canadians are not saving enough for their retirement. A strategy incorporating financial literacy initiatives as well as consumer protection in the form of enhanced regulation may, if properly designed and implemented, enable Canadians to better make sound investment decisions without risking their future retirement.

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¹ The videos can be viewed on Standard Life's YouTube channel at www.youtube.com/StandardLifeCA.

² Task Force on Financial Literacy Report of Recommendations, p. 4.

³ Task Force at p. 5.

⁴ Schwartz, Saul. *Can Financial Education Improve Financial Literacy and Retirement Planning?* IRPP Study No. 12, December 2010. Online at: <http://www.irpp.org/summary.php?id=356>

⁵ Schwartz, p. 1.

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June 22, 2011

VANCOUVER

Business Immigration Law Seminar
May 27, 2011

***For more information or to RSVP for a Spectrum Seminar,
please contact our Calgary office or our Vancouver office***

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