THE LEGAL RISKS OF CAPSA'S PROJECTED ACCOUNT BALANCE GUIDELINE

By Claude Marchessault and Taylor Buckley

JW LTD/GETTY IMAGES

One sure way for sponsors of defined contribution pension plans to attract the attention of class action lawyers is to tell members what the value of their account balance will be in the future and the monthly retirement income stream it will generate.

> If the account contains equity investments, any projected balance is almost certain to be wrong. And even if, by some fluke, the estimated balance is correct, annuity rates are so volatile that the projected retirement income stream could be significantly higher (in which case there would be no complaints) or substantially lower (cue the lawyers) by the time the member retires.

Some plan sponsors already provide members with account balance and income stream projections or tools to calculate the estimates themselves. While the practice isn't new, it arose in the most recent guideline (No. 8) published by the Canadian Association of Pension Supervisory Authorities. In guidelines No. 3 and 8, CAPSA states administrators of defined contribution and capital accumulation plans should consider providing members with information and tools to assist with retirement planning, including an estimate of the accumulated value of the member's account at retirement and the income it should generate.

While CAPSA guidelines don't carry the force of law, the expectation among pension regulators is that plan sponsors will follow them as an industry standard. Sponsors must be vigilant, however, as representations to members about projected account balances or income streams carry legal risk given that Canadian courts have shown a willingness to award

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damages to members who reasonably and detrimentally rely on negligent or unqualified statements made by a plan sponsor.

In light of the legal risks, any projected account balance, future income stream or decision-making tool provided to members should come with clear disclaimer language and confirmation of the assumptions used. CAPSA's guidelines require no less but provide little guidance on model disclaimer language or assumption parameters upon which plan sponsors might rely.

Other jurisdictions have proposed so-called safe harbour protections, including the U.S. Department of Labor that regulates pensions in the United States. It recently proposed a regulation requiring plan sponsors to provide defined contribution pension plan members with projected account balances and income streams. However, unlike the CAPSA guidelines, the U.S. proposal provides protection from lawsuits arising from inaccurate projections as long as sponsors used Department of Labor assumptions in calculating the projections.

The department also used safe-harbour assumptions to develop a lifetime income calculator that estimates future income streams arising from both an employee's current and projected account balances.

While CAPSA's guidelines are well-meaning, they overlook the potential legal risks faced by plan sponsors. If it's serious about account projections, it should seek legislative safe harbour-type protection and develop its own calculator for plan sponsors wishing to provide retirement tools.

For now, sponsors that choose to provide plan members with account projections or retirement tools should work to build sufficient legal protection around their retirement disclosure programs.

Claude Marchessault and Taylor Buckley both practise with Dentons Canada LLP's pension, benefits and employment compensation group in Vancouver. Buckley also practises with the firm's labour and employment groups.

TWO CANADIAN CASES THAT ILLUSTRATE THE LEGAL RISKS:

In *Weldon v. Teck Metals Ltd.*, the plaintiff employees were provided with information and a computer-based account-projection tool that apparently limited assumptions about annual rates of return to between six and 12 per cent in order to assist them in deciding whether to remain in the defined benefit plan or convert to a new defined contribution arrangement. The plaintiffs allege the defendants either intentionally or negligently persuaded members, to their detriment, to convert their defined benefit entitlements based on incomplete, inaccurate and misleading information. The litigation is ongoing.

In *Dawson v. Tolko Industries Ltd.*, the plaintiff employees alleged personalized estimates of entitlements understated the value of accrued defined benefit entitlements and overstated the value of proposed defined contribution accounts, preventing them from making fully informed conversion decisions. The case settled out of court.

EMPLOYERS URGED TO BEWARE OF THE RISKS OF FINANCIAL ADVICE TO STAFF

By *Jennifer Paterson*

Once Canadians have graduated from high school or post-secondary education, there isn't really a formal environment that supports and facilitates group learning around issues like managing money. But many employers are stepping into the void to assist employees with financial literacy.

PW ILLUSTRATION/GETTY

"Employers don't want to provide financial education for fear it's perceived as advice."

29%
of Canadians surveyed say they struggle with bills and payments

46%
have a budget

93%
of those who have a budget always or usually stay within it

Source: The 2014 Canadian financial capability survey published by the Financial Consumer Agency of Canada in November 2015

In the current environment of high debt and low retirement savings, there's an obvious need for programs to address the issue. Employers, however, must be careful of the fine line between what constitutes financial education and what falls under the umbrella of advice.

Financial education in the workplace typically takes the form of printed materials, online resources or in-person workshops for employees to learn about their workplace financial benefits or other financial topics, such as debt management. Only certified financial advisors and planners can provide financial advice, which often includes the analysis of a specific financial situation. Record keepers of pension plans include financial education options as part of their standard offering. They often include access to financial planners as well.

Employers, though, can't give out any advice, which creates a bit of a barrier around financial literacy in the workplace, says Frank Wiginton, chief executive officer of Employee Financial Well-Being, a company based in Oakville, Ont.

"Employers don't want to provide financial education for fear it's perceived as advice. If a company really wants to help their employees deal with the issues they face when it comes to everything from pensions to payroll to debt, they are best to bring in a third party and have a contract that ensures any recommendation or advice that third party gives out is not representative of the company to avoid liability."

Cases in point

McMaster University's employee financial education programs highlight the link between how financially prepared employees feel and how healthy, engaged and productive they are in the workplace, a correlation that has surfaced in many reports and surveys.

For example, a survey published by Workplace Options in April 2016 found 88 per cent of employees are stressed or worried on some level about their personal financial situation. Another survey, published by Secondsight in 2014, found 73 per cent of employees felt more positively about their employer when they received financial education in the workplace.

McMaster University's offering includes access to an employee and family assistance program; one-on-one financial consultations with an expert; and pre-retirement planning with a counsellor. Last year, the university also introduced a full-day retirement planning program. "It helps employees build a clearer vision of retirement, determine how much they need to achieve that vision and shows them where the money will come from to fund their retirement lifestyle," says Deb Garland, program manager for engagement and wellness at McMaster.

The university is working on a second program that provides more general financial information, such as budgeting and debt resolution, for employees. It's also aware that, as an employer, it isn't able to provide financial advice, says Garland.

"Ensuring our employees trusted the information and didn't feel they were receiving a sales pitch was an important factor in our decision," she says, noting the university decided to use a third party. "Some organizations say they are providing education, but there is the fine line. . . . They have to make sure they don't steer people into their other line of work."

BMO Financial Group's focus on financial literacy is twofold, according to Kelly Harper, the bank's director of customer experience learning. First, as an employer in the financial services sector,

A LOOK AT CANADA'S FINANCIAL LITERACY STRATEGY

The focus on financial literacy took an upswing in 2014 when Canada's first financial literacy leader, Jane Rooney, met with stakeholders and held consultations across the country as part of efforts to develop a national strategy.

The national strategy for financial literacy aims to mobilize the public, private and non-profit sectors to strengthen Canadians' financial literacy and help them achieve several goals: managing money and debt wisely; planning and saving for the future; and preventing and protecting against fraud and financial abuse.

Actions under the second goal – planning and saving for the future – are aimed at boosting Canadians' awareness and understanding of existing government and workplace benefits such as savings programs they may be eligible for.

"The strategy is now live and publicly available," says Rooney.

"The next phase is about implementation. We're working towards identifying the very specific demographic groups. I'm meeting with organizations that have delivery channels [and] programs that reach Canadians directly and raising awareness about these three goals."

Rooney's own organization, the Financial Consumer Agency of Canada, has delivered financial workshops for its employees. The workshops don't provide advice. Instead, they provide information and then the call to action is for employees to seek out a financial professional, says Rooney, who's encouraging her federal government counterparts to offer programs as well.

> *"We wanted to wade through and act as that filter and trusted voice and to take people through what the process is for many of these financial experiences."*

it aims to make sure its own staff are financially confident; and secondly, from a brand perspective, it knows that if its employees are financially knowledgeable, they'll also be more confident about how their role connects to the end customer.

In 2013, the organization conducted a financial literacy survey among its employees and then used the findings to develop a pilot financial literacy program followed by a full rollout in 2014.

"We wanted to create an experience that wasn't intimidating and wasn't about making everyone an expert but was really about helping people make better choices and feel confident to go into the bank and have conversations," says Harper.

"We started with budgeting as one of those core financial behaviours that is a cornerstone and we also now have debt management, savings, my first mortgage, my next mortgage and investing."

The online program is all about financial concepts and knowledge rather than products, according to Harper. "While we do encourage employees to make an appointment with an investment specialist if they want, it really acts as a portal to bring information that's already out there, combined with our own information, and packaging it in a way that really helps employees mine through it all. We wanted to wade through and act as that filter and trusted voice and to take people through what the process is for many of these financial experiences."

The fine line between financial education and advice

Determining the line between financial education and financial advice is an issue that Mary Picard, a partner at Dentons Canada LLP, hears a lot about from employers. But, she adds, there are no legal guidelines differentiating between the two. "What we are clear on, though, is what the pension and financial market

66%
of respondents are financially preparing for their retirement

60%
don't know how much they need to save for retirement

Source: The 2014 Canadian financial capability survey published by the Financial Consumer Agency of Canada in November 2015

PW ILLUSTRATION/GETTY

> *"My constant refrain to employers is: Don't do it … because of the legal risk."*

regulators think employers should do if they get a service provider to give investment advice," says Picard.

The guidelines for capital accumulation plans, published in 2004, say a plan sponsor can choose to make investment information available to its employees but note that, "where applicable, a CAP sponsor should periodically review service providers with whom the CAP sponsor has an arrangement or to whom the CAP sponsor has referred CAP members to help them make investment decisions."

Despite the clear language in the decade-old guidelines, Picard has seen very little arise in terms of best practices for reviewing a service provider that gives investment advice. "My constant refrain to employers is: Don't do it, don't do it, don't do it . . . because of the legal risk," she says.

Gary Rabbior, president of the Canadian Foundation of Economic Education, reiterates that the distinction between financial education and advice is an important one, noting that part of a program's success lies in making sure the participants know the difference.

"One of the most important things around financial education and literacy is trust," he says. "If people have any reason to be suspicious or question the motives, it really has a dramatic impact on peoples' willingness to be involved in it. There is, at least to my perception, a trust in the employer in what it can provide, so the question becomes who you're bringing in to do the job and what their backgrounds and abilities are.

"There are a number of organizations that are recognizing that the workplace is one of the last untapped bastions of potential. Once you're out of school, there are few environments where people are gathering and where you can do some education — the workplace is one of them."

Jennifer Paterson is managing editor of *Benefits Canada*: jennifer.paterson@rci.rogers.com.

57%
of respondents are saving through a workplace pension

31%
believe their main source of income in retirement will be their workplace pension

Source: The 2014 Canadian financial capability survey published by the Financial Consumer Agency of Canada in November 2015

Benefits CANADA

Employers urged to prepare for new transgender rights bill

Michael Chen | June 17, 2016

Employers should start preparing as the federal government considers a new transgender rights bill, a lawyer suggests.

The legislation, Bill C-16, would update the Canadian Human Rights Act to include gender identity and gender expression in the list of prohibited grounds for discrimination. It would also amend the Criminal Code to extend hate crime laws to crimes based on gender identity or expression.

Anneli LeGault, a partner at Dentons Canada LLP who has worked on transgender accessibility cases in the past, says employers should be aware of whether of their province already has explicit protections for transgender people.

Alberta, Newfoundland and Labrador, Nova Scotia and Ontario include both gender identity and gender expression in their human rights laws, while legislation in Manitoba, the Northwest Territories and Saskatchewan includes just gender identity.

LeGault predicts the federal bill will have the greatest impact on federally regulated employers, such as banks, airlines, railways, and telecommunications companies.

For employers that want to prepare, LeGault suggests they amend their harassment and complaint policies to cover transgender-specific issues, educate themselves and their employees and look at how they can change their organization to be more inclusive.

LeGault stresses employers should also assure their transgender staff they'll keep matters confidential as it's a "very, very private" issue.

"What you're going to have to hear from the person, and you can't tell them this, are the dates and timelines, like when are [they] going to want to use [their] new name and [their] new pronoun," says LeGault. Important questions, she suggested, include: "What's going to be your timeline for changing clothes and appearance? And then what's your timeline for washrooms? When are you going to want this? . . . When are you going to tell your colleagues? How are you going to tell your colleagues?"

In terms of making the office space inclusive, many employers are already trying to create universal workspaces, a terminology used by designers who are trying to meet both accessibility legislation and the United Nations Convention on the Rights of Persons with Disabilities, according to LeGault.

Universal design can include washrooms and change rooms that accommodate wheelchairs, walkers and other disabilities and are unisex. Organizations can keep these design tenets in mind when renovating or changing their workspace, says LeGault.

Other considerations she recommends for a more “comfortable” space include accommodations for name plates, name tags and gender neutral uniforms. She cites airlines that allow flight attendants to wear pants as an example of a more neutral choice.

When it comes to transgender issues more generally, LeGault is hopeful for the future. While she acknowledges transgender people have “already suffered historically and [that] this is not an easy thing for them to come out at work,” she believes “Canadian employers are very accommodating and adaptive and they will deal with this as well.”

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Employer loses wrongful dismissal case after court finds safety rules unclear

Employer claimed employee's failure to follow protective equipment standards was cause for dismissal, but rules weren't part of employee guidelines
By Adrian Miedema

An employer has lost a wrongful dismissal case after a court found that its safety rules, which it alleged the employee violated, were unclear and not clearly-communicated.

The employee worked at a solid waste facility in the Yukon. The employer fired the employee and attempted to prove "just cause" on the basis of absenteeism, poor working relationships, use of company cell phone for personal calls, and safety violations.

With respect to safety, the employer claimed that the employee did not like to wear her safety vest and steel-toed boots, despite it being a job requirement, and that the employee was constantly reminded to wear her hard hat. The employee acknowledged that she knew that if she did not comply with the safety rules, she would be fired; however, she said that the rules were unclear and she had asked that they be written down.

The court decided that the hard hat requirement was not clearly set out by the employer, and was not included in the employer's "Employee Guidelines" document. The court concluded:

"I find that the Society did not take the necessary steps to ensure that there was a clear and unequivocal set of rules, guidelines and/or policies that made it clear what equipment was to be worn at what locations and at what times. I find that, to the extent that there was some verbal direction provided, this direction was not entirely clear and cannot be relied upon as establishing a standard that Ms. Goncharova can then be viewed as having breached," said the court. "The power to establish clear and unequivocal standards and requirements lay with the Society. It simply was not done."

The employer also failed to prove that the absenteeism, relationship issues and cell phone use justified the dismissal.

This case illustrates the importance of clear communication of safety rules where the employer wishes to discipline or dismiss the employee for a violation of those rules.

For more information see:

• *Goncharova v. Marsh Lake Solid Waste Management Society*, 2015 CarswellYukon 109 (Y.T. Sm. Claims Ct.).

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Low interest rates challenge for funds

Pension plans focus on de-risking

BY JIM MIDDLEMISS
For Law Times

Ask Hugh O'Reilly, CEO of the $18.4-billion OPTrust pension plan, what keeps him awake at night and the former Cavalluzzo Shilton McIntyre Cornish LLP lawyer doesn't hesitate. "I worry about the retirement income security of 87,000 people and their families.

"What keeps me up at night is making sure we work to maintain the funded status of our plan," he says.

O'Reilly joined OPTrust in January 2015, after a distinguished career as head of Cavalluzzo's pension benefits and insolvency practice.

The OPTrust is responsible for administering the pension plans for the Ontario Public Service Employees Union, one of the country's biggest pension plans.

"It's a great opportunity," he says of running a pension fund.

"People underestimate the ability of lawyers to manage. There is an assumption that CEOs need to be people who come out of the C-suite and corporate environment."

However, he says, lawyers are natural managers. Not only do they manage teams but also "lawyers manage issues."

One of the biggest issues pension lawyers and their clients face these days is de-risking the defined benefit plans that they oversee and advise on.

"Low interest rates are a challenge for pension funds," O'Reilly explains.

He says he was fortunate to inherit a plan that was in surplus; however, keeping it funded in a low-interest-rate environment is challenging.

That's why O'Reilly's attention is focused on de-risking, and he's not alone. De-risking is at the forefront of most pension plan agendas, putting pension lawyers at the focal point of advising their clients on risk reduction strategies.

Take Hugh Kerr, vice-president and associate general counsel of Sun Life Assurance Company of Canada. He's been breaking ground in Canada recently with two high-profile pension risk transfer transactions.

In 2015, he was involved in North America's first longevity insurance agreement, which transferred $5 billion of pension risk from BCE Inc.'s defined benefit plan to Sun Life.

Under the agreement, the Bell Canada pension plan pays monthly premiums to Sun Life, which then makes monthly pension payments into the plan for the lifetime of existing pensioners.

The second deal involved a $530-million group annuity plan. Two different inflation-linked pension plans approached Sun Life separately looking to reduce their risk.

Hugh O'Reilly says low interest rates are a challenge for pension funds.

They had almost offset index formulae, which allowed Sun Life to treat the plans as one and structure an annuity deal to take on the risk.

It's believed to be the largest inflation-linked transaction done in Canada.

Kerr, whose role is to advise the retirement services and benefit groups at Sun Life, says it takes time and effort to put together a longevity deal or to find matching plans where risk can be offset.

"I think longevity insurance will find a market," Kerr says. What these deals do, he explains, is "make the existing plans more sustainable" and "make the risk more manageable."

When it comes to de-risking pension plans, lawyers say there is no single approach.

"De-risking means a bunch of different things," says Mary Picard, a pensions lawyer at Dentons LLP in Toronto.

The Sun Life deals, for example, involved using insurance contracts to counteract volatility and risk.

But there are many ways to skin a cat.

For example, Susan Seller, head of the national pension and benefit practice at Bennett Jones LLP in Toronto, says, "Sometimes, at the end of the day, it means winding up the fund or the plan.

"It's the ultimate form of de-risking," which "more clients are looking at and thinking about," Seller adds, particularly for those with plans linked to Consumer Price Index increases.

"It's always a big concern how they are going to deal with that," she says.

Seller says the focus on de-risking means that pension lawyers are busy advising clients on different strategies. She has a five-prong approach. She says plans need to ensure access to the appropriate financial information and make sure it's current, establish a "prudent" and "well-managed" investment policy that includes asset and liability matching, establish an effective governance structure, seek expert advice where needed and conduct due diligence and follow a prudent process for decision-making.

Picard says she is seeing much more attention being paid to plan governance and investment policies in a low-interest environment.

"When interest rates decrease, horror ensues," she says, noting that plan sponsors fear a return to the days when they were only 60 to 70 per cent funded.

Funding status has improved considerably since the financial crises, according to reports on defined benefit plans from the Financial Services Commission of Ontario.

In its 2015 report, FSCO found that funding ratios both on a going-concern basis and an insolvency basis had improved. Only 31 per cent of DB plans FSCO oversees were less than fully funded on a going-concern basis, versus 36 per cent last year.

That's a significant improvement from 2010, following the financial crisis, when 45% of plans were less than fully funded on a going-concern basis, and funding status was declining.

The task for lawyers then was seeking funding relief for their clients from pension regulators. That has lessened.

While things have improved, the decline of defined benefit plans continues to worry.

The number of DBP dropped to 1,283 in the latest reporting period from 1,506 in 2010, a decline of almost 20 per cent, as risk-averse employers eye alternatives.

Picard says another element to de-risking that is taking on greater prominence as stock markets hit record highs in the U.S. is investment risk.

"Pension plans are shifting from riskier equity classes to more conservative fixed-income classes that attempt to match the liabilities of the pension plan," she says.

That reflects a shift in thinking among plans, suggests OPTrust's O'Reilly.

"We no longer see ourselves as asset allocators, we see ourselves as risk allocators. We don't see ourselves as investment managers . . . our job is to deliver pensions," he says.

That's a challenge in a low-interest rate environment, he says, because the "cost of de-risking is expensive."

The annuity market, he says, becomes "much more expensive and much more complicated."

With no signs of interest rates rising, and employees living longer, O'Reilly says he expects that some plans will struggle.

The solution? He suggests there will be more consolidation among plans.

"We're interested in pension plans that want to merge with us. We believe it's very important for pension plans to work together . . . and not be competitors to one another," he says. **LT**

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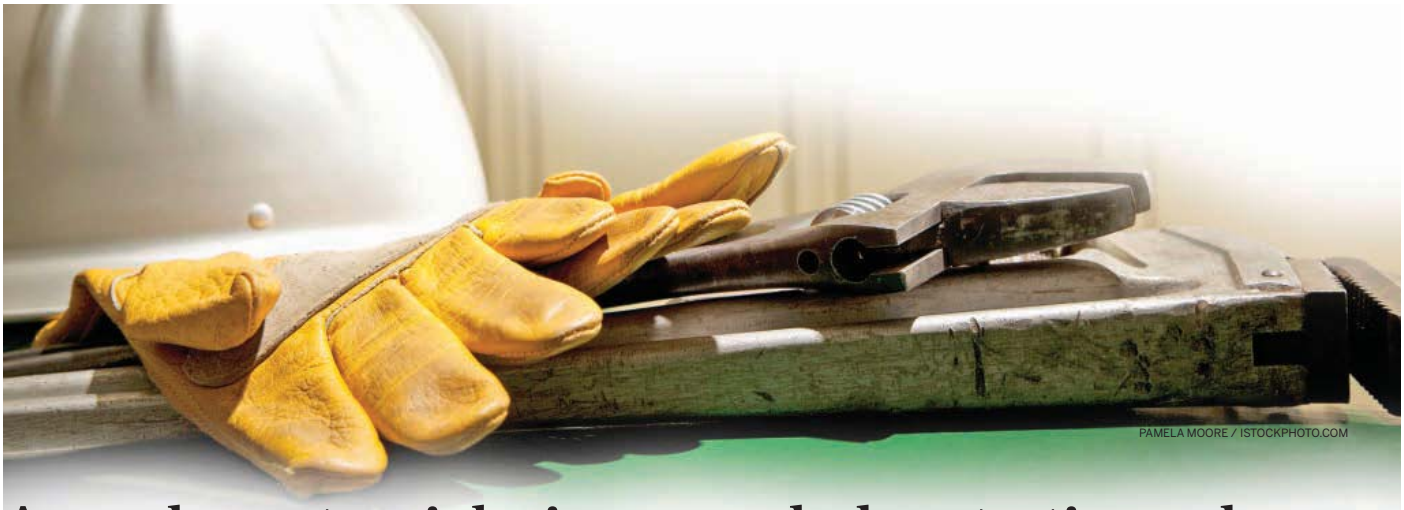

PAMELA MOORE / ISTOCKPHOTO.COM

Appeal court weighs in on workplace testing rules

MICHAEL BENEDICT

Another major legal battle over random drug and alcohol testing in the workplace is on the verge of a watershed decision by the Alberta Court of Appeal. On Nov. 7, that court will be the first at the appellate level asked to apply the Supreme Court of Canada's three-year-old principles and guidelines on when such testing is allowed. The adversaries this time are Suncor Energy, one of the world's largest independent energy companies, and Unifor, the country's largest private sector union.

In advance of the hearing, an Alberta appeal court judge recently approved, over the union's objection, intervener status for five heavy industry associations. They will be allowed to submit a joint brief in Unifor's appeal of a judicial review that quashed an arbitration panel's ruling overturning Suncor's testing policy. The panel agreed Suncor's oil sands operations were, indeed, dangerous, but found its random testing was unreasonable and that its rationale did not trump employee privacy rights. However, Queen's Bench Justice D. Blair Nixon ruled that the panel misapplied the criteria and standards for permissible random testing set out by the Supreme Court in *Communications, Energy and Paperworkers Union, Canada, Local 30 v. Irving Pulp & Paper, Ltd.* 2013 SCC 34. Nixon ordered a new arbitration panel to rehear the matter, and Unifor has appealed the decision in *Suncor Energy Inc. v. Unifor Local 707A* 2016 ABQB 269.

> Even though the union argues that this is a narrow judicial review, in reality the case is being closely watched beyond the oil industry.
>
> **Eric Adams**
> University of Alberta

Now, others will join in the action as a result of Justice Marina Paperny's ruling last month in *Suncor Energy Inc. v. Unifor Local 707A* 2016 ABCA 265. While Justice Paperny acknowledged the union's "compelling" submission that intervener status should be denied because its appeal involves a "relatively straightforward judicial review application involving the reasonableness of an arbitrator's decision…under a particular collective agreement at a particular worksite." However, she went on to say, "Nevertheless, the appeal will likely engage larger policy issues that may usefully be informed by the perspective offered by the applicant industry representations and the resolution of which may directly affect their members."

Justice Paperny also noted that Justice Nixon had granted intervener status to two of the now five applicants representing the mining, construction, electricity and upstream oil and gas industries. While this did not automatically grant them the right to also intervene on appeal, Justice Paperny said it is a "factor to consider." In granting their application, she added, "The interests of the applicants and the assistance they can provide in the appeal remain substantially the same as in the court below."

The case involves a 2012 Suncor random drug and alcohol testing policy for employees in safety sensitive positions. Citing its legal obligation to eliminate or control hazards in the workplace, the company showed evidence of more than 2,000 drug and alcohol-related security incidents over a nine-year period to justify the testing. Suncor also claimed that at least three of the seven people who have died at its worksites were under the influence of drugs or alcohol.

The union filed a grievance, claiming the company's evidence was vague and did not distinguish among unionized, non-unionized or contract employees. The arbitration panel agreed, adding Suncor also failed to show that a worksite problem was sufficiently serious to permit the intrusion of privacy involved in drug and alcohol testing.

But Suncor argued successfully before Justice Nixon that the panel wrongly applied a higher standard than set out by the Supreme Court in *Irving*. While *Irving* says a dangerous workplace does not automatically justify random testing, it adds that such testing is permissible if it is proportionate to the issue being addressed, balancing safety and privacy interests. Justice Nixon found the panel was wrong in requiring a "serious" or "significant" problem to justify random testing. He said Suncor need only establish a "general" problem and that it does not have to establish a causal connection between drug and alcohol usage and accidents.

University of Alberta law professor Eric Adams says Justice Paperny was right to allow the interveners to make arguments on applying *Irving*. "Even though the union argues that this is a narrow judicial review, in reality the case is being closely watched beyond the oil industry," he says.

Adams adds that next month's appeal court hearing will tackle the fundamental tension between safety and privacy in many workplaces. "It's a serious matter," he says. "The right to human dignity and body privacy can't be breached without serious cause.

"On the other hand, the threat of serious injury and catastrophic environmental damage is always there. The employer has a valid interest. *Irving* says there has to be a balance, and the argument will be about its threshold."

For his part, Toronto labour lawyer Jeffrey Andrew of Cavalluzzo Shilton McIntyre Cornish says it would have been surprising if the court had not allowed the others to intervene. "This is such a big issue in Alberta's oil and gas industry," he says. "They are trying to push the envelope to establish factors that will justify this invasion of privacy."

Adds Andrew: "However, if management unilaterally imposes random testing on a unionized environment, it needs evidence that the problem is related to union members. If the problem is elsewhere, it is not relevant to the bargaining unit."

Suncor's outside counsel, Barbara Johnston of Dentons Canada in Calgary, disagrees, saying the employer need only establish a general workplace problem to take remedial action. "*Irving* calls for a balancing, not a hierarchy, of interests," she says.

In Johnston's view, the looming Court of Appeal judgment will "impact on industry broadly and across Canada in regard to the safety of workers, the public and the environment."

Toronto lawyer Howard Levitt, whose practice, Levitt LLP, represents both management and employees, says worker and public safety issues should supersede privacy rights. Overturning the arbitration panel's finding was a "heartening" decision, he says. "Taking drug or alcohol tests is a mild inconvenience," Levitt adds, "when compared to working next to someone who is stoned and can endanger you as well as him or herself."

Brouwer: Federal Court has taken 'hands off' approach

Continued from page 10

to the immigration detention system. "It has viewed the IRPA as sort of a coherent system for detention review," he said.

A recent Federal Court decision, *B.B. and Justice for Children and Youth v. Minister of Citizenship and Immigration*, found that the best interests of a child could be considered in their parent's immigration detention review hearing (Aug. 24, 2016, IMM-5754-15).

The Supreme Court of Canada, in *Kanthasamy v. Canada (Citizenship and Immigration)* 2015 SCC 61, also described the importance of the best interests of the child, but did not frame it as the primary consideration, the report found.

"That decision, like pretty much every domestic Canadian decision, has not gone as far as we're required to go under international law, which is an explicit requirement that decision-makers put the best interests of the child as the primary factor," Brouwer said.

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British Columbia arbitrator reinstates firefighter convicted of possession of stolen boat

Firefighter's arrest wasn't directly related to his job and didn't significantly affect the employer
By Jeff Bastien

In a recent grievance decision, *Re Prince George and Prince George Firefighters, Local 1372 (Williams)*, a labour arbitrator reinstated a firefighter whose employment was terminated after being found guilty of possession of a stolen boat and trailer.

The arbitrator concluded that in order to justify terminating a unionized employee, there must be a sufficient nexus between the employee's misconduct away from work, and his employment duties.

The employee had been a firefighter for 11 years with a pristine work record. There were no concerns with his honesty or work. In 2012, he purchased a boat and trailer for $9,500 from a fellow firefighter. The boat, reportedly worth approximately $30,000, had been stolen. The state of the employee's knowledge when he purchased the boat was disputed.

The employee was arrested in 2013. The RCMP phoned the employee and asked to attend his property to investigate a tip that a stolen boat was located on his property. Within minutes of the call, the employee hooked the boat and trailer up to his car and began towing it away from his property. However, his property was under surveillance and he was arrested.

The employee lied about his acquisition of the boat and trailer in his initial statement to police, providing a story about how he purchased the boat, and three different purchase prices. He later admitted to the RCMP that he bought the boat from a fellow firefighter for much less, but he did not admit to knowing the boat was stolen. However, he made some comments that he had doubts about the deal, and suggested he "had an inkling in the pit of his stomach" about it.

The employer investigated and the employee reluctantly admitted to the arrest. The employee was placed on leave, but the employer did not initially ask if he knew the boat was stolen. When asked in a subsequent interview, the employee said it was a "grey area." He also advised the employer of his attempt to flee with the boat. The employer allowed the employee to return to work with conditions, accepting that he was being forthright.

In the criminal proceedings, the court did not accept the employee's evidence, and he was found to have known the boat was stolen.The trial was widely reported in the local media.

Upon learning of the verdict, the employer terminated the employee's employment. The employer's reasons, as stated at arbitration, included: the comments made by the judge regarding the non-acceptance of the employee's evidence and his credibility, dishonesty and lack of judgment; the media reports and negative publicity; and concerns about the employee's honesty during the employer's investigation.

The arbitrator found it difficult to reconcile evidence regarding the employee's police statement and his evidence at trial and arbitration that he had no concern the boat was stolen. She noted that she had "grave doubts" as to his understanding of the underlying issue of his honesty. Nevertheless, she proceeded to consider the question of whether termination was excessive in the circumstances.

To this end, relying on *Millhaven Fibres Ltd. and OCAW, Local 9-670, Re*, the arbitrator noted that in determining whether the employee's conduct away from the place of work was a justifiable reason for discharge, there was an onus on the employer to show that:

- The conduct of the employee harms the employer's reputation or product
- The employer's behaviour renders the employee unable to perform his duties satisfactorily
- The employee's behaviour leads to refusal, reluctance or inability of the other employees to work with him
- The employee has been guilty of a serious breach of the criminal code and thus rendering his conduct injurious to the general reputation of the employer and its employees
- The conduct causes difficulty in the way the employer properly carries out its function of efficiently managing its works and efficiently directing its working force.

The arbitrator found there was no direct link between the misconduct and the employee's duties. There was no suggestion he could not be trusted to do his firefighting duties. The arbitrator accepted that it was an isolated incident by an employee with a pristine work record, not likely to be repeated. Moreover, he was not in a fiduciary position, and his duties did not expose him to the temptation of greed.

In short, the arbitrator concluded that there was an insufficient nexus between the employee's misconduct and his duties to warrant termination. Accordingly, the arbitrator reinstated the employee, but declined to award wages, seniority or benefits from the date of termination to the date of reinstatement.

Takeaway for employers

Criminal convictions in and of themselves may not justify termination of an employee on the basis of dishonesty and lack of trust. Despite findings of misconduct in criminal proceedings, employers terminating for cause must establish that the misconduct actually relates in more than a general manner to the duties to be performed by the employee.

For more information see:

- *Re Prince George and Prince George Firefighters, Local 1372 (Williams)*, 2016 CarswellBC 2591 (B.C. Arb.).
- *Millhaven Fibres Ltd. and OCAW, Local 9-670, Re*, [1967] O.L.A.A. No. 4 (Ont Arb).

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Men without hardhats: where freedom of religion loses out to workplace safety

Protective headgear a necessary part of work at cargo transport terminals
By Virginie Dandurand

Freedom of religion and the duty to accommodate within the workplace context is a highly important issue in Québec given the discrimination provisions of the Canadian Charter of Rights and Freedoms as well as the Québec Charter of Human Rights and Freedoms. Employers and employees must work together to attempt to reconcile the right to freedom of religion of employees with the legal obligations imposed on employers under occupational health and safety laws. Quebec courts have been frequently called to rule on this particular subject over the years.

Most recently, in the case of *Singh c. Montréal Gateway Terminals Partnership (CP Ships Ltd./Navigation CP ltée),* the Superior Court of Québec was called to rule on the issue as to whether individuals of the Sikh religion could be exempted from a work policy implemented by the Montréal Gateways Terminals (MGT), Empire Stevedoring Co. Ltd. and Termont Terminals Inc. (collectively the "defendant terminals"). This policy required all workers to wear a hardhat when circulating outside on the premises of the terminals. The plaintiffs, truck drivers whose work included transporting containers, claimed that their religious belief prohibited them from wearing such hardhats. Accordingly, they maintained that this policy was discriminatory and violated their right to freedom of religion. Upon adopting the policy, MGT tried to accommodate the plaintiffs by modifying its container loading procedures which enabled them to stay in their vehicles and, hence, avoid wearing hardhats. However, these measures were rejected by the plaintiffs as they claimed that they involved significant disadvantages.

This issue was decided upon on Sept. 21, 2016, by Justice Prévost J.C.S., who ruled that although MGT's policy was prima facie discriminatory and violated the right to freedom of religion as regards to the plaintiffs, it was nevertheless justified given the imperative objectives of such policy.

In reaching his decision, Justice Prévost, J.C.S., began his analysis by examining the principles with respect to discrimination enshrined in the Canadian Charter of Rights and Freedoms and the Québec Charter of Human Rights and Freedoms. To that effect, this decision is of significant importance as it is a rare case of transposition of the protections granted under the Québec Charter of Human Rights and Freedoms to a federally-regulated workplace. He established that the policy was in fact discriminatory since the plaintiffs could not meet the requirement of wearing a hardhat without violating their religious beliefs and, thus, could not work at the terminals operated by MGT. He also confirmed that the policy violated the plaintiffs' right to freedom of religion as their belief was sincerely held and the challenged policy interfered with the plaintiffs' ability to act in accordance with their beliefs in a manner that was more than trivial or insubstantial.

Nonetheless, Justice Prévost, J.C.S., held that the policy implemented by the defendant terminals was justified as it was adopted in order to ensure the safety of workers circulating or working in the terminals operated by the defendant terminals. There was in fact a substantial risk of head injuries for truck drivers when they were required to circulate outside their vehicle on the premises of the terminals. In rendering his decision, Justice Prévost, J.C.S., also underlined the importance of health and safety at work within the Québec society.

For more information see:

• *Singh c. Montréal Gateway Terminals Partnership (CP Ships Ltd./Navigation CP ltée)*, 2016 CarswellQue 9010 (C.S. Que.).

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Canadian HR Reporter
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What is ‘actively employed’?

Ontario’s Court of Appeal looks at language in bonus plans
By Sarah Dobson

By Sarah Dobson

The wording of employment contracts continues to pose challenges for employers. Just ask one Ontario firm that was told to pay almost $60,000 in damages.

The Court of Appeal for Ontario case involved Trevor Paquette, who had worked for TeraGo Networks from 2000 until 2014 when his employment was terminated without cause. As both sides were unable to agree on a severance package, Paquette sued for wrongful dismissal.

The motion judge fixed the reasonable notice period at 17 months. But while the judge awarded damages based on the salary and benefits Paquette would have received during the notice period, he rejected the claim for damages for lost bonus payments.

“Paquette may be notionally an employee during the reasonable notice period; however, he will not be an ‘active employee’ and, therefore, he does not qualify,” said judge Paul Perrel.

Paquette appealed. At issue was whether Perrel erred in denying compensation for lost bonuses on the basis the plan required him to be “actively employed” at the time the bonus was paid.

Ontario Court of Appeal judge Katherine van Rensburg found the lower court made a mistake.

Paquette’s entitlement to bonus payments did not depend on whether he was notionally or in fact “actively employed” after his employment was terminated, she said. And Paquette’s claim was not for the bonuses themselves but for common law contract damages as compensation for the income he would have received had TeraGo not breached his employment contract by failing to give notice.

“The question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant’s common law rights,” said Rensburg.

In the end, Paquette was entitled to compensation as part of his damages for wrongful dismissal for the loss of his bonus for 2014 and the lost opportunity to earn a bonus in 2015. Using an averaging approach, this meant additional damages of $58,386.64.

Past issues revisited
This issue came up in the past around stock option plans as companies weren’t really thinking a lot about what happens upon termination of employment, said Douglas MacLeod, principal at MacLeod Law Firm in Toronto.

“The courts interpreted the language to say, ‘As long as the options were granted or vested during the notice period, then that would continue to happen.’”

So corporations went back and revised the language “so it was very clear the day after you were shown the door, no other options were going to vest or you weren’t going to get any new options. Or they sometimes had clauses where you had to exercise within 30 or 90 days of term, something like that — but at least they dealt with the issue.”

This case is similar, he said.

“The initial drafting, on the face of it, seems pretty clear but the courts are saying now, like they did back then, you need to be really, really, really clear if you’re going to take away somebody’s rights during the common law notice period and this panel of judges didn’t think the existing language was clear enough.”

Just like an employment contract, if an employer wants to restrict an employee’s notice entitlement to something less than her common law entitlement, the contract has to unambiguously state that, said Kyle Lambert, an associate at McMillan in Ottawa.

“The court of appeal is saying the same is the case for bonus entitlement if it’s part of the employee’s standard compensation package.”

The court was very careful in its wording, said Catherine Coulter, a lawyer at Dentons in Ottawa.

“It didn’t send up great big red flags, saying, ‘If you say the following, it won’t suffice,’ but it did leave the door open for better-drafted bonus plans to disentitle employees to bonuses through the notice period. So one can presume from that that if you add other wording to it that makes it clearer, you’ll be fine.”

As to what “more” could be included, that’s the million-dollar question, she said.

“You want to speak about the actual notice of termination date so that bonus entitlements come to an end as of the date of notice of termination or date of notice of resignation. And you probably also want to have some sort of a catchall that says, ‘Notwithstanding any notice period that the employee might be entitled to, that the bonus will come to an end at that earlier date, that earlier notice of termination date.’”

Employers would have to include a termination provision in the employee’s contract that states she is entitled to either x months or x dollars in notice if terminated without cause. And if it’s x dollars, make it a lump sum, for salary only, said Lambert.

“And you want to make sure that without cause notice entitlement is all-inclusive, so ‘Here’s what you get and that encompasses your entire common law entitlement or is in lieu of.’”

But employers have to be careful if they decide to change the wording in bonus plans, particularly if they try to do so for existing employees, he said.

A lot of contracts will just reference an entitlement to bonuses with a bonus plan, said Lambert, so if employers go ahead and change the bonus plan to restricting it to post-termination, and there’s nothing like that in an employee’s existing contract, “then they are unilaterally changing the compensation without changing the contract, and that probably would be considered constructive dismissal.”

Bonus plans are often in separate documents so employers have the flexibility to update performance metrics from year to year, said Coulter.

“For those particular employers, as long as you’ve got clear language in your employment agreement that says you’re going to be subject to a bonus plan, the terms and metrics of which will change from year to year, you’re probably fine to go ahead and change that bonus plan language.”

If an employer has a generic statement in its employment agreement that deals with the bonus plan and people do it catch-as-catch-can from year to year, with no catch-all language, it’s going to be more difficult, she said.

“Then it’s like changing any other employment agreement — you’ve got to give the employee fair consideration in exchange for signing the new agreement during the course of employment and whatever that is, it’s not going to be insignificant in most cases. It’ll be a signing bonus of some sort or a salary increase or a promotion — something along those lines.”

Exploring the duty to accommodate environmental sensitivities

Chelsea Rasmussen,
Dentons Canada LLP

The Human Rights Tribunal of Ontario and Ontario's Workplace Safety and Insurance Appeals Tribunal have each considered employee claims of environmental sensitivities.

Environmental sensitivities are increasingly becoming a topic of concern across Canadian workplaces. They pose a real problem for employers as there is little commentary (or consensus) on these sensitivities and whether they constitute a disability.

Generally speaking, the phrase "environmental sensitivities" describes a multiplicity of reactions or symptoms attributed to chemicals or environmental factors at exposure levels commonly tolerated by many people.

There appears to be no universal cause of environmental sensitivities; they may develop gradually after frequent exposure to low levels of chemicals or environmental factors, or suddenly after a significant exposure.

Disability and accommodation

If an employee with environmental sensitivities is disadvantaged in the workplace as a result of such condition, that person may be considered to have a disability for the purposes of human rights legislation. This disability could, in turn, trigger an employer's duty to accommodate to the point of undue hardship.

In the case of environmental sensitivities, workplace accommodation may range from the avoidance of scented and/or toxic products in the workplace to making physical changes to the workplace, such as changing the colour of the walls.

In addition, employees may claim entitlement from the applicable workers' compensation board for a workplace injury they claim was sustained as a result of exposures in the workplace.

Case law

In *Kovios v. Inteleservices Canada Inc.*, an employee who had sensitivity to normally undetectable scents requested that the company enforce its fragrance policy while she was participating in a training program for new employees.

The employee continued to be bothered by fragrances during the training and ultimately resigned. She subsequently filed a complaint with the Human Rights Tribunal of Ontario claiming discrimination on the basis of a disability.

In responding to an employee's request for accommodation, it is important that an employer take all of the facts of the situation into consideration, and work with the employee to find a reasonable solution that works for all parties.

Accommodation not specified

The Tribunal held that the employee did not advise her employer of the specific accommodation she was seeking and as a result, the issue of whether the company met its duty to accommodate was never engaged.

On that basis, the Tribunal found that the company had not discriminated against the employee.

MCS claim

More recently, Ontario's Workplace Safety and Insurance Appeals Tribunal denied a worker's claim for compensation for the aggravation of a pre-existing condition of Multiple Chemical Sensitivity ("MCS"). In that case, the worker claimed she experienced symptoms as a result of varnish that was used in her workplace prior to her arrival at work.

The Tribunal noted that the standard tools used to determine causation between exposure and illness are of limited use in cases involving MCS.

As a result, the Tribunal considered all of the circumstantially compelling evidence and carefully weighed the medical evidence, including the worker's symptoms.

Exposure and recovery

In this case, the Tribunal found it compelling that the worker was exposed to brief episodes of varnish, but also to other triggering agents she identified to her employer, including gasoline and exhaust.

Given that the worker quickly recovered from her reaction, had only brief exposures to the varnish and was exposed to a number of other outside environmental triggers, the Tribunal concluded that exposure to varnish was an unlikely contributor to her subsequent symptoms.

Employer considerations

As the issue of environmental sensitivities continues to arise in Canadian workplaces, employers should consider taking the following steps:

- Develop a scent-free policy for your workplace and train employees on the policy;
- Upon receipt of an accommodation request concerning environmental sensitivities, seek opinions from medical practitioners regarding what kinds of accommodations are appropriate in the circumstances;
- Work with the employee to find accommodation that works for both parties;

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- If an employee rejects an accommodation proposal, ask why; and
- Keep a record of all efforts made to accommodate, and document when an employee is uncooperative in the process.

Active participation

Ultimately, accommodating employees with environmental sensitivities often requires active participation by most (if not all) workplace parties, including employers, co-workers and visitors to the workplace.

In responding to an employee's request for accommodation, it is important that an employer take all of the facts of the situation into consideration, and work with the employee to find a reasonable solution that works for all parties.

REFERENCES: *Decision No. 1738/15*, 2016 ONWSIAT 389, 2016 CarswellOnt 3177 (Ont. W.S.I.A.T.) at para. 65; Margaret E. Sears (M.Eng., Ph.D.), "The Medical Perspective of Environmental Sensitivities", Canadian Human Rights Commission, May 2007 at 3, 16 and 49; *Kovios v. Inteleservices Canada Inc.*, 2012 HRTO 1570, 2012 C.L.L.C. 230-030 (Ont. Human Rights Trib.).

BRIEFLY SPEAKING

INTELLECTUAL PROPERTY: On **July 28, 2016**, the **Federal Court** partially **granted** a **motion** for **disclosure** within the context of a **copyright infringement** action. **Rogers Communications** was ordered to release the **name** and **address** of a **subscriber** that the applicants allege has been **illegally sharing** several of their **films** over the **Internet**.

The issue before the court was whether Rogers Communications could be ordered to disclose "any and all contact and personal information" of a subscriber, including the subscriber's email address and telephone number.

The motion for disclosure was grounded in the **"notice and notice" regime** for alleged acts of **online copyright infringement** under the ***Copyright Act***. Ultimately, the applicants want to have the matter **certified** as a **"reverse" class action**.

They assert that **additional information** about subscribers, beyond their IP address, name and mailing address, would better enable them to **name subscribers** as **respondents** in the proceeding. The **court rejected** the applicant's **over-broad interpretation** of the notice and notice **regime**.

The court held that it could not be used to compel Rogers to disclose additional pieces of subscriber information. In making this determination, the court stated that **"caution must be exercised"** in ordering disclosure of a subscriber's information to ensure that **"privacy rights are invaded in the most minimal way."** *Voltage Pictures, LLC v. John Doe No. 1*, 2016 FC 881, 2016 CarswellNat 3745 (F.C.) ~ Rebecca Schild, Gowling WLG (Canada) LLP

SECURITIES: The **Court of Appeal for Ontario** recently **dismissed** an **appeal** of the **denial** of **leave** and **certification** for a **proposed statutory secondary market securities class action** under **Part XXIII.1** of the **Ontario *Securities Act***.

In ***Mask v. Silvercorp Metals Inc.***, the plaintiff claimed that Silvercorp Metals Inc. and two of its former executives had **misrepresented** its **mineral resources** and reserves by understating the quantity and overstating the quality of its minerals production.

The **motion judge** found that the **statutory misrepresentation claim** had **no reasonable possibility of success** and that the **common law misrepresentation claim** was likewise destined to **fail**.

On **appeal**, **Justice Strathy** concluded that the motion judge was not limited to a consideration of the plaintiff's evidence. Indeed, the motion judge was "entitled, indeed required, to undertake a **critical evaluation** of **all** of the **evidence** and this necessarily required some **weighing** of the evidence, drawing of appropriate **inferences** and the finding of **facts** established by the record." 2016 O.N.C.A. 641 2016 CarswellOnt 13364 (Ont. C.A.)

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