

## 2022 EMPLOYMENT, LABOUR & EQUALITIES LAW WEBINAR SERIES

# NOT THE 51ST STATE – INTRODUCTION TO EMPLOYMENT & LABOUR LAW IN CANADA

Christopher Andree, **Partner** – Waterloo Region  
Shefali Rajaputra, **Associate** – Waterloo Region  
Wendy Wagner, **Partner** – Ottawa


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# THANK YOU



## CHRISTOPHER ANDREE

*Partner*

 [chris.andree@gowlingwlg.com](mailto:chris.andree@gowlingwlg.com)

 +1 519 575 7505


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## SHEFALI RAJAPUTRA

*Associate*

 [shefali.rajaputra@gowlingwlg.com](mailto:shefali.rajaputra@gowlingwlg.com)


 +1 519 571 7626


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## WENDY WAGNER

*Partner*

 [wendy.wagner@gowlingwlg.com](mailto:wendy.wagner@gowlingwlg.com)

 +1 613 786 0213

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# LEGAL LANDSCAPE

- **1 Federal, 10 Provincial and 3 Territorial jurisdictions**
  - Regional and Municipal legislation may apply or influence
- **2 legal systems**
  - Common Law (judge-made)
  - Civil Law (Civil Code of Quebec)
- **Highly regulated**
  - Legislation / Civil Code
  - Common law (implied terms)
- **Individual rights given prominence**
  - Union/employee-favourable legislation/ administrative bodies
  - Highly developed human rights/ equalities regime

# LEGAL LANDSCAPE (CONT'D)

- **Supreme Court of Canada**

*“Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well being...Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person’s employment status is bound to have far reaching repercussions.”*

*“Covenants in restraint of trade are contrary to public policy because they interfere with individual liberty and the exercise of trade...They are prima facie unenforceable. A covenant will only be upheld if it is reasonable in reference to the interests of the parties concerned and the interests of the public in discouraging restraints on trade.”*

# FUNDAMENTAL DIFFERENCES

- **Labour and paycheque are spelled with “u”**
- **Employment is primarily provincially regulated**
  - No equivalent to federally enforced FMLA, ADA, OSHA, NLRA or EEO
    - Concepts exist in provincial legislation
    - Variations in each province
  - Provincial employment/ labour standards legislation applies to most workers in province (ESA, ESC, LSA, ARLS)
    - Residence of employer irrelevant
  - Certain industries are federally regulated and subject to federal *Canada Labour Code* (CLC)
    - Telecommunications, broadcasting, aviation, inter-provincial transportation

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **No employment “at will”**
  - Employment relationship is a contract
  - Employment is deemed to be indefinite unless proof otherwise (i.e. fixed term, probationary, etc.)
  - Indefinite employment is ended by employer in two ways
    - Just Cause/ Wilful Misconduct – no notice required
    - Without Just Cause/ Wilful Misconduct – notice of termination or pay in lieu of notice required
- **Zero tolerance for “zero tolerance” policies**
- **Context is critical**
  - *“whether an employer is justified in dismissing an employee [for] dishonesty is a question that requires an assessment of the context of the alleged misconduct.” SCC*

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Termination for just cause**

- Legislation in some provinces may require wilful behaviour
  - Poor performance, repeated less serious misconduct may not satisfy test
- Common law (judge-made law) requires balancing of misconduct or performance deficiency against employment history
  - Contextual analysis
  - Proportional response

*“...the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship.” ONCA*

- *“...the principle of proportionality. An effective balance must be struck between the severity of an employee’s misconduct and the sanction imposed.” SCC*

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Reinstatement to employment in absence of just cause**
  - Unionized workplace
  - Non-unionized workplace
    - Canada Labour Code
      - After 12 consecutive months
    - Quebec
      - After 24 consecutive months
    - Nova Scotia
      - After 10 years
  - Human rights violation
    - Broad range of remedies including reinstatement
  - Employment Standards Legislation
    - Right to reinstatement after LOAs



# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Termination with notice or pay in lieu (Exclude Quebec)**
  - Must consider both legislation and common law
  - Factors considered
    - Legislation
      - Length of service
      - Size of payroll (\$2.5 million annually in Ontario)
      - Number of terminations in last four weeks and/or six months
    - Common law
      - Length of service
      - Age
      - Character of employment/ position within organization
      - Availability of similar, suitable alternative employment given experience, expertise, education and the marketplace
  - Notice to Provincial Ministry of Labour of group terminations

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Constructive Dismissal**

- Breach of contract of employment by employer
- Focus on impact of changes on employee
  - Importance of employment (earlier SCC quote)
- *“Where an employer decides unilaterally to make substantial changes to the essential terms of an employee’s contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been constructively dismissed....”*
  - Supreme Court of Canada
- All things equal, more likely to find in favour of employee
- Consideration to support contractual variation

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Quebec**
  - Civil Law tradition (Napoleon)
    - Codification of law
    - Power to contract restricted
      - Employee cannot agree in advance to “reasonable” notice of termination without just cause
  - French language preservation measures
    - Contracts must be initially in French or in English by express agreement
  - Interventionist government agencies and tribunals
  - Generous social policies
    - \$7/ day childcare
    - Workers’ compensation coverage for pregnancy-related illness

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Drug and alcohol testing**
  - Goal of testing is to measure impairment at work
    - Past use not relevant
    - Pre-employment testing generally prohibited
    - Post-incident testing generally allowed
    - Random testing generally prohibited
      - Safety sensitive positions
        - Alcohol testing
      - Alberta oil patch
      - Construction sites
        - Pre-access testing

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Drug and alcohol testing (cont'd)**
  - Addiction is a medical issue and constitutes a disability
    - Duty to accommodate
      - Time off for treatment
      - Reassignment
      - Multiple relapses
    - Discipline is a last resort
      - Last chance agreement

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **3 main political parties**
  - Conservative
  - Liberal (current federal government)
  - New Democratic Party
    - Perceived as the most socialist
    - Never held power federally
    - Regularly holds power provincially
  - Positions of federal and provincial wings of parties with the same name do not necessarily align
- **Coalition (informal) can drive policy** (current federal government)
- **Employment/ Labour legislation often changes with election of new government**

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Restrictive covenants are prima facie unenforceable**
  - Inequality of bargaining power assumed by the courts
  - Contrary to public policy (earlier quote)
  - Non-Competition covenants rarely enforceable
    - Only if non-solicitation insufficient to provide necessary protection
    - Prohibited in Ontario except C-level and President
  - Non-Deal covenants are unlikely to be enforceable
    - Analyzed as a non-competition covenant
  - Non-Solicitation covenants enforceable if reasonable
    - Duration
    - Competitive activities/ products
    - Customers the employee dealt with directly in material way
    - Definition of customer unambiguous

# FUNDAMENTAL DIFFERENCES (CONT'D)

- **Human Rights**
  - Broad range of grounds for liability
    - EEO list, but broader
    - Family status/ marital status
    - Record of offences
    - Source of income (social assistance)/ social condition
    - Political activities
  - Process differs
    - Claims pursued through arbitration (unionized) or human rights tribunals (non-unionized)
    - No standalone lawsuits for discrimination/ No jury trials
  - Awards dramatically lower
    - Lost income/ modest damages, not punitive damages



# SUBTLE DIFFERENCES

- **Legislation**
  - Employment/ Labour Standards
    - Industry specific rules
  - Human Rights
  - Labour Relations
    - Industry specific rules
  - Privacy
    - Patchwork of private sector privacy legislation
  - Pay Equity (ON)
  - Workers' Compensation (Workplace Safety and Insurance)
  - Occupational Health and Safety
  - Accessibility for those living with disability

# SUBTLE DIFFERENCES (CONT'D)

- **Employment/ Labour Standards**
  - Minimum wage
  - Maximum hours of work
  - Overtime
    - Exempt/ Non-Exempt distinction
    - Wage and hour class actions are uncommon
  - Public (Statutory) Holidays
  - Vacation with pay
  - Equal pay for equal work
  - Temporary lay-off

# SUBTLE DIFFERENCES (CONT'D)

- **Employment/ Labour Standards (cont'd)**
  - Notice of Mass Termination
    - Notice to Ministry of Labour
    - Additional notice to individual employees
    - Ontario – 50 employees in a 4 week period
    - British Columbia – 50 employees in a 2 month period
    - Quebec – 10 employees in a 2 month period

# SUBTLE DIFFERENCES (CONT'D)

- **Employment/ Labour Standards (cont'd)**
  - Leaves of Absence
    - Pregnancy/ Maternity/ Paternity/ Parental (>12 months)
    - Family Responsibility/ Personal Emergency (10 days)
    - Personal Illness (< 26 weeks)
    - Compassionate Care (< 12 weeks)
    - Organ donor/ reservist/ victim of crime/ family wedding
    - Right to reinstatement
  - Temporary help agencies
  - Prohibition on reprisal for seeking enforcement
  - Corporate director liability

# SUBTLE DIFFERENCES (CONT'D)

- **Human Rights**
  - Termination of Older Workers
    - Addressed through provincial human rights legislation
      - Focus on discrimination based on any age rather than specific age (40)

# SUBTLE DIFFERENCES (CONT'D)

- **Labour relations**
  - Provincial differences in labour law
    - Collective bargaining
      - First contract arbitration
    - Limits on right to strike
    - Limits on replacement workers
    - Decertification rules
  - Secondary picketing permitted
  - Privacy rights guarded/ bargained

# SUBTLE DIFFERENCES (CONT'D)

- **Union Certification**
  - Non-member petition can trigger vote in Alberta
  - Card based certification in some provinces/ sectors
    - BC recently passed legislation
  - 35-60% support to trigger a vote
  - 50% + 1 of those that vote to achieve certification
  - Period from application to vote varies
    - 5 days in Ontario
    - Campaign often covert until application
  - Significantly narrower free speech rights in Canada
    - Most of what employer wants to say is deemed an unfair labour practice

# SUBTLE DIFFERENCES (CONT'D)

- **Positive Employee Relations**
  - Robust restrictions on employer free speech/ actions
    - Captive audience meetings
    - Threats
    - Intimidation
    - Promises
    - Surveillance
  - Robust unfair labour practice protections
    - New vote
    - Reinstatement to employment with compensation
    - Remedial certification
      - Regardless of the result of the vote



# SUBTLE DIFFERENCES (CONT'D)

- **Workers' Compensation (WSIA, CNESST)**
  - Mandatory coverage for most occupations
  - Government agency (WCB, WSIB, CNESST)
    - Assess and collect premiums
    - Adjudicate claims
      - Benefits
      - Violations
  - Experience rating affects premiums/ surcharges
    - Period to determine impact varies
  - Quasi-criminal prosecution for violations

# SUBTLE DIFFERENCES (CONT'D)

- **Privacy**
  - Federal legislation (PIPEDA) does not apply directly to provincially-regulated employment relationship
  - Private sector privacy legislation
    - Quebec
    - Alberta/ British Columbia
  - Reasonable expectation of privacy
    - Employer's policies critical
    - Progressive discipline
      - Progressive invasion of privacy
  - Intrusion upon seclusion/ public disclosure of private facts
  - Perception of right to privacy strongly held

# SUBTLE DIFFERENCES (CONT'D)

- **Privacy (cont'd)**
  - Background checks
    - Credit
      - Express consent typically required
      - Disclosure of name of credit agency
    - Criminal
      - Record of offences prohibited ground of discrimination
        - Unrelated to employment
      - Database may not be up-to-date or thorough
      - Fingerprinting requirement causes delay (3+ months)
      - Vulnerable sector search (sexual offences)
      - Pardon (record suspension) will erase prior conviction
    - No prohibition against review of social media
      - Risk of obtaining human rights status information

# SUBTLE DIFFERENCES (CONT'D)

- **Pay Equity**
  - Address gender wage discrimination
  - Compliment to human rights and employment/ labour standards legislation
  - “Equal pay for work of equal value”
    - Differs from equal pay for the same work irrespective of gender
  - Prevalent in broader public sector
  - Requires
    - Analysis of gender predominance of job classes (60-70%)
    - Evaluation of value of each class
    - Comparison of pay of classes
    - Adjustment of wages
    - Plan and reporting to government agency

# SUBTLE DIFFERENCES (CONT'D)

- **Occupational Health and Safety**
  - Provincial Ministry of Labour enforcement
    - Fines vary widely
    - > \$1,500,000.00 per charge
    - Individual liability for owners, managers, supervisors and workers
  - Strict liability offence/ Due Diligence defence
  - Workplace violence/ harassment
    - Psychological harassment (Quebec)
  - Criminal liability for wilful workplace safety violations
    - Employer
    - Senior management

# SUBTLE DIFFERENCES (CONT'D)

- **Accessibility Legislation**
  - Require employers and others to implement changes to promote accessibility for those living with disability
  - Federal legislation
  - Provincial legislation in several provinces
    - Ontario first - AODA
    - Others provinces implementing similar legislation
  - Various standards under AODA to remove barriers
  - Differs from ADA

# SUBTLE DIFFERENCES (CONT'D)

- **Absence Management**
  - STD/ LTD benefits
    - Statutory (Workers' Compensation, CPP, MVA insurance)
    - Group insurance plan
    - Self-insured (sometimes administered by third party)
  - Employee has a duty to cooperate in return to work
  - Human rights considerations (disability)
    - Accommodate to the point of undue hardship
      - Bona Fide Occupational Requirement (BFOR)
      - Beyond mere inconvenience
      - Procedural fairness
  - Frustration of employment contract

# SUBTLE DIFFERENCES (CONT'D)

- **Independent Contractors**
  - Factors to determine status are similar to US
    - Control by the Principal over the work being performed
    - Ownership of “tools” related to the service
    - Contractor’s chance of profit or risk of loss
    - Is Contractor engaged in business on his/her own account?
  - Examination of the "total" relationship
    - Does Contractor hire his/her own helpers?
    - Degree the Contractor is responsible for investment and management in the Principal’s business?
    - Does Contractor work exclusively for Principal?
    - Whether Contractor’s activity is part of the business organization of the Principal.
    - Whose business is it?



# TRANSACTION CONSIDERATIONS

- **Transaction Structure**
  - Share purchase considerations are similar to US
  - Asset purchase requires continuity of service per legislation
- **Due Diligence**
  - Structure defines scope of DD
  - Key issues
    - Employment claims from employees and government agencies
    - Termination entitlements
    - Employment/ Labour standards compliance
    - Misclassification of independent contractors
    - Restrictive covenants
    - Immigration considerations

# TRANSACTION CONSIDERATIONS (CONT'D)

- **Integration of Canadian workforce into purchaser**
  - Share vs. Asset transaction
    - No real issue for share transactions
    - Options for engaging workforce in asset transactions
      - Creation of new Canadian corporation
      - Canadian employees directly engaged by US purchaser
      - Engage a Professional Employer Organization
        - Consider joint/common employer issues

# EMPLOYMENT SYSTEMS

- **Individual employment agreement**
  - Documents terms of the contract of employment
  - Indefinite/ fixed term/ part-time/ casual
  - Probationary status
  - Remuneration
  - Overtime
  - Constructive dismissal definition
  - Temporary layoffs
  - Termination provisions
    - Definition of just cause
    - Entitlement to notice of termination

# EMPLOYMENT SYSTEMS (CONT'D)

- **Individual employment agreement (cont'd)**
  - Protection of confidential information
  - Address conflict of interest
  - Assignment of intellectual property rights
    - No assignment of moral rights
  - Restrictive Covenants
    - Non-competition clauses to be scrutinized/ deleted
    - Scope of non-solicitation

# EMPLOYMENT SYSTEMS (CONT'D)

- **Employee Handbook**
  - No references to the handbook not creating a contract
  - Status of employees
    - Reference to “exempt” and “non-exempt”
  - Vacation with pay
  - Public (Statutory) Holidays
  - Leaves of absence
  - Drug and alcohol-free workplace
  - Violence in the workplace/ harassment
  - Performance management/ progressive discipline
- **Canadianize your US policies and procedures**
  - “Z” is pronounced “zed”
  - Quebec/ French language requirements
  - We are not the 51st State


**QUESTIONS?**


# THANK YOU



**CHRISTOPHER ANDREE**

*Partner*

 [chris.andree@gowlingwlg.com](mailto:chris.andree@gowlingwlg.com)


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**SHEFALI RAJAPUTRA**

*Associate*


 [shefali.rajaputra@gowlingwlg.com](mailto:shefali.rajaputra@gowlingwlg.com)


 +1 519 571 7626



**WENDY WAGNER**

*Partner*

 [wendy.wagner@gowlingwlg.com](mailto:wendy.wagner@gowlingwlg.com)

 +1 613 786 0213

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