CANADIAN LEGAL REGULATION OF DISCLOSURE OF INFORMATION TO EMPLOYEES OR PROSPECTIVE EMPLOYEES

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I. INTRODUCTION

Canada has three levels of government—federal, provincial, and municipal. Jurisdiction over labor and employment law in Canada is primarily a provincial matter. About 90% of businesses in Canada are provincially-regulated employers. There are ten provinces and three northern territories in Canada, each with their own legislation. The federal government's authority over employment is limited to industries that are considered to be of national concern or scope (i.e. employees of the federal government and its agencies, Crown corporations, navigation and shipping, grain elevators, railways, airlines and aeronautics, inter-provincial transportation, telecommunications, radio broadcasting, banks, and other businesses declared to be for the general advantage of Canada). Municipalities have no jurisdiction over employment matters.

There are two main sources of law governing the employment relationship in Canada: statutory law (legislation) and common law (jurisprudence). Both sources of law either directly or indirectly impose obligations on employers to disclose information to their employees or prospective employees in order to comply with legislative requirements or to avoid common law liability. Disclosure of information to employees is generally intended to inform them of their employment rights and protect them in the workplace.

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II. WHAT MUST CANADIAN EMPLOYERS DISCLOSE TO EMPLOYEES EITHER AUTOMATICALLY OR UPON REQUEST?

A. Company Policies, Benefits, and Personnel Procedures

1. Human Rights Employment Policies

Canadian federal, provincial, and territorial human rights legislation sets out the prohibited grounds of discrimination in employment and provides that every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex (including pregnancy and childbirth), sexual orientation, age, record of offenses, marital status, same-sex partnership status, family status, or handicap.[1] In order to comply with human rights legislation, most Canadian employers have workplace discrimination and harassment policies, which demonstrate their commitment to a workplace free of discrimination and harassment, and educates their employees on the nature of discrimination and harassment and how the issue will be dealt with in the workplace. Employment standards legislation in the province of Prince Edward Island[2] and the federal government[3] specifically require employers to have a written policy on sexual harassment in the workplace.

2. Labor Relations Policies

On November 2, 2000, Ontario's Minister of Labour introduced Bill 139, the Labour Relations Amendment Act, 2000,[4] which passed Third Reading on December 20, 2000, received Royal Assent on December 21, 2000, and came into force and effect on December 30, 2000. The intention behind this new legislation is, *inter alia*, to strengthen workplace democracy. The new legislation required the Minister to publish a document describing the process for making an

1. Canadian Human Rights Act, R.S.C. ch-6, § 3 (1985); Human Rights, Citizenship and Multiculturalism Act, S.A. §7(1) (1996); Human Rights Code, R.S.B.C. ch. 210, § 13.1 (1996); The Human Rights Code, C.C.S.M. ch. H-175, *as enacted by* ch. 44, S.M. § 9(2) (1987); Human Rights Act, R.S.N.B. ch. H-11, § 3 (1973); The Human Rights Code, R.S.N. ch. H-14, § 9 (1990); Human Rights Act, R.S.N.S. ch. 214, § 5 (1989); Ontario Human Rights Code, R.S.O., ch. H-19, § 1 (1990); Human Rights Act, R.S.P.E.I. ch. H-12, § 1(d) (1988); Charter of Human Rights and Freedoms, R.S.Q. ch. C-12, § 10 (1977); The Saskatchewan Human Rights Code, ch. S-24.1, S.S. § 16 (1979); Fair Practices Act, R.S.N.W.T. ch. F-2, § 3 (1988); Human Rights Act, ch. 3, S.Y.T. § 6 (1987).

2. Employment Standards Act, ch. 18, S.P.E.I. §27 (1992), as amended.

3. Canada Labour Code, R.S.C. ch. L-2, § 247 (1985), as amended (entitled Part III—Standard Hours, Vacation, Wages and Holidays, Division XV.1—Sexual Harassment).

4. Labour Relations Amendment Act, ch. 38, S.O. (2000).

application for decertification, including who may apply, when an application may be made, and the procedure to follow. Under this new legislation, unionized employers must use reasonable efforts to:

> (a) post a copy of the document in every workplace at which unionized employees work;
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> (b) post an additional notice stating that any unionized employee may request a copy of the document from the employer;
>
> (c) distribute a copy of the document to every unionized employee once per calendar year; and,
>
> (d) further provide a copy of the document to unionized employees on request.[5]

An employer will not be seen as initiating an application for decertification or committing an unfair labor practice (discussed *infra*) under the Ontario Labour Relations Act, 1995,[6] by complying with these requirements.

3. Employment Standards Legislation

On December 20, 2000, the Ontario Legislature passed Bill 147, the Employment Standards Act, 2000.[7] This new employment standards legislation repealed and replaced the former Employment Standards Act.[8] The majority of the provisions of the new Act were declared in force and effect on September 4, 2001, with the promulgation of companion regulations. Under this new legislation, every employer is required to post Ministry of Labour material prescribed by the Regulations, including a description of an employer's obligations and an employee's rights in the majority language of the workplace.[9]

4. Disclosure of Pension Plan Information

Establishing an employer-sponsored pension plan is not mandatory in Canada. However, if an employer chooses to establish a pension plan, it becomes governed by the applicable pension benefits legislation.[10]

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5. *See id.* § 9.
6. Labour Relations Act, ch. 1, Schedule A, S.O. § 63.1(5) (1995), as amended.
7. Employment Standards Act, ch. 41, S.O. (2000), as amended.
8. Employment Standards Act, R.S.O. ch. E-14 (1990), as amended.
9. Employment Standards Act, *supra* note 7, § 2.
10. Pension Benefits Standards Act, 1985, R.S.C., ch. 32 (2nd Supp.) (1985), as amended; Pension Benefits Standards Regulations, 1985, S.O.R. 87-19 (1985), as amended; Employment

In a single employer pension plan, the employer is usually plan administrator and plan members are certain eligible classes of employees of the employer, as defined in the plan document. In Quebec, all pension plans are required to be administered by a pension committee, which must include active and inactive member representation.[11]

All of the various Canadian pension benefits legislation requires pension administrators to disclose comprehensive information to employees about their pension plans in order to provide them with a better understanding of their pension entitlements and assist them in their retirement planning. The main disclosure requirements include a plan description, notice and information regarding adverse plan amendments, information regarding withdrawal of surplus from the pension plan fund, annual statements, termination statements, and permit document inspection.

a. Plan Description

The plan administrator (and the pension committee in Quebec) must provide each plan member with a written explanation of the pension plan provisions, together with an explanation of their rights and duties. Usually, this is provided in a booklet that covers the plan provisions regarding eligibility, member contributions, company contributions, the amount of pension payable on retirement, and benefits payable on termination of employment, death and disability. In Quebec, members of simplified pension plans must receive a copy of the actual plan provisions.[12]

Pension Plans Act, ch. E-10.05, S.A. (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352 (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433/93 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32 (1987), as amended; Pension Benefits Act Regulations, Manitoba Reg. 188/87R (1987), as amended; Pension Benefits Act, S.N.B. ch. P-5-1 (1987) as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195 (1991), as amended; Pension Benefits Act, 1997, S.N. ch. P-4.01 (1996); Pension Benefits Act Regulations Under the Pension Benefits Act, 1997, O.C. 968 (1996); Pension Benefits Act, R.S.N.S. ch. 340 (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269 (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8 (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario), Reg. No. 909 (1990), as amended; Supplemental Pension Plans Act, R.S.Q. ch. R-15.1 (1990), as amended; Regulation Respecting Supplemental Pension Plans, O.C. 1158 (1990), as amended; The Pension Benefits Act, 1992, ch. P-6.001, S.S. (1992), as amended; The Pension Benefits Regulations, 1993 R.R.S. ch. P-6.001, No. 1 (1993), as amended.

11. Supplemental Pension Plans Act, R.S.Q. ch. R-15.1, § 147 (1990), as amended.

12. Pension Benefits Standards Act, 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1)(a) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. §§ 19, 22 (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. §§ 8(1)(a), (8)(2) (1986), as amended;

b. Annual Statements

Employers who sponsor pension plans are required to provide each plan member with an individual annual statement (except in Newfoundland, where a plan administrator is only required to provide members with an individual statement at least once every three years or at the written request of a member or former member), containing the prescribed information in respect of the pension plan, the members accrued pension benefits, and any ancillary benefits.[13]

c. Plan Amendments

Where a proposed plan amendment will result in a reduction in pension benefits or would otherwise adversely affect the rights and obligations of a plan member, the administrator is required to send a written notice containing an explanation of the amendment to all plan

Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, §§ 12, 13 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, § 10(1)(a), 10(2) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, §§ 9, 10 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 29 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 23(1), 23(5), 23(7) (1987), as amended; Pension Benefits Act, 1997, S.N. ch. P-4.01, § 25(1)-(3) (1997); Pension Benefits Act, S.N.B. ch. P-5.1, §§ 23(1)-(3), 24(1)-(4) (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, §§ 13(1)-(2), 14, 15(2) (1991), as amended; Pension Benefits Act, R.S.N.S. ch. 340, §§ 31(1)-(3), 32(1)-(4) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, §§ 29, 30(1)-(3) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, §§ 25(1)-(3), 26(1)-(5) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, §§ 38, 39(1)-(2) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. §§ 26, 111 (1990), as amended; Regulation Respecting Supplemental Pension Plans, O.C. 1158-90, §§ 1160-90, 16, 10(27) (1990), as amended; The Pension Benefits Act, 1992, ch. P-6.001, S.S. § 13(1), (3) (1992), as amended; The Pension Benefits Regulations, 1993, R.R.S. ch. P-6.001, Reg. No. 1, §§ 11(1)-(2), 12(1)-(2), 22 (1993), as amended.

13. Pension Benefits Standards Act, 1985, R.S.C. ch. 32 (2nd Supp.), §§ 28(1)(b), 45 (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, §§ 22, 23(1) (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. § 8(1)(b), 8(2) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, § 14 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, § 10(1)(b), 10(2) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, § 11 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 29, as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 23(1), 23(6) (1987), as amended; Pension Benefits Act, 1997, ch. P-4.01, S.N. § 25(4) (1996), as amended; Pension Benefits Act, ch. P-5.1, S.N.B. § 25 (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, § 15(1) (1991), as amended; Pension Benefits Act, R.S.N.S. ch. 340, § 33 (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 31(1)-(2) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, § 27 (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, § 40(1)-(2) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. § 112, as amended (1990); Regulation Respecting Supplemental Pension Plans, O.C. 1158, §§ 57, 59, 59.1, 1160-90, 35 (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. § 13(1), 13(3) (1992), as amended; The Pension Benefits Regulations 1993, R.R.S. ch. P-6.001, No. 1, § 3(1)-(2) (1993), as amended.

members and invite them to submit comments to them and to the Superintendent of the pension commission where the amendment is being registered. The intent of the notice is to inform affected persons of the amendment, give them an opportunity to express their opinion regarding the proposed amendment and, if they wish, pursue legal action. Where the proposed amendment affects members represented by a trade union that is a party to a collective bargaining agreement, the administrator is required to transmit this written notice to the trade union. While a member may complain to the Superintendent about an amendment, if the amendment is acceptable under the terms of the legislation, the Superintendent cannot refuse to accept it for registration.[14]

d. Notice of Withdrawal of Surplus from a Continuing Plan

Where an employer is applying for approval to take a withdrawal of surplus from a continuing plan (except in Quebec where current legislation prohibits an employer from withdrawing surplus assets from a continuing plan), the plan administrator is required to provide written notice to plan members and other persons entitled to pension benefits under the plan, and advise them that if they have comments, they may make them in writing to the applicable pension commission.[15]

14. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1) (1985), as amended; Pension Benefits Standards Regulations 1987, S.O.R. 19, § 22 (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. § 8(1) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, §§ 12, 13 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, § 10(1) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, § 9(2) (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 29 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 23(7) (1987), as amended; Pension Benefits Act, ch. P-5.1, S.N.B. § 24(1)-(4) (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, § 25(3) (1991), as amended; Pension Benefits Act, ch. P-4.01, 1996 S.N. § 25(3) (1997); Pension Benefits Act, R.S.N.S. § 32 (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 30(1) (1987), as amended; Pension Benefits Act, R.S.O. ch. P-8, § 26(1)-(5) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, § 39 (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. §§ 26, 111 (1991), as amended; The Pension Benefits Act 1992, ch. P-6.001, 1992 S.S. § 13(1) (1992), as amended; The Pension Benefits Regulations 1993, ch. P-6.001, R.R.S. 1, § 11(2) (1993), as amended.

15. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1)(a) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, § 16(2)(d) (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. § 58(1)(b) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, § 67 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, § 61(1)(b) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columba Regulations) 433, § 42 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 26(2.1)(b) (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 4(5)(c) (1987), as amended; Pension

e. Termination Statements

A written termination statement must be provided if a plan member terminates membership in the pension plan, either through

Benefits Act, ch. P-5.1, S.N.B. § 59(5) (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, § 48(1)-(2) (1991), as amended; Pension Benefits Act 1997, ch. P-4.01, S.N. § 25(6) (1996), as amended; Pension Benefits Act, R.S.N.S. ch. 340, § 83(2)-(3) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 24(1)-(2) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, § 78(2)-(3) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, § 25(1)-(2) (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. §§ 51(4), 62 (1992), as amended; The Pension Benefits Regulations 1993, ch. P-6.001, R.R.S. 1, § 38(1)-(4) (1993), as amended.

termination of service,[16] full or partial termination of the plan,[17] death prior to retirement,[18] or retirement.[19]

16. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1)(d) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, § 23(2)-(5) (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. § 8(1)(c), 8(1)(e), 8(1)(g), 8(2) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, §§ 15, 17, 18, 20 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, §§ 10(1)(c), 10(1)(g), 10(2) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, §§ 12, 14 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 29 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 23(9) (1987), as amended; Pension Benefits Act 1997, ch. P-4.01, S.N. § 25(5) (1996); Pension Benefits Act, ch. P-5.1, S.N.B. § 26 (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, §§ 16(1), 16(2), 16(5) (1991), as amended; Pension Benefits Act, R.S.N.S. ch. 340, § 34(1)-(2) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, §§ 32(1)-(2), 33(1)-(4) (1987), as amended; Pension Benefits Act, R.S.O. ch. P-8, § 28(1)-(2) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, §§ 41(1)-(2), 42(1)-(4) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. §§ 112.1, 113 (1990), as amended; Regulation Respecting Supplemental Pension Plans, O.C. 1158, §§ 58, 59.1, 57.1, 1160-90, 36 (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. § 13(1)-(3) (1992), as amended; The Pension Benefits Regulations 1993, ch. P-6.001, R.R.S. 1, § 14(1)-(3) (1993), as amended.

17. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1)(d) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, § 23(3) (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. §§ 8(1)(c) 8(1)(h), 8(1)(i), 8(2) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, §§ 21, 22 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, §§ 10(1)(h), (2), 50(1)-(2) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, § 17 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 29 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, §§ 23(3), 23(9) (1987), as amended; Pension Benefits Act 1997, ch. P-4.01, S.N. §§ 60(1), 64 (1996); Pension Benefits Act, ch. P-5.1, S.N.B. §§ 60(2)-(4), 64(1) (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, §§ 49(1), 49(8), 49(9) (1991), as amended; Pension Benefits Act, R.S.N.S. ch. 340, §§ 73(2)-(3), 77(1)-(2) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 26(1)-(9) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, §§ 68(2)-(4), 72(1)-(2) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, § 28(1)-(6) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. §§ 204–207 (1990), as amended; Regulation Respecting Supplemental Pension Plans, O.C. 1158, §§ 12, 13, 67, 1160-90 (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. §§ 13(1), 13(3) (1992), as amended; The Pension Benefits Regulations, ch. P-6.001, 1993 R.R.S. 1, §§ 20, 21 (1993), as amended.

18. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1)(d) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, § 23(5) (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. §§ 8(1)(f), 8(1)(g), 8(2) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, §§ 19, 20 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, §§ 10(1)(f)-(g), 10(2) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, § 15 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 29 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 23(10) (1987), as amended; Pension Benefits Act, ch. P-5.1, S.N.B. § 26 (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, § 16(4)-(5) (1991), as amended; Pension Benefits Act 1997, ch. P-4.01, S.N. § 25(5) (1996); Pension Benefits Act, R.S.N.S. ch. 340, § 34(1)-(2) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 34(1)-(3) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, § 28(1)-(2) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, § 43(1)-(3) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. § 113 (1990), as amended; Regulation

The termination statement must set out the prescribed information in respect of the member's benefits, rights and obligations, including the value of the member's contributions (if any), immediate or deferred pension entitlements, death benefits, and transfer options.

f. Examination of Plan Documentation and Information Upon Request

Plan administrators must provide plan members with certain prescribed pension plan and related plan fund documentation and information for review. In addition, a representative of a trade union that represents members of the plan may also review such documents.[20]

Respecting Supplemental Pension Plans, O.C. 1158, §§ 58, 59.1 (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. §§ 13(1), 13(3) (1992), as amended; The Pension Benefits Regulations, 1993, ch. P-6.001, R.R.S. 1, § 16(1)-(2) (1993), as amended.

19. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), § 28(1)(d) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, § 23(1)-(2) (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. §§ 8(1)(d), 8(1)(g), 8(2) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, §§ 16, 20 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, §§ 10(1)(d), 10(1)(g), 10(2) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, § 13 (1993), as amended; Pension Benefits Act, R.S.M. ch. P32, § 29 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, § 23(8)-(9) (1987), as amended; Pension Benefits Act, ch. P-5.1, S.N.B. § 26 (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, §§ 16(3), 16(5) (1991), as amended; Pension Benefits Act 1997, ch. P-4.01, S.N. § 25(5) (1996); Pension Benefits Act, R.S.N.S. ch. 340, § 34(1)-(2) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 35(1)-(4) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, § 28(1)-(2) (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, § 44(1)-(4) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. § 113 (1990), as amended; Regulation Respecting Supplemental Pension Plans, O.C. 1158, §§ 58, 59.1 (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. §§ 13(1), 13(3) (1992), as amended; The Pension Benefits Regulations 1993, ch. P-6.001, R.R.S. 1, § 15(1)-(2) (1993), as amended.

20. Pension Benefits Standards Act 1985, R.S.C. ch. 32 (2nd Supp.), §§ 28(1)(c), 28(3) (1985), as amended; Pension Benefits Standards Regulations, S.O.R. 19, § 23.1 (1987), as amended; Employment Pension Plans Act, ch. E-10.05, S.A. § 8(3)-(7) (1986), as amended; Employment Pension Plans Regulation, Alta. Reg. (Alberta Regulations) 35, § 25 (2000), as amended; Pension Benefits Standards Act, R.S.B.C. ch. 352, §§ 10(1)(g), 10(4)-(7) (1996), as amended; Pension Benefits Standards Regulation, B.C. Reg. (British Columbia Regulations) 433, §§ 16, 18 (1993), as amended; Pension Benefits Act, R.S.M. ch. P-32, § 30 (1987), as amended; Pension Benefits Act Regulations, Manitoba Regulations 188/87R, §§ 23(1)(b), 23(2), 23(4) (1987), as amended; Pension Benefits Act 1997, ch. P-4.01, S.N. § 25(7) (1996); Pension Benefits Act, ch. P-5.1, S.N.B. §§ 27(1)-(5), 28(1)-(2) (1987), as amended; General Regulation—Pension Benefits Act, N.B. Reg. (New Brunswick Regulations) 195, § 17 (1991), as amended; Pension Benefits Act, R.S.N.S. ch. 340, §§ 35(1)-(5), 36(1)-(2) (1989), as amended; Regulations Under the Pension Benefits Act, N.S. Reg. (Nova Scotia Regulations) 269, § 36(1)-(4) (1987), as amended; Pension Benefits Act, R.S.O. ch. P.8, §§ 29(1)-(5), 30 (1990), as amended; Regulation Made Under the Pension Benefits Act—General, R.R.O. (Revised Regulations of Ontario) 909, §§ 45(1), 45(5), 45(6) (1990), as amended; Supplemental Pension Plans Act, ch. R-15.1, R.S.Q. §§ 114, 115 (1990), as amended; Regulation Respecting Supplemental Pension Plans, O.C. 1158, §§

B. Financial or Business Plans as They Bear Upon the Job or its Future Security

1. Employment Recruitment

Under Canadian common law, employees are able to successfully bring economic loss claims against their employer based on fraudulent or negligent misrepresentation during the hiring process, if they can prove that the employer knowingly or recklessly misrepresented an important aspect of the job and that they reasonably relied on this misrepresentation to their detriment. The leading Canadian case on negligent misrepresentation in the hiring process is *Queen v. Cognos.*[21] The plaintiff in the *Queen v. Cognos* case was a chartered accountant, who was hired away from secure and responsible employment in Calgary, Alberta (Western Canada), to work in a senior capacity on a financial software development project with the defendant employer in Ottawa, Ontario (Central Canada). The representative of the employer, who interviewed the plaintiff, told the plaintiff that the position would be necessary throughout the two year primary development period and beyond. In reasonable reliance on this representation, the plaintiff resigned from his current employment position in Calgary and moved his family across Canada to accept the position with the defendant. Financial approval for the project was not forthcoming and, shortly after the plaintiff began work with the defendant, the project was cut back. The plaintiff's employment was terminated pursuant to the termination provisions of an employment contract between the parties (i.e. upon one month's notice). The plaintiff successfully sued the defendant employer for negligent misrepresentation.

The Supreme Court of Canada applied the negligent misrepresentation decision of the English House of Lords in *Hedley Byrne & Co. v. Heller & Partners, Ltd*.[22] There existed a "special relationship" between the parties and that, accordingly, the employer's representative owed a duty toward the plaintiff as a prospective employee to exercise reasonable care and diligence in making representations during the hiring interview as to the employment opportunity being offered. The Court found that the employer's representative, by implying that the project was a reality

10(18)-(19), 60, 1160-90 (1990), as amended; The Pension Benefits Act 1992, ch. P-6.001, S.S. §§ 13(4)-(7) (1992), as amended; The Pension Benefits Regulations 1993, ch. P-6.001, R.R.S. 1, § 7(1)-(2) (1993), as amended.

21. Queen v. Cognos, 1 S.C.R. 87 (1993).

22. Hedley Byrne & Co. v. Heller & Partners, Ltd., A.C. 465 (1964), 2 All E.R. 575 (1963).

that had the financial support of the employer and by failing to make inquiries of the intention of senior management regarding the project, made a false and negligent misrepresentation to the plaintiff. This misrepresentation caused the plaintiff to be misled as to the level of risk to him with respect to the project. It also caused the plaintiff to resign from his current, secure, responsible, and well-paying employment position in Calgary and move his family across Canada to accept the position with the defendant. The Court, therefore, held that the representation was false, negligently made, and had clearly induced the plaintiff to act upon it to his detriment by accepting employment with the defendant.

The Supreme Court of Canada held that the existence of an employment contract that provided the employer with the right to terminate the plaintiff's employment upon one month's notice was not a bar to the plaintiff's action in tort for negligent misrepresentation leading to that contract, provided the pre-contractual representations relied upon did not become an express term of a subsequent employment contract. The representation complained about in this case had not been covered by the contract in that the plaintiff's complaint was not with the question of his security in the position that had been offered to him (which was covered by the termination clause), but rather dealt with the existence of the very position itself. The Court held that since there was no disclaimer in the contract with respect to this matter, the plaintiff's action in tort had not been waived in the employment contract.

The plaintiff recovered $567,224 (Cdn.) for damages, representing what the Trial Judge considered necessary to put the plaintiff back into the position he would have been in if the negligent misrepresentation had not been made. This amount was comprised of $50,000 (Cdn.) for loss of income on the basis of the plaintiff's loss of opportunity to earn from other sources; $252 (Cdn.) reimbursement for costs of obtaining new employment; $11,972 (Cdn.) for the total loss of the sale of plaintiff's Ottawa residence, including real estate and legal fees (a claim for moving expenses was denied on the basis that the plaintiff's new employer in Calgary reimbursed him for that sum); and, $5,000 (Cdn.) in general damages for emotional distress.

It follows from the reasoning of the Supreme Court of Canada in *Queen v. Cognos* that an employer and its representatives must take reasonable care to ensure that they make accurate statements to potential employees in the pre-hiring process regarding significant aspects of employment (such as its current projects and product

decisions) that it reasonably foresees will impact or are reasonably likely to impact on the applicant's employment.

2. Labor Relations Bargaining

Following service of notice to bargain, Canadian unionized employers are obligated under Canadian labor relations legislation to bargain collectively in good faith to make every reasonable effort to enter into a collective agreement with the union's bargaining agent.[23] This bargaining duty imposes disclosure obligations on the employer to fully and candidly disclose all relevant information and not to make misrepresentations, in order to facilitate "rationale and informed discussion" for the purposes of reaching a collective agreement and minimizing unnecessary industrial relations conflict.[24]

In this regard, a bargaining agent is entitled to "solicit" relevant information from the employer necessary for it to reach informed decisions in bargaining, and an employer is obligated to provide relevant factual information pursuant to a specific request by the bargaining agent. The relevant factual information that typically may be requested by the union's bargaining agent includes wage rates, surveys, time studies, benefits and their cost, pension costs, and health and safety information.[25]

There is also an evolving requirement in Canadian labor jurisprudence of "unsolicited disclosure," which may, under certain circumstances, require employers at bargaining to reveal, on their own initiative, decisions it has made that will have a significant impact on fundamental terms and conditions of employment, and that the union could not have anticipated, such as a plant closing, subcontracting, or a technological change. The rationale behind this development is that it is an extension of the duty to avoid misrepresentation. In a leading

23. Canada Labour Code, R.S.C. ch. L-2, Part I, § 50 (1985), as amended (entitled Part I—Industrial Relations); Labour Relations Code, S.A. ch. L-1.2, § 58 (1988), as amended; Labour Relations Code, R.S.B.C. ch. 244, §§ 11, 47 (1996), as amended; Labour Relations Act, R.S.M. ch. L-10, §§ 26, 62, 63 (1987), as amended (*see also* C.C.S.M. ch. L-10 (1987)); Industrial Relations Act, R.S.N.B. ch. I-4, § 34 (1973), as amended; Labour Relations Act, R.S.N. ch. L-1, § 71 (1990), as amended; Trade Union Act, R.S.N.S. ch. 475, § 35(a) (1989), as amended; Labour Relations Act, 1995, S.O. ch. 1, Schedule A, § 17 (1995), as amended; Labour Act, R.S.P.E.I. ch. L-1, §§ 22, 24 (1988), as amended; Labour Code, R.S.Q. ch. C-27, § 53 (1977), as amended; The Trade Union Act, R.S.S. ch. T-17, §§ 11(a), 11(c), 33(4) (1978), as amended.

24. *See* UE and DeVilbiss (Canada) Ltd., 2 Can. L.R.B.R. 101 (Ont.) (1976); CUPE and Ontario Cancer Treatment & Research Foundation (Thunder Bay Clinic), 9 C.L.R.B.R. (N.S.) 383 (Ont.) (1985).

25. *See* UE and DeVilbiss, *id.*; IWA, Local 2-69 and Consolidated Bathhurst Packaging Ltd., 83 C.L.L.C. 16,066 (Ontario); The Windsor Star, O.L.R.B. Rep. Dec. 2147 (1983); Royal Conservatory of Music, O.L.R.B. Rep. Nov. 1652 (1985).

Ontario labor case on this issue, *UE, Local 504 and Westinghouse Canada Ltd.*,[26] the Ontario Labour Relations Board held that the failure to disclose information under these circumstances was tantamount to misrepresentation:

> Similarly, can there be any doubt that an employer is under [an] . . . obligation to reveal to the union on his own initiative those decisions already made which have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the current bargain.[27]

This unsolicited disclosure duty is limited to finalized and "sufficiently ripe" decisions that have been made by the employer during the course of collective bargaining and does not extend to an obligation on the employer to reveal "possibilities" that it is "thinking seriously" about.[28]

C. Other Information Specific to the Job

1. Occupational Health and Safety Information

Occupational health and safety legislation in Canada establishes the right of workers to know about hazards and potential hazardous materials in the workplace, and to participate and receive health and safety information from their employers, either directly or through a joint employer/employee occupational health and safety committee. The Canadian approach to workplace health and safety is through an internal joint responsibility system, whereby the workplace parties (employers and employees) are jointly responsible for assessing and determining workplace hazards and health and safety needs of the workers and for providing solutions for health and safety matters to the workplaces. The cornerstone of the internal responsibility system is the joint health and safety committees ("JHSC") consisting of

26. *See* UE, Local 504 and Westinghouse Canada Ltd., 80 C.L.L.C. 16,053 (Ontario Labour Relations Board) (application for judicial review dismissed, *see* C.L.L.C. *loc. cit.* 14,062 (Div. Ct.)); for further discussion on this subject, *see* G.W. ADAMS, CANADIAN LABOUR LAW ch. 10 (2d ed. 2000); D.J. CORRY, COLLECTIVE BARGAINING AND AGREEMENT ch. 8 (2000); and, J. SACK, C.M. MITCHELL & S. PRICE, ONTARIO LABOUR RELATIONS BOARD LAW AND PRACTICE ch. 8 (3d ed. 1997).

27. *See* UE, Local 504 and Westinghouse, *id*.

28. *See* IWA, Local 2-69 and Consolidated Bathhurst Packaging, *supra* note 25.

worker and management representatives who meet regularly to address health and safety matters in the workplace.[29]

JHSCs are given broad powers and have the authority to obtain information from the employer respecting the identification of potential or existing workplace hazards; the testing of equipment or biological, chemical, or physical agents for purposes of occupational health and safety; workplace inspections; workplace accidents; and, work refusals. Employers are responsible for establishing and maintaining a JHSC at the workplace and for posting the names and locations of the JHSC members.[30]

2. Posting Ministry Information and Occupational Health and Safety Legislation

Employers are required to keep a copy of occupational health and safety legislation and certain prescribed Ministry of Labour health and safety information available for reference by employees in the workplace.[31]

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29. Canada Labour Code, R.S.C. ch. L-2, Part II, § 135 (1985) (entitled Part II—Occupational Safety and Health); Safety and Health Committees and Representatives Regulations, S.O.R. 305 (1986), as amended; Occupational Health and Safety Act, R.S.O. ch. O-1, § 9 (1990); Joint Health and Safety Committees—Exemptions from Requirements, Ont. Reg. 385 (1996); An Act Respecting Occupational Health and Safety, ch. S-2.1, §§ 68-86 (1981); Regulation Respecting Health and Safety Committees, O.C. 2025 (1983); Workers Compensation Act, R.S.B.C. ch. 492, §§ 2-4 (1996); Occupational Health and Safety Regulation, B.C. Reg. 296, §§ 3.5, 3.6 (1997), as amended; Occupational Health and Safety Act, R.S.A. ch. O-2, § 25 (1980); Joint Worksite Health and Safety Committee Regulations, Alta. Reg. 197 (1977); The Workplace Safety and Health Act, R.S.M. ch. W-210, § 40 (1987); Workplace Safety and Health Committee Regulation, 88R Man. Reg. 106 (1988); Occupational Health and Safety Act, S.S. ch. O-1.2, §§ 15-22 (1993); The Occupational Health and Safety Regulations, 1996, O.I.C. 618 (1996), as amended; Occupational Health and Safety Act, R.S.N.S. ch. 7, §§ 29-32 (1996); Occupational Health and Safety Act, S.N.B. ch. O-0.2, §§ 14-16 (1983); Occupational Health and Safety Act, Nfld. R.S. ch. O-3, §§ 37-40 (1990); Occupational Health and Safety Act, R.S.P.E.I. ch. 50, § 18 (1987); Safety Act, R.S.N.W.T. ch. S-1, § 7 (1988); Occupational Health and Safety Act, R.S.Y.T. ch. 123, §§ 12-13 (1986).

30. Canada Labour Code, R.S.C. ch. L-2, Part II, §§ 135 (5), 136(3) (1985), (entitled Part II—Occupational Safety and Health); Occupational Health and Safety Act, R.S.O. ch. O-1, § 9(3.2) (1990); The Workplace Safety and Health Act, R.S.M. ch. W-210, §§ 40(5), 41(3) (1987); Occupational Health and Safety Act 1993, ch. O-1.2, S.S. § 17 (1993); Occupational Health and Safety Act, R.S.N.S. ch. 7, § 37 (1996); Occupational Health and Safety Act, ch. 0-0.2, S.N.B. § 14(9) (1993); Occupational Health and Safety Act, Nfld. R.S. ch. O-3, §§ 38(7), 43 (1990); Occupational Health and Safety Act, R.S.P.E.I. ch. 50, § 18 (1987).

31. Occupational Health and Safety Act, R.S.O. ch. O-1, § 25(2)(j)-(k) (1990); Workers Compensation Act, R.S.B.C. ch. 492, §§ 2.9, 2.11 (1996); Occupational Health and Safety Act, R.S.A. ch. O-2, §§ 26, 31(1)(n) (1980); Occupational Health and Safety Act 1993, ch. O-1.2, S.S. § 15 (1993); Occupational Health and Safety Act, R.S.N.S. ch. 7, § 38 (1996); Occupational Health and Safety Act, ch. 0-0.2, S.N.B. § 44 (1983); Occupational Health and Safety Act, Nfld. R.S. ch. O-3, § 36 (1990); Occupational Health and Safety Act, R.S.P.E.I. ch. 50, § 32 (1987); Safety Act, R.S.N.W.T. ch. S-1, § 6 (1988); Occupational Health and Safety Act, R.S.Y.T. ch. 123, § 34 (1986).

3. Exposure to Toxic or Hazardous Substances

On October 31, 1988, the Workplace Hazardous Materials Information System (WHMIS) became law across Canada through federal, provincial, and territorial occupational health and safety legislation. WHMIS is essentially a national system of legislated information transfer flowing from suppliers to employers and from employers to workers, about hazards posed by controller products in the workplace. Under WHMIS legislation, employees must obtain Material Safety Data Sheets ("MSDS") from their suppliers of hazardous workplace materials and make them available to workers who use these materials.

WHMIS laws generally give employees the statutory right to receive information on potentially hazardous substances or materials used or produced in their workplace. The key features of WHMIS legislation are:

(a) criteria to identify hazardous materials;

(b) a requirement to provide information about hazardous materials in the workplace;

(c) a cautionary labeling system for containers of hazardous materials and requirements for the disclosure of information by use of an MSDS;

(d) worker education and training programs; and,

(e) a mechanism to protect sensitive proprietary information.[32]

32. Canada Labour Code, R.S.C. ch. L-2, Part II, (1985), (entitled Part II—Occupational Safety and Health); Canada Occupational Safety and Health Regulations, 1988 S.O.R. 68; Occupational Health and Safety Act, R.S.A. ch. O-2 (1980); Chemical Hazards Regulation, Alta. Regs. (Alberta Regulations) 393 (1988); Workers Compensation Act, R.S.B.C. ch. 492 (1996); Occupational Health and Safety Regulations, B.C. Reg. (British Columbia Regulations) 296, §§ 5.3-5.21 (1997); The Workplace Safety and Health Act, R.S.M. ch. W-210, (1987); Workplace Hazardous Materials Information System Regulation, Man. Reg. (Manitoba Regulations) 52 (1988); Occupational Health and Safety Act, ch. 0-0.2, S.N.B. (1983); Workplace Hazardous Materials Information System (WHMIS) Regulation, N.B. Reg. (New Brunswick Regulations) 221 (1988); Occupational Health and Safety Act, Nfld. R.S. ch. O-3, (1990); Workplace Hazardous Materials Information System Regulations (WHMIS), Nfld. Reg. (Newfoundland Regulations) 1149 (1996); Occupational Health and Safety Act, R.S.N.S. ch. 7 (1996); Workplace Hazardous Materials Information System (WHMIS) Regulations, N.S. Reg. (Nova Scotia Regulations) 196 (1988); Occupational Health and Safety Act, R.S.O. ch. O-1 (1990); Workplace Hazardous Materials Information System (WHMIS) Regulations, R.R.O. 960 (1990); Occupational Health and Safety Act, R.S.P.E.I. ch. 50 (1987); Workplace Hazardous Materials Information System (WHMIS) Regulations, R.R.P.E.I. ch. O-1; An Act Respecting Occupational Health and Safety, ch. S-21, R.R.Q. (1981); Information on Controlled Products Regulation, O.C. 445 (1989); Occupational Health and Safety Act 1993, ch. O-1.2, S.S. (1993); Occupational Health and Safety Regulations, 1996, O.C. 618 (1996); Safety Act, R.S. N.W.T. ch. S-1 (1988); Work Site Hazardous Materials Information System Regulations, R.R.N.W.T. ch. S-2 (1990); Occupational Health and Safety Act, R.S.Y.T. ch. 123 (1986); Workplace Hazardous Materials Information System Regulations, O.I.C. 107 (1988).

4. Extent of Computer Monitoring

a. Privacy Policies

Employers in Canada have generally taken the position that since e-mail and Internet computer systems are company assets provided to employees for business purposes, the employer should have the right to access them at any time. With the recent passage of privacy legislation in Canada, discussed *infra*, a key legal issue to be determined is whether and to what extent this information is protected by the legislation. Accordingly, many Canadian employers have implemented privacy policies or specific e-mail and Internet usage policies that provide employees with express notice that their e-mail messages and Internet usage will not be considered private *vis á vis* the employer and may be viewed by management, in order to remove any reasonable expectation of privacy.

b. Computer Systems Policies

An employer's e-mail and Internet policy will also determine whether an employer can legally justify discipline and dismissal decisions for abuse of these systems. Generally speaking, in order to establish just cause for discipline or dismissal in situations where workplace rules and policies have been violated, employers must demonstrate that:

(a) the employer has a policy prohibiting certain e-mail and Internet uses;

(b) the rules were clearly communicated to employees;

(c) the employee was clearly made aware that discipline or dismissal is the penalty for disobedience;

(d) the rules were consistently enforced; and,

(e) the employee violated the policy.

An example of an application of these principles is the recent labor arbitration decision in *Consumers Gas v. Communications, Energy and Paperworkers Union, (Primiani Grievance)*,[33] in which the arbitrator considered the grievance of a unionized employee (the grievor in this case) who had been discharged for receiving and distributing pornographic e-mail messages. The employer became aware of the situation when two large messages "crashed" the

33. Consumers Gas v. Communications, Energy and Paperworkers Union (Primiani Grievance), O.L.A.A. No. 649 (1999).

company's Internet gateway. The employer launched an investigation and discovered that a manager had sent the messages to a number of individuals, including the grievor who had further distributed the material. The employer had a policy that prohibited pornographic materials, or any other materials prohibited by law, from being accessed or distributed using e-mail or the Internet.

Although the employer's investigation revealed widespread violation of the policy from management level downward, only those employees responsible for crashing the system were discharged. In discharging the manager and grievor, the employer drew a distinction between those individuals who received and stored the images, and those who forwarded them on to others. As the manager and grievor actively distributed the material, their conduct was viewed by the employer as more serious.

The arbitrator noted that while the employer had a policy that prohibited this conduct, the policy was not communicated effectively to the employees and, in fact, the grievor was not aware of the company's policy. The arbitrator recognized, however, that corporate property is for corporate use and that even where a formal policy is not in place, common sense should still prevail:

> Lack of knowledge of the policy however, in this case does not assist the grievor. Common sense should have prevailed, and suggested to the grievor that the [computer system] is not for her own extensive use and that the transmission and storage of sexual material would not be acceptable to the business . . . . [In] determining what a reasonable employee would understand to be an appropriate use of the email, . . . the criteria would be whether the receiver or sender would want the message to be made public at the workplace. This is a common sense test.[34]

While the arbitrator was clearly of the view that serious misconduct had occurred, he took note of the fact that the employer shared some responsibility for what occurred. In this regard, the arbitrator found that the employer's policy was not well known among the employees and the employer did not actively monitor compliance with the policy. In previously turning a blind eye to abuse, the arbitrator concluded that the employer had allowed an overly "permissive culture" to take hold and, therefore, was unable to rely on the policy to justify dismissal of the grievor.[35] The arbitrator overturned the grievor's discharge and the arbitrator substituted a one-month suspension.

34. *Id.* ¶ 71.
35. *Id.* ¶ 72.

Employers in non-unionized workplaces must also be able to establish a breach of an enforceable policy under these same principles in order to be able to uphold a termination for cause by the Canadian courts. Failure to establish cause for dismissal can result in substantial severance liability under Canadian employment standards legislation and wrongful dismissal law.

D. Information Contained in the Employee's Personnel File

On April 4, 2000, the federal government passed the Personal Information Protection and Electronic Documents Act ("PIPEDA"),[36] which came into force on January 1, 2001. PIPEDA was enacted to address the collection and dissemination of personal information about individuals, including employees, as part of the government's larger agenda to develop, support, and promote electronic commerce in Canada. Accordingly, the PIPEDA governs, among other things, an employer's collection, use, and disclosure of personal information about its employees. It also addresses an employee's right to obtain access to his or her personal information.

PIPEDA is federal legislation, which currently only applies to federally-regulated employers. However, PIPEDA provides that, effective January 1, 2004, it will apply to all provincially-regulated employers unless the provinces adopt substantially similar legislation by that date. Currently, Quebec is the only province that has substantially similar privacy legislation[37] and, accordingly, Quebec employers will be exempt from the PIPEDA.

"Personal information" is broadly defined in the legislation as information about an identifiable individual. Privacy legislation requires an organization to make readily available to individuals specific information about its policies and practices relating to the management of personal information, including:

> (a) informing an individual about the types of personal information it wishes to collect and the purposes for that collection;
>
> (b) obtaining consent for the collection, use, and disclosure of personal information;
>
> (c) collection, use, and disclosure of personal information according to the rules set out in the Act;

36. Personal Information Protection and Electronic Documents Act, S.C. ch. 5 (2000).

37. Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q. ch. P-39.1 (1993).

(d) provide access and correct errors to personal information upon request; and,

(e) ensure the secure storage and destruction of personal information.

Recourse under Canadian privacy legislation for individuals who are refused access to their file is heard by privacy commissions. Failure to comply with privacy legislation may lead to access orders or fines. As well, officers and directors of a company that commit an infraction will also be liable if they have authorized or consented to the violation.

E. Job References About the Employee Given by the Employer to Others

Privacy legislation, discussed *supra*, prohibits employers from providing personal information concerning its former employees to third parties without the former employee's consent to disclose this information. Canadian employers are not under a legal duty to provide job references about its former employees. However, in some cases, a failure to provide a justified positive reference has led to slightly increased wrongful dismissal damage awards, where an employer has refused to provide the reference;[38] in some cases, has significantly increased wrongful dismissal awards, where the former employer has given unjustified negative references;[39] and, in some cases, courts have held that failure to provide a reference should not increase wrongful dismissal awards unless the employee can show that the lack of a reference actually affected their reemployment efforts.[40]

The usual law of defamation (libel and slander) does not apply to an employment reference since that is a situation of qualified privilege. Accordingly, even if untrue negative comments are made about a former employee in response to a job reference inquiry,

38. Humphrey v. Maritime Paper Products Ltd., 30 C.C.E.L.2d 9 (1997) (New Brunswick Queen's Bench); Legere v. YMCA-YWCA of Saint John, 32 C.C.E.L.2d 93 (1997) (New Brunswick Queen's Bench); Bogden v. Purolator Courier Ltd., 19 C.C.E.L.2d 77 (1996) (Alberta Queen's Bench).

39. Trask v. Terra Nova Motors Ltd., 35 C.C.E.L. 208, 89 Nfld. & P.E.I.R. 130, 278 A.P.R. 130 (Nfld. T.D.) (1991), *aff'd* 9 C.C.E.L.2d 157, 127 Nfld. & P.E.I.R. 310, 396 A.P.R. 310 (Nfld. Court of Appeal) (1995); Yeomans v. Simon Fraser University, 20 C.C.E.L.2d 224 (1996) (British Columbia Supreme Court).

40. Ditchburn v. Landis & Gyr Powers Ltd., 29 C.C.E.L.2d 199 (1997) (Ontario Court of Appeal), *varying* 16 C.C.E.L.2d 1 (Ontario General Division); Kalaman v. Singer Valve Co., 19 C.C.E.L.2d 102 (1996) (British Columbia Supreme Court), *varied on other grounds by* 31 C.C.E.L.2d 1 (1996) (British Columbia Court of Appeal); Taylor v. CBHN Information Systems Ltd., 25 C.C.E.L.2d 36 (1996) (British Columbia Supreme Court); Lim v. Delrina Canada Corp., 8 C.C.E.L.2d 219 (1995) (Ontario General Division).

provided the referee honestly believed the facts asserted, the employee will not succeed in an action for defamation. In order to succeed, the former employee must prove that the comments were made maliciously and in bad faith, such that the referee did not believe the truth of what was said.[41]

If a former employer misrepresents certain significant aspects of a former employee's performance to a prospective employer and the employer hires the employee as a result of that reference, the person providing the reference and their company could be liable for damages for negligent misrepresentation.

The Ontario *Consumer Reporting Act*[42] requires an Ontario employer who does not hire an individual as a result of a negative reference, to inform the individual of the negative reference and the source of that reference. In fact, few Ontario employers follow this practice and there have been no prosecutions to date pursuant to this Act. The Act also prohibits employers from seeking personal information concerning candidates for positions unless those applicants have given them, in writing, permission to seek such references. Canadian employers typically obtain this authorization on the employment application form.[43]

III. WHAT MAY EMPLOYEES LEARN ABOUT THE PROSPECTIVE EMPLOYER

A. The Company's Injury or Health and Safety Record

1. Posting of Occupational Health and Safety Orders and Notices

Where a Ministry health and safety inspector, under the authority of occupational health and safety legislation, issues an order or direction for compliance, a notice of the order must be posted at the workplace.[44]

41. Korach v. Moore, 76 D.L.R.4th 506 (1991), 1 O.R.2d 275 (Ontario Court of Appeals), *leave to appeal to Supreme Court of Canada refused* 79 D.L.R.4th vii, 49 O.A.C. 399n.

42. Consumer Reporting Act, R.S.O. ch. 89 (1980).

43. H.A. LEVITT, THE LAW OF DISMISSAL IN CANADA 473-74, 511 (2nd ed. 1992).

44. Canada Labour Code, R.S.C. ch. L-2, Part II, § 130(2) (1985) (entitled Part II—Occupational Safety and Health); Occupational Health and Safety Act, ch. O-1, R.S.O. § 57(10) (1990); An Act Respecting Occupational Health and Safety, ch. S-2.1, R.R.Q. §§ 182, 186, 189, 190 (1981); Workers Compensation Act, R.S.B.C. ch. 492, §§ 27, 71(3) (1996); Occupational Health and Safety Act, ch. O-2, R.S.A. § 31(1)(u) (1980); General Safety Regulation, Alta. Regs. (Alberta Regulations) 448 (1983); The Workplace Safety and Health Act, R.S.M. ch. W-210, §§ 27-29 and 36(3) (1987); Occupational Health and Safety Act 1993, ch. O-1.2, S.S. §§ 34-35 (1983); Occupational Health and Safety Act, R.S.N.S. ch. 7, § 39(1) (1996); Occupational Health and Safety Act, R.S.P.E.I. ch. 50, § 8(6) (1987); Safety Act, R.S.N.W.T. ch. S-1, § 15 (1988); Occupational Health and Safety Act, R.S.Y.T. ch. 123, § 44 (1986).

2. Posting of Workers' Compensation Record

Ontario employers whose workplaces are covered by the workers' compensation insurance plan established under the Ontario Workplace Safety and Insurance Act, 1997,[45] are mandated to provide employees with information regarding its workers compensation injuries record and post the annual summary of data compiled by the Ontario Workplace Safety and Insurance Board relating to compensable accidents at its workplace.[46]

B. Record of Employee Complaints Against It Filed with Public Agencies (Human Rights Commission, Labor Board, Ministry of Labor, Employment Standards, etc.)

Freedom of association, the right to organize, and the principle of free collective bargaining are concepts inherent to the Canadian system of labor relations established by federal and provincial labor legislation.[47] Within the legislation, employers are prohibited from interfering with the right of employees to organize, be represented by a trade union, participate in collective bargaining and other lawful union activities, or otherwise violate protections provided in the labor relations legislation. Such conduct constitutes an "unfair labour practice."[48]

Remedial action for unfair labor practices is available upon application to a labor relations board. In addition to declarations, directions, and monetary remedies, there are labor relations cases in the federal jurisdiction, Ontario, and British Columbia, that contain orders requiring employers to post and/or mail notices and/or board

45. Workplace Safety and Insurance Act, S.O. ch. 16, Schedule A (1997), as amended.

46. Occupational Health and Safety Act, R.S.O. ch. O-1, § 12 (1990).

47. Canada Labour Code, R.S.C. ch. L-2, Part I, § 8(1) (1985) (entitled Part I—Industrial Relations), as amended; Labour Relations Code, ch. L-1.2, S.A. § 19(1) (1988), as amended; Labour Relations Code, R.S.B.C. ch. 244, §4(1) (1996), *effective* April 21, 1997, as amended; The Labour Relations Act, R.S.M. ch. L-10, § 5(1) (1987) (*see also* C.C.S.M. ch. L-10), as amended; Industrial Relations Act, R.S.N.B. ch. I-4, § 2(1) (1973); Labour Relations Act, R.S.N. ch. L-1, § 5(1) (1990); Trade Union Act, R.S.N.S. ch. 475, § 13(1) (1989); Labour Relations Act, 1995, ch. 1, Schedule A, S.O. § 5 (1995), as amended; Labour Act, R.S.P.E.I. ch. L-1, § 9(1); Labour Code, ch. C-27, R.S.Q. § 3 (1977), as amended; The Trade Union Act, R.S.S. ch. T-17, § 3 (1978).

48. Canada Labour Code, R.S.C. ch. L-2, Part I, § 98 (1985) (entitled Part I—Industrial Relations), as amended; Labour Relations Code, ch. L-1.2, S.A. § 11(2) (1988), as amended; Labour Relations Code, R.S.B.C. ch. 244, § 14(3) (1997), *effective* April 21, 1997, as amended; The Labour Relations Act, R.S.M. ch. L-10, § 30(2)-(3) (1987) (*see also* C.C.S.M. ch. L-10); Industrial Relations Act, R.S.N.B. ch. I-4, §§ 106(3), 103(6), 107(1)-(2); Labour Relations Act, R.S.N. ch. L-1, § 123(2)-(4); Trade Union Act, R.S.N.S. ch. 475, §§ 36(1)-(2), 55(5), 56(1)(b), 56(2); Labour Relations Act, 1995, ch. 1, Schedule A, S.O. § 96(4) (1995); Labour Act, R.S.P.E.I. ch. L-1, § 11(3) (1988), as amended; Labour Code, ch. C-27, R.S.Q. § 16 (1977); The Trade Union Act, R.S.S. ch. T-17, § 9 (1978).

decisions to employees advising them that it has been found to have violated labor laws and affirming that it will comply with the legislation in the future. These remedial orders are issued by labor relations boards in order to dispel fears that may have been created among employees by the actions of the employer.[49] In particular, the Ontario Labour Relations Board in *USWA and Radio Shack (Re)* has characterized the aim of such directives as being the amelioration of the lingering psychological effects and demoralizing effects of unfair labor practices and the consequent injury to the union's organizational support or bargaining strength.[50]

C. Frequency of Employee Litigation Against It

The common law courts of general jurisdiction that hear non-union employment law cases have limited their remedies to monetary remedies. Employees are generally not apprised of the nature or frequency of litigation against its employer unless the litigation receives publicity through the media. The public, including employees, can obtain court decisions and awards regarding its employer from the courthouse that issued the award, or, if the award is reported, from a court reporting service.

As indicated *supra*, on December 20, 2000, the Ontario Legislature passed Bill 147, the Employment Standards Act, 2000,[51] which repealed and replaced the former Employment Standards Act.[52] Under the new legislation, an employment standards officer may require an employer to post, and to keep posted, in or upon the employer's premises in a conspicuous place or places, where it is likely to come to the attention of its employees, any notice relating to the administration or enforcement of the Act or the regulations that the officer considers appropriate, or a copy of a report or part of a report

49. USWA and Radio Shack (*Re*), 80 C.L.L.C. 16,003 (Ontario Labour Relations Board), *application for judicial review dismissed*, *sub nom*. Re Tandy Electronics and USW, 30 O.R.2d 29 (1980) (Divisional Court), *leave to appeal to the Ontario Court of Appeals refused* March 10, 1980; Westinghouse Canada Ltd., 80 C.L.L.C. 16,053, *application for judicial review dismissed*, C.L.L.C. *loc cit*. 14,062 (Divisional Court); Canadian Imperial Bank of Commerce, St. Catharines, 1 Can. L.R.B.R. 307 (Can.) (1980); Frank J. Nowotniak, 2 Can. L.R.B. 466 (Can.) (1979); UFCW and Jacmorr Manufacturing Ltd. (*Re*), O.L.R.B. Rep. Nov. 1709 (1986), *supplementary reasons*, 87 C.L.L.C. 16,048 (Ontario Labour Relations Board); Valdi Inc., 3 Can. L.R.B. 299 (Ont.) (1980); Plaza Fiberglas Manufacturing Ltd., O.L.R.B. Rep. Feb. 192 (1990), *application for judicial review dismissed*, O.L.R.B. Rep. Jan. 83 (Div. Ct.) (1993); City of North York, O.L.R.B. Rep. Sept. 1170 (1995).

50. USWA and Radio Shack, *id.* at 395-408.

51. *See supra* note 7.

52. *See supra* note 8.

made by the officer concerning the results of an investigation or inspection.[53]

D. Disclosure of Compensation

1. Disclosure of Executive Compensation

As of October 31, 1993, the Ontario Securities Commission required public companies that issue securities in Ontario to disclose details of executive pay for the Chief Executive Officer and the next four most highly paid executive officers of the company.[54] Disclosure of compensation includes contributions to defined contribution retirement plans and amounts related to the resignation, termination, or retirement of the named executive. In addition, a pension plan table must be provided in the disclosure, setting out estimated annual benefits payable upon retirement under defined benefit retirement plans (including supplementary plans), where benefits are determined primarily by the executive's final compensation. This table must show estimates at specific compensation levels and years of service. Disclosure must also be made of each named executive's credited service with the company.

2. Disclosure of Union Officials Compensation

As indicated *supra*, on November 2, 2000, Ontario's Minister of Labour introduced Bill 139, the Labour Relations Amendment Act, 2000.[55] Effective January 1, 2000, the new legislation required unions to disclose the salaries of union officials and employees with an annual income from salary and benefits of $100,000 (Cdn.) or more. Unions must provide those compensation disclosure statements to the Minister annually, and to individuals they represent on written request.[56]

IV. CONCLUSION

Canadian employers are obligated to disclose information to their employees or prospective employees in order to comply with human rights, employment standards, pension, securities, labor, and

53. *See supra* note 51, § 93.

54. Securities Act, R.S.O. ch. S-S (1990), as amended; General Regulation, R.R.O. 1015 (1990), Ont. Reg., as amended, No. 638 (1993).

55. *See supra* note 4.

56. *See supra* note 6, § 92.1 (1995), amended by S.O. ch. 38, § 12 (2000).

occupational health and safety legislative requirements, or to avoid common law wrongful dismissal liability. Disclosure of information to employees is generally intended to inform them of their employment rights and protect them in the workplace.