LexisNexis Canada Coronavirus Law Guide – What's New

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The COVID-19 global pandemic is affecting every segment of society. To help members of the legal profession through this crisis, LexisNexis Canada has made some of its most pertinent analytical content available to customers of *Lexis Advance Quicklaw* in the form of 3 PDF documents, two in English and one in French:

- **LexisNexis Canada Coronavirus Law Guide – What's New**
- LexisNexis Canada Coronavirus Law Guide
- Guide juridique LexisNexis Canada sur le Coronavirus

Please note that some of this content is already available in *Lexis Advance Quicklaw*, and most of the remainder will soon be there. We will be launching a new **Health Law** package on *Advance* in the coming months, an important suite of searchable analytic content in Health Law. This way, the content will be available both in print and online, in order to best meet your needs.

The **LexisNexis Canada Coronavirus Law Guide – What's New** is a curated collection of timely, relevant content regarding real estate law, employment law, public health law and emergency powers, excerpted from some of LexisNexis Canada's leading analytical sources, including:

1. An article from a recent issue of our Rule of Law Report, about the U.N. Security Council's plans to address peace and security matters during the pandemic
2. Articles from our Canadian Employment Safety and Health Guide newsletter, including return to work issues and domestic violence and telework
3. Articles from our Employment and Labour Law Reporter newsletter, including monitoring employees who are teleworking and supporting employees' mental health during the pandemic
4. A recent issue of our Canadian Employment Law Guide newsletter, including an article on key considerations when re-opening your business
5. A recent issue of our Health Law Matters newsletter, including an article on the sharing of patient data in COVID-19 healthcare
6. An article from a recent issue of our Ontario Real Estate Law Developments newsletter, including the rent assistance program for small business tenants

Be sure to consult the other legal resources we have made freely available, including the Lexis Practice Advisor Coronavirus Guidance document kit, and COVID-19 Updates in our current awareness service, The Lawyer's Daily.

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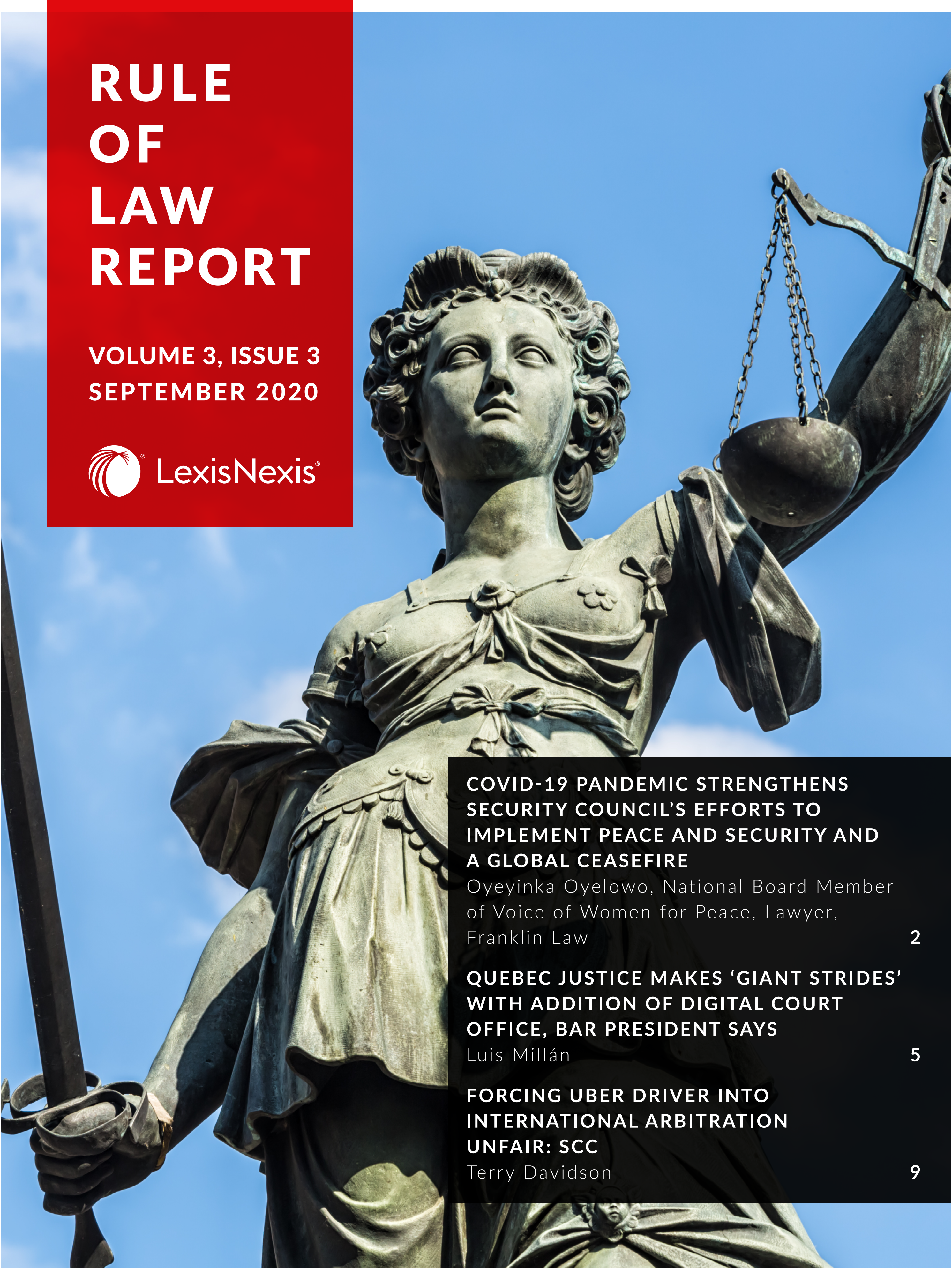

RULE OF LAW REPORT

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COVID-19 PANDEMIC STRENGTHENS SECURITY COUNCIL'S EFFORTS TO IMPLEMENT PEACE AND SECURITY AND A GLOBAL CEASEFIRE
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COVID-19 PANDEMIC STRENGTHENS SECURITY COUNCIL'S EFFORTS TO IMPLEMENT PEACE AND SECURITY AND A GLOBAL CEASEFIRE

Oyeyinka Oyelowo
National Board Member of Voice of Women for Peace,
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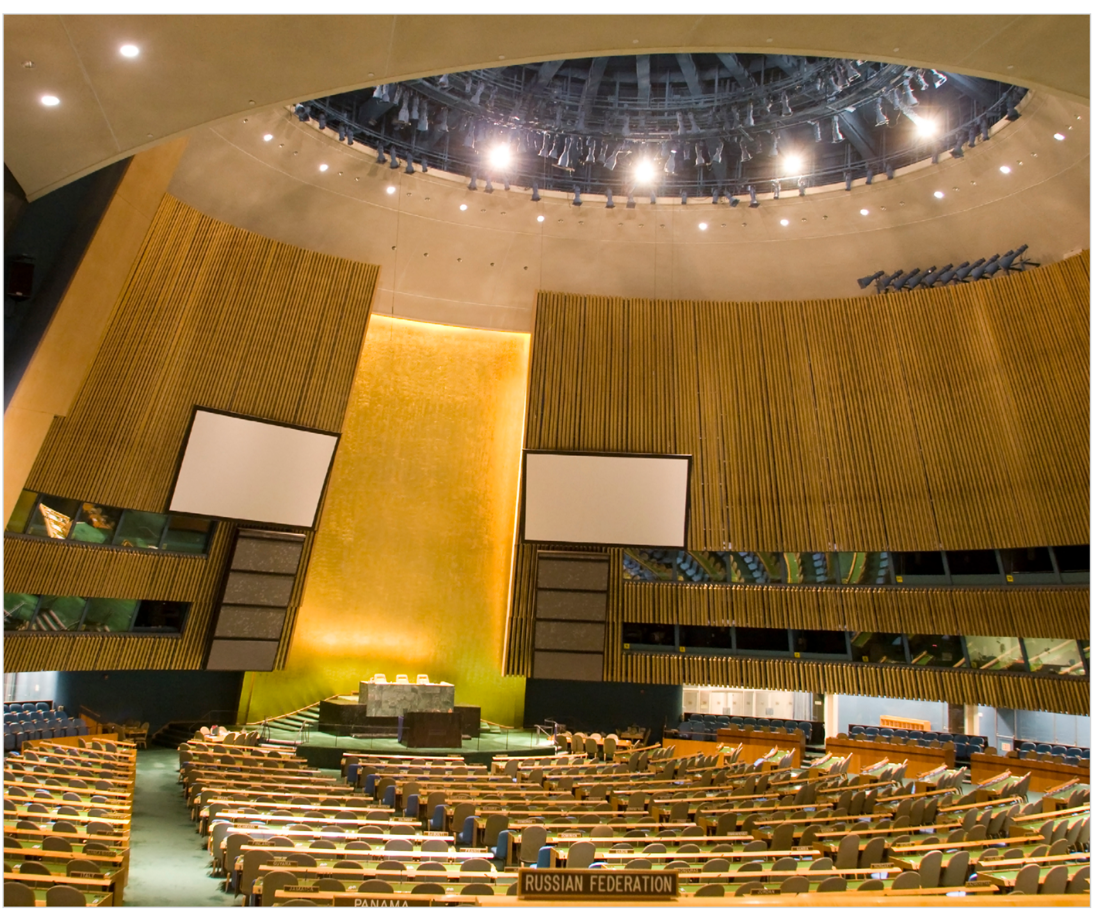
On May 4, 2020, H.E. Mr. Sven Jürgenson, Permanent Representative of Estonia to the United Nations Security Council utilized high tech to conduct a dialogue to ensure transparency around the Security Council's ongoing plans to address Peace and Security matters amidst the COVID-19 pandemic.

The dialogue on May 4, 2020 is a testament to how technology can be used to facilitate respect for international law, cyber security, transparency and rules-based world order, the guiding principles highlighted by H.E Jürgenson for Estonia's presidency in the month of May. H.E Jürgenson indicated that cyber security is a very high priority, especially as Estonia's own government has seen cyberattacks in the past.



The dialogue was virtually attended by approximately 90 participants from civil society organizations from various parts of the world. The dialogue was arranged by the World Federation of United Nations Associations (WFUNA) and it was the twenty-sixth installment in a series of monthly dialogues between the President of the UN Security Council and Civil Society organizations. The dialogue highlighted the council's continuous efforts to provide digital solutions for conflict prevention and good governance in for conflict-ridden nations.

> "Security Council president, H.E Jürgenson echoed the UN Secretary General's call for an immediate global ceasefire, encouraging member states to reduce military spending and allocate funding to urgent domestic and international human security needs."

He indicated that the Security Council planned to continue their work despite the global standstill created by the Covid-19 pandemic. The council has mobilized peace and security initiatives by planning several virtual events to ensure accountability of Estonia's council governance efforts in May.

H.E Jürgenson indicated that the council intends to renew the mandate of the African union mission in Somalia, the UN assisted mission in Iraq and as well extend sanctions in South Sudan. The Security council has previously supported concrete structural conflict prevention initiatives, early warning, and preventive diplomacy in the Middle East and Africa.

For example, 80% of the female population in Syria is widowed due to violent conflict. Widows have no rights to property, leaving daughters and sons vulnerable to poverty, child marriage and extremist recruitment. H.E Jürgenson highlighted the importance and role of civil society and NGOs directly participating in decision-making to inform the world about the sufferings of women and children in warfare and direct conflict.

The dialogue was a briefing for civil society representatives on Estonia's presidency of the Security Council for the month of May, and it was moderated by WFUNA's Secretary-General, Mr. Bonian Golmohammadi.

During the dialogue, organizations were given the opportunity to pose questions in relation to topics such as Youth, Peace, and Security, as well as COVID-19 related topics on Humanitarian Access, and the call for a Global Ceasefire by the United Nations Secretary General. I had the opportunity to attend the dialogue as a National Board member of the NGO, Canadian Voice of Women for Peace.

The Security Council will have three consecutive European presidencies, specifically the presidency held by Estonia in May, France in June and Germany in July. In order to ensure transparency, H.E Jürgenson proposes monthly overviews of the UNSC's work using video conferencing and live streaming to uphold public accountability.

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NOT TURNING A BLIND EYE: ADDRESSING DOMESTIC VIOLENCE, TELEWORK, AND PANDEMIC-RELATED EMPLOYMENT CONSIDERATIONS IN CANADA

— Rika Sawatsky, Joshua Sadovnick, Piers Fibiger, Jonathan Deschamps, Antoine Gagnon, and Stéphane Erickson. © Norton Rose Fulbright Canada LLP. Reproduced with permission.

Rates of domestic violence have increased by 20 to 30 percent across Canada during the COVID-19 pandemic, coinciding with the shift of the workplace from office to home. While employers have a number of legal obligations regarding workplace health and safety and workplace domestic violence, the intersection of these obligations for teleworking employees has received little attention. This legal update explores what lies at that intersection in five major Canadian jurisdictions: Ontario; Quebec; British Columbia; Alberta; and federal.

It should be noted that certain non-legal expert-recommended options for addressing domestic violence in the employment context are discussed in this piece. Those options stem from research by and experience from the Centre for Research & Education on Violence Against Women & Children and should be construed as such.

What is domestic violence?

Domestic violence is an abuse of power that can manifest physically, sexually, psychologically, and/or emotionally by an intimate partner or family member and can include, among other things:

- forced confinement;
- deprivation of the necessaries of life;
- intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property;
- unreasonable restrictions on, or prevention of, financial or personal autonomy;
- stalking or following; and
- intentional damage to property.

Although "domestic violence" is the most commonly used term in employment-related legislation across Canada, some jurisdictions use the term "family violence" or "interpersonal violence" instead. Domestic violence can affect anyone, regardless of their sex, gender, gender identity or expression, sexual orientation, age, race, economic status, or any other characteristic.

A survey of 8,000 Canadians conducted in 2014 found that over a third of workers have experienced domestic violence in their lifetime, over half of whom have experienced violence at or near the workplace and 82 percent of whom have reported domestic violence negatively affecting their work performance. That equates to over 25 percent of every workforce being negatively affected by domestic violence, prior to the pandemic.

As COVID-19 cases surged across Canada, so too did domestic violence rates. Domestic violence reports increased by 20 to 30 percent and crisis calls by 400 percent in some Canadian regions. A Statistics Canada survey released in early April 2020 reported one in 10 women saying they are "very or extremely" concerned about the possibility of violence in their homes due to the stress of confinement alone. Certain experts attribute these numbers to, among other things, the pressure-cooker environment created by increased economic insecurity, social isolation, and an inability to leave abusive situations due to lockdowns.

And so, as employers shifted the workplace from the office to employees' homes, the mitigation of one danger might have inadvertently exacerbated another. Unquestionably, there are some teleworking employees experiencing domestic violence right now. But what should employers do about it?

Legal landscape for employers in Canada

Possible answers to this question lie at the intersection of teleworking and workplace domestic violence laws. Many Canadian jurisdictions have occupational health and safety legislation providing for the safety of employees working from home. Most jurisdictions also have legislation providing for the protection of workers from domestic violence in the workplace. From this, it is possible to infer, in certain circumstances, an obligation on employers to protect workers from domestic violence when the home is the workplace, but the absence of jurisprudence on this subject leaves the extent of employer obligations open to debate. To date, no jurisdiction has implemented specific legal requirements in this regard, but there are some considerations that merit discussion. In this section, we discuss:

- various laws on workplace domestic violence;
- how these laws relate to telework (i.e., working remotely); and
- non-legal options that employers may implement to support employees who may be experiencing domestic violence.

Domestic violence laws

Employers bear legal obligations for workplace domestic violence primarily under four types of legislation: (1) employment standards; (2) occupational health and safety; (3) human rights; and (4) privacy. These four areas of the law are not exhaustive, and employers should remain cognizant of other statutory obligations that may be engaged by workplace domestic violence.

- **Employment Standards**: Employees across the five jurisdictions are entitled under employment standards legislation to take domestic violence leave in order to, among other things, seek medical help, counselling, legal or law enforcement assistance, or relocate from an abusive home. British Columbia, Ontario, Quebec, and the federal jurisdiction entitle employees to be paid for part of their leaves.
- **Occupational Health and Safety**: In Ontario, Alberta, British Columbia, and the federal jurisdiction, the occupational health and safety ("OHS") laws recognize domestic violence in the workplace as a form of workplace violence. Generally speaking, OHS legislation requires employers to take precautions to protect workers from workplace violence through policy development and training and to respond when they become aware, or ought to be aware, of the likelihood of domestic violence exposing an employee to injury. The extent of those precautions are worded differently across the different jurisdictions, as follows:
    - "the prescribed steps to prevent and protect against" in the federal jurisdiction.
    - "every precaution reasonable in the circumstances" in Ontario.
    - "as far as reasonable practicable" in Alberta.
    - "all reasonable steps" in British Columbia.

  - In Quebec, the *Act respecting occupational health and safety* ("Quebec AOHS") does not specifically recognize domestic violence in the workplace as a form of workplace violence; however, employers bear a general obligation under the Quebec AOHS to "protect the health and ensure the safety and physical well-being of the workers."

    Furthermore, the Quebec *Act respecting labour standards* provides that employers "must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it." The employer must also "adopt and make available [...] a psychological harassment prevention and complaint processing policy." Psychological harassment is defined as "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee" and also includes "verbal comments, actions or gestures of a sexual nature."

- **Human Rights**: Given the generally gendered nature of domestic violence and the recognized significance of intersectionality, domestic violence could theoretically and in some cases engage human rights obligations on the following protected grounds: sex, gender, marital status, family status, and disability (including mental health), among others. Also, Quebec's *Charter of human rights and freedoms* provides that "[e]very person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being." However, there is limited jurisprudence on discrimination claims arising out of domestic violence against employees.
- **Privacy**: When abuse is disclosed, employers must balance employee safety with applicable privacy laws. The federal jurisdiction, Alberta, British Columbia, and Quebec all have privacy legislation applicable to private-sector workplaces regarding the collection, storage, distribution, and disclosure of "personal information." In Ontario, private sector employees enjoy protections under privacy legislation on personal health information, which has been declared substantially similar to the federal *Personal Information Protection and Electronic Documents Act*. In addition, Ontario employment standards and OHS laws have confidentiality provisions applicable to employers. For example, employers are required to only reveal the minimum information necessary for protecting workers, and they must have systems in place to protect the confidentiality of employee records and leaves of absence. Finally, Canadian courts have held that privacy-related issues may also be subject to tort liability, including the torts of public disclosure of private facts and intrusion upon seclusion.

Telework-related laws

Currently, there is not a unified approach to extending statutory health and safety obligations to at-home or teleworking workspaces. Indeed, there is an ostensible divide in the approaches taken by the federal jurisdiction, Ontario, and Quebec on the one hand, and British Columbia and Alberta on the other, with the latter group imposing arguably more stringent obligations on employers.

- **Federal**: While the "work place" is broadly defined by the *Canada Labour Code* as any "place where an employee is engaged in work for the employee's employer," the Supreme Court of Canada ruled in a 2019 decision that an employer's health and safety obligations are not limitless and cannot extend to unreasonable circumstances. In *Canada Post Corp. v. Canadian Union of Postal Workers*, the employer's specific obligation to inspect a workplace was limited by this case to parts of the workplace over which the employer has control. For its part, though not required by law, the Canadian Centre for Occupational Health and Safety recommends that employers create telework policies that consider health and safety protections for teleworking employees and offer the same level of safety and security as the regular workspace.
- **Ontario**: The *Occupational Health and Safety Act* defines a "workplace" as including any "land, premises, location or thing at, upon, in or near which a worker works" but specifically excludes "private residences." However, the exclusion was introduced into the legislation at a time when teleworking was uncommon, and the Hansard reports from 1978 reveal that the exclusion contemplated only domestics at the time. As well, the case law out of the Workplace Safety and Insurance Appeals Tribunal and Ontario Labour Relations Board suggests that working at home may not preclude coverage by the legislation. Also, the Workplace Safety and Insurance Board has confirmed that workers' compensation benefits are available for accidents sustained at home in the course of employment. Additional commentary on teleworking laws in Ontario can be found here.

- **Quebec**: The *Quebec AOHS* defines the "workplace" as "any place in or at which a person is required to be present out of or in the course of work, including an establishment and a construction site." This broad definition could include a private residence in which an employee is teleworking. Indeed, Quebec's courts have already held, in a workplace-accident context, that a domestic residence could, in some cases, be considered as a workplace.
- **British Columbia**: The *Workers Compensation Act* defines the workplace as: "any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work," extending employer obligations and workers compensation to the at-home workplace. British Columbia's *Occupational Health and Safety Regulation* also provides for the protection of workers when they are working alone or in isolation. Employers are encouraged to have employees fill out a hazard assessment checklist or conduct a video inspection of the at-home workplace. Employers should also have a system to check in with employees with a daily roll call, whether by email or phone, and ensure that there is a procedure for following up if an employee does not respond or requires emergency assistance.
- **Alberta**: The *Occupational Health and Safety Act* defines a worksite as "a location where a worker is, or is likely to be, engaged in any occupation and includes any vehicle or mobile equipment used by a worker in an occupation." A "private dwelling" exclusion similar to the exclusion in the Ontario legislation was removed in 2018, thereby extending the workplace to the home for teleworking employees. Employers in Alberta should follow the same practices of their counterparts in British Columbia, reviewed above. Of note, if an employer believes an employee has engaged in domestic violence against another in the workplace, the employer has the added obligation of taking reasonably practical steps to prevent such conduct from continuing, a responsibility that can be increasingly complicated when the employee is teleworking.

In short, British Columbia and Alberta definitively recognize the home office as a workplace for OHS purposes. And, the policies and jurisprudence coming out of Quebec, Ontario, and the federal jurisdiction suggest that telecommuters in those jurisdictions may, in certain cases, be entitled to OHS protections as well. The reality that many Canadian workers have transitioned from working at the office to working at home may provide a further policy impetus to recognize a broader definition of the workplace.

Options

In the absence of definitive statutory or judicial guidance, the intersection of the foregoing workplace domestic violence and teleworking laws remains unclear. However, there are a number of options recommended by some non-legal domestic violence experts that may help enhance the protection of teleworkers in certain cases. Below is a summarized compilation of these options offered by the Centre for Research & Education on Violence Against Women & Children in their COVID-19 Domestic Violence Briefings.

- **Talk about domestic violence**. Work toward eliminating the stigma associated with domestic violence by talking about it in workplace communications so that employees feel comfortable about coming forward. In so doing, consider acknowledging that domestic violence is a social problem, not a private problem, and assure all employees that they will not be viewed as less than professional or otherwise deficient because of a disclosure of domestic violence. In these communications, be sure to clarify that confidentiality will be protected.
- **Develop a communication strategy** and communicate regularly with employees to reduce isolation. Provide employees with guidance on what to expect if they disclose violence and reassure them that they will receive employer support and job security. Some options in this regard may include non-traditional means of communication, such as hand signals and code words for use on voice and video calls that employees can use to silently indicate a need for help while at home. This, of course, does not displace the critical role that emergency response services, such as the police, can play should a situation arise where a threat of danger is imminent and serious.
- **Share internal information and resources** that already exist in the workplace related to domestic violence, such as domestic violence leaves. It is possible that in some organizations, junior or mid-level managers may not be equipped to deal with situations of domestic violence in the physical or teleworking workplace. To address this, employers may therefore consider offering training sessions, such as online webinars, for managers and team leaders on the issue of domestic violence and how to support survivors.

- **Provide external information and resources** and make employees aware of ongoing services and resources in the community, such as shelters and transition houses, crisis lines, and legal clinics.
- **Adapt workplace security measures** to the at-home context where possible. For example, employers can establish pre-set emergency telephone numbers or panic alarms connected through employees' mobile phones and ensure that company-established website access is inaccessible by third parties. For some employers, such measures may not always be feasible. Measures in this regard should therefore be adapted to the specific workplace, based on the employer's resources and realities.
- **Be responsive and supportive** in a non-judgmental manner when employees disclose abuse. To achieve this, employers may consider working with police and domestic violence experts to carry out threat assessments and safety plans, help employees access legal and police protection, ensure accessibility to employee assistance plans, and encourage employees to use domestic violence leave to access external support.

Take-aways

The options discussed above are not required by law in any Canadian jurisdiction addressed herein. The law in this area remains nebulous and unexplored in many respects. However, good employers will work to connect with employees on these issues, while remaining compliant with jurisdiction-specific privacy and human rights laws. How this translates on the ground, practically, may be an issue for the courts and legislators to tackle down the road. In the meantime, employers would be wise not to lose sight of this important subject, above all during the rather turbulent and uncertain times engendered by COVID-19.

For further commentary on this important topic, please see our webinar: Canada's spike in domestic violence and related employment considerations.

The authors wish to thank Breanne Matheson for her help in preparing this legal update.

The authors also extend special thanks to Barbara MacQuarrie, Community Director, Centre for Research & Education on Violence Against Women & Children.

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BACK TO NORMAL? COVID-19 AND RETURN-TO-WORK ISSUES

— Stuart E. Rudner. © Rudner Law. Reproduced with permission.

For months now, we have been trying to spread this message: although a lot of things have changed over the last few months, one thing that has not is that attending at work is not optional.

In pre-COVID days, employees did not have the option of simply choosing not to attend at work on a given day, and that is no different now when they are being directed to return to the workplace after a period of layoff/leave or working from home. They can't simply decide that they "prefer" to defer their return.

So what should employers do when an employee indicates their reluctance or refusal to come back to work?

Like many situations, communication is key. The first thing to do is to engage in a conversation with the employee and find out why they do not want to come back at this time. While working is not optional, there are some scenarios in which individuals may have the right to refuse to attend at the workplace. These relate primarily to situations where they have a medical condition that makes them particularly susceptible to the virus or have childcare obligations.

Accommodation: Disability and Childcare Obligations

If an employee has a legitimate need for accommodation or is truly unable to work due to the pandemic, two different exemptions may apply. Most jurisdictions, including Ontario, have provided for job-protected leaves of absence if an employee cannot work due to the virus. It is important to note that this means that they cannot work, as opposed to simply choosing not to.

At the same time, existing human rights legislation already provides for accommodation in many circumstances, such as if an employee has a legitimate need for accommodation or is truly unable to work due to the pandemic. For example, if an individual has a medical condition that makes them particularly vulnerable to the virus and their doctor has said that they should not attend at work, then they may be entitled to accommodation.

Similarly, the protection of family status means that there is a duty to accommodate childcare obligations. As we often discuss with our clients, this does not mean that you must accommodate a choice or preference; if there are other options available to the employee, then they do not have a need for accommodation.

Employees do not have the right to choose the form of accommodation that they receive. Employers can explore other methods of accommodation, including work from home,

modified hours (for example, if they can arrange childcare at certain times of day), or even by providing childcare options, as some employers have done. Accommodation does not automatically mean a leave of absence.

This issue certainly bears watching as the school year starts. So much is unknown right now, as students prepare to head back to school. Some parents have chosen to have them attend remotely, and even those that will be "back in school" are, in many cases, still going to be working remotely for a significant portion of the time. Furthermore, outbreaks may mean that students end up at home unexpectedly. For all these reasons, accommodation of childcare obligations will be front and centre.

Safety in the Workplace

This is where communication is critical. We have helped many clients provide detailed information to their employees explaining the efforts that are being made to keep them safe in the workplace. This can often be done in conjunction with the direction to return, and can include details of the safety protocols that are being implemented along with the workers' obligations with respect to safety. It should also include information on what to do if the worker feels unsafe in the workplace at any time, including a clear process to report concerns. Workers cannot refuse to work because of a generalized fear or concern; there must be a genuine danger in the workplace to trigger the right to refuse unsafe work.

If There Is No Lawful Exemption

These are scary times and it is understandable that people will be wary of attending at work. However, they have to understand that a general fear of going out in public, travelling to work or even being at work will not be sufficient to allow them to simply decline to attend at work at this time while keeping their job.

Once you have explained to an employee all of the processes and policies that are in place to keep the workplace safe, and confirmed that there is no need for accommodation or a statutory leave of absence, then you can advise them that they are required to attend at work as directed. You should also very clearly advise them that a failure to do so will result in the conclusion that they are resigning from their employment.

It may also be worth noting that if they are counting on receiving government assistance such as the Canada Emergency Response Benefit, they may not be eligible since that is supposed to be for people who cannot work, as opposed to those who choose not to work.

Takeaways

Attending at work is not optional, even if an employee has been on a leave, or layoff, or has been working from home. They cannot insist that they will not return "yet", or that they will only work from home.

It is important to ensure that the employee does not fall within any of the exemptions above, as well as to assure them of the efforts being made to keep the workplace safe. Once you do so, then you can insist that the employee return to work, though we do encourage employers to allow people to work from home if they can do so effectively, as that is the safest approach at this time.

We also encourage employers to be flexible when it comes to things like childcare, particularly as the school year commences. These are not normal times, and some flexibility will be necessary. However, that does not mean that employees can refuse to work or insist that they will only do so remotely.

Stuart Rudner *is an Employment Lawyer and Mediator, and he can be reached at stuart@rudnerlaw.ca. You can also follow Rudner Law's employment law updates on their social media platforms and receive their newsletter in your inbox by subscribing to their newsletter.*

CANADIAN EMPLOYMENT SAFETY AND HEALTH GUIDE

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BEST PRACTICES FOR RETURNING TO WORK AND OPERATING A BUSINESS DURING COVID-19: AN EMPLOYER'S GUIDE TO REOPENING PHYSICAL WORKPLACES

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As we better understand the challenges associated with COVID-19, attention has turned to reopening the Canadian economy and retuning to work. This, in turn, raises questions about the steps that employers should be taking to train their employees and adapt their physical workplaces in order to continue operating (if they did not shutdown during the pandemic) or return to work (if they did shutdown) in a COVID-19 world.

As employers across the country consider these challenges, one thing is absolutely clear—careful planning is required to accomplish the competing but essential goals of maximizing protection from the spread of COVID-19 in the workplace for employees, customers and others, while at the same time minimizing disruption to the employer's business operations. Every business is unique, and there is no one business continuity or return to work plan that is recommended for all. Instead, employers must consider a range of issues in the context of their particular business needs. The purpose of this article is to address some of the issues that employers should have in mind as they develop and adapt their business continuity and/or return to work plans. Bennett Jones is available to assist you and your business as you adjust to the "new normal" of COVID-19.

Risks Associated with Operating a Business During COVID-19

In response to the spread of COVID-19, governments across Canada issued public health directives and emergency orders, including closure orders for many businesses in non-essential industries. As the economy gradually reopens, these closure orders are being removed. However, the timing for reopening of specific businesses varies from industry to industry, and from jurisdiction to jurisdiction. Employers who were required to shutdown due to COVID-19 should understand when their business, in their province or jurisdiction, is permitted to reopen, and must not reopen until they are legally permitted to do so. Failure to comply with a closure order can lead to significant liability for businesses including, for example in Ontario, a fine of up to $10,000,000 under the Ontario *Emergency Management and Civil Protection Act*, and personal liability for directors and officers of the business.

Employers should also consider how the risks associated with COVID-19 affect their obligation to take reasonable steps to ensure a safe and healthy workplace under applicable occupational health and safety legislation. In particular, employers who fail to take adequate steps to prevent the spread of COVID-19 in the workplace may be subject to inspections, compliance orders and significant fines imposed by occupational health and

safety officials. There is also the potential for civil liability where the spread of COVID-19 in the workplace leads to illness or injury for employees and third parties who do not have workers' compensation coverage. Finally, employers must be mindful of their obligations under existing employment agreements, employment policies and (if they are unionized) collective agreements, and ensure their business continuity and/or return to work plans take these obligations into account.

In addition to the legal risks associated with carrying on business during COVID-19, there are operational risks as well. In particular, if an employer fails to take adequate steps to prevent the spread of COVID-19 in the workplace, the risk of an outbreak among employees increases. This, in turn, could necessitate the adoption of even stronger preventative measures, or reclosing parts of the employer's business, or the whole business, for an additional period of time. On the other hand, if the anti-COVID-19 measures adopted by an employer are too restrictive or onerous, the employer's business operations may suffer as a result.

Preliminary Steps Before Developing a Business Continuity or Return to Work Plan

Before an employer develops its business continuity or return to work plan, there are a number of preliminary steps that should be taken.

1. First and foremost, determine who the decision makers are that will be responsible for designing and implementing the plan. Steps involved in this process should include:

    - plan preparation, which includes assessing your workplace and developing an operational/return to work plan that clearly demonstrates you have taken "every reasonable precaution in the circumstances" to prevent the spread of COVID-19;
    - plan implementation, which includes developing an effective communication and training strategy for employees;
    - monitoring compliance with, and the effectiveness of, the business continuity/return to work plan, which includes regular review and consideration of applicable government and public health guidance; and
    - responding to issues and problems as they arise and adapting the business continuity/return to work plan as necessary to meet unforeseen challenges.

    If a COVID-19 response team or committee has previously been set up, it may be best suited to take on responsibility for the business continuity/return to work plan as well.

2. Consider if the decision makers responsible for your business continuity/return to work plan have the necessary expertise, or if they require the assistance of experts such as a medical professional, occupational health and safety specialist, communications expert, design consultant or other technical specialist. In addition, consider if anyone other than the designated decision makers should be consulted about the business continuity/return to work plan, such as, for example, a joint health and safety committee or, in the case of a unionized workplace, possibly the union.

3. Consider what resources are available to monitor the latest updates regarding COVID-19, and business operation/return to work guidelines for employers. For example, federal and provincial governments have all established dedicated COVID-19 websites and online resources that are regularly updated with public health and related information. Guidance for employers in each province and jurisdiction to limit the spread of COVID-19 in the workplace has now been posted to these locations. In addition, federal, provincial and some municipal public health authorities have established websites and links that are regularly updated as information becomes available. Most provincial occupational health and safety authorities have established similar online resources. Lastly, many industry associations have developed or are preparing return to work recommendations and best practices specifically tailored to their industry. All of these resources should be regularly consulted and considered by the designated business continuity/return to work decision makers for your business.

4. Finally, consider timing for the ramp-up or reopening of your business. In particular, determine when your business is legally permitted to reopen. For employees who have been laid off, consider how they will be recalled and confirm whether any advance notice of recall is required in your jurisdiction. Also consider whether all employees will return to the workplace at the same time, or if the return to work will occur in stages, with some employees returning

before others. For example, will some employees who are able to work or continue working remotely from home be permitted or required to do so, while other employees return to the physical workplace? If a staggered return to work is contemplated, consider which employees will return first and whether this creates any constructive dismissal or other issues under existing employment contracts. Also, if there is a collective agreement with a union, review the recall and seniority provisions to determine if they comply with the business continuity/return to work plan, or if changes are necessary in consultation with the union.

Issues to Consider in Your Business Continuity or Return to Work Plan

There are a number of issues that should be considered in any business continuity or return to work plan. These include the following:

Communications and Training

Consider how the business continuity/return to work plan, and employee responsibilities under the plan, will be communicated to employees. For example, will there be any communication with employees regarding the plan before they return to the physical workplace? How will questions or feedback from employees be handled? Will you hold regular health and safety meetings to review COVID-19 related procedures? Will any signage be needed in the workplace to ensure employees understand their obligations in particular circumstances? With respect to training, consider whether anything is required so that employees know their obligations in terms of sanitizing, physical distancing, use of PPE and other matters. Consider whether managers require any special training to administer the business continuity/return to work plan. Finally, make sure your plan states that you will continue to adapt and make changes as necessary, and communicate those changes to employees.

Self-Reporting Requirements and Privacy Considerations

Ensure clear guidelines are established so that employee know their responsibility to self-report a positive COVID-19 diagnosis for themselves or their family members, or where the employee or a family member exhibits symptoms of possible COVID-19, or where the employee has come into contact with someone else with COVID-19, or where the employee is subject to travel-related quarantine restrictions, etc. Consider if employees should be required to perform a self-assessment or complete a questionnaire prior to attending at work, or provide any other information to the employer such as COVID-19 test results. Consider if other forms of assessment such as temperature checks will be carried out at work. Consider if employees will be required or encouraged to download a government approved contact tracing app onto their cell phone, and make information from the app available to the employer on request. Finally, consider what privacy protections are necessary in order to deal with any COVID-19 related personal information that is received by the employer, and whether there are any privacy limits on the information that can be collected.

Sanitizing the Workplace

Implement a thorough cleaning of the physical workplace before employees return to work, and communicate this to employees. Consider if the initial cleaning should be carried out by your regular cleaning contractor, or if a specialized service provider is necessary. Once employees return to the physical workplace, consider what cleaning schedules and protocols are necessary. Consider whether cleaning and disinfecting supplies such as alcohol wipes, hand sanitizer dispensers and wash stations will be provided for employees, if the availability and location of these supplies is adequate, and what rules will be enforced concerning their use by employees and third parties present in the physical workplace.

Personal Protective Equipment ("PPE")

Consider whether employees will be required to use PPE, and if so which employees, in what circumstances and what specific PPE. For example, will employees who take an elevator to and from the office each day be required to wear a face mask during their elevator trips? Will PPE be provided or made available to employees required to use it, and if so what standard of PPE will be considered adequate (for example, will an N95 mask be considered necessary in certain circumstances, as opposed to another form of face mask). Will employees be permitted to use their own PPE if they prefer and, if so, are there any standards applicable here?

Regular Hours of Work, or Shifts and Staggered Start Times?

Will regular hours of work be maintained for all employees, or will shifts or staggered start times be required in order to reduce the number of employees at work at a given time, and promote physical distancing? If staggered start times or shifts are necessary, review any union collective agreements to determine whether the proposed work schedule is in compliance, or if discussions with the union will be necessary. Consider your obligations under applicable employment standards and human rights legislation if there are any employees for whom the proposed shift or start times create a particular hardship due to family obligations or other factors.

Entry and Exit Points

Consider entry and exit points to the physical workplace, and whether these access points are controlled by the employer or a third party such as a landlord. If the landlord or other third party controls the access points, consult with them to determine what their plan is to reduce to the risk of COVID-19 exposure for people using the access points, and whether the proposed measures are too lax or too onerous in the circumstances. For example, will there be limits on the number of people allowed to use the elevator at one time, and are those limits practical in the circumstances? How will lineups and bottlenecks at access points (for instance, people waiting to use the elevator) be dealt with, and how will physical distancing be maintained in these circumstances? Consider if the number of access points to the workplace should be restricted so that the number and identity of people in the workplace can be better monitored and controlled. Consider how any such measures comply with fire code and other safety regulations. Consider if any special monitoring equipment such as temperature checking devices will be used at access points, and what rules apply to that. Finally, consider how deliveries and other shipping and receiving issues will be dealt with, and whether items delivered to the workplace should be sanitized and how.

Physical Distancing of Work Stations

Consider whether the physical separation of work spaces is adequate and whether any changes to the physical layout of the workplace are advisable or possible. Consider whether other measures besides reconfiguring the workplace are possible, such as reducing the density of employees in particular areas, use of plexiglass screens or other physical separation equipment or the use of directional signage and floor markings.

Gathering Areas

Consider common gathering areas such as reception areas, lunch rooms and meeting rooms, and whether any measures are required to promote physical distancing in these spaces. Consider whether all common or gathering areas in the workplace will be open, or whether some will remain closed.

Frequent Touchpoints and Common Equipment

Consider frequent touchpoints such as door handles, light switches and elevator buttons, and what steps are necessary to ensure they remain clean and disinfected. Should measures such as propping open doors be considered, and how will this work in terms of safety and security concerns, fire code regulations and other considerations? What steps will be taken to ensure that common equipment such as coffee machines, cups and glasses, microwave ovens, vending machines, water coolers and photocopiers remain clean and disinfected, and will all such equipment remain in use or will some of it be temporarily removed or shut off?

HVAC Systems

Are there any changes or improvements to the HVAC system that should be considered to improve ventilation and air circulation in the workplace?

Third-Party Access

Consider whether any measures are necessary to limit or control third-party access to the physical workplace. Consider what physical distancing, sanitization, PPE or other requirements will be imposed on third parties present in the

workplace, and what steps will be taken if a third party refuses to comply with these requirements. Consider if there are any contractor employees present on site (for example cleaning personnel), what COVID-19 related rules apply to them, whether the rules are adequate and who is responsible for enforcing those rules. Consider if there are any alternatives to in-person third-party meetings that should be promoted or mandated through the use of technology (such as Zoom conferences and other virtual meeting options).

Changes to Employment Policies

Consider whether there is anything in the business continuity or return to work plan that requires your existing employment policies to be amended, or new polices to be adopted, and how those policy changes will be communicated to employees. In the case of a unionized workplace, consider whether the business continuity/return to work plan complies with any collective agreements, and whether consultation with the union is necessary or advisable in relation to the plan.

Consequences for Failure or Refusal to Comply with the Business Continuity or Return to Work Plan

Consider what disciplinary or other consequences will be applied to employees who fail or refuse to comply with the business continuity or return to work plan. For example, will employees be sent home in these circumstances, and if so will they be paid or unpaid while they are away? When considering the issue of discipline, take into consideration whether the employee's action constitutes misconduct, or if it reflects a legitimate concern involving human rights, privacy or the right to refuse unsafe work under occupational health and safety legislation. Also consider what steps will be taken where a third party or contractor employee fails or refuses to comply with the business continuity or return to work plan.

Response to a Positive Diagnosis or Potential Exposure to COVID-19 in the Workplace

Consider in advance what steps you will take if an employee or their family member tests positive for COVID-19, or is exhibiting symptoms of possible COVID-19, or has been exposed to someone else with COVID-19. Will self-quarantining or testing be required in these circumstances, and what happens if the test result comes back positive or negative? What steps will be taken with respect to contract tracing among other employees, and who will be responsible for that? Will the business remain open while these steps are taken, or are there any additional protective measures that will be implemented in these circumstances? How will a positive test result in the workplace be communicated to other employees, bearing in mind the privacy rights of the employee with confirmed or suspected COVID-19?

Response to Employees Who Believe that Returning to Work will Cause or Exacerbate a Disability or Health Risk

Some employees may believe that returning to work at this time will cause or exacerbate an existing disability such as anxiety, an autoimmune disorder or respiratory problems, or lead to some other increased risk to health and safety. Consider in advance how you will handle these concerns, including who such concerns should be directed to, what medical information will be required from the employee, whether any job protection exists under applicable employment standards legislation and whether the employee would qualify for short- or long-term disability benefits in these circumstances. Also consider whether any human rights issues arise and, if so, whether the employee can be accommodated by working from home.

The list of issues above is not exhaustive, and other factors may also need to be considered depending on the nature of the employer's business. If you are an employer with a business in a non-essential industry that requires assistance with any aspect of your return to work plan, or if you have a business in an essential industry that has continued to operate during COVID-19 but wish to evaluate some of the anti-COVID-19 measures you are taking, please contact any member of the Bennett Jones Employment Services group for assistance. In addition, please visit our COVID-19 Resource Centre for other COVID-19-related materials.

WORKING SAFELY FROM HOME

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What are the employer's obligations to an employee when an employee is not working in the office? With so many employees now working from home, employers' health and safety obligations need to be reexamined.

The *Occupational Health and Safety Act* and Working From Home

In Ontario, section 3(1) of the *Occupational Health and Safety Act* ("OHSA") states that it "does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith."

So, in regular people speak, this means that if your employee is working in their own home the OHSA does not apply.

In some sense this makes sense, but in other ways, it doesn't. An employer cannot be expected to come into an employee's home and evaluate risks, nor be expected to assume liability for the safety of their worker in an environment—the worker's home—that they have no control over.

Employers—even in offices where there may not be obvious health and safety issues like noxious substances or big machines—are generally required to make sure that exits are clear, that file boxes aren't going to fall on anyone, etc. These are the types of safety issues that could, presumably, also pose risks to workers who are in their own homes.

Workplace Violence and Harassment

The application of the violence and harassment provisions of OHSA makes more sense in a home environment. Workers who work from home are still expected to work with their colleagues, clients, etc. In many cases, these interactions will likely be similar to face to face interactions one may have in an office—just less the risk of inappropriate touching. Workers could still be bullied or harassed virtually or over the phone. This can happen just as easily around the watercooler as on the company Slack channel.

Direction from Case Law

While direction from decision-makers is sparse, two decisions offer contradictory direction with respect to the application of the OHSA to people working from home.

The Workplace Safety Insurance Appeals Tribunal (the "WSIAT") stated in *Decision No 2249/16*, 2016 ONWSIAT 2410 that the "*OHSA* does not apply to work performed by an owner in a private residence". In this case, the WSIAT was required to determine whether modified work offered to an injured worker to do at home was reasonable and safe, in spite of the fact that the work would not be covered by OHSA because it would be completed at home. The WSIAT found that the fact that work would not be covered by the OHSA did not mean it was not safe.

This decision contrasts with an Ontario Labour Relations Board (the "OLRB") decision *Watkins v. The Health and Safety Association for Government Services*. This case involved allegations of workplace harassment and reprisal under the OHSA by an employee who "worked remotely from his home office, but also travelled as part of his duties." The OLRB allowed the complaint to proceed to a hearing. No non-application of the OHSA argument was made. The OHSA does apply to work done outside of a private residence, even if it is done outside of the office. For example, the OSHA applies when an employee is travelling for work, attending conferences, working on a client site, etc. Perhaps the fact that this worker travelled as part of his duties brought his complaint safely under the OHSA.

Takeaways

As it stands the OHSA likely does not apply to work done at home. However, given the unprecedented number of employees now working from home, and the lack of clear jurisprudence, this could change.

Employers should consider how to ensure safe working conditions for their employees who are working at home. While employers obviously are not going to be doing home visits to make sure there are no cords to trip on or boxes about to fall on anyone's head, they can do things like ensure that workers are being adequately supervised, even when working remotely. A clear and reasonable remote working policy can take an employer a long way.

You can access SpringLaw's complimentary Remote Worker Policy here.

If you'd like to book a consult to talk about remote working issues in your workplace, get in touch.

HEALTH AND SAFETY FROM COAST TO COAST

Alberta

N95 Respirator Alternatives

On May 3, 2020, Ministerial Order, No. 2020-21, came into effect.

The Ministerial Order temporarily amends the *Occupational Health and Safety Code*, AR 87/2009, during the COVID-19 public health emergency.

The amendment lists specific respirator standards, approved for use in other countries, that employers can use without needing to request an approval.

The amendment addresses the interim situation of domestic shortages of N95 respirators approved by the National Institute of Occupational Safety and Health and remains in effect until 60 days after the state of public health emergency is over.

See https://www.qp.alberta.ca/Documents/MinOrders/2020/Labour_and_Immigration/2020_021_Labour_and_Immigration.html to view the Ministerial Order.

Manitoba

Additional Enforcement Personnel Regulation

On May 14, 2020, the *Additional Enforcement Personnel Regulation*, Man. Reg. 40/2020, came into effect. It empowers certain persons to enforce emergency health hazard orders and public health emergency orders.

The prescribed persons include safety and health officers under *The Workplace Safety and Health Act*, CCSM c. W200, inspectors under the *Liquor Gaming and Cannabis Control Act*, CCSM c. L153, health officers under *The Public Health Act*, CCSM c. P210, and officers under *The Provincial Parks Act*, CCSM c. P20.

The *Additional Enforcement Personnel Regulation* will be repealed on December 31, 2020.

WORTH NOTING

Workplace Safety Guidelines

Most provincial and territorial governments have released workplace safety guidelines to help employers reopen their businesses safely after being shut down as a result of the COVID-19 pandemic. The guidelines include recommended actions employers can take to protect workers, customers, and the general public from the virus.

General guidelines, which apply to all workplaces, include information on such things as cleaning, disinfection, and personal protective equipment. Guidelines have also been released for specific sectors.

Workplace guidelines can be accessed here:

Alberta: https://www.alberta.ca/assets/documents/covid-19-workplace-guidance-for-business-owners.pdf

British Columbia: https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus

Manitoba: https://manitoba.ca/asset_library/en/coronavirus/restoring-workplace-guidance.pdf

New Brunswick: https://www2.gnb.ca/content/gnb/en/corporate/promo/covid-19/measures_businesses.html

Newfoundland and Labrador: https://www.gov.nl.ca/covid-19/information-sheets-for-businesses-and-workplaces/

Northwest Territories: https://www.gov.nt.ca/covid-19/en/services/employers-employees/health-advice-employers-and-businesses

Nova Scotia: https://novascotia.ca/reopening-nova-scotia/

Nunavut: no information available at the time of writing

Ontario: https://www.ontario.ca/page/resources-prevent-covid-19-workplace#section-2

Prince Edward Island: https://www.princeedwardisland.ca/en/topic/renew-pei-together

Quebec: https://www.cnesst.gouv.qc.ca/salle-de-presse/covid-19-info-en/Documents/DC100-2146A-Guide.pdf

Saskatchewan: https://www.saskatchewan.ca/government/health-care-administration-and-provider-resources/treatment-procedures-and-guidelines/emerging-public-health-issues/2019-novel-coronavirus/re-open-saskatchewan-plan/covid-19-workplace-information

Yukon: https://yukon.ca/en/industry-specific-guidelines-and-recommendations-covid-19

Use of Non-Medical Cloth Masks or Face Coverings in Workplaces

The Government of Canada's Special Advisory Committee on COVID-19 advises that non-medical masks or cloth face coverings are not considered personal protective equipment.

The Committee states that while the supply of medical masks should be preserved for healthcare settings, there may be some non-healthcare workplaces in which a medical mask may be a more appropriate choice to protect workers. This can include, for example, workplaces where services are to be provided to clients who are unable to wear a non-medical mask or face covering when measures such as the two-metre physical distance or plexiglass/transparent barriers are not possible or available.

The Committee also points out that masks may not be suitable for all types of workplaces. Employers should consult with the applicable federal, provincial, and territorial occupational health and safety agencies and local public health authorities before introducing mask-wearing policies to the workplace.

See http://www.phn-rsp.ca/sac-covid-ccs/wearing-masks-community-eng.php to read the Committee's guidance on the use of non-medical cloth masks or face coverings in workplaces.

<u>Note</u>: General information on the use of non-medical masks or face coverings in each jurisdiction can be found here:

Federal: https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks/about-non-medical-masks-face-coverings.html#_Appropriate_non-medical_mask

Alberta: https://www.alberta.ca/assets/documents/covid-19-guidance-for-wearing-non-medical-masks.pdf

British Columbia: http://www.bccdc.ca/health-info/diseases-conditions/covid-19/prevention-risks/masks

Manitoba: https://sharedhealthmb.ca/files/covid-19-use-of-cloth-face-masks.pdf

New Brunswick: https://www2.gnb.ca/content/dam/gnb/Departments/h-s/pdf/MASK.pdf

Newfoundland and Labrador: https://www.gov.nl.ca/covid-19/files/Guidance-on-Cloth-Masks-Non-Medical-Masks.pdf

Northwest Territories: https://www.gov.nt.ca/covid-19/en/services/prevention/face-coverings

Nova Scotia: https://novascotia.ca/coronavirus/staying-healthy/#masks

Nunavut: no information available at the time of writing

Ontario: https://www.ontario.ca/page/face-coverings-and-face-masks?_ga=2.21239035.1599792223.1590019332-1903965733.1472513246

Prince Edward Island: https://www.princeedwardisland.ca/en/information/health-and-wellness/using-non-medical-masks-in-the-community

Quebec: https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/wearing-a-face-covering-in-public-settings-in-the-context-of-the-covid-19-pandemic/

Saskatchewan: https://www.saskatchewan.ca/government/health-care-administration-and-provider-resources/treatment-procedures-and-guidelines/emerging-public-health-issues/2019-novel-coronavirus/public-health-measures/guidance-on-homemade-masks

Yukon: no information available at the time of writing

Alberta Agriculture Training Support Program

On May 8, 2020, the Government of Alberta announced a new Agriculture Training Support Program to support employers in the agriculture sector offset costs for COVID-19 safety and training, including the costs for personal protective equipment.

Under the program, the government will contribute up to $2,000 per new employee, to a maximum of $50,000 per employer. Grants will be administered on a first-come, first-served basis until available program funding ($5 million) is fully allocated. Approximately $1 million in funding will be targeted for meat processors to provide support for new hires to undertake meat-cutting training.

Program support is targeted to agricultural, meat processing, and horticultural businesses and services on the Government of Alberta's essential service list (https://www.alberta.ca/restricted-and-non-restricted-services.aspx), with the exception of aquaculture.

Applications will be accepted via the Canadian Agricultural Partnership website (https://cap.alberta.ca/CAP/).

See https://www.alberta.ca/release.cfm?xID=71300983A43C2-052C-9669-7A9B903D1A9CFD39 to read the Province of Alberta news release.

WorksafeBC Waives Premiums for Employers Who Receive Canada Emergency Wage Subsidy

On May 26, 2020, WorkSafeBC announced it will waive premiums for employers who have been approved to receive the Canada Emergency Wage Subsidy ("CEWS") for workers on leave with full or partial pay. The waiver will be retroactive to March 15, 2020, and will continue for the duration of the CEWS program.

See https://www.worksafebc.com/en/about-us/news-events/news-releases/2020/May/worksafebc-announces-additional-support-for-employers-impacted-by-covid-19 for more information.

New Online Market To Connect Manitoba Businesses With Personal Protective Equipment

On May 13, 2020, the Manitoba government announced the launch of a new online marketplace, B2BManitoba, to connect businesses with suppliers of non-medical grade personal protective equipment ("PPE") and other materials required for businesses as they reopen.

In addition, B2BManitoba will help businesses that did not close to restock supplies and will help manufacturers who have retooled their current operations to produce PPE and are looking for ways to access a new customer base.

See www.B2BManitoba.ca to access the online marketplace.

See https://news.gov.mb.ca/news/index.html?item=48139&posted=2020-05-13#.XrxK1flCgd8.twitter to read the Province of Manitoba news release.

Funding To Protect Ontario Farm Workers

In response to the COVID-19 pandemic, the Canadian government and the Ontario government have announced $2.25 million funding for farm businesses.

The funding is to help farmers enhance health and safety measures to prevent the spread of COVID-19. Farm businesses can apply for funding for initiatives like purchasing personal protective equipment, enhanced cleaning and disinfection, and redesigning workstations. Farm businesses can also apply for funding for unexpected costs for housing and transportation because of a COVID-19 outbreak among on-farm employees.

See https://news.ontario.ca/omafra/en/2020/05/canada-and-ontario-take-steps-to-further-protect-farm-workers to read the Province of Ontario news release.

Funding for Ontario Apprentices

On May 22, 2020, the Ontario government announced that it will provide grants of $2.5 million to apprentices to purchase tools, protective equipment and clothing for their trade, along with forgiving previous loans to purchase tools. The funding amounts will be distributed as follows: $1,000 for those in motive power sector trades; $600 for those in construction and industrial sector trades; and $400 for those in service sector trades.

See https://news.ontario.ca/opo/en/2020/05/ontario-helps-people-impacted-by-covid-19-get-back-to-work.html to read the Province of Ontario news release.

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• KEEPING TRACK OF EMPLOYEES FROM A DISTANCE: MONITORING TECHNOLOGIES AND RELATED LEGAL CONSIDERATIONS FOR TELEWORKING •

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Due to COVID-19, teleworking has become the new norm in Canada and many parts of the world. In the traditional physical workplace, employers are generally permitted to take certain reasonable steps to observe or supervise what employees are doing throughout the day. In part, this is because the workplace is not considered a private space and it is normally reasonable for employers to exert control over what employees do in the workplace in the general course of their employment-related duties.

However, in a teleworking world, an employer's right or ability to monitor its employees is less clear. For teleworking employees, the lines between personal space and personal information, and work-related space and work information can often be blurred. For this reason, it is important for employers to take into account a number of considerations when monitoring teleworking employees while minimizing liability concerns.

WHAT ARE EMPLOYMENT-RELATED MONITORING TECHNOLOGIES?

Employment-related monitoring technologies have been used by employers for some time. While these technologies are not new, applying these technologies to teleworking employees is relatively novel. The most typical monitoring technologies focus on monitoring computer, email, and telephone usage to

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EMPLOYMENT AND LABOUR LAW

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assist in determining when employees are actively working and when they are not. Some employers utilize network software that can monitor the network, internet, and email usage of a large group of employee users, including recording the amount of time users are idle and not working, the frequency of internet surfing, and rates of incoming and outgoing emails and phone calls.

Using employment-related monitoring technologies has a number of benefits both for assisting in supervising employees working remotely and otherwise. Most commonly, monitoring technologies are used to keep track of log-in times and employee assiduity. These technologies can also provide employers with information on efficiency and productivity, network performance, and compliance with employer policies and applicable laws. Additionally, these technologies can assist employers in meeting their legal obligations in a remote working environment such as protecting the confidentiality of business information, and keeping records of work hours and overtime to comply with employment standards.

Moreover, employers can use such technologies to signal potential human rights issues related to employees. For example, a situation where an employee should, but has not, logged on for a notable period of time may signal to the employer that something is not okay, and in some cases, may trigger a duty to inquire under applicable human rights legislation or other laws, including with respect to mental health (see https://www.nortonrosefulbright.com/en-ca/knowledge/publications/0242254f/are-you-okay-addressing-employee-mental-health-during-challenging-times). This is especially the case where there's a reasonable belief an employee may be suffering from a mental health disability, including addiction.

These above-discussed forms of monitoring technologies differ, however, from more controversial technologies that can be referred to as "content monitoring" or "spyware." Technologies that allow employers to intercept communications, scan or capture images for content, monitor keystrokes, or

covertly listen into phone calls are much more invasive and may be found overly intrusive and not justified for general use depending on the circumstances.

WHAT CONSIDERATIONS EXIST REGARDING A TELEWORKING EMPLOYEE'S REASONABLE EXPECTATION OF PRIVACY?

In a nutshell

In Canada, privacy law is governed by legislation, the common law, Quebec's civil law, as well as employment contracts and collective agreements. The federal jurisdiction, British Columbia, Alberta and Quebec all have provincial privacy legislation that governs the protection of personal information in the context of employment. As for Ontario, there is no overarching provincial privacy legislation governing the protection of employee personal information.

However, in 2016, the Ontario Court of Appeal recognized a tort of privacy invasion called "intrusion upon seclusion," which may impose requirements on employers akin to those found in other jurisdictions. Without specific legislation on the issue in Ontario, the guiding principles flowing from the federal *Personal Information Protection and Electronic Documents Act* are generally followed by employers in order to minimize risk and liability in this area. Undoubtedly, the application of privacy laws will depend on the factual matrix of any given situation. Employees may also have a reasonable expectation of privacy by virtue of a contract or collective agreement.

Monitoring teleworking employees can, in some cases, also have fundamental and human rights implications. Specifically in Quebec, privacy is included as a human right under the Quebec *Charter of Human Rights and Freedoms*. The Quebec Charter also enacts protections against unfair and unsafe working conditions that endanger health, safety and physical integrity.

Further, the *Civil Code of Québec* expressly provides for the right to privacy. The Civil Code provides that specific situations may be considered invasions of privacy, and one example is entering and taking anything in a person's dwelling, intentionally intercepting a person's private communications or keeping a person's private life under observation by any means.

Use of company devices and teleworking

In contrast to the physical workplace, the right to a reasonable expectation of privacy for teleworking employees is much more nuanced, as the lines between work and personal space can become blurred. Whether or not a teleworking employee has a reasonable expectation of privacy will depend on a constellation of factors, including whether or not they are using company or personal equipment and what level of monitoring an employer wishes to use. Indeed, the case law suggests an employee's reasonable expectation of privacy depends on the "totality of the circumstances," which generally includes the following:

- what information is being collected;
- how "personal" or sensitive the information is;
- whether the employee has a subjective expectation of privacy; and
- whether the subjective expectation of privacy is reasonable in the circumstances.

For teleworking, some employers have provided employees with company-owned devices with which to complete their work, while others may rely on employees to use personal devices, such as computers and phones.

In terms of company-owned devices, generally speaking, even where some personal use is allowed, employees may have a diminished but reasonable expectation of privacy for such use. When it comes to using employee personal devices to accomplish work, the law in this area remains fact specific and nebulous. Notably, however, the Supreme Court of Canada has held that, "[i]t is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal

computer."[1] That being said, while ownership is a relevant consideration in assessing an employee's reasonable expectation of privacy, it is not always determinative.

Indeed, other relevant and important considerations when assessing an employee's reasonable expectation of privacy may include the employer's policies, practices, and customs. As the Supreme Court of Canada has noted, "[t]hese 'operational realities' may diminish the expectation of privacy that reasonable employees might otherwise have in their personal information."[2] But, as with ownership of the device being used, written policies alone are not always determinative and are generally considered together with the totality of the circumstances.

Perhaps one of the chief considerations when contemplating the implementation of monitoring technologies for teleworking employees is their consent. Consent, in most cases, may be implicitly or expressly obtained. In any case, the prudent employer would strive for transparency with employees, including with respect to monitoring techniques and expectations.

Government-provided guidance

To mitigate potential risks in this area, employers should bear in mind some guidelines as best practices. For instance, the privacy commissioners of Canada, Alberta, and British Columbia promote certain guidelines on obtaining meaningful consent from employees (see https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gl_omc_201805/#_what). While other jurisdictions are not necessarily bound by these guidelines, employers who plan to monitor their employees in any way should be aware of these best practices. The guidelines include:

- Emphasizing key elements of policies in a comprehensive way, such as what personal information is being collected, who the information is being shared with, the purpose for collecting, using, or disclosing the information, and any risks and consequences associated with the collection, use, or disclosure thereof.
- Employers would be wise to provide a clear choice for employees to grant or withhold consent and employers must be prepared to explain why any collection, use, or disclosure is a condition of employment.
- Employers would be well advised to draft their policies and consent requests in a comprehensive and understandable way because consent is generally only valid where the employee understands what he or she is consenting to.
- Obtaining meaningful consent should be an ongoing process, and where circumstances change, as they have in light of COVID-19, employers must notify employees and obtain their consent prior to the changes taking effect.

PRACTICAL CONSIDERATIONS AND TAKE-AWAYS

In light of the privacy and human rights issues discussed above, employers may wish to carefully consider either creating or revising their existing applicable policies. To that end, some considerations employers can keep in mind include the following:

1. Develop a plan

- Develop or agree on a daily work schedule for each employee. Depending on the circumstances, schedules can differ from one employee to another. For example, an employee who has child care obligations may not be able to work the standard hours, but could certainly be expected to be online and working at different or accommodated times;
- Consider holding regular team meetings (including by video conference) to enable the team to discuss goals and connect with other employees;
- Establish clear and objective performance measures and goals;
- Establish milestone dates to keep projects on track and identify issues in a timely manner;

- Encourage social networking and remote social activities in a safe manner and;
- Address problems right away to prevent teleworkers from feeling like they are isolated.

2. Develop a policy

- Develop and disseminate clear employee privacy policies defining rights, obligations, reasonable expectations of privacy, monitoring techniques being used, as well as permissions and limitations, including in relation to electronic devices.
- Designate a privacy officer and resource person in information technology, human resources and/or management to whom employees can turn to should they have any questions or concerns.

3. Consult with employees

- Lawfully obtaining employee consent can be key in limiting employer liability and helping to ensure productivity in the workplace.
- As part of this exercise, consideration should be given to consultation strategies with employees to ensure they are aware of the monitoring techniques being used and understand their responsibilities in the remote workplace.
- In the labour context, introducing new or revisiting existing policies should be done in compliance with any applicable collective agreement, and, where possible, in consultation with the union or trade representative.

As it can be expected that many employees will continue to work remotely, on a part- or full-time basis, it can also be expected that their reliance on technology, including company-owned equipment, such as cell phones, computers, and more will continue. Given this reality, employers would be well served to promote a culture of transparency and trust with employees. Not only can this serve to facilitate consent, but there is evidence in the literature indicating that a strong employer-employee bond of trust and clear and meaningful communication can contribute to a more harmonious and respectful work environment.

[*The authors would like to thank summer students Emma Hammer, Elizabeth Kazakov and Florence Picard for their contributions to this legal update.*]

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[1] *R. v. Morelli*, [2010] S.C.J. No. 8, 2010 SCC 8.

[2] *R. v. Cole*, [2012] S.C.J. No. 53, 2012 SCC 53.

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• TOP FIVE EMPLOYER QUESTIONS ON THE CANADA EMERGENCY RESPONSE BENEFIT •

Lindsay McLeod, Partner, and Laura Blumenfeld, Associate, Blake, Cassels & Graydon LLP.
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[Editor's Note: This article was originally written on May 28, 2020. On June 16, 2020, it was announced that the Canada Emergency Response Benefit would be extended by eight weeks, to a total of 24 weeks.]

The Canada Emergency Response Benefit (CERB) provides welcome financial support to workers across Canada who have stopped working due to the COVID-19 pandemic. Eligible workers are entitled to C$500 per week for up to 16 weeks, paid in four-week blocks. The CERB is available for the period of March 15, 2020 to October 3, 2020. Now, almost two months after its launch, here are the top five questions we have been asked by employers:

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1. WHO IS ELIGIBLE FOR THE CERB?

The CERB is available to workers who meet the eligibility criteria. This includes full-time and part-time employees, as well as workers who would not typically qualify for Employment Insurance (EI) benefits, such as contract workers or self-employed individuals.

In order to be eligible for the CERB, a worker must meet the following conditions:

i. Lives in Canada and is at least 15 years old
ii. Earned income of at least C$5,000 in 2019 or in the 12 months prior to the CERB application
iii. Did not quit his or her job voluntarily
iv. Experienced reduced work hours due to COVID-19 or stopped working due to COVID-19—including, without limitation, due to job loss, temporary layoff or an unpaid leave of absence—or is eligible for EI regular or sickness benefits or has exhausted his or her EI regular benefits but is still unable to work due to COVID-19
v. Has earned income of less than C$1,000 for 14 or more consecutive days in the worker's initial

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four-week claim period. Government commentary provides that for subsequent claim periods an eligible worker cannot have earned income of more than C$1,000 for the entire four-week claim period. An employer may continue to provide non-cash benefits to an employee, such as medical benefits.

Importantly, there is no requirement that workers experience a permanent break in the employment or contractor relationship in order to access the CERB. For example, workers may be eligible for CERB if their work hours and pay are reduced or if they are placed on temporary layoff or an unpaid leave of absence. Employers should be mindful that unilaterally imposing such changes to the terms and conditions of employment or engagement could give rise to constructive dismissal or breach of contract claims. However, given the current situation where finding new work in the short term may be difficult, many workers have been willing to consent to such arrangements in order to maintain the working relationship.

2. HOW DOES THE CERB INTERACT WITH THE CANADA EMERGENCY WAGE SUBSIDY (“CEWS”)?

An eligible employer can claim the CEWS in respect of eligible remuneration paid to an employee during a CEWS claim period, even if the employee is receiving or has received CERB payments in respect of the same claim period. However, an employer is not permitted to claim the CEWS in respect of an employee who has been without remuneration from the employer for a period of 14 or more consecutive days in the claim period. It is possible for an employer to hire back eligible employees and pay them retroactively in respect of a claim period and receive the CEWS. In this situation, an employee who has received the CERB in respect of this period may be required to repay the CERB.

Example: An employee is placed on temporary layoff on March 15, 2020. During the temporary layoff period, the employee does not earn any income and receives the CERB. However, the employer subsequently recalls the employee to work on April 11, 2020, and retroactively pays the employee

for the entire period of layoff. In this situation, assuming the employer is eligible for the CEWS, the employer will be permitted to include the employee's eligible remuneration in its CEWS application for the March 15, 2020 to April 11, 2020 claim period and the employee will be required to return or repay the CERB funds received in respect of that four-week period.

3. CAN AN EMPLOYER "TOP-UP" THE CERB THROUGH A SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN ("SUB PLAN")?

A SUB Plan registered with Service Canada allows an employer to increase, or "top-up," the regular or sickness EI benefits an employee may receive, without resulting in a claw back of EI benefits. Since the CERB was announced, employers have wondered whether the federal government would allow the CERB to be topped up in a similar manner.

Unfortunately, the federal government recently confirmed that payments from a SUB Plan will be considered employment income when assessing whether an individual meets the CERB eligibility requirements. If an employee receives employment income in excess of the C$1,000 threshold, the individual will not be eligible for the CERB. Employees will be required to repay the CERB for periods where the employee is subsequently found ineligible.

Furthermore, all employees who ceased working after March 15, 2020, and would have otherwise been eligible for regular or sickness EI benefits, will receive the CERB first before having their EI claim processed. Individuals do not get to choose whether to receive the CERB or regular EI benefits. This means that employees will not begin receiving regular or sickness EI benefits until after the 16-week CERB has been exhausted. As a result, an employer cannot top-up an employee's earnings while the employee is collecting the CERB, even if the employer has a pre-existing SUB Plan in place.

4. DOES AN EMPLOYER NEED TO ISSUE A RECORD OF EMPLOYMENT ("ROE")?

An employee does not need an ROE to apply for and receive the CERB. However, employers should be providing ROEs when there is an interruption in earnings in case an employee subsequently applies for EI after the CERB is exhausted. When completing the reason for separation (block 16) on the ROE, Service Canada notes that (i) if an employee is sick or quarantined, use code D (illness or injury), (ii) if an employee is no longer working due to a shortage of work (business closed or decreased operations) use code A (shortage of work), and (iii) if an employee refuses to go to work but is not sick or quarantined, use code E (quit) or code N (leave of absence), as appropriate.

5. WHAT SHOULD AN EMPLOYER CONSIDER WHEN REINSTATING EMPLOYEES?

As provincial governments begin to loosen emergency measures and implement strategies to re-open the economy, more workplaces will be permitted to open. Yet with social distancing requirements and other safety directives in place, many companies will likely experience a transition period where business remains slow and employees are not needed on a full-time basis.

During this transition period, some employees may be recalled on a part-time basis, earning more than C$1,000 per month — and making them ineligible for the CERB — but less than the C$2,000 they would have received through the CERB. The CERB does not account for this transition period or offer any top-up payment to such employees. As a result, such employees will be in a worse financial position upon returning to work than they were before. This will likely affect their willingness to return. Employers should be mindful of this issue and be prepared to offer employees sufficient financial incentive to return.

For general information on considerations for returning to work and other issues related to COVID-19, please see the Blakes COVID-19 Resource Centre: https://www.blakes.com/pages/2020/covid-19-your-resource-centre.

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• ONTARIO PROVIDES EMPLOYERS WITH TEMPORARY RELIEF FROM COVID-RELATED TERMINATION RISKS •

Chiedza Museredza, Associate, Victor Kim, Associate, and Kyle Lambert, Partner, McMillan LLP.
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On May 29, 2020, the Ontario government introduced a new regulation (*Infectious Disease Emergency Leave*, O. Reg. 228/20, available at: https://www.ontario.ca/laws/regulation/r20228) (the "**Regulation**") that provides employers with temporary relief from certain termination provisions in the *Employment Standards Act, 2000* ("**ESA**").

The new measures, summarized below, provide enhanced protection from COVID-related termination risks for employers whose operations have been impacted by the recent pandemic. The Regulation limits the risk of a temporary layoff turning into a permanent dismissal or being deemed a constructive dismissal under the ESA for the duration of the "COVID-19 period". However, the new measures do not apply to unionized employees.[1]

DEFINITION OF "COVID-19 PERIOD"

The COVID-19 Period is defined as the period beginning on March 1, 2020 and ending on the date that is six weeks after the day that the emergency (https://news.ontario.ca/opo/en/2020/03/ontario-enacts-declaration-of-emergency-to-protect-the-public.html) is terminated. Importantly, having six-weeks after the declared emergency ends will provide employers with an opportunity to assess long-term needs coming out of the pandemic.

CONSTRUCTIVE DISMISSAL

The Regulation provides that, for the purposes of the ESA, the following does not constitute constructive dismissal if it occurred during the COVID-19 Period:

a. A temporary reduction or elimination of an employee's hours of work by the employer for reasons related to the designated infectious disease.
b. A temporary reduction in an employee's wages by the employer for reasons related to the designated infectious disease.

However, the above does not apply if the employer constructively dismissed the employee and the

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employee resigned from his/her employment in response before May 29, 2020.

SUSPENSION OF TEMPORARY LAYOFF PERIOD

The Regulation modifies the effect of the ESA's temporary layoff provisions by providing that an employee whose hours have been partially or entirely reduced (i.e. placed on temporary layoff) is exempt from the ESA's termination and severance provisions. Specifically, section 6 of the Regulation states:

> An employee whose hours of work are temporarily reduced or eliminated by the employer, or whose wages are temporarily reduced by the employer, for reasons related to the designated infectious disease during the COVID-19 period is exempt from the application of [the termination and severance sections] of the Act for the purposes of determining whether the employee has been laid off, and the employee shall not be considered to be laid off under those sections, other than [where there is a permanent discontinuance of all the employer's business at an establishment].

The Regulation's effect is that the time limits on temporary layoffs — the times at which temporary layoffs become terminations — are suspended for the COVID-19 Period, with all employees laid off because of COVID-19 deemed to be on a leave of absence, instead. This means that time spent on layoff during the COVID-19 Period will not count towards the period of time that an employee can be on temporary layoff. So, if an employee was laid off for 12 weeks during the COVID-19 period, they are deemed to be on leave instead. If the employer has to keep that employee on layoff at the end of the COVID-19 Period, the "clock" resets to zero. Otherwise, a layoff lasting longer than the periods below would be deemed to be a "termination" which triggers the employer's obligations to provide termination pay (and severance pay if applicable):

a. A layoff of not more than 13 weeks in any period of 20 consecutive weeks; or
b. A layoff of more than 13 weeks in any period of 20 consecutive weeks, if the layoff is less than 35 weeks in any period of 52 consecutive weeks and if certain conditions are met.

COMPLAINT DEEMED NOT TO HAVE BEEN FILED

The Regulation provides that a complaint made by an employee to the Ministry of Labour regarding the temporary reduction or elimination of the hours or work and/or wages, will be deemed not to have been filed.

This applies only if the reduction or elimination of hours of work and/or wages occurred during the COVID-19 Period for reasons related COVID-19.

AMENDMENT TO INFECTIOUS DISEASE EMERGENCY LEAVE

As previously reported (https://www.mcmillan.ca/Ontario-Amends-Employment-Standards-Legislation-in-Response-to-COVID-19), in response to the COVID-19 crisis, the Ontario government introduced a new job-protected unpaid leave called the infectious disease emergency leave.

The Regulation prescribes[2] a new reason for entitlement to the infectious disease emergency leave by providing that an employee is deemed to be on the leave if their hours of work have been temporarily reduced or eliminated by their employer due to COVID-19 during the COVID-19 Period (the "**Prescribed Reasons**"). This new provision is deemed to have started on March 1, 2020 and applies during the COVID-19 Period.

Benefits

Under the ESA, an employee has the right to continue to participate in each type of benefits plan during a leave of absence unless they choose not to do so in writing. If an employee on an infectious disease emergency leave for the prescribed reasons stopped participating in any benefit plan before May 29, 2020, they are exempt from this right for the duration of the COVID-19 Period. Similarly, employers who stopped making employer contributions for any

benefit plan before May 29, 2020 are exempt from the obligation to make contributions for the duration of the COVID-19 Period.

KEY TAKEWAYS

The new measures introduced by the Regulation may provide relief for Ontario employers that have been forced to reduce employee hours or wages in response to the COVID-19 pandemic's impact on their operations.

Employers whose layoffs were approaching the 13-week ESA threshold will now be able to continue with the status quo without worrying about triggering a number of terminations, including a possible mass termination.

However, while the Regulation provides that the temporary reduction of hours of work and wages are not constructive dismissal for the ESA purposes, it remains to be seen how the common law will ultimately react to the employer's unilateral reduction in hours of work and wages. It remains possible that an Ontario court will find that a reduction in hours or wages, even if in response to the COVID-19 pandemic and permitted by the ESA, amounts to a constructive dismissal. What is positive for employers is that an employee will have to bring a claim in Court, rather than at the Ministry, if they want to make a constructive dismissal claim.

Employers should also remain aware of the risk that layoffs might trigger a mass termination if employees are not brought back after the COVID-19 Period expires. The ESA still provides that any termination caused by a layoff exceeding the permitted time limit is deemed to occur on the first date of the layoff. Employers should be aware of mass termination risks if they are unable to resume operations after the declared emergency ends.

Finally, employers should be aware that all employees whose hours of work have been temporarily reduced or eliminated are now deemed to have been placed on the infectious disease emergency leave. The infectious disease emergency leave is a job-protected leave under the ESA, and as such, the employees under this leave are generally entitled to the same right, including reinstatement to the same position if it still exists, or a comparable position, if it no longer exists, as employees who take pregnancy or parental leave, although benefits continuation is not required during the COVID-19 Period.

If you have any questions relating to the above, please do not hesitate to contact a member of the Employment & Labour Relations Group at McMillan LLP: https://www.mcmillan.ca/employment-and-labour-relations.

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[1] Note that the Regulation does not apply to employees of federally-regulated entities, such as banks, airlines and telecommunication companies, even if those employees are working in Ontario.

[2] *See* ESA section 50 (1.1)(b)(vii).

• NEW COVID-19 IMMIGRATION POLICY FOR CHANGING THE EMPLOYMENT STATUS OF TEMPORARY FOREIGN WORKERS •

Katie Van Nostrand, Partner, and Natasha Lakhani, Associate,
Mathews, Dinsdale & Clark LLP.
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Immigration, Refugees and Citizenship Canada ("IRCC") recently released a new public policy. The new policy will allow temporary foreign workers ("TFW") who are in Canada to change either their employer or listed job within approximately 10 days of submitting an application to change their work permit and make a request to fall under the public policy via the web form (https://secure.cic.gc.ca/enquiries-renseignements/canada-case-cas-eng.aspx).

Upon receiving an approval-response email from IRCC's web form, the TFW will be able to transition to the new role without waiting for the new work permit to first be issued. This policy will remain in effect until revoked by IRCC. This is a welcome announcement by IRCC and was introduced because of the COVID-19 crisis.

WHO CAN ACCESS THIS POLICY?

Foreign workers who:

- are currently on implied status (their work permit had expired but they submitted a new work permit application before the expiry of the old work permit and they have not left Canada) and are bound by the conditions of the expired work permit;
- currently hold a valid work permit, but the foreign national wants to change jobs or employer; or
- are work permit exempt but want to move into a position that requires a work permit.

We note that TFWs who are in Canada as Business Visitors or foreign nationals who are work permit exempt under the global skills strategy 15 or 30 day exemptions do not fall under this new policy.

ELIGIBILITY REQUIREMENTS

TFWs must meet the following requirements:

- Be in Canada and have valid temporary resident status or implied status;
- Have a valid work permit or be authorized to work without a work permit;
- Submit a new work permit application, change of conditions or a work permit renewal for an employer specific work permit where no decision has yet been made;
- Plan to work for a new employer and/or occupation;
- Request the public policy exemption through the web form; and
- Request that the public policy exemption be applied until a decision is made on their work permit application.

OVERALL PROCESS

TFWs must first submit an application for a change in work permit conditions. Next, they are required to submit a Web Form, requesting the expedited change in status. If the request is approved, IRCC will email the TFW and let them know that their request has met the eligibility criteria under the public policy. The TFW can then attach that email with their work permit and proceed to work for the new employer or occupation. If the request is denied, an email from IRCC will be sent to the foreign national and they will be advised that they do not meet the requirements of the public policy. If the request is refused, the TFW may not immediately change their employment. This new policy will assist employers to employ new foreign workers or allow for changes in roles of current foreign workers

much more quickly than before. In the past, foreign workers who wanted to change roles or employers and held 'closed' employer-specific work permits were required to submit a change in work permit application and wait until the new work permit was issued, before they could start the new role; a time period of anywhere between 89-120+ days. This new public policy will allow TFWs to change jobs as soon as they receive confirming correspondence from IRCC's web form, which will usually arrive in only 10 days.

We will continue to update our clients with information as soon as it becomes available. If you have any questions about this topic, other COVID-19 related questions, or would like assistance with developing and/or reviewing pandemic plans, please do not hesitate to contact a Mathews Dinsdale lawyer (https://mathewsdinsdale.com/our-team/), or refer to the Firm's COVID-19 website resources (https://mathewsdinsdale.com/covid-19-employer-support/).

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• SUPPORTING YOUR EMPLOYEES' MENTAL HEALTH DURING COVID-19 •

Sean J. O'Donnell, Principal, SJO Legal Professional Corporation.
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The devastating physical and economic effects of COVID-19 are now clear. What may be less clear, however, are the effects that it is having on mental health. While employers struggle during the transition to get their team working from home or conduct regular sanitizing of their premises — along with the business impacts of having their physical locations shut down or complying with new regulations — they also need to keep in mind that now more than ever, employees may be facing mental health challenges as they deal with their stress and anxiety concerning the pandemic.

Essential workers such as grocery store clerks, food producers, and healthcare workers may be feeling fearful that they are going to contract COVID-19. Those working from home may be feeling depressed or anxious that they might lose their jobs. This stress may lead to bursts of anger, poor work quality or withdrawal. If you work with a larger team, you may want to have a meeting or teleconference with those in supervisory roles to review your company's mental health policies and how to respond when you suspect an employee is having difficulty.

During this pandemic, it is reasonable for employers to expect that at least some of their employees will experience mental health challenges. It would be prudent therefore for employers to be proactive in communicating early on that they are there to support their employees through this challenging time.

Let your employees know that help is available to them if they are struggling. If your company offers an Employee Assistance Program ("EAP"), take the time to make sure that they are aware of it and how to access it. You can also provide your employees with online resources for mental health support.

WHAT IS AN EMPLOYER TO DO? — THE DUTY TO ACCOMMODATE:

Under the Ontario *Human Rights Code*, employers have the duty to accommodate employees with disabilities provided that it does not cause the company undue hardship. And this duty to accommodate includes mental health issues.

The manner in which you accommodate your employees is going to vary based on their needs but some ideas for accommodation include:

- Reduced or more flexible work hours — this may be particularly beneficial for employees who are working from home and who have children to take care of;
- More frequent breaks for employees who must still work on site; and
- Taking additional measures (beyond what has been mandated by the government and health authorities) to help ensure your employees feel safe.

OTHER WAYS TO SUPPORT EMPLOYEE MENTAL HEALTH:

Even though most employees may not tell you that they are experiencing stress and anxiety during this time, the truth is that many of them are.

Keeping the lines of communication open is one of the best things you can do to support your employees right now. This may include things like regular check-ins and teleconferences for employees who are working from home. Sharing your own anxieties can also be helpful in making it feel acceptable for employees to express theirs.

Finally, do what you can to encourage self-care during this time. Let employees know that you want them to take care of themselves by eating healthy and staying active — perhaps getting up from their computer every once in a while to go for a walk.

SJO LEGAL IS HERE TO HELP:

If you are an employer and need help in knowing how to accommodate employees with mental health issues during COVID-19 or in simply being supportive, we would like to help. Call us today to speak with a member of our team.

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Canadian Employment Law Guide

June 2020
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KEY CONSIDERATIONS WHEN RE-OPENING YOUR BUSINESS

— Lisa Goodfellow, Partner, and Michael Cleveland, Articling Student. *© Miller Thomson LLP. Reproduced with permission.*

[Editor's note: This article was originally published on May 6, 2020. Please note that Ontario's O Reg 228/20, *Infectious Disease Emergency Leave*, which is discussed below in the Progress of Legislation section of this newsletter, was filed on May 29, 2020. That Regulation has significant implications to temporary layoffs related to COVID-19 during the COVID-19 period and infectious disease emergency leave, among other things.]

In recent days, much of the conversation around the COVID-19 pandemic has shifted to the subject of re-opening various sectors of the economy and the eventual return to a "new normal". While the precise details of this re-opening remain unscheduled in many provinces, including in Ontario, what is certain is that employers will encounter a slate of employment law issues as they endeavour to re-open.

Among the first issues that employers will have to consider is bringing laid-off employees back to work. Employers need to be aware of the rules governing temporary layoffs and the proper method for recalling laid-off workers. Moreover, the fact that employees will be returning to work does not mean that those employees' lives will have returned to normal—they may continue to face unexpected demands such as childcare obligations or caring for an ill family member. Thus, it is likely that employers will receive an above-average number of requests for leaves of absence or accommodation in the form of flexible work arrangements in response to these circumstances. Employers will need to be cognizant of their obligations under human rights legislation in relation to these issues, as well as the special COVID-19-related job-protected leaves which are now available to employees. Finally, the unfortunate reality that COVID-19 will continue to proliferate even as businesses re-open is likely to prompt concern from employees about the safety of their workplaces. As a result, some employees may refuse to attend work, or may refuse to perform specific work, out of concern for their safety. Employers need to know how to properly respond to such refusals, and should know how to approach occupational health and safety in the workplace so as to reduce the number of such refusals. Advance preparation will position employers to experience a successful return to the new normal, whatever it may entail.

This article primarily refers to the state of the law in Ontario. Many of the general principles discussed here are applicable in other jurisdictions, but employers should be sure to seek appropriate advice in relation to the jurisdictions in which they operate.

Recalling employees from temporary layoff

As employers look toward re-opening, one of the first orders of business will be to recall employees from layoff. In this regard, employers must be cognizant of the rules and

limitations relating to temporary layoffs. In Ontario, a "temporary layoff" can last for a maximum of 13 weeks in any period of 20 consecutive weeks, or 35 weeks in any period of 52 consecutive weeks where certain conditions are met (for instance, where the employee receives supplementary unemployment benefits or remains on the group benefits plan), or for the period during which they retain recall rights under a collective agreement. A "week of layoff" is defined as a reduction of 50% or more of an employee's regular weekly wages. An employee who is temporarily laid off is not entitled to statutory notice or termination pay unless and until the layoff exceeds the periods set out above.

Any layoff exceeding the applicable temporary layoff period will be deemed a termination of employment. In such circumstances, the termination date will be deemed to have taken place retroactive to the first day of the layoff, and any entitlements owing to the employee should be calculated as of that date.

Given that many employers laid off their employees in mid to late March, it is unlikely that there have been any deemed terminations yet. However, businesses which intend to remain closed through May or beyond should be mindful of when the temporary period will expire.

Employers should also be attentive to the procedure to be followed for recalling laid-off employees. Some jurisdictions require the recall notice to adhere to a certain format. For instance, in Alberta, a recall notice must be served on the employee, must be in writing, and must state that the employee is to return to work within seven days from the date notice was served. While there is no prescribed format of recall notice in Ontario, employers will want to ensure that employees actually receive the notice of recall, and are given a reasonable period to return to work. Sending such notice by way of email can pose challenges because it is difficult to verify that the notice was received by the employee. Confirmation that the employee received a recall notice is important because an employee on temporary layoff who refuses to return to work within a "reasonable time" after having been requested to do so by their employer is not entitled to notice of termination or termination pay. If the employer cannot prove that the employee actually received the recall notice, they will encounter difficulty relying on this exemption.

Deciding which employees to recall should be based on business needs, while avoiding any appearance of discrimination. If a "rolling" recall is implemented as a business ramps up operations, employers should be careful to ensure that *Human Rights Code*-protected grounds such as age, family status or disability are not factors in deciding who receives a recall notice. Recall should be offered to all qualified employees. Additionally, refusals to return to work will need to be assessed on case-by-case basis to ascertain whether the refusal is related to issues such as family status or disability.

Finally, if the company is unionized or has a written policy regarding layoffs and recall procedures, it must follow the process laid out therein.

The duty to accommodate

As businesses re-open or transition away from remote-work operations, some employees may be reluctant to attend at the workplace for a variety of reasons. Usually, an employee's absence will be grounds for discipline. However, in some cases, a refusal may be related to a human rights ground, giving rise to a duty to accommodate.

Many employees are struggling to meet unprecedented demands, including remote work, childcare issues, and family members losing their jobs or falling ill. Employees may seek flexible work arrangements in response to these circumstances. For instance, employees may ask to continue working remotely until childcare centres or schools re-open. In Ontario, and most Canadian jurisdictions, discrimination with respect to employment on the basis of family status is prohibited by human rights legislation. Employers would be prudent to consider in advance how they will respond to employees seeking accommodation on the basis of issues which engage human rights legislation. They should be prepared to be flexible in responding to such requests, and seek appropriate legal advice as needed.

The Ontario Human Rights Commission's policy position is that negative treatment of employees who have, or are perceived to have, COVID-19, for reasons unrelated to public health and safety, is discriminatory and prohibited under the *Human Rights Code*. Employers have a duty to accommodate employees in relation to COVID-19, unless it would amount to an undue hardship based on cost, or health and safety. While the Human Rights Tribunal of Ontario is not bound to follow the OHRC's view, the Commission's policy positions do have persuasive value.

If an employee refuses to attend the workplace without reasonable excuse, the employer may impose discipline, including termination. However, one should weigh the potential negative optics of imposing such discipline during a global pandemic. The same calculus applies to considerations over discipline in relation to a decline in employee performance.

Employers can require medical information from employees in specific circumstances such as for return-to-work or accommodation purposes, but this process is complicated by the ongoing pandemic. Practically, it may be difficult for employees to obtain medical documentation at this time. Privacy issues also arise when employers ask employees for health information. Generally speaking, if an employer intends to collect personal or medical information, it should explain why the information is being collected, obtain the consent of the employee to same, and keep the scope of disclosure as minimal as possible. All disclosure of information and consent for such disclosure should be documented.

New job-protected leaves

Employers in Ontario should be aware that additional job-protected leaves are currently available under the *Employment Standards Act, 2000*. Similar leaves are available in many other jurisdictions. The existence of these leaves may help employees navigate the challenging situations faced by many employees at this time.

The first leave, introduced in response to the COVID-19 pandemic, is the Infectious Disease Emergency Leave. This unpaid, job-protected leave is available to employees who are not performing the duties of their position for certain reasons related to COVID-19, including:

- personal illness, quarantine or isolation in specific circumstances;
- concern by the employer that the employee may expose other individuals in the workplace to COVID-19;
- to provide care or support to certain family members for a reason related to COVID-19, including school or day care closures; or
- due to certain travel-related restrictions (e.g. where the employee cannot reasonably be expected to return to Ontario).

The leave is retroactive to January 25, 2020 and is available for as long as the employee is not performing the duties of their position for one of the above reasons. Employers cannot require employees to provide medical notes to prove they are eligible for the leave, but can require "evidence that is reasonable in the circumstances."

The second leave, "Declared Emergency Leave," applies where an emergency has been declared pursuant to the *Emergency Management and Civil Protection Act* (EMCPA) and the employee cannot work because they are subject to an order under the EMCPA or the *Health Protection and Promotion Act;* or where the employee needs to provide care or assistance to close family members. Employers cannot require employees to provide medical notes to prove that they are eligible for the leave, but can require "evidence that is reasonable in the circumstances." This leave will be available until the ongoing emergency declaration is terminated.

An employer cannot require an employee to take a statutory leave of absence unless the employment standards legislation allows for such. Under the Ontario *Employment Standards Act, 2000*, the Infectious Disease Emergency Leave does in fact contemplate an "employer-directed" absence from the workplace. For example, the government has indicated that this would include an employer directing an employee to stay at home if the employee has recently travelled internationally and the employer is concerned that the employee could expose others in the workplace to COVID-19.

Work refusals and occupational health and safety

In all jurisdictions, occupational health and safety legislation makes employers and supervisors responsible for taking all reasonable precautions to protect the health and safety of workers. This includes ensuring that workers are provided with the information, instruction, training, equipment, and supervision necessary to ensure health and safety in the workplace. These obligations apply with respect to the risks of COVID-19 transmission in the workplace.

Generally speaking, across the country, occupational health and safety legislation allows employees to refuse to perform work that they perceive as unsafe. In Ontario, an employee refusing work must immediately tell the supervisor or employer that the work is being refused and explain the circumstances for the refusal. When an employer becomes

aware of a work refusal, it must investigate the worker's concerns in conjunction with a workplace joint health and safety committee member or the health and safety representative, as applicable. If the matter is not resolved, the worker and the supervisor or employer must contact the Ministry of Labour. At that point, a government inspector will investigate the work refusal and determine whether the refusal is justified. At the time of writing, the Ministry of Labour has not yet upheld a work refusal initiated on the basis of COVID-19 related safety concerns. [Note also that employees who contract COVID-19 while at work may be eligible for WSIB coverage; thus, employers may also have a duty to report the illness to the WSIB.]

To ensure that best practices are followed, and to minimize the likelihood that employees will refuse to perform work they perceive as unsafe, employers should be proactive about implementing safety precautions as they move to resume operations. The types of precautions taken by employers will vary depending on the nature of the workplace. Employers should be attentive to all federal, provincial, and municipal requirements which govern conduct in the workplace during the pandemic, such as requirements to modify the workplace to permit social distancing. Employers should refer to the sector specific guidance and tip sheets developed by the Canadian Centre for Occupational Health and Safety, available on the CCOHS website. In addition, the Public Health Agency of Canada has created a comprehensive set of guidelines on employer decision-making during the pandemic, including a discussion of the use of personal protective equipment and other risk mitigation strategies. Those guidelines are available on the Government of Canada's website.

Conclusion

Significant ambiguity remains as to what the coming year will bring, but one thing is certain—the fact that businesses may soon be re-opening will not mean that things have returned to normal. Both employers and employees must continue to adapt as operations resume and the "new normal" comes into focus. If employers take heed of the above considerations, they will be well-positioned to successfully address the challenges that will be faced in the coming months.

Miller Thomson is closely monitoring the COVID-19 situation to ensure that we provide our clients with appropriate support in this rapidly changing environment. For articles, information updates and firm developments, please visit our COVID-19 Resources page.

PROGRESS OF LEGISLATION

Federal

Employment Insurance Act Amended and *Income Support Payment Amount Regulations* Introduced

Pursuant to the *Interim Order Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*, SOR/2020-61, which was registered on April 1, 2020 and was deemed to come into force effective March 15, 2020, the *Employment Insurance Act* has been amended to add a new Part VIII.4 entitled "Employment Insurance Emergency Response Benefit". Claimants under this new Part are persons who have ceased working, whether they were employed or self-employed, for reasons related to COVID-19, or persons who "could have, but for the coming into force of this Part, on or after March 15, 2020, had a benefit period established with respect to any of the benefits referred to in subsection (3)", i.e.:

(a) benefits paid under Part I [of the *Employment Insurance Act*], with the exception of benefits paid under sections 22 to 25; and

(b) benefits paid under section 152.03.

The new Part VIII.4 sets out information about making a claim for the Employment Insurance emergency response benefit "for any two-week period starting on a Sunday and falling within the period beginning on March 15, 2020 and ending on October 3, 2020", as well as about eligibility and ineligibility, payment of the benefit, the amount of the benefit ($500 per week), the maximum number of weeks for which the benefit may be paid (16 weeks), and more.

A related regulation, the *Income Support Payment Amount Regulations*, SOR/2020-062, made under the *Canada Emergency Response Benefit Act* was also registered on April 1, 2020. It provides that, for the purpose of subsection 7(1) of the *Canada Emergency Response Benefit Act*, the "amount of an income support payment for any week is $500." These new Regulations state that they come into force on the date that they were registered.

New Interim Orders Modify Employment Insurance Emergency Response Benefit

As discussed above, the *Employment Insurance Act* was amended by SOR/2020-61, effective March 15, 2020, to add a new Part VIII.4 entitled "Employment Insurance Emergency Response Benefit". On April 16, 2020, the federal government registered two interim orders under the *Employment Insurance Act* that modify certain aspects of this new benefit. A third interim order was registered on April 24, 2020.

Interim Order No. 2 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit), SOR/2020-88, specifies that claimants will remain eligible for the Employment Insurance Emergency Response Benefit if they receive income from employment or self-employment of up to $1,000 over a period of four weeks. In addition, the order specifies that that claimants in receipt of the Employment Insurance Emergency Response Benefit are eligible to receive the additional amounts under the Family Supplement.

Interim Order No. 3 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit), SOR/2020-89, expands the eligibility requirements for the Employment Insurance Emergency Response Benefit to make it available to Employment Insurance claimants who have recently exhausted their regular benefits and are unable to find work for reasons related to COVID-19.

Interim Order No. 4 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit), SOR/2020-95, was registered on April 24, 2020, and published in the *Canada Gazette*, Part II, Volume 154, Number 10, dated May 13, 2020. It expands the eligibility requirements for the Employment Insurance Emergency Response Benefit to make it available to self-employed fishers who have recently exhausted their Employment Insurance benefits under Part VIII of the *Employment Insurance Act* ("Self-employed Persons Engaged in Fishing") and are unable to commence working for reasons having to do with COVID-19.

All three interim orders are deemed to have come into force on March 15, 2020.

Alberta

Ministerial Order Modifies Application of Certain Sections of the *Employment Standards Code*

In a Ministerial Order (M.O. 18.2020) dated April 6, 2020, Alberta's Minister of Labour and Immigration ordered a number of temporary modifications to the *Employment Standards Code* (the "Code") and the *Employment Standards Regulation* (the "Regulation") to respond to the "state of public health emergency in Alberta due to pandemic COVID-19 and the significant likelihood of pandemic influenza". According to the Ministerial Order:

- Subsection 17(2) of the Code, which deals with notice of shift changes, is amended to replace the words "at least 24 hours' written notice" with "giving written notice as soon as is practicable in the circumstances".
- Effective March 17, 2020, notwithstanding subsection 53.982 of the Code, which sets out provisions related to unpaid leave for personal and family responsibilities, employees are entitled to unpaid leave for the period of time recommended (or directed) by the Chief Medical Officer to meet their responsibilities in relation to a family member under quarantine and to a child of the employee "due to the closures of schools or daycares as a result of COVID-19 effective March 16, 2020." Such an employee is exempt from the 90-day employment requirement set out in subsection 53.982(1) of the Code. An employee who takes leave under this provision must provide their employer, on request, with documentation that is reasonable in the circumstances and at a time that is reasonable in the circumstances, demonstrating their entitlement to this leave, but an employer is not permitted to require the provision of a medical certificate as documentation.

- The "termination pay after temporary layoff" provision at section 63 is modified to strike out the words "one or more periods exceeding, in total, 60 days within a 120-day period" and replace them with "more than 120 consecutive days" (this applies where a notice of layoff was provided to an employee on or after March 17, 2020).
- Section 74 of the Code, which deals with a "director's variance or exemption" and section 74.1, which deals with a "Minister's variance or exemption", as well as subsection 43.86(1) of the Regulation, which deals with variances under section 74 of the Code, do not apply and replacement provisions are substituted.
- Subsections 43.86(3) and 43.87(1) of the Regulation do "not apply with respect to an application by an employer, a group of employers, or an employer association impacted by COVID-19 for" a variance or exemption made under section 74 of the Code (as amended by the Ministerial Order) or an order made under section 74.1 of the Code (as amended by the Ministerial Order).
- Section 137 of the Code, which sets out requirements related to group terminations, does not apply and it is replaced by a provision that specifies that an employer who intends to terminate the employment of 50 or more employees at a single location must provide the Minister, as soon as is practicable in the circumstances, with written notice specifying the number of employees being terminated and the effective date of the terminations (note that this replacement provision does not apply in respect of the termination of employees employed on a seasonal basis or for a definite term or task). Additionally, paragraph 55(1)(*a*) of the Code is modified by striking out the words "termination notice of at least the period of notice required under section 137(1) if that section applies, or in any other case".
- Section 13.33 of the Regulation, which deals with temporary changes in work schedule, is amended by striking the words "with at least 2 weeks' notice" and substituting them with "by giving notice as soon as is practicable in the circumstances".

The Ministerial Order provides that it comes into force on April 6, 2020 and that it lapses (unless sooner continued by an order of the Lieutenant Governor in Council under the *Public Health Act*) at the earliest of:

(a) August 14, 2020;

(b) 60 days after Order in Council 080/2020 is terminated by the Lieutenant Governor in Council, if Order in Council 080/2020 is terminated before June 15, 2020;

(c) when this Order is terminated by the Minister under section 52.811(2) of the [*Public Health Act*] because the Minister is satisfied that this Order is no longer in the public interest; or

(d) when this Order is terminated by the Lieutenant Governor in Council under section 52.811(1)(*c*) of the [*Public Health Act*].

To view the Ministerial Order, visit: https://www.qp.alberta.ca/Documents/MinOrders/2020/Labour_and_Immigration/2020_018_Labour_and_Immigration.pdf. For more information, see the government's press release: https://www.alberta.ca/release.cfm?xID=700122D6A74F3-F688-D77B-42A3309636AA078B.

British Columbia

New Regulation Extends Temporary Layoff Period During COVID-19 Pandemic

On May 4, 2020, the *Employment Standards Regulation* was amended by BC Reg 94/2020 to modify the temporary layoff provisions in respect of employees who are laid off as a result of the COVID-19 pandemic.

Generally, the *Employment Standards Act* defines a "temporary layoff" as "a layoff of up to 13 weeks in any period of 20 consecutive weeks". BC Reg 94/2020 specifies that, where the COVID-19 emergency is a cause of all or part of an employee's layoff and the employee has no right of recall, a "temporary layoff" means "a layoff of up to 16 weeks in any period of 20 consecutive weeks".

This temporary definition does not apply to loggers working in the interior area who are recalled to work if the temporary layoff is the result of a normal seasonal reduction in activity.

Manitoba

Public Health Emergency Leave Now Available Under *Employment Standards Code*

On April 15, 2020, *The Employment Standards Code Amendment Act*, SM 2020, c. 7, received first, second, and third reading and Royal Assent. It amends *The Employment Standards Code* (the "Code") to create a new category of leave—public health emergency leave.

An employee is entitled to an unpaid public health emergency leave if, "in relation to the pandemic in Manitoba caused by the communicable disease known as COVID-19", they are unable to perform their work because:

(a) they are under medical investigation, supervision, or treatment;

(b) as a result of information or directions issued by certain specified officials and government bodies, they are required to quarantine or isolate themselves within the meaning of *The Public Health Act* or they are "subject to self-isolation or any other measure that results in their inability to work";

(c) due to the employer's concern about exposure to others, the employer has directed the employee not to work;

(d) they are providing care and support to a family member, as defined in section 59.2 of the Code (this includes "care or support needed to be provided as a result of the closure of a school or premises where child care is provided");

(e) they are directly affected by travel restrictions and cannot reasonably be expected to travel to their workplace;

(f) they are subject to an order made under *The Public Health Act*; or

(g) they are acting in accordance with an order made under *The Emergency Measures Act*.

According to the amendments, the employee is entitled to the leave whenever one of the above criteria applies to them, and the "leave ends when none of those circumstances apply to the employee." An employee taking public health emergency leave may be required to provide their employer with "reasonable verification of the necessity of the leave as soon as practicable"; however, the employer must not request a certificate from a health professional or health officer as verification and an employee is not required to provide such certificate.

A transitional measure provides that, in respect of the period from March 1, 2020 until the amendments came into force on April 15, 2020, an employee is entitled to, and is deemed to have taken, public health emergency leave if the employee was employed by an employer on or after March 1, 2020 and the employee, in relation to the COVID-19 pandemic in Manitoba, was unable to perform their work because of one of the circumstances set out above in items (a) to (g), on or after March 1, 2020. Their leave is deemed to end (or to have ended) when none of the circumstances in items (a) to (g) apply to the employee.

A new subsection 60(3.1) was also added to the Code. It provides for a temporary suspension of requirements related to physician's certificates and medical certificates, beginning March 1, 2020, with respect to the following leaves of absence: maternity leave, compassionate care leave, unpaid leave for organ donation, leave related to critical illness, long-term leave for serious injury or illness, or public health emergency leave. For the duration of the temporary suspension, employers may not request, and employees are not required to provide, physician's certificates or medical certificates in respect of eligibility for one of the listed leaves of absence.

The amendments came into force on Royal Assent, except for provisions that deal with the repeal of the public health emergency leave and the temporary suspension of physician's certificates and medical certificates, which will come into force on a day to be fixed by proclamation. Note: despite the eventual repeal of the public health emergency provisions, a transitional provision makes it clear that an employee who takes or has taken public health emergency leave on the day the provisions are repealed may extend the leave for as long as one of the circumstances set out in items (a) to (g) continue to apply to them.

New Brunswick

Employment Standards Act Amended; New Regulation Sets Out Details of COVID-19 Emergency Leave

An Act to Amend the Employment Standards Act, SNB 2020, c. 12, received first, second, and third reading and Royal Assent on April 17, 2020. It made several amendments to the *Employment Standards Act* (the "Act").

Most notably, the Act now includes provisions providing for an emergency leave of absence. A new section 44.028 of the Act provides that, if it is "necessary in the opinion of the Lieutenant-Governor in Council", an employer must grant an employee a leave of absence in any of the following circumstances:

(a) when the Minister of Public Safety declares a state of emergency under the *Emergency Measures Act* in respect to all or any area of the Province;

(b) when the Governor in Council declares a public welfare emergency, a public order emergency, an international emergency or a war emergency under the *Emergencies Act* (Canada);

(c) when the Governor in Council makes an order under section 58 of the *Quarantine Act* (Canada);

(d) in any circumstance relating to

(i) a notifiable disease prescribed by regulation under the *Public Health Act* or declared to be a notifiable disease in an order of the Minister of Health or the chief medical officer of health, as the case may be,

(ii) a notifiable event prescribed by regulation under the *Public Health Act*, or

(iii) any other threat to public health.

Subsection 44.028(2) makes it clear that an emergency leave is to be granted in accordance with the regulations.

In addition, the language in sections 28 and 44.04 of the Act was modified. Finally, section 85 of the Act, which sets out the regulation-making power of the Lieutenant-Governor in Council was amended to deal with emergency leave. Such a regulation may set out: (i) eligibility requirements for the leave; (ii) purposes for which the leave may be taken; (iii) whether the leave (or any part of it) may be taken as paid or unpaid leave, and if any portion may be taken as paid leave, the rate of pay to be paid during the leave; (iv) the "determination of different categories of leaves of absences and remuneration for any category of employee in any industry, business, trade or occupation"; (v) the deeming of a suspension, layoff, dismissal, or termination as a leave under the emergency leave provisions; (vi) the date the leave commences or is deemed to have commenced (this date may pre-date the coming into force of a Regulation); (vii) the duration of the leave and whether it is fixed or of indeterminate length; (viii) extension of a leave; (ix) the employee's right to interrupt or defer a different leave of absence granted under the Act in order to take emergency leave; (x) the verification that an employee is required to provide the employer; (xi) details regarding confidentiality, disclosure, or sharing of the documentation that an employee is required to provide to an employer in respect of emergency leave; and (xii) any other leave entitlements not referred to.

On April 28, 2020, the government filed NB Reg 2020-29, the *COVID-19 Emergency Leave Regulation—Employment Standards Act*, which sets out certain details of this new leave.

NB Reg 2020-29 provides that, for the purposes of the new emergency leave provisions, an employer, on application by an employee, shall grant an unpaid emergency leave to any of the following employees:

- an employee under individual medical investigation, supervision, or treatment related to COVID-19;
- an employee acting in accordance with an order under the *Public Health Act* related to COVID-19;
- an employee who is in quarantine or isolation or is subject to a control measure, which may include self-isolation, and the quarantine, isolation, or control measure was implemented as a result of information or directions related to COVID-19 issued or provided to the public, in whole or in part, or to one or more individuals, through any appropriate means of communication, by a medical officer of health appointed under the *Public Health Act*, a

medical practitioner, a nurse practitioner, a nurse, Tele-Care, the Government of New Brunswick or Government of Canada, or a department or agency of the Government of New Brunswick or Government of Canada or a council of a local government;

- an employee under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to COVID-19;
- an employee providing care or support to an individual with whom the employee shares a close family relationship because of a matter related to COVID-19 that concerns that individual, including school or early learning and childcare facility closures; and
- an employee who is directly affected by travel restrictions related to COVID-19 and, under the circumstances, cannot reasonably be expected to travel back to New-Brunswick.

An employee who intends to take emergency leave shall provide written notice as soon as possible and shall indicate the purpose for which the leave is taken. Employers are not permitted to request a medical certificate to verify that the employee is incapable of working due to COVID-19.

An employee's emergency leave shall end on the earliest of:

- the date on which the employer and employee agree;
- the date on which the purpose for taking the emergency leave no longer exists; or
- the date on which NB Reg 2020-29 is repealed.

An employee's eligibility for emergency leave is retroactive to March 12, 2020. If an employer, on or after March 12, suspends, lays off, dismisses, or otherwise terminates an employee who is eligible for emergency leave, the employee shall be deemed to have been granted an emergency leave.

Finally, NB Reg 2020-29 requires employers to keep all documentation or other material received in relation to an employee's emergency leave confidential, except in certain specified circumstances.

Nova Scotia

Labour Standards Code Amendments Proclaimed in Force

As previously reported in the *Canadian Employment Law Guide* newsletter no. 184, dated April 2020, the *Labour Standards Code (amended)*, SNS 2020, c. 13, received Royal Assent on March 10, 2020 and certain sections took effect on that date.

On May 5, 2020, the remaining sections of the *Labour Standards Code (amended)* were proclaimed in force. These sections primarily deal with changes to the reservist leave provisions of the *Labour Standards Code*, including:

- reducing the qualifying period for reservist leave from one year to three months (or such shorter period as may be prescribed);
- expanding the definition of "service" for the purposes of reservist leave to include deployment, training, travel time, and treatment;
- increasing the maximum length of reservist leave from 18 months in a three-year period to 24 months in a 60-month period (or a longer period where the leave is taken as a result of a national emergency within the meaning of the *Emergencies Act* (Canada));
- updating the notice and verification requirements for reservist leave; and
- modifying the Governor in Council's regulation-making powers in respect of reservist leave.

Also on May 5, the *General Labour Standards Code Regulations* were amended by NS Reg 73/2020. The amendments repealed certain provisions pertaining to reservist leave and made various other minor amendments.

Ontario

New *Infectious Disease Emergency Leave* Regulation

As previously reported in the *Canadian Employment Law Guide* newsletter no. 184, dated April 2020, the *Employment Standards Act, 2000* was amended on March 19, 2020 to add a new leave of absence for employees who are unable to work for certain reasons related to a designated infectious disease. Under O Reg 66/20, *Infectious Disease Emergency Leave*, which also came into effect on March 19, 2020, COVID-19 was designated as an infectious disease for the purposes of this leave.

On May 29, 2020, the government filed a new regulation, O Reg 228/20, *Infectious Disease Emergency Leave*, which revoked and replaced O Reg 66/20.

O Reg 228/20 reiterates that diseases caused by a novel coronavirus, "including Severe Acute Respiratory Syndrome (SARS), Middle East Respiratory Syndrome (MERS) and coronavirus (COVID-19)", are designated as infectious diseases for the purposes of infectious disease emergency leave, and employees' entitlement to emergency leave for a reason related to COVID-19 is deemed to have started on January 25, 2020.

The remainder of O Reg 228/20 modifies the rules for temporary layoffs and statutory constructive dismissal during the "COVID-19 period", which is defined as "the period beginning on March 1, 2020 and ending on the date that is six weeks after the day that the emergency declared by Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act* is terminated or disallowed."

The regulation specifies that an employee is deemed to be on infectious disease emergency leave in respect of any time during the COVID-19 period that the employee does not work because his or her hours of work are temporarily reduced or eliminated for reasons related to the designated infectious disease. Such employees are subject to all requirements and entitlements applicable to infectious disease emergency leave, except for the requirement to notify the employer of the leave. In addition, employers are not required to reinstate an employee deemed to be on leave's participation in a benefit plan if the benefits were discontinued prior to May 29, 2020.

Employees are not deemed to be on leave if they are terminated during the COVID-19 period or if they are laid off due to the permanent discontinuance of the employer's business. An employee who has been given written notice of termination in accordance with section 57 or 58 of the *Employment Standards Act, 2000* is not considered to be on leave unless the employer and employee agree to withdraw the notice.

O Reg 228/20 further specifies that:

- a temporary reduction of hours or wages for reasons related to COVID-19 during the COVID-19 period shall not be considered a layoff under the *Employment Standards Act, 2000*;
- a temporary reduction of hours or wages for reasons related to COVID-19 during the COVID-19 period does not constitute a constructive dismissal under the *Employment Standards Act, 2000*; and
- any complaint filed with the Ministry of Labour in relation to a temporary reduction of hours or wages for reasons related to COVID-19 during the COVID-19 period is deemed not to have been filed.

These exemptions do not apply to any temporary layoff that became permanent before May 29, 2020, or any constructive dismissal that occurred before May 29, 2020.

For employees who have a regular work week, an employee's hours or wages are considered to be reduced if the employee works fewer hours or earns less regular wages in the work week than he or she worked or earned in the last regular work week before March 1, 2020. The regulation also specifies how to determine whether a reduction in hours or wages has occurred for employees who do not have a regular work week, who were not employed for the entire week preceding March 1, 2020, or who were on vacation or not able to work for any part of the last work week before March 1, 2020.

The majority of O Reg 228/20's provisions do not apply to unionized employees. However, they do apply to assignment employees, with necessary modifications.

Prince Edward Island

New Emergency Leave Proposed

On May 26, 2020, Prince Edward Island introduced Bill 38, *An Act to Amend the Employment Standards Act (No.3)*. Bill 38 proposes to amend the *Employment Standards Act* to add a new unpaid leave of absence for employees who cannot work due to an emergency. If passed, the amendments will be deemed to have come into force on March 16, 2020.

If passed, eligible employees would be entitled to an unpaid leave of absence for the duration of time for which the employee cannot perform the duties of his or her position due to one or more of the following:

- an emergency declared under the *Emergency Measures Act*;
- a public health emergency declared under the *Public Health Act*;
- a direction or order of a public health official or the Chief Public Health Officer under the *Public Health Act*;
- an emergency declared under Part 1, Part 2, or Part 3 of the *Emergencies Act* (Canada);
- an order of a quarantine officer under the *Quarantine Act* (Canada);

The definition of "emergency" would also extend to certain situations where an employee's family member requires care or assistance due to one of the reasons above.

Emergency leave would also be available to an employee who:

- is in isolation or quarantine, or is subject to a control measure, including self-isolation, where the quarantine, isolation, or control measure was implemented as a result of information or directions issued to individuals or the public by the Chief Public Health Officer related to a communicable disease prescribed in the *Notifiable Diseases and Conditions and Communicable Diseases Regulations* (EC560/13) made under the *Public Health Act*;
- is under a direction given by the employee's employer in response to a concern of the employer that the employee may expose other persons in the workplace to a prescribed communicable disease; or
- is out of the province and is directly affected by a travel restriction related to a prescribed communicable disease and in the circumstances cannot reasonably be expected to return to the province.

An employee who wishes to take emergency leave would be required to provide as much notice as is reasonably possible and, if requested by the employer, supporting evidence that is reasonable in the circumstances. However, an employee would not be required to provide a medical certificate.

Employers would be required to reinstate the employee in the same position with no loss of wages and benefits at the end of the leave.

Temporary Amendment to *Exemptions Regulation* Under *Retail Business Holidays Act*

Pursuant to the *Retail Business Holidays Act Exemption Regulations Amendment*, EC2020-250, the *Exemption Regulation*, made under the *Retail Business Holidays Act*, is temporarily amended as follows: sections 3 and 4 of the *Exemptions Regulation* are revoked and replaced by a provision that exempts "a retail business that sells or offers for sale food, food products and household or personal products for customer pickup" from the application of paragraph 2(1)(*a*) of the *Retail Business Holidays Act*, subject to the proviso that the person who operates such a business shall not sell (or offer for sale) any goods other than by advance purchase during the hours specified. Paragraph 2(1)(*a*) of the *Retail Business Holidays Act* prohibits persons from selling, offering for sale, or purchasing goods or services by retail on a holiday, subject to certain exceptions listed at sections 3 and 4 of that Act.

According to the *Retail Business Holidays Act Exemption Regulations Amendment*, the Regulations come into force on April 18, 2020. The new section 3 of the *Exemptions Regulation* is revoked "on the date on which Order

EC2020-174, the declaration of a state of public health emergency pursuant to subsection 49(1) of the *Public Health Act* R.S.P.E.I. 1988, Cap. P-30.1, is terminated."

Saskatchewan

The Employment Standards Regulations Amended

On May 14, 2020, *The Employment Standards Regulations* under *The Saskatchewan Employment Act* were amended by Sask Reg 62/2020, *The Employment Standards (Public Emergencies) Amendment Regulations, 2020 (No. 2)*.

As reported in the *Canadian Employment Law Guide* newsletter no. 184, dated April 2020, *The Employment Standards Regulations* were previously amended on March 19, 2020 to add new provisions exempting employers and employees from certain sections of *The Saskatchewan Employment Act* during a public emergency period. The amendments made by Sask Reg 62/2020 modified some of these new exemptions.

A "public emergency period" is defined as "the period during which an order of the chief medical health officer issued pursuant to subsection 2-59.1(2) of [*The Saskatchewan Employment Act*], or an emergency declaration ordered pursuant to *The Emergency Planning Act*, is in force."

Under the March 19 amendments, employers were permitted to lay off employees for a period of up to 12 weeks in a 16-week period without triggering the requirement to provide notice or pay in lieu. Sask Reg 62/2020 expands this exemption to permit employers to lay off employees for the entire public emergency period plus a further two weeks after the emergency period ends. Any employee who is not scheduled to work after the expiry of the two-week period is deemed to be terminated and is entitled to pay in lieu of notice from the date of his or her layoff. Any employee who is scheduled to work but does not return is deemed to have resigned.

Sask Reg 62/2020 also added a new provision providing that employers are exempt from the group termination notice requirements during a public emergency period. Employers are not required to provide any notice to affected employees or unions, but they must provide notice to the minister "as soon as reasonably possible after the termination."

WORTH NOTING

Canada Emergency Response Benefit Expanded

In the *Canadian Employment Law Guide* newsletter no. 184, dated April 2020, we told you about the Canada Emergency Response Benefit (the "CERB"). Since that material was written, the federal government has announced changes to the eligibility criteria for the CERB. According to an updated Backgrounder document dated April 15, 2020, the eligibility rules for the CERB have been expanded to:

- Allow people to earn up to $1,000 per month while collecting the CERB.
- Extend the CERB to seasonal workers who have exhausted their EI regular benefits and are unable to undertake their regular seasonal work as a result of the COVID-19 outbreak.
- Extend the CERB to workers who have recently exhausted their EI regular benefits and are unable to find a job or return to work because of COVID-19.
- Allow artists to receive royalty payments for copyrighted works produced before March 1st while collecting the CERB[.]

In addition, the expanded Backgrounder document contains an announcement about what the federal government describes as a "new wage boost for essential workers".

To view the updated Backgrounder document, visit: https://www.canada.ca/en/department-finance/news/2020/04/expanding-access-to-the-canada-emergency-response-benefit-and-proposing-a-new-wage-boost-for-essential-workers.html.

Federal Government Launches Application Process for Canada Emergency Wage Subsidy; Announces It Will Extend the Canada Emergency Wage Subsidy; Regulatory and Proposed Legislative Changes Also Announced

The federal government's *COVID-19 Emergency Response Act, No. 2*, SC 2020, c. 6, enacted a new Canada Emergency Wage Subsidy ("CEWS") for eligible employers that are impacted by the COVID-19 pandemic.

On April 27, 2020, the federal government launched the application process for the CEWS. Eligible employers can apply for the CEWS through the CRA's *My Business Account* or through the CRA's online application portal at: https://apps.cra-arc.gc.ca/ebci/ghnf/netf/prot/ntrWgSbsdyStndAln.action.

For detailed information and instructions about who can apply for the subsidy, how eligibility is assessed, and how the subsidy is calculated, visit the federal government's CEWS website at: https://www.canada.ca/en/revenue-agency/services/subsidy/emergency-wage-subsidy.html.

In a news release and a backgrounder document, both dated May 15, 2020, the federal government announced important changes to the CEWS. Notably, the Finance Minister announced that government will be extending the CEWS by 12 additional weeks, to August 29, 2020. The news release indicated that, following consultations with representatives of business and labour, additional potential changes may be forthcoming.

In addition, the news release and the backgrounder document contain information about regulatory changes the federal government has made to extend CEWS eligibility to:

- Partnerships that are up to 50-per-cent owned by non-eligible members;
- Indigenous government-owned corporations that are carrying on a business, as well as partnerships where the partners are Indigenous governments and eligible employers;
- Registered Canadian Amateur Athletic Associations;
- Registered Journalism Organizations; and
- Non-public colleges and schools, including institutions that offer specialized services, such as arts schools, driving schools, language schools or flight schools.

Finally, the news release and backgrounder document indicated that the federal government is pursuing proposed legislative changes to the CEWS that would provide "flexibility for employers of existing employees who were not regularly employed in early 2020, such as seasonal employees", ensure appropriate application of the CEWS in respect of amalgamated corporations (and situations where one corporation is wound up into another), and modify the eligibility rules related to trusts.

The news release is available here: https://www.canada.ca/en/department-finance/news/2020/05/government-extends-the-canada-emergency-wage-subsidy.html. The backgrounder document may be found here: https://www.canada.ca/en/department-finance/news/2020/05/extending-eligibility-for-the-canada-emergency-wage-subsidy.html.

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MAKING MORE COVID-19 DATA AVAILABLE - PRIVACY AND THE SHARING OF PATIENT DATA IN COVID-19 HEALTHCARE

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Canadian institutions and companies are subject to federal and provincial laws relating to the collection, use and disclosure of personal information. Personal information is broadly defined as information about an identifiable individual and could potentially include de-identified information if it could be readily rendered identifiable. These laws are particularly strict for highly sensitive personal health information. It is easy to understand why data is generally kept confidential and privacy is paramount in a health-care context.[1] There are compelling reasons why more data needs to urgently be made publicly available in a pandemic, while respecting individual patient privacy.

Getting More Information Out To The Public

Tracking and predicting the spread of COVID-19 and individuals' responses to it is of crucial importance, and governments and health organizations need all the help they can get. There can understandably be limited resources in compiling and analyzing information when healthcare resources are being overwhelmed by patients in need. The extra effort taken now to collect and analyze information is critical to develop a playbook to counter COVID-19 in the future.

Hospitals should continue to comprehensively record and, as permitted, share data with public health agencies. Without proper collection and sharing of comprehensive basic health information, health care providers can feel like they are operating with only a partial picture of the virus and how to treat it. It is also helpful for public health agencies to share aggregated or anonymized information with the public so they have a fuller understanding about the extent of community spread of disease. The public release of data is more than simply an exercise in transparency. It provides important public outreach and it is educational. Data is also a basis for local government policy decisions, for example, whether to close businesses or restrict travel. Public compliance with government policy on protective measures and travel restrictions depends in part on their awareness and acceptance of the public health data.

Collection of Data

The data must be captured as fully as possible once necessary consents are in place (patient consent may be express, implied or obviated in some cases). It is critical that the

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[1] See https://www.bereskinparr.com/doc/handling-patient-data-in-artificial-intelligence for our earlier article.

backlog of diagnostic testing be resolved to collect as much useful input data as possible. In jurisdictions where there are limited test kits available, and unsuspected mild cases do not qualify for testing (self-isolate instead), the “curve” has been slower to flatten. Here in Ontario, there have been as many as 10,000 pending test results at times, and reports of over a week wait for results in some areas. Testing capacity and through put need to increase to get better input data.

The Benefits of Collaboratively Analyzing Collected Data

There is no substitute for human analysis. However, everyone recognizes that all tools at our disposal need to be utilized. Technology, such as artificial intelligence (“AI”) can step in, particularly in analyzing large amounts of patient data after it has been collected by hospitals. This is an area where healthcare providers may have their own in-house solutions, but often they collaborate with outside companies to access expertise. The shared data in a COVID-19 context could include data about initial patient assessments, comorbidities (underlying health issues), drug treatments, physical treatments (e.g., ventilators), timelines, demographics, geography and patient outcome. For companies developing healthcare AI solutions, large volumes of quality input data are essential to allow the AI to learn quickly and provide useful output. Read our article about digital health companies and the power of AI in healthcare.[2]

Any Disclosure of Collected Data Must Comply With Privacy Legislation - Privacy Commission Views

Using large volumes of data can be at odds with privacy legislation, however, it need not be an impediment to getting effective data into healthcare software solutions.

Many federal and provincial privacy commissioners have published guidance noting the importance of complete and accurate information flow during a crisis and how this can be permitted through applicable privacy legislation.

For example, in its statement[3] the Office of the Information and Privacy Commissioner of Newfoundland and Labrador urges “do not let privacy considerations put anyone’s health at risk.” It released a document entitled “Don’t Blame Privacy – What To Do and How To Communicate in an Emergency”[4] which, among other things, notes that both the *Access to Information and Protection of Privacy Act*, *2015* and the *Personal Health Information Act* include provisions that allow for disclosure in emergencies or when the public interest trumps the protection of privacy.

Similarly, the Office of the Privacy Commissioner of Canada has released guidance, “Privacy and the COVID-19 outbreak”[5], which discusses when personal information may be disclosed by a private or public sector entity without consent.

The Office of the Information and Privacy Commissioner of Alberta released a statement, “Privacy in a Pandemic”,[6] which also stresses the import of ensuring that public bodies, health custodians and private sector organizations know how personal or health information may be shared during a pandemic or emergency situation. Its statement also confirms that all three of its privacy laws include provisions which allow for the sharing of personal or health information in the event of an emergency.

How To Prepare Health Data For Sharing - Aggregated or De-Identified Data

Every type of disclosure must comply with privacy laws. For example, a health authority may disclose information to an arm’s length research partner or make it publicly available. Organizations may be hesitant to disclose personal or health information because they are unclear about whether the disclosure is permitted under applicable legislation.

[2] https://www.bereskinparr.com/doc/canada-needs-to-urgently-feed-more-data-into-healthcare-ai-solutions.

[3] https://www.oipc.nl.ca/guidance/documents/emergencies/.

[4] https://www.oipc.nl.ca/pdfs/EmergenciesPrivacy.pdf.

[5] https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd_covid_202003/.

[6] https://www.oipc.ab.ca/resources/privacy-in-a-pandemic-advisory.aspx.

A key tool for sharing information is to use de-identified or aggregated data. Data that is truly de-identified, anonymized or aggregated is not within the definition of "personal information" (how to "truly" render data de-identified or anonymous is beyond the scope of this article). Using aggregated and anonymized data can be very useful in identifying trends.

It is important to be mindful of potential re-identification risks and whether the "anonymous" data release could actually lead to identification of an individual. As a hypothetical example, if it is disclosed COVID-19 Patient 500 is female, is in their 30s, lives in Milton, Ontario, traveled to Italy in March, and has diabetes as an underlying condition, then that narrows pool of individuals that could fit that criteria, and privacy issues must be carefully measured.

Sharing Collected Data with Research Partners Using Data Sharing Agreements

Health care institutions also typically control use and retention of anonymized data through agreements with companies. Data sharing agreements can be used to facilitate the transfer of data between organizations or institutions. These types of agreements identify the parameters which govern, for example, how each party may collect, use, analyze, safeguard, transmit, store, retain and destroy data. Data sharing agreements can also ensure that both parties have considered and are abiding by any obligations that may exist under provincial privacy statutes or various research and ethical guidelines.

These information sharing initiatives can facilitate health care delivery and research projects and can provide valuable data needed for AI systems.

Sharing Collected Data with The Public

Anonymizing data can also facilitate public sharing of data. We have seen governments share daily reports[7] on anonymized patients. Public sharing of anonymized or aggregated information is important for public education, research, and to round out the information that healthcare workers receive from their own institutions.

The importance of properly assessing privacy issues and making data quickly available is apparent. For example, the extent of community transmission can appear to be greatly understated in the absence of up to date health data. Younger demographics seeing only mortality demographics may believe that they are overall low risk if hospitalization and ICU data by age group is not released (death is rare in youth, but hospitalizations or ICU admissions are more common). Powerful AI software tools may be able to plug some of the gaps in data collection and analysis, but AI does this best when we feed as much information into it as possible. As the scope of data release by health authorities evolves, data releases must be clearly qualified as to the restrictions on the quality of the data released (e.g., number of tests backlogged).

Conclusion

Privacy law balances patient protection with allowing public health authorities to generate and share their best data in aggregate or anonymized form. The collection of the best data and transparent release to research partners and the public are critical for managing the COVID-19 situation.

We appreciate the challenging and important work being done by public health authorities, and this article is provided as a constructive comment to explain how data is shared in compliance with privacy laws.

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[7] https://www.ontario.ca/page/2019-novel-coronavirus.

NEW DEVELOPMENTS IN ONTARIO HEALTH CARE DUE TO COVID-19

— Irv Kleiner,
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Province of Ontario Suspends Collective Agreement Provisions in Hospital and Long-Term Care Sector

As a result of the state of emergency that was declared on March 17, 2020, the Provincial Government issued an Order under the *Emergency Management and Civil Protection Act* on March 21, 2020 which applied to hospitals and psychiatric facilities ("Health Service Providers") and which effectively allows Health Service Provider to suspend certain provisions in collective agreements with trade unions.

Pursuant to the Order, Health Service Providers are authorized to deploy staff as they deem necessary in order to respond to, prevent and alleviate the outbreak of COVID-19 for patients.

This includes the right to:

(i) identify staffing priorities, and the right to redeploy staff within different locations in or between facilities;

(ii) the right to change work assignments including the right to assign work to non-unionized staff and/or to contractors;

(iii) the right to change work schedules/assignments;

(iv) the right to defer/cancel vacations, leaves of absence regardless of whether such vacations or leaves are established by statute, agreement or otherwise;

(v) the right to employ extra part-time or temporary employees or contractors to perform bargaining unit work; and

(vi) the right to use volunteers to perform work which may include bargaining unit work.

The Order expressly provides that a Health Care Provider may implement redeployment plans without having to comply with collective agreement provisions, including lay-off, seniority/service and or bumping provisions.

What was particularly noteworthy to employers in this sector, was that the Health Service Provider can "suspend for the duration of this Order, any grievance process, with respect to any matter that is referred to in this Order".

Pursuant to a Regulation dated March 23, 2020, an additional Order was enacted by the Province with respect to licensees within the meaning of the *Long-Term Care Homes Act, 2007* and, to a municipality or board of management that maintains a long-term care home.

The most recent Order effectively extends the right of employers who operate long- term care facilities to suspend certain collective agreement obligations in the same manner that the Province did so in the earlier Order that applied to Hospitals. The most recent Order is the same as the Hospitals' Order save and except for the following two differences: Long-Term Care employers do not have the right to redeploy staff to work in COVID-19 assessment centres (screening centres do not exist in Long-Term Care Facilities) and, Long-Term Care employers do not have the right to cancel or postpone services not related to responding to, preventing or alleviating the outbreak of the virus.

While no regulations/Orders have been enacted for facilities that operate retirement homes, nor for social and community service employers at this time, it is evident that the Province is prepared to respond quickly with new regulations and/or Orders as the progression of this health crises continues to unfold.

Limitations on Employees To work In One Long-Term Care Facility/Hospital

In a COVID-19 Directive that has been sent to Long-Term Care Homes under the *Long Term Care Homes Act*, *2007* (issued under the *Health Protection and Promotion Act*), the Province has indicated that *Employers should work with employees to limit the number of different work locations that employees are working at so as to minimize the risk to patients of exposure to COVID-19*.

Both Hospitals and Long-Term Care Homes (and in some cases Retirement Homes) have been requiring their part-time employees to disclose any other positions of employment that they occupy in other health care facilities and to effectively choose to work at only one facility. There may well be resistance to this initiative from certain employees and from the Unions that represent them. We would recommend that the Unions (in a unionized environment) be advised of the implementation of a policy like this prior to eliminating any part-time employee's right to work pursuant to any collective agreement.

While the initiative makes a great deal of sense in the context of containing the rate and spread of the virus, many employers in this sector (who have already been challenged to recruit and retain qualified PSW's), will be presented with challenges to replace workers who opt to work elsewhere and not for the Employer that has put them to an election.

Childcare for Frontline Staff

In order to support health care and frontline workers during the COVID-19 outbreak, the Province has indicated that it will exempt certain child care centres from the Order[1] to close all licensed child care centres pursuant to the state of emergency that was declared by the Premier previously. In allowing select child care centers to resume operations, frontline workers will be able to focus their efforts in protecting the general public so that they are not concerned about family members not being looked after.

The initiative is intended to provide certain health care and other frontline workers (including doctors, nurses, paramedics, firefighters, police, and correctional officers) with access to emergency child care. These child care centres will be required to follow prescribed health and safety requirements and have a plan in place should any staff, children or parents be exposed to the virus.

If you have any questions about COVID-19 and your workplace, or any other human resource law issue, please contact a member of the Torkin Manes LLP team (https://www.torkinmanes.com/expertise/service/employment-labour). For more information about dealing with COVID-19, please visit their COVID-19 Resource Center (https://www.torkinmanes.com/our-resources/covid-19-resource-centre).

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RECENT DEVELOPMENTS

COVID-19 Update

In response to the COVID-19 pandemic, governments across Canada have declared states of emergency and issued orders affecting health care providers and organizations.

Note: the COVID-19 situation is continually evolving and the information below is current as of April 27, 2020.

Alberta

On March 17, 2020, Alberta declared a state of public health emergency under the *Public Health Act*, in effect for 90 days. See: http://www.qp.alberta.ca/documents/Orders/Orders_in_Council/2020/2020_080.pdf.

The Alberta Chief Medical Officer of Health has issued orders under the *Public Health Act* affecting the health sector. See: https://open.alberta.ca/dataset?sort=title_string+desc&q=&audience=Health+Care+Professionals&tags=CMOH+orders.

British Columbia

On March 18, 2020, British Columbia issued an order declaring a state of emergency under the *Emergency Program Act*. See: http://www.bclaws.ca/civix/document/id/oic/oic_cur/m073_2020.

[1] https://news.ontario.ca/opo/en/2020/03/ontario-enacts-declaration-of-emergency-to-protect-the-public.html.

On April 14, 2020, the declaration of a state of emergency was extended for a third period, ending April 28, 2020. See: http://www.bclaws.ca/civix/document/id/oic/oic_cur/0173_2020.

The Provincial Health Officer has issued orders under the *Public Health Act* affecting the health sector. See: https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/current-health-topics/covid-19-novel-coronavirus.

Manitoba

On March 20, 2020, Manitoba declared a state emergency under *The Emergency Measures Act*. See: https://www.gov.mb.ca/asset_library/en/proactive/2019_2020/declaration-soe.pdf.

The Chief Provincial Public Health Officer has issued orders under *The Public Health Act* affecting the health sector. See: https://www.gov.mb.ca/covid19/soe.html.

New Brunswick

On March 19, 2020, New Brunswick declared a state of emergency pursuant to the *Emergency Measures Act*. See: https://www2.gnb.ca/content/gnb/en/news/news_release.2020.03.0139.html.

On April 16, 2020, the state of emergency was extended for a third period, ending April 30, 2020. See: https://www2.gnb.ca/content/gnb/en/news/news_release.2020.04.0209.html.

The Chief Medical Officer of Health has issued guidance memos and guidance documents affecting the health sector. See: https://www2.gnb.ca/content/gnb/en/departments/ocmoh/cdc/content/respiratory_diseases/coronavirus/HealthandAlliedHealthProfessionals.html.

New Brunswick Pandemic Task Force Created

New Brunswick has established a pandemic task force to help combat COVID-19.

The task force is vested with decision-making authority about the pandemic response for all aspects of the health-care system, including the regional health authorities, Extra-Mural and Ambulance New Brunswick, primary care, and the long-term care system.

A clinical group of experts with relevant practice experience will be called upon as appropriate to provide advice that will inform or validate the decisions of the task force.

See https://www2.gnb.ca/content/gnb/en/news/news_release.2020.04.0184.html to read the Department of Health news release.

Newfoundland and Labrador

On March 18, 2020, Newfoundland and Labrador declared a public health emergency pursuant to the *Public Health Protection and Promotion Act*. See: https://www.gov.nl.ca/snl/files/NLG20200318_EXTRA.pdf.

On April 17, 2020, the Minister of Health and Community Services ordered the extension of the public health emergency for a third period of 14 days, effective April 17, 2020. See: https://www.gov.nl.ca/covid-19/files/Public-Health-Emergency-Extension-Declaration-April-16-2020.pdf.

The Chief Medical Officer of Health has issued orders affecting the health sector. See: https://www.gov.nl.ca/covid-19/public-health-orders/.

Northwest Territories

On March 24, 2020, the Northwest Territories declared a state of emergency pursuant to the *Emergency Management Act*, in effect until April 7, 2020. See: https://www.gov.nt.ca/en/newsroom/news-release-state-emergency-declared-northwest-territories.

On March 18, 2020, the Minister of Health and Social Services declared a public health emergency under the *Public Health Act*, in effect until April 1, 2020. See: https://www.gov.nt.ca/en/newsroom/news-release-public-health-emergency-declared-northwest-territories.

The public health emergency, which was first extended on April 1, 2020 (https://www.gov.nt.ca/en/newsroom/territorial-public-health-emergency-and-state-emergency-have-been-extended.

As of April 27, 2020, the Northwest Territories has not issued other orders specifically affecting the health sector.

Nova Scotia

On March 22, 2020, Nova Scotia declared a provincial state of emergency pursuant to the *Emergency Management Act*. See: https://novascotia.ca/coronavirus/docs/Declaration-of-Provincial-State-of-Emergency-by-Minister-Porter-Signed-March-22-2020.pdf.

On April 19, 2020, the state of emergency was extended for a third period, ending May 3, 2020. See: https://novascotia.ca/coronavirus/docs/2020-04-19-SOE-Renewal.pdf.

The Medical Officer of Health has issued orders under the *Health Protection Act* affecting the health sector. See: https://novascotia.ca/coronavirus/alerts-notices/.

Nunavut

On March 20, 2020, Nunavut declared a state of emergency pursuant to the *Public Health Act*. See: https://www.gov.nu.ca/sites/default/files/pha_order_state_of_ph_emergency_200320.pdf.

On March 18, 2020, the Minister of Health declared a public health emergency under the *Public Health Act*. See: https://www.gov.nu.ca/health/news/minister-health-declares-public-health-emergency.

On April 16, 2020, the Minister of Health issued an order extending the state of public health emergency for a third period, ending April 30, 2020. See https://gov.nu.ca/sites/default/files/order_extending_public_health_emergency_to_april_30_2020.pdf.

As of April 27, 2020, Nunavut had not issued other orders specifically affecting the health sector.

Ontario

On March 17, 2020, Ontario declared an emergency under the *Emergency Management and Civil Protection Act*. See: https://www.ontario.ca/orders-in-council/oc-5182020.

On April 14, 2020, an order was issued extending the state of emergency for a third period of 28 days. See: https://news.ontario.ca/opo/en/2020/04/ontario-extends-declaration-of-emergency-to-continue-the-fight-against-covid-19.html.

Ontario has issued orders affecting the health sector. See: https://www.ontario.ca/page/emergency-information.

Ontario Develops New Health Data Platform to Help Defeat COVID-19

In consultation with the Ontario Privacy Commissioner, the province is developing a new health data platform called the Pandemic Threat Response ("PANTHR").

PANTHR will hold secure health data that will allow researchers to better support health system planning and responsiveness, including the immediate need to analyze the current COVID-19 outbreak.

The information gathered in PANTHR will allow researchers to help with:

- increasing detection of COVID-19;
- discovering risk factors for vulnerable populations;
- predicting when and where outbreaks may happen;
- evaluating how preventative and treatment measures are working; and
- identifying where to allocate equipment and other resources.

When launched, PANTHR will provide access to de-identified, integrated data on publicly funded administrative health services records, including:

- physician claims submitted to the Ontario Health Insurance Plan;
- medical drug claims submitted to the Ontario Drug Benefit Program;
- discharge summaries of hospital stays and emergency department visits; and
- claims for home care and long-term care.

PANTHR will also contain clinical data from special registry collections, such as the Critical Care Information System, which reports on critical care capacity in the province, and clinical data extracted from public health, hospital, laboratory and diagnostic imaging information systems. Other supporting data may also be added based on needs of researchers in achieving COVID-19 objectives.

See https://news.ontario.ca/mohltc/en/2020/04/province-developing-new-health-data-platform-to-help-defeat-covid-19.html to read the Ministry of Health news release.

Ontario Removes Three Month OHIP Waiting Period

Effective March 19, 2020, the three-month waiting period for Ontario Health Insurance Plan ("OHIP") coverage has been temporarily removed from the *General Regulation*, RRO 1990, Reg. 552 under the *Health Insurance Act*, RSO 1990, c. H.6 due to the COVID-19 situation.

Individuals who are currently in their three-month waiting period are eligible for OHIP coverage as of March 19, 2020. Individuals enrolled for OHIP after March 19, 2020, will have immediate coverage.

See http://www.health.gov.on.ca/en/pro/programs/ohip/bulletins/4000/bul4749.aspx for more information.

Prince Edward Island

On March 16, 2020, Prince Edward Island declared a state of public health emergency under the *Public Health Act*. See: https://www.princeedwardisland.ca/sites/default/files/publications/20200316truwww_2.pdf.

On April 16, 2020, the state of public health emergency was extended for an additional 30 days. The province also declared a state of emergency under the *Emergency Measures Act* effective until April 30, 2020. See: https://www.princeedwardisland.ca/en/news/prince-edward-island-declares-a-state-of-emergency.

On March 31, 2020, the Chief Public Health Officer issued an order affecting the health care sector. See: https://www.princeedwardisland.ca/sites/default/files/publications/20200401130341726.pdf.

Quebec

On March 13, 2020, Quebec declared a public health emergency under *the Civil Protection Act* for 10 days (in French only) (https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/decret-177-2020.pdf).

On April 15, 2020, an order was issued extending the declaration of a public health emergency for a third period, ending on April 24, 2020. See: https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/decret-460-2020-anglais.pdf.

On April 22, 2020, the state of emergency was extended for an additional eight days. See: https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/lois-reglements/decret-478-2020-anglais.pdf.

The Minister of Health and Social Services has issued orders affecting the health sector. See: https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/situation-coronavirus-in-quebec/#c47907.

Saskatchewan

On March 18, 2020, Saskatchewan issued a declaration of emergency under *The Emergency Planning Act*. See: https://www.saskatchewan.ca/government/news-and-media/2020/march/18/covid-19-state-of-emergency.

The Chief Medical Health Officer has issued orders affecting the health sector. See: https://www.saskatchewan.ca/government/health-care-administration-and-provider-resources/treatment-procedures-and-guidelines/emerging-public-health-issues/2019-novel-coronavirus/public-health-measures/public-health-orders.

Yukon

On March 27, 2020, Yukon declared a state of emergency pursuant to the *Civil Emergency Measures Act*. See: https://yukon.ca/en/news/yukon-declares-state-emergency-response-covid-19.

On March 27, 2020, the Chief Medical Officer ordered dental practices to suspend all non-urgent treatment until further notice. See: https://yukon.ca/en/news/march-27-2020-yukons-chief-medical-officer-health-provides-update-covid-19.

On April 17, 2020, the Minister of Community Services issued an order restricting entry into Yukon. See: http://www.gov.yk.ca/legislation/regs/mo2020_019.pdf.

LEGISLATION UPDATE

Federal

Regulations Amending the Schedule to the Quarantine Act (COVID-19 Coronavirus Disease)

Regulations Amending the Schedule to the Quarantine Act (COVID-19 Coronavirus Disease), SOR/2020-53, came into effect on March 17, 2020.

The Regulations amend the *Quarantine Act*, SC 2005, c. 20 ("Act") to add COVID-19 to the Schedule of reportable illnesses under the Act.

The amendment requires travellers to notify Canadian authorities of their suspected or confirmed presence or exposure to COVID-19 prior to entering Canada. The amendment also requires conveyance operators to notify Canadian authorities before they arrive at their destination in Canada that a person on board their conveyance might be capable of spreading COVID-19.

Previously, travellers and conveyance operators were not required to notify authorities, in the absence of being asked.

The Regulations were published in the *Canada Gazette* on April 1, 2020.

Alberta

Bill 10 - Public Health (Emergency Powers) Amendment Act, 2020

The *Public Health (Emergency Powers) Amendment Act, 2020*, SA 2020 c. 5 (the "Act", formerly Bill 10) received Royal Assent on April 2, 2020. The Act, except sections 2, 5 to 8 and 11, came into effect on March 17, 2020. Section 11 took effect on March 27, 2020.

The Act amended the *Public Health Act*, RSA 2000, c. P-37 to, among other things, increase the maximum penalty for violating public health orders from $2,000 to $100,000 for a first offence and from $5,000 to $500,000 for a subsequent offence.

Ontario

Ontario Regulation 72/20

On March 20, 2020, O. Reg 72/20 amended the *General Regulation*, O. Reg. 79/10 under the *Long-Term Care Homes Act, 2007*, SO 2007, c. 8 to provide long-term care homes with flexibility to address staffing requirements during a pandemic.

The general rule is that at least one registered nurse ("RN") who is employed by the home and part of the home's regular nursing staff must be on duty at all times. The amendments provide that if a pandemic prevents an RN from attending work in the home and the home's back-up plan cannot be met, the home may use:

- an RN who works at the home pursuant to a contract with the home or who works at the home pursuant to a contract between the home and an employment agency;
- a registered practical nurse who is an employee of the home or who works at the home pursuant to a contract with the home and an employment agency, if the Director of Nursing and Personal Care or an RN is available for consultation; or
- a member of a regulated health profession who is a staff member of the home and who has a set of skills that, in the reasonable opinion of the home, would allow them to provide care to a resident, if the Director of Nursing and Personal Care or an RN is available for consultation.

The amendments provide that the prescribed minimum hours that the Director of Nursing and Personal Care of a long-term care home must provide at the home do not apply during a pandemic.

The amendments also modify the training and criminal reference check requirements for homes hiring new staff members and volunteers during a pandemic.

O. Reg 72/20 was published in *The Ontario Gazette* on April 11, 2020.

Ontario Regulation 83/20

On March 24, 2020, O. Reg 83/20, amended the *General Regulation*, O. Reg. 79/10 under the *Long-Term Care Homes Act, 2007*, SO 2007, c. 8 to provide that if a long-stay or short-stay resident of a long-term care home or the resident's substitute decision-requests in writing to be discharged due to a pandemic, the home must discharge the resident and communicate the resident's medical care requirements.

If a resident who was discharged seeks re-admission to the home from which they were discharged within three months from the date of discharge, they will have fewer requirements to meet for being admitted back into the home.

The amendments also expediate admission for persons occupying beds in public hospital as well as for persons from the community, to a long-term care home during a pandemic.

O. Reg 83/20 was published in *The Ontario Gazette* on April 11, 2020.

Limiting Work to a Single Long-Term Care Home Regulation

On April 14, 2020, the Ontario government issued an emergency order, *Limiting Work to a Single Long-Term Care Home Regulation*, O. Reg. 146/20, under the *Emergency Management and Civil Protection Act*, RSO 1990, c. E.9.

The order directs long-term care employers to ensure their employees, including registered nurses, registered practical nurses, personal support workers, kitchen and cleaning staff only work in one long-term care home, effective 12:01 a.m. on Wednesday, April 22, 2020. The order must be posted by employers in the long-term care home.

Ontario Regulation 159/20

On April 16, 2020, O. Reg 159/20 amended the *General Regulation*, O. Reg. 257/00 under the *Ambulance Act*, RSO 1990, c. A.19, to allow operators of land ambulance services to employ or engage, or continue to employ or engage, persons who do not meet the prescribed requirements, but who have successfully completed certain prescribed programs, to provide patient care as emergency medical attendants during a declared state of emergency.

RECENT CASES

Court of Appeal Allowed Physician's Appeal of Directive Suspending Licence to Practice Medicine

Alberta Court of Appeal, November 28, 2019

Dr. Collett, a 74-year old family medicine physician, appealed a decision of the Council of the College of Physician and Surgeons of Alberta (the "College"). The Council dismissed his appeal against a 2018 directive that suspended his licence

to practice medicine. The College's complaints director issued the directive following a peer review report that suggested Dr. Collett suffered from a cognitive impairment. The complaint's director had a concern that the suggestion of cognitive impairment meant Dr. Collett's patients were potentially impacted in the way Dr. Collett was caring for them. There was no evidence that Dr. Collett's health impaired his ability to practice family medicine safely and competently. None of Dr. Collett's treating physicians or colleagues indicated any concerns that his health prevented him from practicing medicine in a safe and competent manner. The complaints director gave Dr. Collett two business days to decide whether he would voluntarily cease practicing medicine until he was able to provide the complaints director with a qualified assessor's statement that his health did not prevent him from practicing medicine safely and competently. In 2019, the College terminated Dr. Collett's suspension and reinstated Dr. Collett as an active member of the College. Dr. Collett challenged the 2018 suspension directive on three grounds: firstly, there was no evidence that he was incapacitated; secondly, the College did not grant him procedural fairness; and thirdly, a reasonable person would conclude that the College was biased against him. The College argued that the appeal was moot because Dr. Collett's suspension had been lifted in 2019.

The appeal was allowed. The appeal was not moot. The complaints director had no authority under subsections 118(1) and (4) of the *Health Professions Act* ("Act") to direct Dr. Collett to undergo a medical examination and to suspend his licence on the ground of incapacity. Subsection 118(1) of the Act authorizes the complaints director, if he or she has grounds to "believe" that a regulated member is incapacitated, to order a regulated member to submit to a medical examination and to authorize the examiner to disclose the results to the complaints director. Subsection 118(4) allows the complaints director, who has lawfully exercised the authority under subsection 118(1), to direct the regulated member to cease practicing medicine until the complaints director receives the results of the examinations ordered under subsection 118(1). In the instant case, the complaints officer had no lawful basis to exercise the authority vested in him under subsections 118(1) and (4) of the Act. The Appeal Committee erred in coming to the contrary conclusion. Firstly, the complaints director did not state in writing that he "believed" Dr. Collett was incapacitated. The fact that he had a "concern" was not good enough. Secondly, the grounds which the complaints director identified for his "concern" would not cause a person acting rationally to conclude that Dr. Collett suffered from a physical, mental, or emotional condition or disorder that impaired his ability to provide professional services in a safe and competent manner. The complaints director had to explain how Dr. Collett's mild cognitive impairment or executive function deficit would impair Dr. Collett's ability to practice family medicine safely. He did not do this. The complaints director's decision to allow Dr. Collett only two business days to respond to the complaints director's demand to temporarily withdraw from the practice of medicine was inadequate and procedurally unfair. The short window for a response did not give Dr. Collett an appropriate amount of time to assess the merits of the complaints director's request and to organize a compelling response in opposition to it if he decided not to accede to his request. A one-month deadline would have been fair. Concurring reasons were provided.

College of Physicians & Surgeons of Alberta v. Collett, 2020 CHFL ¶ 15,878

Surgeon Did Not Breach Standard of Care in Not Performing Carpal Tunnel Release

Manitoba Court of Queen's Bench, December 16, 2019

In August 2013, Baier fell from a tractor at work. He fractured his right wrist. Baier was taken to hospital where X-rays were taken. The emergency doctor noted Baier had sensation and movement in all fingers and blood circulation was satisfactory. In consultation with the Dr. Tung, an orthopaedic surgeon, the fracture was aligned and a partial cast was applied. The next day, Dr. Tung performed surgery to secure Baier's fracture with a plate and screws. Following the surgery, Baier complained of increased pain and swelling in his fingers and a decrease in sensation. Dr. Tung ordered that Baier's arm be iced and elevated. The next day, Dr. Tung performed surgery to secure Baier's fracture with wires and pins. Following surgery, Dr. Tung applied a partial cast. Baier experienced less pain, an increased ability to gently move fingers, and numbness throughout his hand due to swelling. Baier used a small percentage of the permitted pain medication. Baier was discharged from hospital and his pain was controlled by Tylenol #3. In September 2013, Baier saw Dr. Tung and complained of increased pain in his hand and wrist, numbness in his index finger, and some stiffness. Dr. Tung removed Baier's cast and observed some reduced sensation in the median nerve distribution, but the injury was healing well. The cast was re-applied. Baier attended a follow-up appointment with Dr. Tung in October 2013 where Baier's cast was removed as the pain was under better control. When Baier's wrist, fingers, and thumb were moved gently, he did not

experience pain. Sensation in the median nerve distribution was reduced slightly. Range of motion in Baier's wrist, fingers, and circulation were normal, and the incisions were healing well. The pins were removed although X-rays showed the fracture was not fully healed. Baier was asked to return in four weeks. In November 2013, Baier sought a second opinion from Dr. Mazek, an orthopaedic surgeon. Dr. Mazek noted purple colouration of Baier's hand and that there were no nerve or circulatory abnormalities. Dr. Mazek diagnosed Baier with complex regional pain syndrome ("CRPS"). In December 2013, Dr. Clark, an experienced hand and upper limb orthopaedic surgeon, confirmed the CRPS diagnosis. Baier was treated for CRPS by Dr. Tung. Since the summer of 2014, Baier had seen no doctors other than his family physician. His last visit to his family physician was in June 2017. Baier had pursued no therapies or counselling, including occupational therapy, since 2014. Baier claimed that he continued to experience symptoms and disability in his right hand that he attributed to negligent medical treatment by Dr. Tung. Baier's medical expert concluded that Dr. Tung failed to meet the expected standard of care by not performing carpal tunnel release. Dr. Tung's medical expert concluded that Dr. Tung was not negligent by not performing carpal tunnel release. At issue was whether Dr. Tung met the standard of care required of him and whether anything done, or not done, by Dr. Tung caused Baier's disabilities.

The action was dismissed. Dr. Tung was not negligent. Dr. Tung did not breach the standard of care expected of him by not performing carpal tunnel release. That conclusion was supported by the totality of evidence, which included: the diffuse nature of Baier's symptoms (i.e., they were not focused in the median nerve distribution); the absence of escalating pain; and the absence of an opinion from Baier's treating physicians that carpal tunnel release ought to have been performed or that Baier's CRPS was related to nerve damage. The statements in the medical records were consistent with there being no nerve damage. Alternatively, not performing carpal tunnel release was an honest and intelligent exercise of Dr. Tung's judgment. Carpal tunnel release was not standard practice where there was a distal radius fracture absent clear evidence of median nerve dysfunction. Dr. Tung treated Baier in a sufficiently aggressive, attentive and appropriate manner. Dr. Tung's standard practice when examining Baier and others suffering from a similar injury was consistent with his training and practices in other emergency wards and clinics. Dr. Tung did not breach the standard of care by failing to take sufficient measures (other than carpal tunnel release) to mitigate anticipatable problems. Baier failed to establish that anything done, or not done, by Dr. Tung caused his CRPS or the symptoms he continued to experience.

Baier v. Tung, 2020 CHFL ¶ 15,879

Discipline Committee Erred in Rejecting Physician's Evidence Without Considering Whether It Was Credible and Reliable

Ontario Superior Court of Justice, Divisional Court, July 23, 2019

On March 21, 2017, the Discipline Committee ("Committee") of the College of Physicians and Surgeons of Ontario ("College") found that Dr. Kunynetz had committed sexual abuse and disgraceful, dishonourable or unprofessional conduct involving four patients.

With respect to three patients (Patients A, B, and D), it was alleged that Dr. Kunynetz failed to leave the room while the patient was undressing; failed to use drapes; and removed clothing without warning.

With respect to two patients (Patients C and D), it was alleged that Dr. Kunynetz pressed his genitals against their legs in the course of an examination. With respect to Patient B, it was alleged that he touched her breasts in a manner not consistent with the clinical examination. The Committee found that Dr. Kunynetz had committed acts of professional misconduct with respect of all four patients.

With respect to Patients C and D, the Committee found that he had engaged in conduct that would reasonably be regarded as disgraceful, dishonourable or unprofessional conduct by allowing his abdominal fat pad to contact their bodies without warning, apology or excuse.

With respect to Patient B, the Committee found that Dr. Kunynetz had committed sexual abuse. The Committee held that amendments to the Regulated Health Professions Act, 1991 ("RHPA"), which came into force on May 30, 2017, had retrospective effect with respect to the finding of sexual abuse of Patient B. The amendments, which were effected by the Protecting Patients Act, 2017 ("PPA"), added breast touching for a non-clinical reason to the list of sexual acts that would result in mandatory revocation of a member's certificate of registration. The Committee also found that even if the amendments did not have retrospective effect, revocation was appropriate. Dr. Kunynetz was order to pay costs in the amount of $145,460. Dr. Kunynetz appealed the Committee's decision.

The appeal was allowed in part. The Committee's finding that Dr. Kunynetz had engaged in professional misconduct by removing clothing of Patients A and D without warning or explanation was reasonable and was sustained. After Patient B had made a complaint in 2008, the College investigator had provided Dr. Kunynetz with reading material that emphasized the importance of explaining to a patient ahead of time the nature and reason for any portion of a physical examination. This was not done before the shifting of clothing performed by Dr. Kunynetz. The Committee's finding that Dr. Kunynetz had engaged in sexual abuse of Patient B, by touching her breasts in the manner not consistent with the clinical examination, was unreasonable and was quashed. The Committee rejected all of Dr. Kunynetz's evidence because he said he had no individual memory of the events at issue. The Committee did not consider whether the evidence he gave about what he would have done or what his usual practice would have been was credible and reliable. The Committee erred in rejecting his evidence without considering whether it was credible and reliable. The Committee was selective in its consideration of discrepancies and inconsistencies and did not explain why it accepted and relied on some evidence of Dr. Kunynetz's evidence and rejected other parts of it. The Committee concluded that, at the hearing, Dr. Kunynetz had changed his evidence with respect to whether he put his hands inside her bra. The Committee isolated that single subject and failed to consider the entirety of Dr. Kunynetz's evidence. By isolating Dr. Kunynetz's evidence on that single subject, the Committee failed to consider his evidence in an even-handed manner. The Committee compounded that unfairness by emphasizing Patient B's demeanour as supportive of her credibility. The Committee failed to assess any of the evidence relating to the allegation that Dr. Kunynetz had touched Patient B's breasts on the standard of clear, convincing, and cogent evidence. The Committee found that there was no clinical justification for the touching of Patient B's breasts. In coming to that conclusion, the Committee reversed the burden of proof, which was an error of law and unreasonable. The Committee's finding that Dr. Kunynetz had engaged in professional misconduct by allowing his abdominal fat pad to contact the bodies of Patients C and D without warning, apology or excuse was unreasonable and was quashed. In the Notice of Hearing, the College alleged that he was engaged in sexual abuse by pressing his genitals against the leg of Patients C and D. The allegation of allowing contact between his abdominal fat pad and Patients C and D was never raised in the particulars of the allegations, in cross-examination or in closing submissions. It surfaced for the first time in the Committee's reasons for decision. Dr. Kunynetz met the case as it was alleged. He had no opportunity to meet a significantly different allegation. The Committee's decision ordering revocation was unreasonable.

Given that the Divisional Court quashed the Committee's finding that Dr. Kunynetz had engaged in sexual abuse by touching Patient B's breasts, it was not necessary for the Court to address the issue of retrospectivity. However, the Court chose to do so. In the normal course, legislation operates from the day it comes into force. There is a general presumption that legislation should not be applied in a retrospective manner. The presumption can be rebutted if the primary purpose of the legislation is public protection. In the instant case, while it was clear that the purpose of the PPA was to protect the public, there was no indication in the statute that the Legislature had turned its mind to whether the amendments to the RHPA were intended to operate retrospectively. There was no other basis to find that the presumption against retrospectivity had been displaced. The Committee erred in its analysis and in its decision that the amendments brought by the PPA had retrospective effect. Given the Court had quashed the Committee's findings of sexual abuse and professional misconduct by touching, the penalty of revocation had to be quashed. The remaining findings were removal of clothing without warning or consent and two breaches of an interim order. Dr. Kunynetz had been under suspension for 28 months and had been subject to the revocation order for 17 months for a total of 45 months. It was unlikely that a penalty greater than that period of time would be imposed with respect to the remaining findings. The penalty imposed for those findings was a suspension up to the date of the release of the decision. Given that Dr. Kunynetz had been successful in his defence of the allegations that attracted the most severe penalty, but was found to have committed an act of professional misconduct and to have contravened a term of his certificate of registration, there would be no costs of the hearing before the College. On consent, there would be no costs of the appeal.

College of Physicians and Surgeons of Ontario v. Kunynetz, 2020 CHFL ¶ 15,880

Court Allowed Motion for Summary Judgment by Physician to Dismiss Negligence Action Against Him

Ontario Superior Court of Justice, December 17, 2019

In 2016, Noddle commenced an action against Dr. Levy, a family medicine physician, and the Ontario Ministry of Health (the "Ministry"). Noddle alleged that Dr. Levy negligently prescribed medication which caused him cognitive impairment and vision loss. Noddle also alleged that the Ministry was liable because it negligently approved the medication and failed

to warn of its side effects. Dr. Levy had treated Noddle from 1999 to 2013. In 2010, Dr. Levy diagnosed that Noddle had genital warts and prescribed Aldara, a topical cream for genital warts. A month later, Noddle saw Dr. Levy and complained of a mild adverse reaction to Aldara. Dr. Levy recommended that Noddle immediately discontinue the use of Aldara and referred Noddle to a dermatologist. The dermatologist confirmed the diagnosis of genital warts and cauterized the warts. In 2017, Dr. Levy brought a motion for summary dismissal of the claims against him on two grounds. First, there was no genuine issue requiring a trial regarding Dr. Levy's discharge of his duty of care. Second, the action was barred through expiry of the applicable two-year limitation period. The Ministry brought a motion to strike the Statement of Claim as a nullity at law. The Ministry maintained that the action was a nullity on two grounds: first, Noddle did not provide the appropriate statutory notice of the claim; and second, the Ministry did not have the capacity to be sued and was not a proper party to the action. The Ministry also sought an order striking Noodle's statement of claim against it without leave to amend on the basis that Noodle's claim did not disclose a reasonable cause of action and was an abuse of process.

The motions were allowed. Dr. Levy's motion for summary judgment was granted and the action against him was dismissed. The Ministry's motion to strike the Statement of Claim as a nullity at law was granted and the action against it was struck. In naming the Ministry as a defendant, Noodle had improperly sued an entity that was incapable of being sued. The Ministry is a department of the Crown, not its own legal entity. There was no basis for the commencement of an action against a ministry of the Crown. The action against the Ministry was also a nullity because Noodle did not provide the 60-day statutory notice to the Crown. Proper notice is a necessary pre-condition to a claim in damages against the Crown, which cannot be waived or abridged. Given the action against the Crown contravened the 60-day statutory notice period for the institution of Noddle's claim against the Crown, it was a nullity. Noddle did not establish on a balance of probabilities that Dr. Levy breached his duty of care. The Court accepted Dr. Levy's medical expert opinion that Dr. Levy's clinical decisions, investigations, referral, and treatment were all within the standard of care. Accordingly, there was no genuine issue for trial as to Dr. Levy's discharge of his duty of care. Additionally, the action against Dr. Levy was statute barred. By 2013, upon receipt of his complete medical records from Dr. Levy, Noddle knew and had all the evidence on which he reasonably ought to have known. The limitation period expired in 2015. Noddle therefore initiated the action against Dr. Levy beyond the two-year limitation period.

Noddle v. Ontario (Ministry of Health), 2020 CHFL ¶ 15,881

No Basis for Extending Limitation Period to Add Physician as Defendant in Negligence Action

Ontario Court of Appeal, September 24, 2019

In July 2007, Rumsam attended the Huronia Urgent Care Clinic ("Huronia") for treatment of a wrist injury. Dr. Pakes assessed her wrist and ordered an x-ray. Dr. Pakes reviewed the x-ray results which indicated a possible hairline fracture. He then discharged her with advice that she immobilize, rest, ice, and compress the wrist. A few days later, Huronia received a copy of the x-ray report prepared by a radiologist. The report confirmed a "suspected displaced scaphoid fracture" and recommended a follow up x-ray. A physician at Huronia reviewed the report but Rumsam was not advised that further follow up was required. After the pain in her wrist worsened, Rumsam visited her family doctor who referred her to an orthopaedic surgeon. She had surgery in April 2008 and in August 2008. Rumsam reached the age of majority in June 2010. In May 2012, Rumsam commenced an action in negligence against Dr. Pakes and Huronia. She claimed that Dr. Pakes and Huronia failed to advise her that follow up medical consultation was required and failed to notify her of the x-ray which indicated that a follow up x-ray should be done, resulting in the need for further surgeries for which she sought damages. Huronia and Dr. Pakes maintained that the radiologist's report confirming the fracture was reviewed by a second clinic physician, who had attempted to contact Rumsam at the telephone number provided by Rumsam in order to advise her of the findings. In a factum filed in August 2013, Rumsam stated that on the day following her attendance at Huronia, a second clinic physician had called her to tell her about the x-ray findings and the radiologist's recommendation for a follow up x-ray. In February 2016, Dr. Pakes and Huronia, in response to an undertaking given at an examination for discovery in August 2014, confirmed that Dr. Kargel had made a handwritten note on the x-ray report indicating that he had called Rumsam but the call was not answered. In November 2016, Dr. Pakes and Huronia advised Rumsam that, contrary to the earlier statement, there was no evidence that anyone had ever attempted to call Rumsam. In January 2017, Rumsam sought to add Dr. Kargel as a defendant in the action on the basis that Dr. Kargel had reviewed the x-ray report which indicated a potential fracture, but failed to advise and treat her. Dr. Pakes and

Huronia opposed the motion to add Dr. Kargel as a defendant, maintaining that the claim against Dr. Kargel was statute-barred. The motion judge concluded that the claim against Dr. Kargel was not statute-barred. The motion judge held that it was reasonable to conclude that Rumsam was unable to identify Dr. Kargel as the physician who wrote the handwritten note. Therefore, Rumsam arguably failed to communicate with her until November 2016 when Pakes and Huronia complied with the undertaking, advising that no one from the clinic had called Rumsam. He therefore held that the claim against Dr. Kargel was not statute-barred. Dr. Pakes and Huronia appealed, maintaining that the motion judge had failed to apply the correct test for discoverability under subsection 5(1) of the Limitation Act, 2002 ("Act"). The Act provides that a claim is discoverable when the plaintiff has or ought to have knowledge of the material facts of the claim, not when the plaintiff discovers potential liability. The appellants argued that the motion judge erred in his application of the principle that a plaintiff must exercise reasonable diligence to discover a claim after being advised of a triggering event. The Act sets out a basic limitation period of two years. As such, a claim must be brought within two years of a claim being discovered.

The appeal was allowed. The motion judge erred in his application of paragraph 5(1)(b) of the Act. The injury was sustained in July 2007, and therefore the limitation period ordinarily would have expired on July 2009. Given that Rumsam did not turn 18 until June 2010, the presumptive limitation period did not begin to run until that date. The limitation period would have expired in June 2012 but for the discoverability principle. By August 2013, Rumsam knew all of the material facts except the name of the second clinic physician. By August 2013, she was required to exercise reasonable diligence to get the name of the second clinic physician within the two-year period as she knew she likely had a claim against that person for her injuries. August 2013 was "the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to" as set out in paragraph 5(1)(b) of the Act. The onus to prove reasonable diligence was on Rumsam. She failed to exercise reasonable diligence as she did not make any inquires to determine the author of the note or her involvement in Rumsam's care from August 2013 until Dr. Pakes' examination for discovery in August 2014. As such, there was no basis to extend the limitation period for more than two years as Rumsam knew of the likely claims and was in a position to ascertain the name by reasonable diligence. There was a palpable and overriding error in the motion judge's finding because he did not address Rumsam's knowledge of the material facts of the claim apart from the name of the second clinic physician. He erred in his application of paragraph 5(1)(b) of the Act as he did not address Rumsam's obligation and failure to exercise reasonable diligence to obtain the name as of August 2013.

Rumsam v. Pakes, 2020 CHFL ¶ 15,882

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GOVERNMENT ANNOUNCES DETAILS OF RENT ASSISTANCE PROGRAM FOR SMALL BUSINESS TENANTS

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Commercial landlords and tenants have been monitoring government communications with the hope of hearing that some form of rental assistance is on the way.

On April 24, 2020, the federal government gave these parties cause for optimism with the announcement of an agreement in principle with the provinces and territories to provide rent reduction relief to qualifying small business tenants that have been significantly affected by the COVID-19 pandemic.

This aid program, known as the Canada Emergency Commercial Rent Assistance program ("**CECRA**"), will provide forgivable loans to qualifying commercial property owners who agree to lower the gross rent payable by their tenants for April, May and June 2020 by at least 75%.

The program will be administrated by Canada Mortgage and Housing Corporation ("**CMHC**"), with MCAP and First Canadian Title assisting in the processing of applications and delivery of loans. Each province and territory has agreed to contribute to the costs of implementation in varying proportions.

On April 29, 2020, CMHC added a page to its website[1] outlining the application process and eligibility criteria for CECRA. On May 19, 2020, CMHC announced that applications for CECRA would be submitted through an online application portal on its website, and provided sample documents for applicants to review in advance of the portal opening. On May 25, 2020, the application portal opened for registration for certain provinces on a staggered basis. As of May 29, 2020, the portal has been open for registration by all eligible applicants.

The CECRA program is aimed at small business tenants. However, Prime Minister Trudeau has indicated that the federal government is working on some form of rent assistance program for larger business tenants and it is has been reported recently that a coalition of retailers and landlords are lobbying on behalf of larger business for the implementation of a program comparable to CECRA.

[1] Available at: https://www.cmhc-schl.gc.ca/en/finance-and-investing/covid19-cecra-small-business.

KEY ELEMENTS OF CECRA

The key elements of the CECRA program are generally described as follows:

- The government will offer forgivable loans to qualifying commercial landlords to cover up to 50% of the monthly gross rent payable by eligible small business tenants for the months of April, May and June 2020. Landlords and tenants will each be responsible for 25% of the gross rent.
- The loans will be forgiven if the landlord enters into a Rent Reduction Agreement with the eligible small business tenant under which the landlord will have agreed: (i) to reduce rent to 25% of gross rent for the months of April, May and June 2020; and (ii) not to evict the tenant during the period in which the tenant receives the rent forgiveness or rent credit contemplated under the Rent Reduction Agreement. In addition, the landlord must not seek to recover any reduced or abated rent after the program expires.
- CMHC will disburse the loans directly to the landlord's financial institution. The landlord need not have a mortgage secured by its property to qualify; property owners with or without a mortgage are eligible for CECRA provided the other program requirements are met.
- Landlords must submit the following documents in support of their application for a CECRA loan: a Rent Reduction Agreement and attestations from each of the tenant and landlord confirming their eligibility for the program. Landlords must also agree to the terms and conditions of CECRA's form of Forgivable Loan Agreement which is viewable once an application has been created in the application portal.
- The deadline to apply for CECRA is August 31, 2020. Landlords who have not offered rent reductions of at least 75% for April, May and June will be able to do so retroactively to qualify for CECRA.
- Landlords must submit one application for all eligible tenants at one property. Once registered, the application portal will be available on a 24/7 basis for applicants to add information and upload documents.

ELIGIBILITY CRITERIA

1. Eligible Tenants

According to CMHC, in order to qualify for a CECRA loan the tenant must: (i) pay no more than $50,000 dollars in monthly "gross rent" per location[2]; (ii) generate no more than $20 million dollars in gross annual revenues (based on the 12 month period used to calculate the tenant's 2019 fiscal year) on a consolidated basis at the ultimate parent level[3]; and (iii) have experienced at least a 70% drop in pre-COVID-19 revenues. The 70% revenue decrease is to be determined by comparing revenues for April, May and June to revenues from the same months in 2019 or alternatively compared to average revenues for January and February 2020.

CMHC has indicated that the CECRA program will be available to non-profits and charities. Sub-tenancy arrangements are also eligible provided the other program requirements are satisfied.

2. Eligible Landlords

CMHC advises that an eligible landlord (referred to as an "eligible commercial property owner") is one that: (i) is the registered owner of commercial property in Canada where the impacted small business tenant is located; and (ii) has declared rental income in its personal or corporate tax return in years 2018 and/or 2019 or has commenced generating

[2] The term "gross rent" for the purposes of the program includes base, net or minimum rent or gross rent, monthly instalments of operating costs, property taxes and other additional rent amounts payable to the landlord (e.g., maintenance costs, repairs, utilities, management fees) and, percentage rent. A number of additional costs and penalties are excluded from "gross rent" (such as interest and penalties on unpaid amounts and insurance proceeds) and are itemized on CMHC's website.

[3] If the tenant or its ultimate owner produces consolidated financial statements, then the tenant would use revenues reported for the group level of companies.

commercial rental revenue on or before April 1, 2020. CMHC has indicated that commercial properties with a residential component or a mixed use which includes at least 30 per cent commercial component are also eligible for the program.

REQUIRED DOCUMENTATION

As mentioned, all CECRA applications must include a Rent Reduction Agreement and attestations from each of the tenant and landlord. CMHC has provided sample forms of these documents on their website. Landlords must also agree to the terms and conditions of a form of Forgivable Loan Agreement, which is viewable once an application has been created in the application portal. Certain key provisions of these documents are summarized below. It remains unclear how negotiable the terms in these documents will be, and whether CMHC will expect each applicant's documentation to mirror the terms of the samples.

1. Rent Reduction Agreement

The applicant landlord must enter into a Rent Reduction Agreement with each impacted tenant to document the required 75% gross rent reduction over the eligible three month period in accordance with the program terms and conditions. Key provisions of CMHC's sample form of Rent Reduction Agreement include the following:

- The agreement is conditional upon, and not binding until, final approval of the CECRA loan application. Accordingly, by entering into this agreement a landlord would not be committing itself to providing a rent reduction in the event the CECRA application is rejected.
- The agreement may apply retroactively so as to enable the parties to apply for a CECRA loan after the eligible three month period has ended, so long as they are able to prove eligibility during that period. If gross rent has already been paid in full for the eligible three-month period, the landlord must agree to either reimburse the tenant for the amount of gross rent paid in excess of the reduced rent payable during that period or provide a credit for future instalments of rent. If the parties have already entered into a prior rent deferral or reduction agreement for the eligible three-month period, the prior agreement is deemed amended to conform to the CMHC form of agreement and such amounts will be included in calculating the total amount of the required rent forgiveness.
- The tenant is required to confirm, to the best of its knowledge, that all information and declarations provided in connection with the CECRA application are true and correct, and acknowledge that any false or misleading information in the tenant's attestation may result in ineligibility (in which case the forgiven rent less any amounts paid by the tenant shall be due and owing to the landlord within 30 days' notice of ineligibility).
- The landlord agrees that it will not seek to either evict the tenant or recover the rent forgiven under the agreement for the period commencing on April 1, 2020 until the date on which the tenant is no longer receiving rent relief under the agreement.

2. Forgivable Loan Agreement

The landlord must also enter into a Forgivable Loan Agreement with CMHC which documents the terms and conditions of the CECRA loan. A sample Forgivable Loan Agreement was originally provided on the CMHC site, but has since been removed. Key provisions of the sample agreement include the following:

- The loan will be an unsecured, interest free, forgivable loan of up to 50% of the gross rent payable by the tenant minus a *pro rata* portion of any insurance proceeds available to the landlord or any non-repayable proceeds of any other federal or provincial commercial rent assistance programs which are received or receivable by the parties in respect of the eligible three month period.
- The loan proceeds must be used: (i) first, to reimburse or credit the eligible tenant(s) for any gross rent paid during the eligible three month period in excess of 25% of the gross rent during that period; and (ii) second, towards any costs and expenses relating directly to the property, including financing costs and operation, maintenance and repair obligations (e.g., common area maintenance, property taxes, insurance and utilities).
- The landlord must repay the loan on December 31, 2020, unless it is forgiven by CMHC on such date. The loan will be forgiven by CMHC unless an "Event of Default" occurs, which are as follows: (i) the landlord fails to comply with

the terms and conditions of the CECRA program, Forgivable Loan Agreement or Rent Reduction Agreement; (ii) the landlord makes false or misleading representations in its application and documents; (iii) the landlord commits fraud or misconduct; or (iv) events of bankruptcy and insolvency occur. If an Event of Default occurs, CMHC may terminate the loan and require immediate repayment with interest and exercise any rights and remedies under any documents or conferred by law, including assigning the loan to Canada Revenue Agency.

- The landlord must not seek to evict the tenant nor attempt to recover any gross rent that has been forgiven except if the tenant is determined to have given false or misleading information in the tenant's attestation. In such event, the landlord is required to use commercially reasonable effort to recover the gross rent that was previously forgiven and to use such amounts to repay the loan to CMHC.

3. Tenant Attestation

The landlord must also obtain from each eligible tenant a signed attestation confirming the tenant's eligibility under the CECRA program requirements.

Under the form of attestation provided by CMHC, the tenant must declare and confirm, among other things, that: (i) it meets the eligibility requirements described above, (ii) has investigated, and where possible, made application for, any available business interruption insurance proceeds and commercial rent assistance offered by the government and must disclose any such proceeds which are receivable or received, and (iii) it is not subject to any actual or pending proceedings under any bankruptcy or insolvency legislation.

4. Landlord Attestation

The landlord must sign an attestation confirming that the information provided in the CECRA application is correct and attesting to the parties' eligibility under the CECRA program requirements.

Under the form of attestation provided by CMHC, the landlord must declare and confirm, among other things, that it: (i) has no knowledge, acting reasonably and without investigation, of any falsehood or misrepresentation contained in the tenant's attestation, (ii) has investigated, and where possible, made application for, any available rental loss insurance proceeds and commercial rent assistance offered by the government, (iii) has disclosed any such proceeds which are receivable or received to CMHC and shall pay some or all of such proceeds to CMHC in accordance with the Forgivable Loan Agreement, and (iv) has obtained any consents that may be required from its lenders to permit the parties to enter into the Rent Reduction Agreement and Forgivable Loan Agreement.

Both the landlord's and tenant's attestations also include integrity declarations whereby the attestor is required to declare and confirm that, among other things, the attestor and its affiliates have not been convicted of any criminal, penal or regulatory offences with respect to any financial matters and have not been declared by the federal or any provincial or territorial government to be ineligible to do business with such government body.

As mentioned, any false or misleading information contained in the landlord's or tenant's attestations may result in the CMHC rendering the applicant ineligible to benefit from the CECRA program, thereby entitling the CMHC to remedies for recovery of any benefits conferred.

5. Additional Information

In addition to the documentation noted above, CMHC has indicated that an application for CECRA must also include supporting information regarding the parties and the subject property, including: property address and type, property tax statement, the latest rent roll for each property and the number of commercial units, contact information for the tenant, the landlord and any co-owners, banking information (including a bank statement), the tenant's registered business name, lease area and monthly gross rent for the eligible three-month period.

CONCLUDING REMARKS

The roll out of the CECRA program is certainly welcome news for small business tenants who have been significantly impacted by the COVID-19 pandemic. However, questions remain about the program's mechanics and eligibility criteria.

What is the process for verification of a tenant's 70% decline in revenues and annual gross revenue? Would retailers and restaurants who have closed for business and shifted to operating pick-up and delivery services be excluded from the program if they are unable to demonstrate a 70% decline in revenues? We suspect these issues will be clarified in the course of CMHC's administration of the program.

Further, as the CECRA program remains voluntary, many eligible landlords have been reluctant to participate. As a result, there have been calls for government intervention to protect tenants from eviction or seizure of their property due to their inability to pay rent during the COVID-19 shutdown. On June 8, 2020, the Ontario Government responded to these calls with the announcement of proposed changes to the Commercial Tenancies Act which would, if passed, temporarily halt evictions of tenants that are eligible for the CECRA program and reverse evictions that occurred on or after June 3, 2020. It remains to be seen how the announcement of these legislative changes will impact the success of the CECRA program.

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