

DOLDEN

WALLACE

FOLICK LLP

EMPLOYMENT PRACTICES LIABILITY AND EMPLOYMENT PRACTICES LIABILITY INSURANCE COVERAGE IN CANADA

Eric A. Dolden, Shelley Armstrong & Amos Comeau

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18th Floor – 609 Granville St.
Vancouver, BC
Canada, V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777

308 – 3330 Richter Street
Kelowna, BC
Canada, V1W 4V5
Tel: 1.855.980.5580
Fax: 604.689.3777

850 – 355 4th Avenue SW
Calgary, AB
Canada, T2P 0J1
Tel: 1.587.480.4000
Fax: 1.587.475.2083

500 – 18 King Street East
Toronto, ON
Canada, M5C 1C4
Tel: 1.416.360.8331
Fax: 1.416.360.0146

CONTACT LAWYER

Eric Dolden

604.891.0350
edolden@dolden.com

Shelley Armstrong

604.891.0357
sarmstrong@dolden.com

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1. GENESIS OF EPL COVERAGE

Since 1998, there has been a “new kid on the block” in the insurance world that is a child of the times. It is called Employment Practices Liability (EPL) insurance, and its growing presence in both the Canadian and U.S. insurance markets reflects the fact that Canadian and American workers are becoming more aware of their human and civil rights, and are more prepared than ever to seek redress for rights violations.

Since the mid-1980's, American employers and insurers have faced increasing numbers of employment related claims for such wrongs as age, race & sex discrimination, wrongful termination, sexual harassment, and breach of employment contract. Until that time the standard commercial general liability policy did not address these types of claims. These employment related claims had long fallen outside the scope of coverage, whether because of the generally held belief that workers' compensation insurance would encompass such claims, or because for public policy reasons these types of claims were not appropriate subjects for insurance coverage. In response to this emerging trend of employment related claims, insurers initially began providing defences for certain claims under the general liability and employment liability policies; however, these historical policies did not fully and adequately respond to newly emerging claims. In some instances, insurers litigated coverage to establish circumstances where coverage did not apply. Eventually, insurers added employment related exclusions to the directors and officers liability (D&O), homeowners and CGL policies; thereafter, EPL policies emerged.¹

Gone are the days when EPL policies cover only sexual harassment, discrimination and wrongful termination. These policies now cover such claims as retaliation, defamation, and invasion of privacy, and will likely continue to expand the coverage possibilities of this saleable and comprehensive product.² A growing number of claims, and increased liability, have had a cascade effect, first in the business and employment worlds, and now in the insurance world. While employers have been scrambling to modify their workplace practices and are asking what they can do to protect themselves against claims, insurers have been confronted with claims for coverage under policies that were never intended to respond to such risks. The result has been a growing awareness of the need for insurance coverage, coupled with the knowledge that existing products do not fit or adequately address the risks. And so, EPL policies were born.

¹ Paul E.B. Glad and Richard V. Rupp, “Employment-Related Liability Claims and Insurance”, 716 *PLI/Comm* 121.

² Jeffrey P. Klenk, “Emerging Coverage issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments”, 21 *W. New Eng. L. Rev.* 323.

Today, EPL policies are an important risk management tool in the insurance marketplace for employers. However, they will continue to evolve with the changing economic and legal landscapes.

1.A. WHAT IS EMPLOYMENT PRACTICES LIABILITY (HEREAFTER “EPL”)?

EPL refers to liability stemming from discrimination in the workplace, sexual harassment and other employment-related practices and conduct that may give rise to legal liability. Most claims in Canada fall under the jurisdiction of administrative tribunals, with some exceptions. Typical claims in Canada would include:

- complaints before a federal or provincial human rights tribunal involving work place discrimination based on sex, race, colour, ancestry, place of origin, political beliefs or some other prohibited ground
- complaints before the Courts or federal or provincial tribunals involving either sexual harassment or sexual abuse in the workplace
- lawsuits in the Courts relating to defamation or negligent supervision of the workplace, resulting in sexual harassment
- complaints before a provincial Workers Compensation Board or the federal Labour Relations Board with respect to occupational health and safety matters
- complaints before a federal or provincial Labour Relations Board relating to hazardous chemicals or substances
- complaints before a federal or provincial Labour Relations Board relating to wages or other employment standards

The key feature of EPL claims is that they are brought against employers or fellow employees, usually by other employees, employee applicants or customers, and relate to employment conduct, policies or conditions. Specific complaints include allegations that as a result of the conduct, policies or conditions, the claimant:

- failed to get a job

- lost his or her job (whether by express or constructive means)
- failed to be advanced or promoted
- received a lower level of compensation than they were otherwise entitled to
- caused them to be subject to a hostile, humiliating, distressing or harmful environment or actor

The relief sought in EPL claims ranges from monetary or compensatory damages, to reinstatement, declaratory relief, apologies, changes to workplace policies, practices, and structures, to punitive and exemplary damages.

EPL claims typically name not just the perpetrator of the harmful conduct, but also name the employer organization or the supervisors, directors or officers of the company. Allegations include vicarious liability, negligent supervision or negligent policy-making - in other words, failing to have appropriate policies in place to prevent the harmful conduct.

In the United States most claims are heard in the Courts, although in some instances the claimant may first have to seek permission to sue from the Equal Employment Opportunity Commission. The fact that most EPL claims in the United States are heard in a Court proceeding means that in the United States there is an opportunity for pre-trial discovery and deposition which is not available (in most instances) in Canada. In Canada, the provincial administrative tribunals employ staff investigators and staff to assist complainants through the complaint process. Lawyers are often not even involved. The exceptions in Canada are EPL claims alleging defamation or false imprisonment and, more recently, lawsuits in Ontario alleging infringement of the Ontario Human Rights Code (provided they are brought together with another cause of action), which claims may proceed directly to Court.

1.B. WHY NOW? - THE U.S. EXPERIENCE

The growth in EPL claims and the corresponding push for EPL coverage that originated in the United States has now firmly planted itself in Canada. Until approximately 20 to 25 years ago, EPL coverage was virtually unheard of in either country. Today, EPL policies (or endorsements to a D&O policy) are well-known and have become simply one product amongst a “standard suite” of insurance products being marketed to

employers in the U.S. Faced with a similar need, Canadian insurers now offer similar coverages.

The growth in EPL claims can be attributed to a number of factors which together have created a receptive environment for the claims. These include:

- a strong civil rights movement
- the resulting passage of protective human rights legislation
- an increasing awareness generally of human rights
- a growing intolerance and distaste for violations and discrimination
- an increasing willingness on the part of victims to disclose sexual misconduct
- public support for the imposition of restitution and penalties on violators

In the United States, we have only to think about the publicity surrounding the testimony of Professor Anita Hill at the Clarence Thomas hearings, and more recently, allegations involving former President Bill Clinton, to realize the broad impact and “fuel of support” that such infamous claims do generate on the wider public at large. One commentator has estimated that after the Clarence Thomas hearings, claims in respect of sexual harassment jumped 70 per cent.³ The publicity generates awareness; spawns those who have been victim to similar injustices to give pause; and then empowers them to take the necessary steps to demand justice in their own circumstances.

More and more as well, such real public support is turning into legal clout for people seeking redress for human rights injustices or other employment law “wrongs”. Whereas, for example, certain conduct used to be kept “in the closet”, due to embarrassment or due to prevailing “blame the victim” public attitudes (e.g. sexual misconduct claims or claims alleging discrimination on the basis of sexual orientation), now, due to changing public attitudes, victims of misconduct are able to feel more confident going public with their complaints. The support is reflected not just in the

³ This figure was reported by *Houston Chronicle* writer Ron Nissimov in July 1992. Quoted in Judith I. Pearson, “Harassment: Risk Management Tools”, *Risk Management* (January 1997): 25 at 26.

media coverage; the public's abhorrence of discriminatory behaviour has been given significant teeth in the form of legislative additions to human rights, employment and criminal law. The legislation not only lists prohibited conduct so as to codify the violations; it provides a concrete and accessible framework for redress. Armed with public backing and legal authority, claimants are now both more willing and more able to pursue their rights of action.

1.C. THE CANADIAN EXPERIENCE

Perhaps because Canada's human rights movement is less cohesive than that in the United States, or perhaps because Canadians are less litigious, EPL claims have been slower in coming to the forefront in Canada. However, surely but steadily, the frequency of such claims has been growing, following the American lead.

Recently in Canada, there has been a burgeoning of public and legal intolerance and distaste for discriminatory and otherwise illegal or improper conduct by employers. It is easy to think of recent examples which received wide media attention. In the mid-2000s, allegations of sexual misconduct at both Simon Fraser University and the University of British Columbia generated waves of public concern - not only over the allegations of harassment, but over the *manner in which the allegations were investigated and managed after the fact*. Now in the spotlight are numerous allegations of sexual misconduct within the top ranks of the Canadian military, as well as the Canadian federal government's continuing struggle with the pay equity legislation. The fact that the foregoing events have become "media moguls" is a testament to the fact that human rights and employment continue to be significant issues and liabilities to be reckoned with in 2014.

1.D. THE CHALLENGE OF EPL CLAIMS

EPL claims present both a challenge and an opportunity for the insurance industry. The initial cause for concern was how to control and deflect EPL coverage claims being made under standard coverages which were never intended to cover such risks, and thereby protect reserves that were allocated for more traditional risks. It soon became clear that with traditional coverages "sealed up" with more appropriate wordings, there was (and continues to be) a pressing business need to address the gap in coverage, in an intelligent way, with an eye to past experience gained from managing more traditional insurance products.

1.E. EPL SUBJECT MATTER: HIGH STAKES

Key to the challenge of managing EPL risks is understanding that EPL claims, as compared to other litigation, involve more than the usual dose of “emotional baggage”, *both* from the perspective of the employee claimant *and* the employer organization insured. From the employee claimant’s perspective, the claim is almost always supercharged with the sense that the employee was victim to a very personal wrong or injustice. Such claimants are likely to have suffered, at best, hurt feelings and anger, and at worst, serious emotional distress and psychological or physical harm and suffering. From the employer organization’s perspective, its good name, reputation and credibility have been challenged, and as a result, employee and management morale and attention, productivity and customer goodwill are threatened. The end result of such high stakes? If not properly managed, it is likely that the dispute could be prolonged, bitter, and costly for everyone involved.

Where personal and business stakes are so high, quick, decisive action can reap large dividends, as can alternative dispute resolution (ADR) techniques. It may be that a prompt, sincere apology and handshake could resolve amicably a matter which otherwise might escalate into bitter litigation and costly adverse publicity. Getting the parties to sit down so that the wronged party’s story can be told, and so that the employer can offer either an explanation or an apology, could defuse the situation and be a critical step in avoiding each party becoming too entrenched into a position. There are of course no guarantees, but the very human element involved in these claims makes them particularly suited to ADR techniques.

2. SOURCES FOR LIABILITY EXPOSURES

Significant human rights and employment rights legislation has been passed over the past several decades, both in Canada and in the United States. As the legislation has grown in scope and complexity, it appears that the exposures and claims flowing from such legislation are growing in frequency and severity. One of the keys to understanding EPL claims is understanding the legislative framework underlying the claims as well as the decisions rendered by tribunals and Courts interpreting the legislation.

2.A. UNITED STATES LAW

In the United States, EPL claims can be based on either federal or state law.

2.A.1. Federal Laws

The main sources of legislation barring discriminatory practices by employers are discussed below:

a. *Title VII of the Civil Rights Act of 1964*

Title VII of the *Civil Rights Act* of 1964 is the foundational human rights statute in the United States. It prohibits discrimination in hiring, termination, compensation and other terms and conditions of employment, and in respect of asserting rights under the Act, on the basis of race, colour, national origin, sex or religious preference, pregnancy, childbirth and related medical conditions.⁴ Title VII applies to employers of 15 employees or more. Title VII prohibits both direct, or intentional discrimination, and unintentional discrimination that has an adverse impact on a particular group, that is not justified by business necessity. Remedies include reinstatement, back pay, lost benefits and attorney fees.

b. *Civil Rights Act of 1991*

The *Civil Rights Act* of 1991 amended the *Civil Rights Act* of 1964 by opening the door to the specific remedies of compensatory and punitive damages in cases of sexual harassment and intentional discrimination. In addition, the procedural amendments have enabled claimants to demand jury trials.

c. *Age Discrimination in Employment Act of 1967*

The *Age Discrimination in Employment Act* of 1967 applies to employers having 20 employees or more and specifically prohibits termination of employment or other discrimination based on age. The Act covers persons aged 40 and older and attempts to address the problem of older workers being replaced by younger workers. Remedies available under certain circumstances include reinstatement, back pay, lost benefits, front pay and attorney fees.

d. *Equal Pay Act of 1963*

⁴ “Related medical conditions” to “pregnancy” and “childbirth” include abortion. In *Turic v. Holland Hospitality, Inc.* 842 F. Supp. 970 (W.D. Mich. 1994) (United States District Court) the court ruled that the plaintiff was discriminated against on that basis when she was wrongfully discharged after having an abortion. The Court also ruled that she could bring a claim for religious discrimination. For a similar decision in Canada, see *Bird v. Aphetow House Ltd.* (Dec. 14, 1987, Saskatchewan Board of Inquiry)

The *Equal Pay Act* of 1963 legislates equal pay for work of equal skill, effort and responsibility, and under similar working conditions, and prohibits wage discrimination based on gender.

e. *Rehabilitation Act of 1973*

The *Rehabilitation Act* of 1973 prohibits discrimination against those having physical or mental handicaps by federal contractors and those in receipt of federal financial assistance.

f. *Americans with Disabilities Act (ADA)*

The *ADA* was enacted in 1990 and became effective in 1992. It applies to employers having 15 or more employees and prohibits discrimination against persons with disabilities in the terms and conditions of employment (such as hiring, promotion, compensation and termination of employment). It also imposes significant duties of “reasonable accommodation”, in some instances requiring buildings and facilities to be modified in order to be made accessible - exposing businesses to a significant potential liability. The test for “reasonable accommodation” is “undue hardship”. Of note is the fact that the *ADA* is receiving a liberal construction, with the term “disabled” being interpreted to include the obese and alcoholics.⁵

g. *“Whistleblower” protection statutes*

Various statutes protect employees from retaliation when they “blow the whistle” on their employers’ discriminatory practices.

2.A.2. State Laws

In addition to federal laws, many states and local governments have statutes prohibiting discrimination in employment and housing. The list of prohibited behaviours is in some cases more extensive than at the federal level. For example, in California, the list includes medical conditions such as cancer, marital status and physical handicap. Remedies also include awards for emotional distress and punitive damages. At the local level, particular issues can receive particular attention. For

⁵ *Clark-Peterson Co. v. Independent Ins. Assocs.*, 492 N.W. 2d 675 (Iowa, 1992) (alcoholism as a disability); *Cook v. Rhode Island*, 1993 U.S. App. LEXIS 30060 (1st Cir. Nov. 22, 1993) (obesity as a disability); and *Cassista v. Community Foods, Inc.*, 856 P. 2d 1143 (Cal. 1993).

example, in Los Angeles and San Francisco, AIDS-based discrimination has been banned, as well as discrimination based on sexual preference.

2.B. CANADIAN LAW

In Canada, EPL claims find their authority in several human rights and employment right statutes that are legislated at both the federal and the provincial levels. The overlap in jurisdiction exists because while the Canadian *Constitution Act* makes “property and civil rights” a subject of provincial jurisdiction, at the same time, “federal works and undertakings” (including companies incorporated under the federal *Canada Business Corporations Act*) fall under federal jurisdiction.

2.B.1 Federal Laws

In contrast to the United States, Canadian legislative protections at the federal level are bundled into relatively few statutes covering numerous issues. However, Canadian legislators are increasingly turning their minds, and pens, to legislative provisions developed in the United States with the result that this area is growing at a rapid rate. Some of the more central statutes are as follows:

a. The Canadian Human Rights Act

Prohibited grounds for discrimination are set out in the *Canadian Human Rights Act* as follows:

3. (1) *For the purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds for discrimination.*

3. (2) *Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.*

Included in the *Act's* “prohibited discriminatory practices” are discrimination in hiring, firing, and discrimination in the course of employment: i.e., applications, advertising for prospective employees, policies which result in discrimination, recruiting, hiring, promoting, training or any other matter.

Wage discrimination and the provision of accessible public facilities are also contemplated:

11. (1) *It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.*

- ...
14. (1) *It is a discriminatory practice,*
(a) in the provision of goods, services, facilities or accommodation customarily available to the public,
(b) in the provision of commercial premises or residential accommodation, or
(c) in matters related to employment,
to harass an individual on a prohibited ground of discrimination.

The *Act* applies to all federal undertakings. Complaints under the *Act* with respect to alleged violations are heard under the administrative jurisdiction of the Canadian Human Rights Tribunal, which has broad, remedial powers to order payment of damages, reinstatement or accommodation at the workplace.

In 2008, the scope of the *Canadian Human Rights Act* was amended to include matters under the *Indian Act*, extending human rights protections to members of First Nations communities. In 2011, members in those communities could bring complaints to the Canadian Human Rights Commission about their own governments.⁶

b. The Canada Labour Code

The *Canada Labour Code* essentially governs workplace conditions and employment standards, and outlines prohibited conduct other than traditional civil rights violations/discriminatory practices. A voluminous piece of legislation, the *Code* has sections regulating (and providing minimum standards) in relation to the following topics:

- labour law - i.e., regulating the formation of unions and collective bargaining
- standards, conduct and procedures for upholding workplace health and safety (in relation to buildings, equipment, practices, hazardous substances, etc.)
- employment standards - regulating hours, overtime, minimum wages, severance standards, vacation and pregnancy leave, and freedom from sexual harassment

Complaints and investigations under the *Code* are brought to/by the Federal Labour Relations Board.

⁶ Canadian Human Rights Commission, "2013 Annual Report to Parliament" at p. 2.

c. *The Employment Equity Act*

The broad mission statement of the *Employment Equity Act* at the federal level speaks loudly to its ambitious remedial goals and the broad political clout that underlies it:

2. *The purpose of this Act is to achieve equality in the work place so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfillment of that goal, to correct conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.*

The *Act* imposes, on federal jurisdiction private and public sector employers of 100 employees or more, affirmative obligations to identify employment practices that result in employment barriers to disadvantaged persons, and to prepare a plan of positive policies and practices to eliminate such practices and to reasonably accommodate difference. A failure to act in compliance with this administrative burden can lead to fines, proceedings before the Employment Equity Tribunal, and even orders for payment of wage differentials.

2.B.2. Provincial Laws

At the provincial level, by 1980 each of the provinces had enacted a Human Rights Code, or legislation to govern human rights in their provincial jurisdiction. Prohibited grounds of discrimination and prohibited discriminatory practices resemble those identified at the federal level, but variations do exist among the provinces, meaning that legislation should be checked closely to verify whether a liability truly exists in any given instance. B.C.'s *Human Rights Code*, for example, is quite broad. It enumerates as prohibited grounds race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age and conviction of a criminal or summary conviction offence.

With the exception of Ontario⁷, human rights tribunals in each province have exclusive jurisdiction over human rights complaints and enforcement procedures.

Each province typically has employment standards legislation, workers compensation legislation and legislation providing for worker occupational health and safety, all of which “mirror” to a large degree the federal statutes described *supra*. Ontario

⁷ See sectopm 4.D.3.

introduced employment equity legislation in 1993, but subsequently repealed it after a change of government in 1995.

3. FEDERAL AND PROVINCIAL “WHISTLEBLOWER” LEGISLATION

Until relatively recently, Canada did not have “whistleblower” legislation to specifically protect employees against retaliation. Historical whistleblower legislation comprised various Canadian and provincial human rights laws, which prohibited retaliatory conduct by employers. However, this prohibition was not enacted in separate legislation.

All this has changed in the past decade and now more than 100 statutes address the prohibition of an employer’s retaliatory conduct towards employees who “whistleblow.” For a broad sampling of these statutes, you should review Schedule A to this paper (WHISTLEBLOWING: An Overview to Legislative Protections).

Among the most notable legislative provisions are the following:

1. *Canada Labour Code*, R.S.C. 1985, c. L-2

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee’s rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee ...testified, provided info during an investigation, etc.

2. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

s. 14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

...

s. 59 No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.

3. *Criminal Code of Canada*, R.S.C. 1985, c. C-46

s. 425.1(1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

s. 425.1(2) Any one who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

The *Public Servants Disclosure Protection Act*⁸ has protected whistleblowers in the federal public sector since April 15, 2007. This Act requires employers in the public sector to establish a code of conduct that provides civil protections for whistleblowers including disciplinary actions against a public servant who takes a reprisal against a whistleblower, and reinstatement or damages in lieu of reinstatement for whistleblowers who have been subject to reprisal. It states simply (at section 19) that, “no person shall take any reprisal against a public servant or direct that one be taken against a public servant”. Since the coming into force of the *Public Servants Disclosure Protection Act, supra*, the following Canadian provinces and territories have enacted their own whistleblower protection laws to protect whistleblowers in their respective public sectors: Alberta; Manitoba; Saskatchewan; New Brunswick; Ontario; Nova Scotia; and Nunavut⁹. Newfoundland and Labrador will not be far behind. In that province, Bill 1, *An Act Respecting Public Interest Disclosure* received second reading in the House of Assembly on May 6, 2014.

At present, only two Canadian jurisdictions have general whistleblower protection in place for the private sector: (1) New Brunswick under section 28 of its *Employment Standards Act*¹⁰; and Saskatchewan under section 2-42 of its *The Saskatchewan Employment Act*¹¹.

⁸ *Public Servants Disclosure Protection Act*, SC 2005, c 46.

⁹ See: *The Public Interest Disclosure (Whistleblower Protection Act)*, SA 2012, c P-39.5 (Alberta); *The Public Interest Disclosure (Whistleblower Protection) Act*, CCSM c P217 (Manitoba); *The Public Interest Disclosure Act*, SS 2011, c P-38.1 (Saskatchewan); *Public Interest Disclosure Act*, SNB 2012, c 112 (New Brunswick); *Public Service of Ontario Act*, 2006, SO 2006, c 35, Sch A (Ontario); *Public Interest Disclosure of Wrongdoing Act*, SNS 2010, c 42 (Nova Scotia); *Public Service Act*, SNu 2013, c 26 (Nunavut).

¹⁰ *Employment Standards Act*, SNB 1982, c E-7.2.

¹¹ *The Saskatchewan Employment Act*, SS 2014, c S-15.1.

The difference between the New Brunswick and Saskatchewan schemes and those of the other provinces is that the New Brunswick and Saskatchewan regimes prohibit employers from punishing employees for making complaints or providing information against the employer with respect to *any* matter covered by the *Employment Standards Act* or *The Saskatchewan Employment Act*, respectively, or the violation of *any other* Provincial or Federal Act. Conversely, each of the other provinces only protect complaints made with respect to that province's employment standards legislation. Thus, the New Brunswick and Saskatchewan schemes are far broader in their scope and application.

The *Employment Standards Act*, S.N.B. 1982, c. E-7.2 provides:

s. 28 Notwithstanding anything in this Act an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefore is related in any way to

- (a) the application by an employee for any leave to which the employee is entitled under this Act;*
- (b) the making of a complaint or the giving of information or evidence by the employee against the employer with respect to any matter covered by this Act; or*
- (c) the giving of information or evidence by the employee against the employer with respect to the alleged violation of any Provincial or federal Act or regulation by the employer while carrying on the employer's business;*

or if the dismissal, suspension, layoff, penalty, discipline or discrimination constitutes in any way an attempt by the employer to evade any responsibility imposed upon him under this Act or any other Provincial or federal Act or regulation or to prevent or inhibit an employee from taking advantage of any right or benefit granted to him under this Act.

1988, c.59, s.9.

The *Saskatchewan Employment Act*, SS 2014, c S-15.1 provides:

- 42-2(2) No employer shall take discriminatory action against an employee because the employee:*
- (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada; or*
 - (b) has testified or may be called on to testify in an investigation or proceeding pursuant to this Act, another Act or an Act of the Parliament of Canada.*

2013, c.S-15.1, s.2-42.

Given the trend throughout Canada with respect to greater protection for employees generally and whistleblowers specifically, we can expect to see similar provisions developing in employment standards legislation throughout the country.

4. SEXUAL HARASSMENT

4.A. DISCRIMINATION ON THE BASIS OF SEX:

Sexual harassment is a violation of the various human rights Acts and Codes, as it is discrimination on the basis of sex. The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, for example, includes sex as a prohibited ground of discrimination.

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

The Supreme Court of Canada has stated that the sexual harassment of one female employee in a given matter is no less discriminatory on the basis of sex than if all female employees are sexually harassed (*Janzen v. Platy Enterprises Ltd.*¹²). See also *Barnes v. Costle*¹³, which is often cited as a leading authority in Canada.

4.B. WHAT CONSTITUTES “SEXUAL HARASSMENT”?

In *Janzen, supra*, the Supreme Court of Canada unanimously provided a non-exhaustive definition of sexual harassment:

“... sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour. [para 52]

...sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment... When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. [para 56]”

¹² *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. (Supreme Court of Canada).

¹³ *Barnes v. Costle*, (1977), 561 F. 2d 983 (United States Court of Appeals).

Furthermore, the British Columbia Human Rights Tribunal has also stated that:

*"Sexual harassment can range from sexual innuendoes, propositions for dates or sexual favours to leering, grabbing or sexual assault. Sexual harassment can be both physical and psychological. Psychological harassment can include requests for dates and sexual favours."*¹⁴

A complainant is "not required to establish that she expressly objected to the conduct...it is sufficient that [a respondent] knew or ought to have known, that the conduct was unwelcome."¹⁵

The Human Rights Tribunal has determined that a singular, unreciprocated romantic or sexual advance is not necessarily sexual harassment: the threshold is unique in every situation having regard to the respective positions of each party to the advance, their ages, employment positions, previous advances and the circumstances.

4.C. THE EMPLOYER'S VICARIOUS LIABILITY:

The law is clear that an employer is liable for the sexual harassment committed by its employee when those actions fall within the course of the employment relationship. As with other employee wrongs for which vicarious liability is imposed, the employee's conduct is deemed to be the employer's conduct, regardless of whether or not this conduct is authorized or intended by the employer.

Supreme Court of Canada Justice La Forest, in *Robichaud v. Brennan*¹⁶ approved of and cited the following excerpt explaining the "enterprise causation" theory from the U.S. Supreme Court in *Meritor Savings Bank, FSB v. Vinson*¹⁷:

"It is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates."

This rationale for the imposition of vicarious liability on the rogue's employer is common in instances of sexual harassment.¹⁸

¹⁴ See *Fougere v. Rallis*, 2003 CarswellBC 3487, 2003 BCHRT 23, (sub nom. Fougere v. Rallis (No. 1)) 46 C.H.R.R. D/392 (British Columbia Human Rights Tribunal).

¹⁵ *Willis v. Blencoe*, 2001 BCHRT 12 (British Columbia Human Rights Tribunal); *Harriot v. National Money Mart Co.*, 2010 HRTO 353 (Ontario Human Rights Tribunal).

¹⁶ *Robichaud v. Brennan*, [1987] 2 S.C.R. 84 (Supreme Court of Canada).

¹⁷ *Meritor Savings Bank, FSB v. Vinson*, 106 S.Ct. 2399 (1986) (US Supreme Court).

¹⁸ See *Janzen, supra*; *Bazley v. Curry*, [1992] 2 SCR 534 (Supreme Court of Canada).

4.D. REMEDIES:

Awards under the Human Rights scheme are premised on two heads: remedial orders regarding the insured's behaviour and compensatory awards for the claimant.

4.D.1. Orders Against the Insured:

Remedial or corrective orders are authorized under the legislation. Essentially these constitute a declaration that the insured breached the Human Rights legislation and an order that the contravention cease.

Other orders include a requirement that the insured apologize to the claimant; that the insured undergo a training course on sexual harassment; that the insured implement a system to prevent discrimination from reoccurring or post literature regarding sexual harassment in the workplace.

4.D.2. Compensatory Orders for the Claimant:

Compensatory awards are, like common law damages, intended to return the claimant to the position as though no wrong had been committed. Generally speaking, these financial awards are not "lucrative" and the bulk of the award is generally for loss of employment income and "hurt feelings." The following factors are generally considered in determining the appropriate award for compensation for the injury to dignity, feelings and self-respect:

- (i) the nature of the harassment: was it simply verbal or was it physical as well?
- (ii) the degree of aggressiveness and physical contact in the harassment;
- (iii) the ongoing nature: the time period of the harassment;
- (iv) the frequency of the harassment;
- (v) the age of the victim;

- (vi) the vulnerability of the victim; and
- (vii) the psychological impact of the harassment upon the victim.¹⁹

Historically, awards for hurt feelings or “injury to dignity, feelings and self-respect” were a few thousand dollars. These are increasing at a rapid rate. In 2007, the “high end” egregious cases awarded \$10,000 for the Human Rights version of “pain and suffering”. Today, awards of \$10,000 and up for hurt feelings are normative.²⁰ Furthermore, some tribunals award damages for hurt feelings under more than one provision of the respective legislation such that, in effect, the claimant receives double the award.

Claimants may also be awarded damages for lost wages and benefits, if their employment salary is affected, interest on this amount, personal costs to attend the hearing, and the like. Customarily, legal costs are not recoverable in the Human Rights field. No doubt this is indicative of the tribunals’ desire to keep lawyers out and encourage a system of self-representation on the part of the parties to the claim.

4.D.3. Procedure: Before the Courts or Before the Tribunals?

Until recently, if a plaintiff complained of acts that are covered by Human Rights legislation, they were foreclosed from commencing a tort action, irrespective of whether the tort action would be in lieu of the human rights application. The Courts held that where a mechanism existed for resolution of a claim for discrimination and the other mechanism provided a real remedy, then the Court had to dismiss the claim insofar as the allegations can be dealt with by the other mechanism. Procedurally, insofar as the allegations could be dealt with by an administrative body, the pleadings before the court were struck out or the entire claim was dismissed.²¹

In most jurisdictions, the foregoing remains the current state of the law. In Ontario, however, following the coming into force of the full Bill 107 amendments to the Ontario

¹⁹ See *Torres v. Royalty Kitchenware Ltd.*, 3 C.H.R.R. D/858; Ontario Board Of Inquiry; April 8, 1982; *Reverand Gael Matheson v. The Presbytery of Prince Edward Island*, May 31, 2007, P.E.I.H.R.T. (Prince Edward Island Human Rights Tribunal).

²⁰ See *McIntosh v. Metro Aluminum Products Ltd. and Zbigniew Augustynowicz* 2011 BCHRT 34 (BC Human Rights Tribunal) where the claimant was awarded \$12,500 as damages for injury to dignity, feelings and self respect where the Tribunal found that the claimant was subjected to sexual harassment (in the form of “sexting”) in the course of her employment.

²¹ See *Nicholas v. Mullin* (1998), 199 N.B.R. (2d) 219 (Q.B.); *Chapman v. 3M Canada Inc.* (1997), 30 C.C.E.L. (2d) 102 (Ont. C.A.); *Bouchard v. Canada (Minister of National Defence)* (1999), 187 D.L.R. (4th) 314 (Fed. C.A.); *Mohammed v. Canada (Treasury Board)* (1999), 181 D.L.R. (4th) 590.

Human Rights Code²² in June 2008, Ontario courts are empowered to award civil remedies for human rights infringements provided such claims are coupled with another cause of action. In particular, pursuant to section 46.1 of the Ontario Human Rights Code, if, in a civil proceeding in an Ontario court, the court finds that a party to the proceeding has infringed a right under Part I [*Freedom from Discrimination*] of another party to the proceeding, the court may make either of the following orders, or both:

- An order directing the party who infringed the right to pay monetary compensation for losses arising out of the infringement, including compensation for injury to dignity, feelings, and self-respect; and/or
- An order directing the party who infringed the right to make restitution, other than through monetary compensation, for losses arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

Notably, the Bill 107 amendments also remove the \$10,000 cap on damages awardable on account of mental distress which previously existed.

Since the Bill 107 amendments enacting s. 46.1 of the Code came into force, there have been 19 cases which have relied on that section within a civil action²³. The human rights allegation was upheld in two of these: *Wilson v. Solis Mexican Foods Inc.*²⁴, and *Beikhout v. 2138316 Ontario Inc.*²⁵ (the latter of the two was a small claims case involving sexual discrimination). In *Wilson*, the plaintiff was awarded \$20,000 for infringement of her rights, reflecting “the importance of the right that was infringed, the impact of the

²² *Human Rights Code*, RSO 1990, c H.19.

²³ [Mackie v. Toronto \(City\)](#), [2010] O.J. No. 2852; [Leclair v. Ottawa \(City\) Police Services Board](#), [2012] O.J. No. 1233; [Stokes v. St. Clair College of Applied Arts and Technology](#), [2010] O.J. No. 1544; [Cavic v. Costco Wholesale Canada Ltd.](#), [2012] O.J. No. 5039; [Aba-Alkhail v. University of Ottawa](#), [2010] O.J. No. 1741; [Andrachuk v. Bell Globe Media Publishing Inc. \(c.o.b. Globe and Mail\)](#), [2009] O.J. No. 461; [Jaffer v. York University](#), [2010] O.J. No. 4252; [Grogan v. Ontario \(Human Rights Tribunal\)](#), [2012] O.J. No. 864; [Wilson v. Solis Mexican Foods Inc.](#), [2013] O.J. No. 4271; [Dwyer v. Advanis Inc.](#), [2009] O.J. No. 1956; [Halton Condominium Corporation No. 29 v. Howard](#), [2009] O.J. No. 3566; [Berkhout v. 2138316 Ontario Inc.](#), [2013] O.J. No. 1125; [Cerqueira v. Ontario](#), [2010] O.J. No. 3037; [Desjardins v. Society of Obstetricians and Gynecologists of Canada](#), [2012] O.J. No. 6098; [Russell v. York \(Regional Municipality\) Police Services Board](#), [2011] O.J. No. 3541; [St. John's Evangelical Lutheran Church of Toronto v. Steers](#), [2011] O.J. No. 4758; [Anderson v. Tasco Distributors](#), [2011] O.J. No. 106; [Connell v. University of British Columbia \(B.C.C.A.\)](#), [1998] B.C.J. No. 13; [Dobreff v. Davenport](#), [2009] O.J. No. 13.

²⁴ *Wilson v. Solis Mexican Foods Inc.*, 2013 ONSC 5799.

²⁵ *Beikhout v. 2138316 Ontario Inc.*, [2013] O.J. No. 1125.

defendant's conduct, and the particular circumstances". In *Beikhout*, the plaintiff was awarded \$15,000 for infringement of her rights, taking the following factors into account: the violations occurred over several weeks, there was touching and the plaintiff was afraid she would lose her job, felt humiliated and scared and was ultimately fired when she complained.

The jurisprudence is clear that s. 46.1 provides substantive jurisdiction to Ontario courts and permits a plaintiff to advance an allegation before the courts and seek damages for a breach of Part I of the Code along with an otherwise properly pleaded cause of action. While it appears that to date, s. 46.1 of the Code has not provided the kind of alternative venue to the Tribunal for human rights cases that was contemplated by many under Bill 107, we expect that lawyers and plaintiffs will rely on this provision with increasing frequency in the future. We also expect that other Canadian jurisdictions will follow in Ontario's footsteps in the coming years and adopt similar or equivalent provisions in their own Human Rights legislation.

5. DISCRIMINATION ON THE BASIS OF FAMILY STATUS

In recent years, the Canadian Human Rights Commission has been receiving an increasing number of complaints for alleged discrimination on the basis of family status. A very recent decision from the Federal Court of Appeal potentially exposes employers and insurers alike to increased risk of liability under this ground of discrimination.

Ms. Johnstone worked for the Canada Border Services Agency ("CBSA"). She requested that the CBSA allow her to work full-time hours over a three-day week so that she could balance her work with her care giving responsibilities. The CBSA refused to accommodate her request. As a result, Ms. Johnston filed a discrimination complaint with the Canadian Human Rights Commission, alleging that the CBSA was discriminating against her on the basis of family status. In 2010, the Canadian Human Rights Tribunal ruled that the CBSA had discriminated against Ms. Johnstone.²⁶ In January 2013, the Federal Court dismissed the Attorney General's application for judicial review of the case.²⁷ The Attorney General appealed to the Federal Court of Appeal.

²⁶ *Johnstone v. Canada Border Service Agency*, 2010 CHRT 20 (CanLII).

²⁷ *Canada (Attorney General) v. Johnstone*, 2013 FC 113 (CanLII), 2013 FC 113.

On May 2, 2014, the Federal Court of Appeal released its decision dismissing the Attorney General's appeal.²⁸ In so doing, the Federal Court of Appeal confirmed that the ground of family status in the [Canadian Human Rights Act](#) includes parental obligations which engage the parent's legal responsibility for the child, such as childcare obligations, as opposed to personal choices.

6. FREQUENCY AND SEVERITY OF CLAIMS IN CANADA

While it is difficult to know exactly with what frequency EPL claims are arising in Canada, or the scope of their monetary awards, all indications seem to be that the number of EPL claims is slowly rising and the average value of these claims is modestly increasing; however, the vast majority of successful EPL claims remain under \$25,000 and administrative tribunals continue to increase their share of employment related claims.

The U.S. Equal Employment Opportunity Commission recorded between 93,277 and 99,947 claims made annually between 2008 and 2013.²⁹ In Canada, both the frequency of EPL claims and the severity of the awards continue to be much less than in the United States, even taking into account the difference in the size of the population. Recently, the authors' firm compiled a summary study of EPL claims³⁰ decisions in Canada, both at the administrative and Court levels.

The summary study revealed that between 2008 and 2013, 289 cases were reported in which EPL damages were awarded, 255 being administrative tribunal decisions and 34 being Court decisions. In 88% of all cases the EPL quantum was assessed at \$25,000 or less. 28% were of all awards were \$5,000 or under. Only 4% of cases resulted in damages over \$50,000, with these high awards usually arising from litigation dealing with defamation or alleged criminal conduct.

A chart setting out the data is included below:

Table 1: STATISTICAL DATA ON EMPLOYMENT PRACTICE VIOLATIONS IN CANADA

²⁸ *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII). See also: *Canadian National Railway Company v. Seeley*, 2014 FCA 111 (CanLII).

²⁹ U.S. Equal Employment Opportunity Commission, "Charge Statistics FY 1997 Through FY 2013" at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

³⁰ Please note that this summary review did *not* account for pure "wrongful dismissal" claims alleging a failure to pay salary in lieu of reasonable notice.

Source: 255 cases from the *Canadian Human Rights Reporter* (2008 - 2013)

AWARD AMOUNT	TOTAL CASES	% OF TOTAL
\$0.00 - \$5,000.00	70	27.5%
\$5,001.00 - \$10,000	85	33.5%
\$10,001.00 - \$25,000.00	78	31%
\$25,001.00 - \$50,000.00	21	8%
Over \$50,000.00	1	0%

Source: 34 cases from *Canadian Cases on Employment Law and CANLII* (2008 - 2013)

AWARD AMOUNT	TOTAL CASES	% OF TOTAL
\$0.00 - \$5,000.00	11	32%
\$5,001.00 - \$10,000	1	3%
\$10,001.00 - \$25,000.00	8	24%
\$25,001.00 - \$50,000.00	3	9%
Over \$50,000.00	11	32%

Combination of two case groups (289 cases)

AWARD AMOUNT	TOTAL CASES	% OF TOTAL
\$0.00 - \$5,000.00	81	28%
\$5,001.00 - \$10,000	86	30%
\$10,001.00 - \$25,000.00	86	30%
\$25,001.00 - \$50,000.00	24	8%
Over \$50,000.00	12	4%

Interestingly, the data has not altered dramatically from a similar study our firm did for the years 1997 - 2002. The prior summary study revealed that between 1997 and 2002, only 210 cases were reported in standard law reporter series, 166 being “administrative law” decisions and 44 being Court decisions. The rise in total number of awards is modest considering the perceived popularity of human rights tribunals. The percentage of awards at \$25,000 and under is similar to 12 years ago but there is evidence of average claims values moving into the range of \$10,000 to \$20,000 with a decrease in the number of claims under \$5,000.

The decrease in judgments over \$50,000 may be attributable to the Supreme Court of Canada’s approval in 2008 of a more rigorous test for aggravated damages in the

employment law context as discussed below in section 10.E.3. The increasing cost of litigation and the lay litigant friendly process before human rights tribunals may also have encouraged parties to bring their claims via the administrative process where awards almost never rise above \$50,000.

The 2003 data is summarized in the table below:

Table 2: STATISTICAL DATA ON EMPLOYMENT PRACTICE VIOLATIONS IN CANADA

Source: 166 cases from the Canadian Human Rights Reporter (1997 - 2002)

AWARD AMOUNT	TOTAL CASES	% OF TOTAL
\$0.00 - \$5,000.00	76	46%
\$5,001.00 - \$10,000	49	30%
\$10,001.00 - \$25,000.00	30	18%
\$25,001.00 - \$50,000.00	9	5%
Over \$50,000.00	2	1%

Source: 44 cases from Canadian Cases on Employment Law (1997 - 2002)

AWARD AMOUNT	TOTAL CASES	% OF TOTAL
\$0.00 - \$5,000.00	1	2%
\$5,001.00 - \$10,000	0	0%
\$10,001.00 - \$25,000.00	14	32%
\$25,001.00 - \$50,000.00	17	39%
Over \$50,000.00	12	27%

Combination of two case groups (210 cases)

AWARD AMOUNT	TOTAL CASES	% OF TOTAL
\$0.00 - \$5,000.00	77	37%
\$5,001.00 - \$10,000	49	23%
\$10,001.00 - \$25,000.00	44	21%
\$25,001.00 - \$50,000.00	26	12%
Over \$50,000.00	14	7%

The vast majority of Canadian claims are heard by administrative tribunals rather than Courts, whereas in the United States many claims find their way into Court and even to jury trials, which opens the door to very high punitive awards where the jury's sensibility is offended. In contrast, Canadian administrative tribunals are more preoccupied with correcting workplace conditions than awarding substantial damages

in any particular case. In Canada, awards for humiliation and distress are nominal (less than \$25,000), as are the usual awards for punitive and exemplary damages.

When claims do find their way into Canadian Courts, very few cases are heard by juries and when juries are used, the trial judge is permitted to give the jury directions as to what would constitute a “typical award” for similar claims. This practice generally results in the judgments remaining more or less consistent with prior (relatively low) awards.

Finally, the overall impression is that the legal culture in Canada is less litigious than it is in the United States. Canadians seem to generally prefer negotiating such claims or walking away, rather than becoming embroiled in an expensive suit. Alternative dispute resolution methods are also embraced in Canada, which will likely mean that disputes of this nature will at least have a good opportunity to be resolved out of court, rather than creating precedents. The tradition of wrongful dismissal law in Canada likely also has had a significant impact on the legal tradition with respect to employment liability. In keeping with the Canadian legal tradition of there being an implied contract for reasonable notice, “wrongful dismissal” suits in Canada tend to focus not on *why* the employee was dismissed but *what compensation or severance pay* the employee is entitled to in lieu of their entitlement to reasonable notice. The focus in such suits has not been on awarding punitive damages for outrageous behaviour, but rather, reasonable compensatory damages.

7. THE DEVELOPMENT AND FUTURE OF EPL POLICIES

As an initial response to the need for EPL coverage, in the late 1980’s and the early 1990’s, some U.S. insurers developed “add-on” coverage for EPL risks in the form of an endorsement to the Director and Officer Liability (D & O) coverage. Such add-on endorsements to D & O coverage were subsequently introduced to the Canadian insurance market.

The Canadian and U.S. insurance industries have since recognized that there is a need for “stand-alone” EPL policies for three primary reasons. First of all, many private companies in Canada do not carry D & O insurance, and since such small to mid-size companies are perhaps most at risk, due to their lack of professional human resources personnel keeping up with changing employment trends, such companies have the potential to become a significant market for EPL products. Secondly, it has been the U.S. experience that in some cases, companies with D & O coverage prefer to keep their limits for EPL and D & O risks separate. Thirdly, there are certain inconsistencies

between EPL and D & O cover, such as who is an “insured”, that may make a stand-alone policy preferable to some businesses.

In 2013, there were already approximately 50-55 carriers active in the stand alone EPL insurance market in the United States.³¹ In the U.S. at least, EPL is a strong but mature business, with little in the way of growth opportunities. However, opportunities do exist in expanding the purchase of coverage by smaller employers. As well, carriers in the U.S. are responding to the unusually high level of claims by raising rates and deductibles, and implementing stringent controls on defence costs.³²

In Canada, the trend is for Fortune 1000 companies to buy EPL insurance if they have a ‘white collar’ workforce. Typically, the policies Fortune 1000 companies purchase have a large self-retention on defence costs and indemnity. Firms with unionized workforces, on the other hand, are not inclined to purchase EPL policies as many policies exclude claims arising out of a labour contract involving a unionized workforce. Among the small medium enterprise insureds (the “SMEs”), a larger portion are buying EPL policies as they become better understood by risk managers and insurance brokers. The trend for policies purchased by the SMEs is a reduction in the self-retentions/deductibles from levels of \$20,000 to \$25,000 down to \$10,000. Today, among technology risks, it is not uncommon to see \$2,500 self-retentions on defence costs and indemnity. Finally, while in the U.S. the Great Recession produced a raft of wrongful terminations as employers cut staff, which in turn caused premium levels to increase dramatically, in Canada where the economy remained relatively stable, premiums have not been increasing significantly and, in fact, are relatively stable.

8. EPL UNDERWRITING CONSIDERATIONS

In considering EPL risks in relation to a potential applicant for EPL insurance coverage, underwriters are conducting risk assessments of applicants which ask not just for the claims history of the insurance applicant, but details of the management philosophy and employment practices that are in place as a matter of routine. In this way, underwriters are able to evaluate whether the applicant’s practices are up to date, or whether from an EPL standpoint, the organization is a “disaster waiting to happen”.

Typically, from an underwriting standpoint, the factors to be considered can include the following:

- Class of Business

³¹ The Betterley Report, “Employment Practices Liability Insurance Market Survey 2013” (December 2013).

³² The Betterley Report, *supra*.

- Geographical Location
- Management
- Corporate History
 - * Mergers and Acquisitions
 - * Business Closings
 - * Layoffs
- Employee Mix/Size
 - * Full time/Part time
 - * Salary Ranges
 - * Terminations/Turnover Rate
- Human Resources
 - * Dedicated Function
 - * Policies, Procedures, Training
- Claim History
 - * Loss Prevention
 - For the Board
 - Employment Applications
 - The Interview Process
 - Employee Handbooks
 - Employee Review Guidelines
 - Harassment Policy
 - Discharging an Employee

In addition, EPL application forms typically include the following kinds of questions:

- a) Whether the employees are unionized or non-unionized;
- b) How many employees, and whether full-time or part-time;
- c) Jurisdiction of employees (i.e. location of offices);
- d) Whether buildings are owned or leased, age of buildings, and level of accessibility to disabled persons;

- e) How many employees above a certain level of compensation;
- f) Whether employment counsel, in-house or out-of-house, is used;
- g) Whether there is a human resources department or manager;
- h) Whether there is an employee handbook and if it is distributed to all employees (provide copy of same);
- i) Whether there is a human resources manual that is followed (provide copy of same);
- j) Whether the employee and human resources handbooks were developed in consultation with counsel and address certain key topics such as:
 - i) Discrimination;
 - ii) Sexual harassment;
 - iii) Confidentiality of complaints;
 - iv) Grounds for termination;
 - v) Procedures for redress;
 - vi) Services for employees;
 - vii) Procedures for employee review and appraisal;
- k) Questions with respect to the existence of training of management, and frequency of same;
- l) Whether there is a written company-wide policy statement in place with respect to discrimination, including sexual harassment, in the workplace and whether it is communicated to employees (provide copy of same);
- m) Whether any employee has been appointed to be a watch-dog on the company's compliance with human rights legislation;

- n) Whether there is a procedure in place for grievances;
- o) Whether there is an “open door” policy in place with respect to employee input into the workplace;
- p) Questions about the employee application procedure, including the existence and nature of testing, physical examination, screening, qualification and skill demands of potential employees;
- q) Whether private recruitment firms are used to recruit employees and what steps have been taken to ensure they comply with existing human rights legislation;
- r) Whether/what arrangements are in place to accommodate disabled employees, both with respect to applications and emergency evacuation from buildings;
- s) Whether medical records of employees are kept separate from other personnel records and are kept locked, secure and confidential;
- t) Whether a formal employment application form is used (provide copy of same);
- u) Whether written and formalized procedures are in place with respect to progressive discipline and record-keeping on discipline of employees;
- v) Procedures for termination of employees and involvement of human resources personnel;
- w) Numbers of recent terminations, resignations and retirees;
- x) Whether restructuring, acquisitions, or lay-offs are planned;
- y) Whether in such planning, consultants have reviewed such plans for compliance with trust plans or any other benefit plans;
- z) Details with respect to benefit plan management;

- aa) Details as to nature, quantum, judgment or settlement status of recent lawsuits, claims, administrative proceedings, complaints, including human rights complaints, demand letters received, etc.;
- bb) Existence, status and nature of prior and existing insurance policies;
- cc) Whether the company has been the subject of allegations or investigation into conduct that is alleged to be criminal, anti-trust, or in violation of any copyright, patent, securities, or federal, state or provincial statute;
- dd) Names and affiliations of directors;
- ee) Financial statements;
- ff) Prior knowledge warranty with respect to facts giving rise to a claim.

The foregoing EPL underwriting questions reflect that is not just what an organization does, but also what it *doesn't* do that can affect EPL risks. The theme implicit in the questionnaires is clear: EPL risks are reduced through strict and voluntary compliance with human rights laws, advertising such a compliance policy widely within the organization and opening one's doors to change, and documenting properly both the good practices *and* any problems that might arise.

Insurers have been quick to reassure insurance applicants that insurers will not be demanding change in the workplace, but rather, have as their goal to ensure those employers who already have good controls in place but nonetheless face an almost inevitable risk of exposure to claims have appropriate coverage. The flip side to this is that presumably, those employers who do *not* have good controls in place are either not eligible for coverage, or, are paying an extra premium for the higher risk.

Faced with the alternative of "no coverage" or "high-premium coverage", employers are voluntarily becoming more pro-active. More than ever, employers are seeking help and advice from insurers and counsel, asking what steps they can take to reduce the risk of an EPL claim being brought against them. Everyone benefits from the dissemination of information: "doing the right thing" is both good for employees *and* good for business. The goal is, with a combination of preventative actions and EPL coverage, to manage EPL exposures at an acceptable level for everyone.

9. REDUCING EPL EXPOSURE

There is plenty of expert advice and literature available to guide insured organizations wanting to take steps to reduce their EPL exposure. The sources of the information are many and diverse: human rights organizations, government departments, human resources specialists, insurance defence counsel, employment law counsel, and so on. All have had intimate involvement with the issues, from different perspectives.

There are certain key steps that organizations can take to address EPL exposure. The following is an overview:

- a) Conduct a review of current policies, practices and liabilities

This is an important first step for any organization. It involves considering the circumstances of the business, and evaluating what is and is not being done to make EPL concerns a priority for the business. This step also involves identifying, evaluating and prioritizing particular vulnerabilities - which could range from a particular hiring practice, to a particular supervisor's behaviour. Identify the risks and what needs to be done.

- b) Plan a strategy for education, awareness and accessibility to the priority of non-discrimination and "open-door" management and conflict resolution

The second step involves planning a strategy for integrating the desired changes into the workplace. How will the training be accomplished? Who will draft the new policy statement and procedural manuals? Will they be reviewed by counsel? How often will performance evaluations take place? How will third party consultants hired to do recruiting be informed that compliance is a priority for the company?

Specifically, organizations should be encouraged to do the following:³³

- **Put policies into place:** develop policy statements defining and barring discrimination and sexual harassment; make sure that such statements are widely disseminated to employees and are accessible in terms of procedure, language used and examples of prohibited activities; enforce the policy statements consistently and fairly

³³ Adapted from Gerald L. Maatman, Jr., "EPL litigation: Emerging Areas of Increased Exposure"

- **Develop and implement a complaints protocol:** develop an effective protocol for quickly responding to complaints and quickly investigating and remedying problems that are discovered in a good faith manner
- **Advertise a “zero tolerance” policy within the organization:** develop a statement of “zero tolerance” toward discrimination, sexual harassment and retaliation, and advertise that it is a priority through regular dissemination to management and all employees
- **Train staff regularly:** implement and document a regular training program for management and supervisory personnel designed to ensure that such personnel have the skills and training to follow through on policies of employment equity, and zero tolerance of sexual harassment and discriminatory practices
- **Put into practice an “open door” policy:** invite employees to raise concerns both informally and formally; and follow up on such concerns
- **Ensure that premises and practices comply** with the duty of reasonable accommodation to persons with disabilities, if applicable
- **Ensure that supervisors responsible for hiring are aware of human rights guidelines and are properly trained** to comply with same
- **Consider how to cope with any potential “glass ceiling” issues:** develop a means to monitor any potential problems in this area - it has been suggested that a mentoring program could be an effective means for breaking any patterns which might otherwise exist
- **Implement a business ethics policy:** a company-wide statement on ethics, that bears consequences of regular enforcement and discipline can be a tool for a company to prove both to its employees and to the outside world, that ethical behaviour is a priority for the company

- **Develop effective exit interview practices:** conduct exit interviews (including form questionnaire) with departing employees, so that employees have the chance to share input/air their grievances and put them into writing - this strategy not only commits the employee to the facts as written, but assists the company in identifying and addressing problems within the company that could lead to litigation, should the exiting worker decide to seek legal advice
 - **Develop an International Code of Conduct:** to avoid negative publicity, organizations may want to consider voluntarily adopting North American minimum standards of conduct at all of their plants world-wide
- c) Implement the strategy

Change inevitably confronts resistance. Be prepared to deal with it!

- d) Plan a strategy for responding to the crisis that will arise

It is important for organizations to anticipate that even with the changes in policy, there is inevitably EPL exposure and a need to be prepared to respond quickly to claims, in order to defuse the crisis. Such strategic planning can include having “at the ready” the evidence of the company’s active commitment to non-discriminatory practices, a designated spokesperson, and a decision made that in some circumstances, an apology and information-sharing may be the best way to defuse the situation.

In the U.S., insurers are working with employers to reduce the employers’ EPL exposure. Assistance includes providing insured organizations with sample policies and protocols, literature interpreting corporate duties and responsibilities under the various legislation, and even access to free legal advice/information from counsel, via 1-800 telephone numbers. Such ideas are not novel to the Canadian insurance scene, but it is interesting to see that in the EPL context, insurers are acting more than ever in creative ways to assist clients to reduce their risk of losses.

10. THE BASICS OF COVERAGE: AN INTRODUCTION TO EPL COVER

Unlike CGL policies, to date a “standard” EPL policy has not been developed, which means that the market remains quite competitive, as carriers work out the different risks associated with different wordings. Nonetheless, there are certain commonalities

to EPL insurance policies that can be highlighted. These, together with some emerging areas for debate, are discussed in this section.

10.A. WHAT TRIGGERS AN EPL CLAIM: THE NATURE OF EPL POLICIES

EPL policies are being written on a “claims made and reported” basis, as opposed to an “occurrence” basis, therefore resembling D & O policies more than CGL policies. In accordance with this “claims made and reported” approach, coverage is triggered by:

- a) an “EPL Violation” being alleged against an Insured; resulting in
- b) an EPL Claim being made and reported, during the coverage period, regardless of when the events giving rise to the claim took place.

Under a “claims made and reported” policy, as opposed to an “occurrence policy”, the insurer can be satisfied that after a certain date, the insurer will not be liable under the policy and can therefore adjust its reserves for future liability accordingly. As the risk assumed with a “claims made and reported” policy is less than that of an “occurrence policy”, where the insurer faces potentially indefinite liability, premiums are generally lower in the former policy.

The significance of the “claims made and reported” policy is exemplified in the 1999 United States District Court decision, *Specialty Food Systems, Inc. v. Reliance Insurance Company of Illinois*³⁴. In that case, the insured sought a declaration that its EPL policy covered an age discrimination claim asserted by a former employee. The insured had purchased two consecutive EPL policies, each with a one year policy period. The two policies limited coverage to “acts for which claims are first made against the insured while the policy is in force and which are reported to the company no later than sixty (60) days after the termination of the policy period.”

During the period of the first EPL policy, the insured terminated an employee and received notice of a discrimination complaint from the Equal Employment Opportunity Commission (EEOC). It was not until the effective period of the second EPL policy that the employee filed suit. The insured provided notice of this suit to the insurer within 60 days after the expiration of the second policy. The Federal District Court applied the plain language of the policy and found that the notice from the EEOC *was* a claim first

³⁴ *Specialty Food Systems, Inc. v. Reliance Insurance Company of Illinois*, 45 F. Supp. 2d 541 (United States District Court, E.D. Louisiana).

made under the first EPL policy, even though it was not accompanied by a filed suit, and therefore timely notice was not provided by the insured.

The 2001 United States decision, *Pantropic Power Products, Inc. v. Fireman's Fund Insurance Company*³⁵, also dealt with consecutive 'claims made' EPL policies. The insured found itself without coverage for a sexual harassment suit.

During the effective period of the first EPL policy the employee filed a sexual harassment charge against the insured with the Florida Commission on Human Rights. The insured did not provide notice of this to the insurer. During the effective period of the second EPL policy, the employee filed a civil suit against the insured for retaliation and negligent retention. The insured reported this suit to the insurer more than 60 days after the expiry of the first policy.

The District Court found that the two consecutive policies did **not** merge to create one continuous policy. Furthermore, the district court found that the employee's claim for retaliation and negligent retention were sufficiently related to the employee's earlier sexual harassment claims such that all of the claims were deemed to be a single claim made against the insured for the purposes of determining whether the claim was reported in a timely manner to the insurer.³⁶

10.B "EPL VIOLATION"

A typical EPL policy will define "Employment Practices Violation" to mean:

...an actual or alleged:

- (1) Wrongful Dismissal, discharge or Termination (either actual or constructive) of employment;
- (2) Sexual Harassment or Workplace Harassment of any kind including the alleged creation of a harassing workplace environment;
- (3) discrimination;
- (4) Retaliation (including lockouts);
- (5) employment-related libel, slander, humiliation, defamation or invasion of privacy;

³⁵ *Pantropic Power Products, Inc. v. Fireman's Fund Insurance Company*, 141 F. Supp. 2d 1366 (United States District Court, S.D. Florida).

³⁶ Similarly, in *Janjer Enterprises, Incorporated v. Executive Risk Indemnity, Incorporated*, 97 Fed. Appx. 410, 2004 WL 1011004(4th Cir. (Md.)) (United States Court of Appeals, Fourth Circuit). [unpublished], coverage was denied under a 'claims made and reported' EPL policy due to the late reporting of the insured. The insured reported the sexual harassment suit to its insurer promptly once the employee commenced a civil suit. However, 7 months earlier, the insured received notice of a discrimination charge from the EEOC. The court found that that the EEOC charge was a related claim and the insured failure to provide the required notice to the insurer was fatal.

- (6) wrongful failure to employ or promote;
- (7) wrongful deprivation of career opportunity, wrongful demotion or negligent employee evaluation, including the giving of negative or defamatory statements in connection with an employee reference;
- (8) wrongful discipline;
- (9) failure to grant tenure;
- (10) failure to provide or enforce adequate or consistent employee corporate policies and procedures relating to an Employment Practices Claim;
- (11) employment-related wrongful infliction of emotional distress and mental anguish;
- (12) misrepresentation to an employee or applicant for employment with the Company, which is connected to, related to, or associated with, an employment relationship alleging matters enumerated above;
- (13) violation of an individual's civil rights relating to any of the above,

but only if the Employment Practices Violation relates to an Insured Individual, whether direct, indirect, intentional or unintentional.

With respect to any customer, client or any other individual or group of individuals, other than an Insured Individuals, Employment Practices Violation shall mean only any actual or alleged Sexual Harassment, discrimination or violation of an individual's civil rights relating to such Sexual Harassment or discrimination.

“Sexual Harassment” is typically defined to mean:

...unlawful sexual advances and/or requests for sexual favours and/or verbal or physical conduct of a sexual nature against a past, present or prospective employee of the Company that (a) are made a condition of employment and/or (b) are used as a basis for employment decisions and/or (c) create a work environment that interferes with performance.

The policy will also stipulate *where* the EPL Violation must have taken place. Some EPL policies restrict coverage to acts that took place in the United States or Canada; others stipulate that they relate to conduct “*occurring anywhere in the world*”.

To accommodate changing conditions, discrimination has been defined in most policies now to include: “*race, colour, religion, age, sex, national origin, disability, pregnancy, sexual orientation or preference, or other status protected pursuant to any applicable federal, state or local statute or ordinance.*”³⁷

Wrongful termination has also been broadened in some EPL policies to include “*the actual or constructive termination of the employment, or demotion or, failure or refusal to promote*” such that it addresses the fact that employees are often not fired outright.³⁸

³⁷ *Supra*, note 2.

³⁸ *Supra*, note 2.

Lastly, employment practices violations are also expanding to include defamation (both in the context of an employee reference, and even in the context of comments made in an employee review), invasion of privacy, invasive surveillance, negligent hiring or retention and wage and hour issues.

Undoubtedly, insurers will continue to monitor employment litigation carefully and respond with coverage expansions and/or exclusions on the basis of economic and legal developments and claims experience.

10.C SUGGESTED WORDING FOR CANADIAN EPL POLICIES

The following is the suggested wording for a “claims made and reported” EPL Policy written for the Canadian market. This suggested wording is tailored to Canada’s legal and regulatory environment. Unlike the wording discussed above, this suggested text refers to a “Wrongful Employment Practice”, instead of an EPL Violation, and a “Claim for a Wrongful Act”, rather than an EPL Claim.

10.C.1 “Wrongful Act”

In Canada, a typical policy will define “Wrongful Act” (sometimes characterized as “Inappropriate Employment Conduct”) to mean:

...any actual or alleged error, omission, misstatement, misleading statement, neglect, breach of duty or Wrongful Employment Practice by:

- (1) the Organization, or
- (2) the Individual Assureds, individually or collectively, in the discharge of their duties solely in their capacity as Individual Assureds of the Organization, or where such Individual Assureds serve as directors or officers of any not-for-profit organization at the specific request and direction of the Board of Directors of the Organization and such Loss is not indemnified by such not-for-profit organization or any of its insurers.

10.C.2 “Wrongful Employment Practices”

In Canada, a typical policy will define “Wrongful Employment Practice” to mean:

...any actual or alleged:

- (1) wrongful or unfair dismissal, discharge or termination, either actual or constructive, including breach of an implied term of an employment contract; or

- (2) discrimination, including but not limited to discrimination based upon age, gender, race, colour, national origin, religion, sexual orientation or preference, pregnancy or disability; or
- (3) harassment (including but not limited to sexual harassment, whether “quid pro quo”, hostile work environment or otherwise), national origin based harassment; or
- (4) wrongful deprivation of career opportunity, employment or promotion or wrongful demotion; or
- (5) wrongful, excessive or unfair discipline; or
- (6) negligent evaluation including the issuing of negative or defamatory statements in connection with an employee reference, negligent hiring or negligent supervision of others in connection with the above, but only if employment related and claimed by or on behalf of any employee; or
- (7) failure to provide or enforce adequate or consistent employment policies and procedures relating to any Wrongful Employment Practices; or
- (8) employment-related misrepresentation(s) to an Employee or applicant for employment; or
- (9) failure to grant tenure; or
- (10) employment-related libel, slander, humiliation, mental anguish, infliction of emotional distress, defamation or invasion of privacy; or
- (11) retaliation.

The significance of the “Wrongful Act” definition (albeit in the context of a D&O policy) is exemplified in the 2013 decision of the Ontario Superior Court of Justice, *Precidio Design Inc. v. Great American Insurance Company*³⁹, in which Great American Insurance Company (“Great American”) was ordered to pay its insured, Precidio Design Inc., over \$239,000 in respect of a loss claimed under a D&O policy.

In 2003, Great American issued a D&O policy to Precidio Inc. controlled by Marc Heinke. This policy was renewed through January 15, 2010. In 2009, Precidio Inc. terminated all operations and dismissed its employees. Heinke subsequently commenced operations with new employees under a new company named Precidio Design Inc. to whom Great American issued another D&O policy in 2010. In June 2010, Heinke received notice from the Ontario Ministry of Labour regarding claims from 36 former employees of Precidio Inc. who sought termination pay and other benefits from Precidio Inc. Precidio Design Inc. notified Great American of the Ministry’s claims in August 2010. Great American denied coverage on the basis that the Ministry’s claim was against Precidio Inc. and not Precidio Design Inc.

The Ministry subsequently declared that Precidio Design Inc. was a “related employer” of Precidio Inc. based on s. 4 of the Employment Standards Act, 2000 (“ESA”) and found that Precidio Inc. and Precidio Design Inc. were jointly and severally liable to pay the

³⁹ *Precidio Design Inc. v. Great American Insurance Co.*, 2013 ONSC 7148.

Ministry for the ESA violations. When Great American continued to refuse coverage, Precidio Design Inc. brought an application in court. Great American raised several arguments in support of its denial of coverage, which the Court rejected. Most importantly, the Court rejected Great American's argument that Precidio Design Inc. had not committed a "Wrongful Act" as defined in the policy. In so doing, Justice Perell, on behalf of the Court, stated:

"Perhaps, the simplest argument is that for whatever reason, Precidio Design Inc. has been found to have contravened the ESA, and it was precisely for coverage for this type of liability that it purchased insurance coverage. In other words, Precidio Design Inc. purchased coverage for its violations of the ESA, and if the insurer did not wish to insure the risk of liability under s. 4 of the ESA, it should have made that exclusion from coverage clear" (at para. 51).

The Court's decision is significant in that it makes it clear that a D&O liability policy (with coverage language similar to the policy wording at issue in *Precidio*) will afford coverage to an insured who is found liable under section 4 of Ontario's *Employment Standards Act, 2000*.

10.C.3. "Condition Precedent" to Coverage on a "Claims Made and Reported" Form

To ensure the sanctity of a "claims made and reported" form, EPL insurers may want to implement condition precedent language in the policy that stipulates that coverage is "subject to" the insured having received a "claim" and reported the "claim" within the time specified in the policy.

When an insurer does not use the words that it is a "condition precedent" to coverage that notice must be given to the insurer during the policy year, then if the insured does not report the claim to the insurer within the time specified in the policy, the insured can potentially obtain relief from forfeiture pursuant to insurance legislation and/or non-insurance legislation. In BC, the relevant provisions with respect to relief from forfeiture are section 13 of the *Insurance Act*, R.S.B.C. 2012, c. 1 (the "B.C. *Insurance Act*") and section 24 of the *Law and Equity Act* R.S.B.C. 1996, c. 253. Other jurisdictions have comparable legislation and thus are confronted with the same problem.⁴⁰

⁴⁰ For relief from forfeiture pursuant to insurance legislation, see: *Insurance Act*, RSA 2000, c I-3, s. 520 (Alberta); *The Saskatchewan Insurance Act*, RSS 1978, c S-26, s. 109 (Saskatchewan); *The Insurance Act*, CCSM c 140, s. 130 (Manitoba); *Insurance Act*, RSO 1990, c I.8, s. 129 (Ontario); *Insurance Act*, RSNB 1973, c I-12, s. 110 (New Brunswick); *Insurance Act*, RSNS 1989, c 231, s. 33 (Nova Scotia); *Insurance Contracts Act*, RSNL 1990, c I-12, s. 10 (Newfoundland); *Insurance Act*, RSPEI 1988, c I-14, s. 92 (Prince Edward Island); *Insurance Act*, RSY 2002, c 119, s. 55 (Yukon); *Insurance Act*, RSNWT 1988, c I-4, s. 46 (Northwest Territories); and *Insurance Act*, RSNWT (Nu) 1988, c I-4, s. 46 (Nunavut). For relief from forfeiture pursuant to non-insurance legislation, see: *Judicature Act*, RSA 2000, c J-2, s. 10 (Alberta); *Courts of Justice*

Section 13 of the B.C. *Insurance Act* states:

- 13 Without limiting section 24 of the *Law and Equity Act*, if
- (a) there has been
 - (i) imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted by the insured with respect to the loss, and
 - (ii) a consequent forfeiture or avoidance of the insurance in whole or in part, or
 - (b) there has been a termination of the policy by a notice that was not received by the insured because of the insured's absence from the address to which the notice was addressed,
- and the court considers it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court, on terms it considers just, may
- (c) relieve against the forfeiture or avoidance, or
 - (d) if the application for relief is made within 90 days of the date of the mailing of the notice of termination, relieve against the termination.

Section 24 of the *Law and Equity Act* states:

- 24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

This issue has been dealt with in *Stuart v. Hutchins*⁴¹. This case concerned a motion for a declaration that the third party insurer, American Home Assurance Company (“American Home”), owed a duty to defend an action commenced against the defendant, by reason of a contract of insurance which the defendant had entered into with American Home. The policy at issue was a “claims made and reported” policy which provided that:

“...The Insured shall, as a condition precedent to the availability of the rights provided under [the] policy, give written notice to the [Insurer] as soon as practicable during the Policy Period, or during the extended reporting period (if applicable), of any claim against the Insured...”.

“The insured received notice of the claim during the policy period but did not report the claim to American Home until after the policy period had expired. As in the case at bar, the insured took no

Act, RSO 1990, c C.43, s. 98 (Ontario); *Judicature Act*, RSNB 1973, c J-2, s. 26 (New Brunswick); *Judicature Act*, RSNL 1990, c J-4, ss. 91-93 (Newfoundland); *Judicature Act*, RSNS 1989, c 240, s. 41 (Nova Scotia); *Judicature Act*, RSPEI 1988, c J-2.1, s. 39 (Prince Edward Island); *Judicature Act*, RSY 2002, c 128, s. 13 (Yukon); *Judicature Act*, RSNWT 1988, c J-1, s. 28 (Northwest Territories); and *Judicature Act*, SNWT (Nu) 1998, c 34 s 1, s. 26 (Nunavut).

⁴¹ *Stuart v. Hutchins* (1997) 1-3229 C.I.L.R. 558 (Ontario Court General Division), reversed (1998) 164 D.L.R. (4th) 67, [1999] I.L.R. I-3619 (Ontario Court of Appeal).

steps to renew its policy with American Home, nor had it applied for the “extended reporting coverage” available under the policy. The insured was successful at trial. McRae, J. for the Ontario Court (General Division) held that although the insured had become aware of a potential claim during the policy period and had failed to notify American Home of it prior to expiration of the policy, relief from forfeiture was available under section 129 of the Insurance Act, R.S.O. 1990, c I.8.”

The decision was overturned on appeal. After the Court of Appeal considered the distinction between “occurrence” insurance policies, and “claims made and reported” policies it concluded that:

“... the answer to the central issue lies in the proper characterization of [the insured’s] failure to provide [American Home] with written notice of the potential ... claim during the policy period. To be precise, can it be said that [the insured’s] failure in this regard constituted imperfect compliance with a term of the policy, such that s. 129 of the Act [similar to section 13 of the B.C. Insurance Act] could be invoked, or, did it amount to non-compliance with a condition precedent to coverage, thereby foreclosing the availability of s. 129?” [emphasis added]

The Court of Appeal concluded that the Plaintiff was not entitled to relief from forfeiture pursuant to sections 129 of the Ontario *Insurance Act* [equivalent to section 13 of the B.C. *Insurance Act*] and section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 [equivalent to section 24 of B.C.’s *Law and Equity Act*].

Thus, if EPL insurers use the words that it is a “condition precedent” to coverage that the insured shall provide notice to them within the time specified in the policy and the insured does not provide notice, then this amounts to non-compliance with a condition precedent to coverage. The insured will not be able to seek relief from forfeiture pursuant to either section 13 of the B.C. *Insurance Act* or section 24 of the *Law and Equity Act* and the like legislation in other Canadian provinces.

However, if the policy does not state that notice is a “condition precedent to coverage” and if an insured fails to give notice that a claim has been made against the insured within the policy period, then the Courts may regard this as imperfect compliance with a term of the policy and grant the insured relief from forfeiture. This means that, if there are no other bars to coverage, EPL insurers will be indemnifying the insured for a claim when they did not receive notice of the claim.

10.C.4 “EPL Claim”: A Requirement for Formalities?

Clearly an “EPL Claim” relates to an “EPL Violation”. However, some debate is still apparent in EPL forms as to whether underwriters will require that the claim be in the form of an action or suit, an administrative or investigative proceeding, or a formal notice of violation, or whether merely a written complaint or demand for compensation

will suffice as a trigger. Some carriers have stipulated that there is no “claim” without a formal proceeding; however, most carriers seem to prefer the more liberal definition.

This issue arose in the 2007 decision of the Ontario Superior Court of Justice, *Dynacare v. St. Paul Fire and Marine Insurance Company*.⁴² In that case, Dynacare Company (“Dynacare”) sought coverage from St. Paul Fire and Marine Insurance Company (“St. Paul”) under its EPL policy when its employee, Mr. Meadows, commenced an action for wrongful dismissal. The policy at issue was a “claims-made” policy, which defined “Claim” to include, *inter alia*, a written demand against any insured for monetary damages brought by or on behalf of any past, present or prospective employee of the Company for a Wrongful Employment Practice. The policy also included an exclusion clause which stated that it did not provide coverage for any prior or pending written demand for monetary damages.

Dynacare had terminated Mr. Meadows prior to obtaining the EPL insurance policy. At the time of Mr. Meadows’ termination, Dynacare provided him with a letter stating that it would continue to pay his salary pending resolution of the amount of compensation that he would be provided in lieu of notice. The letter also stated that negotiations in good faith would continue. The last communication between the parties contained an offer by Dynacare to terminate Mr. Meadows on a certain date and to provide him with his full salary until that date in exchange for a full release (the “Offer”). Mr. Meadows subsequently commenced a wrongful dismissal claim against Dynacare. Shortly thereafter, Dynacare advised St. Paul of the claim.

St. Paul denied coverage on the basis that the Offer constituted a prior demand for monetary damages. Dynacare thereafter commenced proceedings seeking a declaration that St. Paul wrongfully denied coverage. St. Paul, in turn, brought a motion for summary judgment to dismiss Dynacare’s action. The issue to be decided at trial was whether the Offer constituted a demand for monetary damages. Justice Herman on behalf of the Ontario Superior Court of Justice concluded that there was a triable issue and refused to dismiss Dynacare’s claim on the Summary Trial application. In so doing, he noted that the essence of a wrongful dismissal action was not just that an employee had been dismissed without cause, but that an employee had been dismissed without cause and the employer had failed to give adequate notice or compensation in lieu of notice. Ultimately, Justice Herman concluded that there was a triable issue as to whether at the time of the Offer Dynacare and Mr. Meadows were negotiating a severance package, or whether negotiations had broken down by that time such that the matter would not be resolved through negotiations.

⁴² *Dynacare Company v. St. Paul Fire and Marine Insurance Company* (2007), 2007 CarswellOnt 4766 (Ont. S.C.J.).

Finally, we note that one commentator has suggested that some EPL wordings require that damages must be claimed, before a duty to defend or indemnify is triggered.⁴³ This has been raised as problematic for an insured in the United States, because very often before claimants start a Court action in the U.S., they must first bring a claim for declaratory relief to the Equal Employment Opportunity Commission, seeking permission to have a trial before a jury. Obviously, insureds would want coverage for defending such a proceeding.

10.C.5. "Insureds" Under EPL Cover

Under a typical policy, there are two classes of "insureds", "insured individuals" and the "insured company". Insured individuals are typically defined as directors, officers and employees. Notably, the definition is broadly inclusive, encompassing *de facto* directors and officers, those in receipt of wages, individuals leased to the company, and independent contractors. Employees on probation may be excluded from the definition.

The inclusion of *de facto* directors stems from the Canadian *Company Acts*, which impose legal responsibility on any person who performs the duties of a director though not formally appointed - e.g. when a person steps into a vacancy, or when a person overstates their authority and misleads another into thinking they are a director.

Some EPL forms state that the covered perils may relate to an *applicant* for employment, not just an "Insured Individual". Other policies stipulate that "future employees" are covered. Each wording aims to cover a slightly different risk and it is up to consumers to decide what they need.

Generally speaking, both the employer and their employees will have coverage under the policy. However, in cases where the employee is not an insured, a third party may still sue the employer and allege the employer is vicariously liable for the conduct of the employee so as to attract coverage.

⁴³ Michael A. Rossi, "Recent Developments in Employment Practices Liability Insurance Law and Products in the United States", [1997] 10 Int. I.L.R. 318 at 320. See also: *Re Dr. Max Neiman and CGU Insurance Company*, 2002 CanLII 61180 (ONSC), in which the Ontario Superior Court of Justice found that the employer, Dr. Neiman, had no coverage under the EPL extension of his insurance policy for two human rights complaints brought by his former employees because the Human Rights tribunal had authority to award "compensation", but not "damages".

In the British Columbia Court of Appeal case of *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada*⁴⁴, the insured cab company sought indemnity from its insurer for two actions involving assault and battery allegedly committed by the insured's employee, against a customer. The Chambers judge dismissed the insured's action finding in part that as the assault and battery, as a tort, has its origins in intention, the third party's claim was excluded from the insured's policy in light of the exclusion provision which provided that coverage did not apply to claims for bodily injury 'expected or intended from the standpoint of the insured.'

However, the Court of Appeal concluded the employer did have coverage for the vicarious liability. In its reasons, the Court of Appeal acknowledged that if the 'insured' referred to in this exclusion was the employee, then the alleged assault would be considered 'intended' from their standpoint. But, in the case before the court, the 'insured' was the employer. Their liability, if any, is a vicarious liability for the acts of its employees. Since, there was no basis for concluding that the bodily injuries were expected or intended from the standpoint of the employer, the exclusion did not apply. It is important to keep in mind when dealing with vicarious liability claims against the employer that "*[i]t is not the act of the wrongdoer which is attributed to the employer, nor is it the fault or blame of the wrongdoer which is attributed. It is the victim's remedy against the wrongdoer, namely liability for the wrong, which is attributed*".⁴⁵

10.D. BASIC EPL RISKS AND UNIQUE QUIRKS OF CANADIAN AND U.S. LAW

The risk insured against under an EPL policy is two-fold:

- (1) "Loss" arising from an "Employment Practices Claim" (against an Insured Individual or the Company); and
- (2) "Loss" being defined to include "Defence Costs" and any settlement or judgment in respect of an Employment Practices Claim, advanced prior to its final disposition.

9.D.1. Covered "loss"

In addition to substantive damage awards, *Canadian EPL products are being offered with punitive and exemplary damages included in the definition of a covered "loss"*. This is in sharp

⁴⁴ *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada*, (1998) 66 B.C.L.R. (3d) 86 (British Columbia Court of Appeal).

⁴⁵ *Ibid*, para 13. See also: *B.C. Master Blasters Inc. v. Aviva Insurance Co. of Canada*, 2006 BCSC 1488.

contrast to the U.S. policies, which typically *exclude* punitive and exemplary damages, unless added by special endorsement and extra premium. The difference in coverage is explained by the differences in the monetary awards being made in Canada and the United States, discussed *supra*. The relatively nominal punitive awards in Canada have made coverage of this risk possible.

In both jurisdictions, *pre-judgment and post-judgment interest tend to be included, as are civil fines and penalties*.

In the United States, EPL forms make reference to “multiplied” damages. As this concept has no application to Canada, such wordings have been dropped.

The concept of “Loss” needs to be understood from the standpoint of traditional principles of Canadian insurance law. Among the basic tenets of insurance law is that losses must be both fortuitous and contingent to be the subject of a coverage peril. As the Supreme Court of Canada stated in *Lloyd’s of London v. Scalera*⁴⁶:

“Insurance is a mechanism for transferring fortuitous contingent risks. Losses that are neither fortuitous nor contingent cannot economically be transferred because the premium would have to be greater than the value of the subject matter in order to provide for marketing and adjusting costs and a profit for the insurer. It follows therefore that where the literal wording of a policy might appear to cover certain losses, it does not, in fact, do so if (1) the loss is from the inherent nature of the subject matter being insured, or (2) it results from the intentional acts of the insured.”

The legal meaning of “Loss” for claims is a crucial definition for the insurance industry as “Loss” is usually the trigger for indemnity or reimbursement under an EPL policy. The Courts have refined what “Loss” includes and stated that it requires that the damages claimed flow from a “claim” that truly entails an economic deprivation to the insured.

10.D.2. No Coverage for “Wrongfully Acquired Benefits”

In the United States insurers have successfully persuaded the courts that indemnity or reimbursement exposures resulting from misrepresentation are restitutionary in nature and, thus, not “Loss”. The principle is that if the settlement is merely a method for purging a profit which is wrongfully obtained by the insured through their own conduct with the underlying plaintiffs, the insured should not be reimbursed or “compensated” by the insurer for this activity. Essentially, if the insurer were to pay the claim, the effect would be to allow the insured to profit from their wrongful action.

⁴⁶ *Lloyd’s of London v. Scalera* (2000), 185 DLR (4th) 1 (S.C.C.).

Therefore, an insured would have an incentive to lie, cheat and steal, as it would accrue any potential profit whereas any potential risk would be passed off to the insurer.

"This argument is based on the principle that a settlement that merely returns an amount improperly obtained by the insured – an "ill-gotten gain" – should not be a covered loss."⁴⁷

In *Level 3 Communications, Inc. v Federal Insurance Company*,⁴⁸ the United States Court of Appeals concluded that the D&O insurer was not responsible for the settlement payment in a securities fraud transaction as the settlement monies "*represent[ed] the disgorgement of profits to which insured corporation was never entitled.*"

10.D.3. Vicarious Liability of Employer

In *Cargill, Inc. v National Union Fire*⁴⁹, Cargill had to pay Monsanto for the profit it derived from using Monsanto's proprietary technology without authority. Employees of Cargill had stolen Monsanto's technology and Cargill was held liable for its employees' unauthorized acts. The Court held: "*We cannot conclude that an insured suffers a loss when it reimburses a third party for employee dishonesty carried out for the benefit of the employer/insured.*"

10.D.4. Canadian Application of "Wrongfully Acquired Benefits"

This doctrine has been applied in Canada.

The case of *Moore (Township) v Guarantee Co. of North America*⁵⁰ provides a straightforward factual matrix to appreciate the application of this principle. A municipal township collected too much tax from a local corporation and was forced by court order to repay the excess. The Township claimed against its liability insurer who insured against "all loss" for "damages". The Ontario Court of Appeal referred to the "profit or advantage" exclusion to demonstrate that "*not all payments made by the Township, even those responsive to a 'wrongful act' as defined in the policy, constituted a 'loss', as defined in the policy.*" The Court concluded that the Township merely repaid the tax money that it had no authority to collect and that the liability policy "*was not intended to cover this type of payment.*"

⁴⁷ See *Central Dauphin School District v American Casualty Co.*, 426 A2d 94 (Pa 1981).

⁴⁸ *Level 3 Communications, Inc. v Federal Insurance Company*, 272 F3d 908, 910–912 (7th Cir 2001).

⁴⁹ *Cargill, Inc. v National Union Fire*, 2004 Minn.App. LEXIS 33, unpublished (Court of Appeals of Minnesota).

⁵⁰ *Moore (Township) v Guarantee Co. of North America* (1995), 26 O.R. (3d) 733 (C.A.)

The Quebec Superior Court approved of *Moore in Universite Concordia c. Compagnie D'Assurance London Guarantee*.⁵¹ The University had made unilateral changes to its employee pension plan, which reduced benefits and created a \$71 million surplus that the University appropriated. When the employees sued to recover the pension surplus the University turned to its liability insurer for coverage against the claim. The Court concluded that the claim could not be considered a "Loss" for insurance purposes since there were no damages flowing from a fortuitous event. The Court explained that the only goal of insurance was to compensate insureds for losses suffered by them, not to enrich them, and concluded that to allow insurance for this claim would permit the University to finance its pension plan by means of its insurer.

10.D.5 "Defence Costs"

A typical definition of "Defense Costs" in an EPL policy makes clear that true costs are covered whereas indirect or consequential expenses incurred by the insured are not:

...reasonable and necessary fees, costs and expenses consented to by the Insurer (including premiums for any appeal bond, attachment bond or similar bond, but without any obligation to apply for or furnish any such bond) resulting solely from the investigation, adjustment, defense and appeal of a Claim against the Insureds, but excluding salaries of officers or Employees of the Company. (emphasis added)

Defence costs incurred to pursue cross-claims and third party claims, even those asserting only contribution and indemnity, may not satisfy the language '*resulting solely from the ... defence and appeal of a Claim.*' In the 2004 Ontario decision, *Sapi v. American Assurance Company*⁵², a coverage dispute arose between the insurer and insured which ultimately resulted in the parties entering into a settlement agreement that the insurer would pay 40% of the defence costs of Sapi to defend the claims against him. That settlement agreement stated that the defence costs must result '*solely from the ... defence and appeal of any claim against the insured.*'

The Ontario Court concluded that any cross-claims and third party claims, even those asserting only contribution and indemnity, were separate and distinct from the defence of the actions initiated against the insured. In fact they were claims initiated **by** the insured. The "defence costs" inherent to the cross-claims and third party claim did not fall within the ambit of 'defence costs' as defined in the agreement. Generally, cross-

⁵¹ *Universite Concordia c. Compagnie D'Assurance London Guarantee*, [2003] J.Q. No. 4443 (Q.L.)(Sup.Ct.).

⁵² *Sapi v. American Assurance Company*, [2004] I.L.R. I-4274, 2004 CarswellOnt 368 (Ontario Superior Court of Justice). See also: *Aviva Insurance Co. of Canada v. Real Estate Errors and Omissions Insurance Corp.*, 2009 BCSC 1411.

claims and third party claims are in the interests of the insured and the insurer. However, in *Sapi*, that was not the case and the D&O insurer denied coverage.

In the initial product development, EPL coverage was treated much like a D & O policy in that the insurer's response was purely reimbursement for both defence costs and indemnity. However, as U.S. insurers have learned through experience, this underwriting decision has had expensive consequences: insurers are now learning that because the insured employer's reputation and credibility are at stake, employers are motivated to litigate EPL claims to the "bitter end", with defence costs out of all proportion to indemnity amounts.

In response to the burden of such heavy defence costs, many insurers have taken the step of incorporating a "duty to defend" clause in their EPL product, to accord the insurer greater control and management over EPL litigation. There are different versions of such clauses. Whereas some unequivocally accord the insurer the dual right and obligation to defend the claim, on the insurer's terms, other clauses are written so as to give the insured the right to promptly tender the defence of the claim to the insurer (e.g. within 30 days of receipt of the Claim), which then imposes on the insurer the duty to assume the defence of the Claim, "regardless if it is groundless, false or fraudulent". The end result of both wordings has been that rather than simply "footing the bill", insurers are now actively involved in the defence of EPL claims.

Another step that insurers have taken to control costs has been to introduce in the EPL form "pre-approved panel" of defence counsel from which counsel must be selected, whether the insurer or the insured is directing the litigation. Such counsel have been selected based upon their expertise and their familiarity with, and adherence to, the insurer's guidelines with respect to litigation management and cost-effective litigation. . Currently, the trend is for insurers to permit their insureds to select counsel (even where the insurer has a "duty to defend") where the insured is a large employer with a significant self-retention for both defence costs and indemnity. However, for small and medium sized enterprises (where there is invariably a "duty to defend"), the trend is for insurers to select pre-approved panel counsel who specializes in EPL defense work.

Another approach adopted by insurers to manage EPL risks is for insurers to maintain a 1-800 "hotline" for use by their insureds. Oftentimes, these lines are managed by pre-approved panel counsel with expertise in EPL claims. In essence, the line gives an insured reporting a potential claim immediate access to free legal advice. The idea is to head off and/or minimize the severity of an eventual claim.

Finally, many insurers are inserting clauses giving insurers the power to demand alternative dispute resolution of any claim they deem appropriate.

Many EPL insurers are inserting “allocation of costs” clauses into EPL policies, in order to provide for the orderly division of costs, in the event that insured’s claim indemnity for *both* covered and non-covered losses. Experience with D & O policies has proven that such clauses can help in preventing litigation on this issue. For example, such an “Allocation Clause” might stipulate that while defence costs will be 100% covered, losses other than defence costs are to be allocated based upon the relative legal exposure and relative benefit to each of the insurer and insured. A sample wording of such an Allocation Clause may read as follows:

Allocation

In the event of any of the Insureds in a Claim incur both Loss that is insured by this Policy and also Loss which is not insured by this Policy, then with respect to either insured or uninsured claims or parties, the Insureds and the Company agree to use their best efforts to determine a fair and proper allocation of the amounts as between the Insureds and the Company taking into account the relative legal and financial exposures and the relative benefits, obtained by the Insureds.

10.D.7. Libel, Slander and Invasion of Privacy

In adapting a D & O policy to an EPL cover, one of the coverages that emerges as essential is coverage for libel, slander and/or invasion of one’s right to privacy. These are typical allegations in EPL claims. To exclude these sources of exposure would in essence negate EPL coverage. Most EPL policies list these risks amongst “EPL Violations”.

10.D.8. Emotional Harm and Mental Distress: Dealing with the “Bodily Injury” Exclusion

A fundamental feature of almost any EPL claim is an allegation that the claimant has suffered emotional harm or mental distress as a result of the EPL Violation. In many cases, this is the only personal injury alleged in EPL claims. As will be discussed in greater detail below, the lack of a more traditional “physical” bodily injury in EPL claims has been one of the bases upon which CGL coverage has traditionally been denied to EPL claimants in the U.S., the Courts there requiring a more physical manifestation to constitute a “bodily injury” claim.

In Canada, however, construction of “bodily injury” clauses has tended toward a liberal construction, favouring the opinion that claims for “bodily injury” include claims for emotional and psychological harm.⁵³

This difference in the legal interpretation of the CGL “bodily injury” exclusion clause has been significant in the EPL context, since EPL products must necessarily afford coverage for emotional and mental distress claims. Interestingly, however, while coverage *is* being afforded, EPL underwriters have made the decision to limit EPL policy coverage to *only* emotional distress or mental anguish and *not other* kinds of bodily injuries.

This wording leaves a gap in EPL cover for other kinds of bodily injury that could entail from an EPL violation. For example, an allegation of sexual assault having *sequelae* of physical injury *other* than emotional distress would *not* be covered under the EPL product. There may be some chance for coverage for the employer under a CGL policy, providing the CGL policy is not the 2005 Insurance Bureau of Canada’s CGL Form. Some CGLs may provide the employer with coverage on grounds of vicarious liability or failure to supervise, but coverage for the perpetrator would almost certainly be excluded under the CGL’s “intentional act” exclusion.

10.D.8. Related Acts

There appears to still be a lack of uniformity on whether EPL policies will or will not have a “related acts” clause in their policies. Without such a clause, insureds could end up paying a separate deductible for each of several related acts, which would effectively erode coverage for the insured. One can see how this could be significant in the EPL context, however, in the case of a broad pay equity or discriminatory policy action, or an action involving one perpetrator of sexual misconduct but several victims. This is yet another business decision to be made by underwriters.

10.E. “CANADIANIZING” THE U.S. EPL COVER

Since EPL policies were first developed in the United States, in adapting the U.S. policies to Canada, some interesting differences have had to be accounted for in the new Canadian wordings:

⁵³ See e.g. *Wellington Guarantee v. Evangelical Lutheran Church in Canada* (1996), 22 B.C.L.R. (3d) 352 (British Columbia Court of Appeal), discussed *infra* and *W.-V. (T.) v. W. (K.R.J.)* (1996), 29 O.R. (3d) 277 (Ontario General Division)

10.E.1. The definition of “damages”

In the United States, with a few exceptions, each party in a lawsuit bears his or her own expenses in the event of liability. In contrast, in Canada, the English system prevails, meaning that the successful party recovers his or her own legal costs *in addition to* the damages award. It is standard in Canada for liability policies to include coverage for *both* the substantive damages award *and* the “recoverable taxable legal costs” - those costs that the successful party is entitled to have paid by the other party.

Because of this, to avoid the gap in coverage that would otherwise result, EPL wordings in Canada generally include “taxable legal costs” in the definition of “damages”. Notably, however, because the “limits of coverage” *include* taxable legal costs, overall exposure is *not* affected.

10.E.2 Coverage for “Wrongful Dismissal”

The U.S. EPL policies list “wrongful dismissal” or “wrongful discharge” as an EPL Violation. This is because, in the U.S., an allegation of “wrongful dismissal” almost necessarily entails an allegation that the employer violated a human right or otherwise acted illegally or improperly in relation to some right accorded by statute. Because there exists in the United States a strong tradition of employees being employed “at will” and terminated “at will” of the employer, suits alleging breach of an implied contract to employ beyond the termination date have been rare, only because they had such little chance of success. There is now emerging in the United States some recognition of express and implied contracts for employment beyond the termination date, but by far the most common meaning of “wrongful dismissal” entails a statutory breach or rights violation being alleged.

In Canada, on the other hand, the legal tradition in employment law more favours employees than in the United States, and out of that tradition there has developed the concept that *every* contract of employment has an express or implied term of “reasonable notice of termination” or pay in lieu of reasonable notice. What this means is that in Canada, a “wrongful dismissal” action almost always necessarily entails an allegation that reasonable notice of termination was not given (claiming pay in lieu thereof), and may or may not involve an allegation that at the same time, the employer also committed the “wrong” of statutory breach of a human right or some other unlawful act.

Some EPL wordings in Canada have left the U.S. wordings on this issue not adapted to the Canadian legal context, and in the author’s opinion, this leaves Canadian insurers vulnerable to a significant Canadian exposure, i.e. insuring employers for no greater

“wrong” than failing to provide reasonable notice to a terminated employee - in essence, providing “firing” insurance. It is the author’s opinion that such a risk is *not* a proper subject-matter for insurance coverage, but rather, is a matter of corporate responsibility - otherwise insured employers could simply fire employees “willy-nilly”, and look to their insurer to pick up the “pay in lieu of reasonable notice” tab due to the employee.

For this reason, to take into account this difference in Canadian and American legal traditions, it is necessary to insert into the Canadian policy an exclusion that will limit the EPL Violation of “Wrongful Dismissal”, such exclusion to provide as follows:

It is further understood and agreed that for the purposes of coverage afforded by this endorsement, the Insurer shall not be liable to make any payment for Loss in connection with any Claim against the Company or an Individual Insured:

...
alleging, arising out of, based upon or attributable to the liability under any contract or agreement, express or implied, oral or written, including, but not limited to, the dismissal of an employee, except to the extent that the Company or the Individual Insured would have been liable in the absence of the contract or agreement;

...
It should be noted that excluding coverage for claims for “pay in lieu of reasonable notice” is *not* analogous to excluding coverage for “front pay” and “back pay” that is associated with a finding of wrongful dismissal [or dismissal associated with illegal conduct] in the United States and which amounts usually *are* covered under the U.S. EPL policies. Notably, “back pay” denotes the amount due from the date of the improper discharge to the date of the Judgment and “front pay” denotes the amount from the date of trial to the date when it is expected that the Plaintiff will ultimately obtain some form of employment. Claims for such amounts relate to claims for lost pay associated with an *illegal* firing. This is quite different from pay associated with a firing that is merely in breach of an implied term of reasonable notice. The terminology of “front pay” and “back pay” does not exist in the Canadian legal context and therefore these U.S. wordings are not generally reflected in the Canadian policies.

10.E.3 Coverage for “Unfair Dismissal”

Claims of “unfair dismissal” in Canada generally accompany claims of “wrongful dismissal”; however, unfair dismissal relates to the *conduct* of the employer regarding the dismissal itself. It is said to be “bad faith” on the part of the employer in dealing with the employee’s termination, or, “bad faith discharge”. For example, an employee who is terminated without just cause or sufficient notice has a claim for wrongful dismissal. However, if the employer did not act in “good faith” in terminating the employee, the employee may also have a claim for unfair dismissal.

The circumstances in which damages resulting from the manner of dismissal may be available were described in *Wallace v. United Grain Growers Ltd.*⁵⁴. Namely, where the employer engages in conduct during the course of dismissal that is “... unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (at para. 98).

In *Wallace, supra*, the Supreme Court of Canada held that the employer’s conduct in the manner of dismissal was a factor in determining the appropriate notice period to be awarded to an aggrieved employee. As such, it was impossible to summarize mathematically what damages for unfair dismissal would “cost” the employer. However, in the 2008 decision *Honda Canada Inc. v. Keays*⁵⁵, the Supreme Court of Canada revisited the issue of damages for breach of the obligation of good faith on dismissal. In *Honda*, the Court rejected the extension of the notice period to account for the employer’s conduct in the manner of dismissal (i.e. what are now known as “Wallace damages”) and replaced them with the basic contractual damage principle of reasonable foreseeability.

Following *Honda*, all reasonably foreseeable damages arising out of the employment contract are recoverable. The measure of damages is not the arbitrary extension of the notice period, but all actual provable damages. As stated by the Supreme Court of Canada (at para. 54):

[D]amages are recoverable for a contractual breach if the damages are ‘such as may fairly and reasonably be considered either arising naturally... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.’ [...].

The Supreme Court of Canada went on to find that the obligation of good faith on termination as set out in *Wallace* is within the contemplation of the parties to an employment contract so that damages for breaching the obligation of good faith are reasonably foreseeable and thus compensable. In particular, the Supreme Court of Canada stated (at para. 58):

... In Wallace, the Court held employers “to an obligation of good faith and fair dealing in the manner of dismissal” [...] and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees” [...]. At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. [...] (cites omitted).

And further (at para. 59):

⁵⁵ *Keays v. Honda Canada Inc.*, 2008 SCC 39.

... Damages attributable to conduct in the manner of dismissal are always to be awarded under the Hadley principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. [...]

Bastarache J., speaking for the Supreme Court of Canada, then went on to provide the following examples of conduct in dismissal resulting in compensable damages:

- **attacking the employee's reputation by declarations made at the time of dismissal;**
- **misrepresentation regarding the reason for the decision; and**
- **dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance.**

Additional examples of conduct in dismissal resulting in compensable damages include (*Wallace, supra* at paras. 99 and 100):

- A wrongful accusation of theft and mentioning this accusation to other potential employers.
- Unfounded accusations of theft combined with a refusal to provide a letter of reference after termination.
- Telling the employee that his position was eliminated but that another position necessitating a transfer would be found for him when in fact, the company was simultaneously contemplating his termination. When a position could not be found, the employee was terminated. The employee was not advised of this for over a month even though the employer knew he was selling his home for the transfer. He was abruptly terminated after the sale of his home.
- An employer who made the decision to fire the employee when he was on disability leave, suffering from a major depression. The employee advised the manager as to when he would be returning

to duty and informed him he was taking a two-week vacation. He was fired immediately upon his return to work.

- an employer temporarily closed its bar and laid off the bartender. Then, while the bar was closed, new executives implemented a new salary structure for bartenders. The employer advertised for a bartender at half of the plaintiff's wage rate. The employee was unaware of any change until he saw the newspaper advertisement from which he learned he was dismissed and not to be reinstated.

In *Honda*, the Supreme Court of Canada also took the opportunity to reiterate that punitive damages are to be reserved for very exceptional cases. In this regard, Bastarache J. stated, in part (at para. 68):

...The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment".

The *Honda* decision has supplanted the *Wallace* decision as the seminal case in this area.

In *Honda*, the employee, Mr. Keays, alleged wrongful dismissal of his employment with Honda. Mr. Keays had been an employee with the company for 15 years. During his employment, he was diagnosed with Chronic Fatigue Syndrome ("CFS"). He was provided accommodation by his employer and permitted to be absent with supporting medical documentation. Because the medical documentation did not specifically provide that Mr. Keays was absent due to the CFS, Honda demanded that Mr. Keays attend a doctor selected by Honda. When Mr. Keays refused, he was dismissed. At trial level, the judge found that Mr. Keays was wrongfully dismissed and was entitled to 15 months pay in lieu of notice. He also awarded Mr. Keays an additional 9 months for bad faith in the manner of dismissal and \$500,000 in punitive damages. The Ontario Court of Appeal lowered the punitive damages award to \$100,000, but otherwise upheld the trial court's decision. The Supreme Court of Canada unanimously upheld the award of 15 months' pay in lieu of notice. The majority further held that this was not an appropriate case for an award of what were 'Wallace damages' or an award of punitive damages.

The decisions since *Honda* reveal that:

- the twin thresholds of unfair or bad faith behaviour by the employer plus actual proof of damages means that aggravated damages are difficult to prove and when awarded, are relatively modest; and
- punitive damage awards are rare but in the right factual circumstances, significant awards may be sustained.⁵⁶

10.E.4 Coverage for Discrimination on the Basis of a Disability

In this context, “disability” includes both physical and mental disability. A review of the published statistics of the Human Rights agencies at the federal and provincial levels in Canada reveals that claims for disability discrimination are by far the most prevalent type of discrimination claim. For example, in 2013, 55 percent of the discrimination complaints received by the Canadian Human Rights Commission were on the basis of disability.⁵⁷

It is confronting mental disabilities that may present the most problems for employers and thus result in more claims, given that these disabilities by their very nature are more difficult to recognize and accommodate.

In particular, employees with drug and/or alcohol addiction present a difficult case. In Canada, drug and alcohol addictions are recognized as disabilities. If an employer chooses to discipline or dismiss an employee because of deficiencies in the employee’s performance and such deficiencies are linked to drug or alcohol addiction, such discipline or dismissal may in fact be discriminatory.⁵⁸

11. INADEQUACY OF OTHER TYPES OF POLICIES

One of the reasons that employers may be particularly motivated now to update their employment practices is the fact that claims for coverage which have been presented under traditional CGL and D & O policies have (for the greater part) not been successful, due to the effect of policy exclusions. Because coverage disputes *did* result in

⁵⁶ Aggravated and Punitive Damages and Related Legal Issues, CLE Employment Law Conference – 2013 paper 8.1.

⁵⁷ Canadian Human Rights Commission, “2013 Annual Report to Parliament” at p. 24 (available online at: <http://www.chrc-ccdp.gc.ca/sites/default/files/pdf/chrc-annual-report-2013.pdf>).

⁵⁸ See for example *Benoit v. Bell Canada (Quebec)*, 2004 CHRT 32 (Canada Human Rights Tribunal).

some cases in coverage being ordered, wordings in these policies have now been tightened to “seal off” any ambiguities. Insurers have simultaneously been developing EPL products designed to respond directly to EPL risks.

It is worthwhile examining some of the coverage disputes which took place in respect of exclusions set out in the traditional policies, because it is the decisions in respect of these disputes which will be used as precedents when it inevitably comes time to argue the proper construction of the EPL wordings.

11.1 D & O POLICIES

Most Director and Officer Liability (D & O) policies are designed to provide coverage for claims by shareholders against directors and officers, in respect of the directors or officers’ alleged negligent mismanagement of the company or breach of fiduciary duty to the detriment of the shareholders (*e.g.*, a drop in stock prices).

The policies generally insure “wrongful acts” which acts are typically defined as having the following key features:

- a breach of duty, negligence, error, misstatement, misleading statement or omission
- done in their capacity as a director or officer
- leading to a claim against them solely as a result of their director or officer status

D & O policies do *not* generally insure the corporate entity, except to the extent of providing reimbursement to the corporate entity for *its* prior indemnification of directors and officers in respect of the directors’ and officers’ direct liability. In effect then, D & O insurance monies “flow through” to the directors.

There are several exclusions which render D & O coverage unsuitable for responding to EPL claims:

(a) The “Intentional Act” Exclusion

As indicated above, a key feature of a “wrongful act” insured under a D & O policy is that the “wrongful act” be unintentional or in the nature of a negligent error or omission, as indicated in the “key features” above. This aspect of D & O coverage was

tested in an EPL context in the American case of *Golf Course Superintendent Ass'n of America v. Underwriters at Lloyds of London*⁵⁹. At issue was whether the D & O policy would cover claims of retaliatory conduct against certain employees. The Court ruled that as the retaliatory conduct was inherently intentional, it did not fit within the meaning of a “wrongful act” insured under the policy wherein “wrongful act” was defined as “any negligent act, error, omission, misstatement or misleading statement.” Since the retaliatory conduct was willful, there was no coverage.

(b) The “Bodily Injury” Exclusion

Another standard form for D & O policies is the “bodily injury” exclusion. Since most EPL claims allege emotional distress, this has resulted in coverage being excluded - at least in Canada, where emotional distress is considered “bodily injury”.

(c) The “Sexual Misconduct” Exclusion

With the onset of claims for coverage for sexual misconduct, D & O wordings have been amended in the last five years to include specific exclusions for sexual misconduct, since in some decisions it has been held that such misconduct is not *per se* intentionally injurious. Given that this leaves open the possibility that such conduct might be covered as “negligent”, specific exclusions have been inserted to dispel any notion of coverage for this risk.

11.2 CGL POLICIES

Comprehensive General Liability (CGL) policies are designed to provide coverage for exposures *other* than those risks addressed by specialized covers (such as workers compensation, aviation, automobile, directors and officers or marine insurance).

Insurers, together with representative organizations such as the Insurance Bureau of Canada, have developed standard forms for CGL cover. The basic features consist of the following:

- an insuring clause (setting out duties to defend and to indemnify);
- a requirement for bodily injury or property damage resulting from an accident;

⁵⁹ *Golf Course Superintendent Ass'n of America v. Underwriters at Lloyds of London*, 761 F. Supp. 1485 (D. Kan. 1991) (United States District Court).

- a limitation on the persons insured;
- a restriction on the scope of damages; and
- a set of policy exclusions.

The exclusions target risks that require an additional premium to obtain coverage, or require a completely separate policy. Without these exclusions (or the limiting words of the insuring clause), the CGL policy would cover all liabilities, and as one can imagine, this would neither be affordable nor a viable insurance risk.

Both the insuring clauses and the exclusions under CGL forms pose problems for EPL claims:

(a) The Requirement For an “Occurrence” or “Accident”

Most CGL policies set out in their insuring clauses that they cover “occurrences” or “accidents” that result in personal injury or damage to property. Often the insuring clause will stipulate that an “occurrence” is “an accident...neither expected nor intended from the standpoint of the insured”. Such a definition poses a coverage problem for EPL exposures. Not only does the standard CGL cover usually contemplate a single, definite, sudden happening (which EPL exposures are often anything but), acts of discrimination, harassment or termination on unlawful grounds cannot be seen to be “accidental”. Even if the result was not intended or expected, the act itself was not an accident.

Cases abound which have determined that EPL exposures such as this are not covered for this reason.⁶⁰

In the case of sexual molestation claims, a heated, and sometimes almost moral, debate has raged over whether sexual molestation can ever be accidental or unintended in its injurious effect. The debate has played out both in Canada and the United States and to some extent, is still being resolved in the legal arenas. The preferred view seems to be that, applying a “reasonable person” standard, and not a subjective standard, sexual

⁶⁰ See for example: *Loyola Marymount Univ. v. Hartford Acc. & Indem. Co.* (1990) 219 CA3d 1217, 1225 (California Court of Appeal); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 CA4th 1585, 1604 (California Court of Appeal); *Forest Meadows Owners Association v. State Farm General Insurance Company*, 2014 U.S. App. LEXIS 6993 (California Court of Appeal) In *Lipson v. Jordache Enter.*, 9 Cal. App 4th 151, 11 Cal. Rptr. 2d 271, review denied, No. S029034, 1992 Cal. LEXIS 5535 (Cal. 1992) (California Court of Appeal), the Court stated, “An employment termination, even if due to a mistake, cannot be unintentional.”

assault is inherently injurious and therefore can never be construed to be accidental. As stated by the Court in *Scanlon v. Providence Mutual*⁶¹:

"When accident is so understood, it is clear that the cause of the boy's injuries, as claimed in the civil action underlying the present petition, were not accidental. The boy and his mother alleged that the insured committed sexual assaults upon an intended victim. The assaults were inherently injurious in the most obvious sense that they should not be performed upon a boy without appalling effects on his mind as well as forbidden contacts with his body. This common understanding of the nature of such acts is beyond reasonable dispute and consistent with the legislative classification of the acts within the most serious category of sex offenses...Because the causation of psychological injury was thus inherent in the acts alleged, the acts cannot be treated as accidental causes, and the defendant's claim that he did not actually intend to inflict the particular psychological injury claimed is irrelevant...Hence, liability arising from the defendant's act is not covered."

A policy may also have an "expected injury" exclusion, with the same effect as an "occurrence" requirement. In the case of *American Family Mut. Ins. Co. v. M.B.*⁶², it was found that the defence of an action brought by employees of a modeling agency in respect of sexual abuse by a photographer was not covered, due to the fact that the evidence showed that the insured was aware of a number of incidents of reported abuse and therefore reasonably had knowledge of what was going on, deliberately disregarded it, and therefore the injury was "expected".

(b) Compare if "Occurrence" is Defined to be an "Accident or Event"

If "occurrence" is defined to be an "accident or event", it has been held that the reference to "event" can be construed to include non-accidental, or intentional, acts.⁶³ EPL exposures may then proceed.

(c) The Need for "Bodily Injury"

In the United States, the requirement under CGL policies for a resulting "bodily injury" before there can be a claim, has often posed a problem in EPL claims, since the U.S. courts have usually held that emotional distress is not "bodily injury" for the purposes of the policy.⁶⁴

⁶¹ *Scanlon v. Providence Mutual*, 138 N.H. 301 (1994), at p. 306 (Supreme Court of New Hampshire).

⁶² *American Family Mut. Ins. Co. v. M.B.*, 563 N.W. 2d 326 (1997) (Minnesota Court of Appeals).

⁶³ See e.g. *United Pac. Ins. Co. v. The McGuire Co.* (1991) 229 CA3d 1560, 1565. (California Court of Appeal); *Ins. Co. of the Pa. v. City of Long Beach*, 2009 U.S. App. LEXIS 15825 (California Court of Appeal).

⁶⁴ See e.g. *American Motorists Ins. Co. v. Allied-Sysco Food Servs., Inc.* (1993) 19 CA4th 1342, 1347 (California Court of Appeal).

In Canada, however, the CGL's requirement for a "bodily injury" is not, on its own, a coverage problem for EPL claims, since in Canada, the Courts have reached the opposite legal conclusion, finding that emotional and psychological harm do constitute "sickness" and "bodily injury"⁶⁵. In *Wellington Guarantee v. Evangelical Lutheran Church*,⁶⁶ the policy at issue was a non-profit corporation professional indemnity policy, a liability policy. It excluded claims related to "sickness". In a coverage dispute over the insurer's duty to defend a sexual abuse claim involving injuries of depression, nervous shock, psychological injury and mental distress, the Court ruled that the "sickness" exclusion applied and there was no duty to defend.

(d) Exclusions for "Employee Injuries or Claims"

If an insured manages to overcome the hurdle of demonstrating a "bodily injury", the further standard exclusion for "employee injuries or claims" may ultimately dispense with the coverage issue.⁶⁷ This is a common CGL exclusion, originally inserted to exclude coverage already provided by workers compensation.

(e) Exclusions for "Intentional Injuries" or "Intentional Acts"

Like the decisions which have determined that EPL conduct is not "accidental" in nature, and therefore not an "occurrence", there are numerous decisions which have found that the intentional or wilful nature of EPL conduct results in coverage being excluded under an "intentional act" exclusion. In the case of *Northern Insur. Co. v. Morgan*⁶⁸, the Court concluded that based upon an intentional acts exclusion, there was no duty to defend a sexual harassment suit, even though negligence was included in the suit's allegations, since the Court found that no reasonable jury would conclude that the insured acted negligently. The Court found that regardless of how the action was plead, the jury would find either that the conduct was intentional and precluded from coverage, or that the conduct was consensual and not actionable.

With an "intentional injury" clause, in dubious cases, the Court may rule that there is a possibility of coverage, that rests on the distinction between disparate treatment versus disparate impact - i.e. the possibility one can act intentionally without injurious effect. While this argument has been widely accepted with respect to "adverse impact"

⁶⁵ See *W.-V. (T.) v. W. (K.R.J.)* (1996), 29 O.R. (3d) 277 (Ontario General Division).

⁶⁶ See *Wellington Guarantee v. Evangelical Lutheran Church* (1996), 22 B.C.L.R. (3d) 352 (British Columbia Court of Appeal).

⁶⁷ See *Sam's Auto Wrecking Co. Ltd. (Wentworth Metal) v. Lombard General Insurance Company of Canada*, 2013 ONCA 186.

⁶⁸ *Northern Insur. Co. v. Morgan*, 186 Ariz. 33, 918 P. 2d 1051 (1995) (Arizona Court of Appeal).

discrimination, the debate is much more heated when it comes to something like sexual abuse (as discussed *supra.*).⁶⁹

Interestingly, it may be that while a perpetrating employee's act *is* excluded due to its clear intentional nature, the company or supervisor's alleged failure to supervise may *not* be excluded. As a result of this ambiguity or loop-hole in CGL cover, some insurers have changed their policy exclusion wordings from an "intentional act by the insured" to "an intentional act by *an* insured", so that the act of one insured negates coverage for all.

There is also a version of the intentional act exclusion which relates to criminal acts or failures to act resulting in bodily injury. This again broadens the exclusion, making it harder for an insured to argue that coverage is available.

(f) "Personal Injury" Endorsements

Even "personal injury" endorsements, which add defamation, false imprisonment and malicious prosecution to the risks of CGL coverage, frequently do not afford coverage for EPL exposures, since EPL exposures simultaneously fall victim to the CGL's "intentional act" or "intentional injury" exclusions, or an "employment related acts" exclusion (on the latter issue, see especially the discussion of *Frank and Freedus v. Allstate, infra.*).

(g) Exclusions for "Employment Related Acts" or "Injuries Arising Out of and In the Course of Employment"

Many CGL policies now include an exclusion for "employment related acts" or "injuries arising out of and in the course of employment". Courts have determined that an action claiming damages related to the termination of an employee "arose out of and in the course of employment".⁷⁰ In *Frank and Freedus v. Allstate Ins. Co.*⁷¹, the Court found that there was *no* duty to defend an action alleging wrongful dismissal and defamation. The employee alleged that he had been improperly terminated on the basis that he was gay and HIV positive. The Court found that the exclusion was designed to exclude coverage for "practices, policies, acts or omissions which are related to employment,

⁶⁹ See e.g. *SaveMart Supermarkets v. Underwriters at Lloyds London* 843 F. Supp. 597, 606 (ND CA 1993) (United States District Court) and see also the discussion in Canada in the related decisions of *Sansalone v. Wawanesa*; and *Lloyds v. Scaleria* (April 9, 1998, British Columbia Court of Appeal, CA022745), in the context of a similar exclusion clause in a homeowner's policy.

⁷⁰ See e.g. *Shoemaker v. Myers* (1990) 52 C3d 1 (Supreme Court of California).

⁷¹ *Frank and Freedus v. Allstate Ins. Co.*, 45 Cal. App. 4th 461, 52 Cal. Rptr. 2d 678 (1996) (California Court of Appeal).

including employment-related defamation” and found that on the facts, both the termination and the defamation alleged were employment-related and therefore excluded under the terms of the policy.

(h) The “Insured vs. Insured” Exception

Such exclusions were specifically designed to keep out EPL claims. The exclusion aims to not only avoid the possibility of collusion amongst insureds, but also clearly denotes that employment-related matters are not the subject of a CGL policy.

(i) Sexual Abuse Exclusion

In response to sexual abuse claims occasionally obtaining coverage under “intentional injury” exclusions, most CGL underwriters, like D & O underwriters, have amended their forms to specifically exclude sexual misconduct and all claims related to such misconduct.

(j) Damages Limited to Compensatory Damages - Excludes Punitive and Exemplary Damages

Another reason why CGL policies fall short on EPL exposures is that they customarily only insure compensatory damage awards. Punitive and exemplary damages are excluded. In the Canadian context, this is a significant gap, given that compensatory damages awards do not tend to be very large and so the punitive component is relatively significant.

11.3 HOMEOWNERS POLICIES

When EPL claims are refused coverage under standard CGL and D & O policies, insureds have often looked to their Homeowner policies for indemnity or a defence, at least with allegations of sexual misconduct. Because this tactic has succeeded in certain instances, most Homeowner’s forms now contain a sexual assault exclusion. In fact, the Insurance Bureau of Canada includes the following exclusion for its standard form homeowner’s policy:

Exclusions - We do not insure claims arising from:

Section II

7. a. sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person insured by this policy; or

7. b. failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment.

The U.S. experience suggests that such exclusions *could* work to exclude coverage not only for the risk of abuse but all of the related allegations: in one suit alleging battery, assault, negligence, invasion of privacy, wantonness and sexual harassment and vicarious liability for the offensive comments and touching of a co-worker, the Court held that *all* of the acts alleged fell under the sexual and physical abuse exclusion, since all of the allegations related to the physical and verbal abuse of the employee. The Court ruled there was no duty to defend.⁷²

12. EXCLUSIONS IN AN EPL COVERAGE

While there are no standard EPL forms, there are a number of exclusions which are verging on “standard” EPL exclusions. For the most part, these exclusions are the result of business decisions on the part of insurance carriers not to insure certain losses which are either otherwise insured elsewhere, too great a risk, too uncertain a risk or simply not an appropriate subject matter for insurance. These exclusions are discussed below.

- (a) Losses related to workers’ compensation obligations, unemployment insurance, social security or old age security, retirement or pension benefits, disability benefits or other similar laws or obligations

These exclusions fall under the “otherwise insured” category, in that these programs are all self-sustaining or self-insured. Insofar as there may be an allegation that an insured person was negligent or in breach of their fiduciary obligations in respect of their administration of such matters, corporate entities have the option to obtain either D & O coverage or alternatively, fiduciary coverage.

- (b) Losses related to being ordered to provide sensitivity training or any other corporate program, policy or seminar relating to any Employment Practice Claim, except as to Defence Costs

It is likely that this exclusion is fueled by several considerations. Firstly, underlying the exclusion may be an understandable philosophy on the part of underwriters that such

⁷² *CNA Int’l Reinsurance Co. v. CPB Enter.*, No. 96-1026-CB-M, 1997 U.S. Dist. LEXIS 18466 (S.D. Ala. Nov. 6, 1997) (United States District Court).

programs constitute “preventative maintenance” and as such, should remain the financial responsibility of the employer; and simply because an employer may have been ordered to put such practices into place *after the fact* of a claim, does not change its essential character or burden. Secondly, the risk is an uncertain one to underwrite - potentially non-existent, yet should it arise, potentially very expensive and open-ended in its period of obligation. Hence the exclusion.

- (c) Losses flowing from liability under the contract or agreement, express or implied, oral or written, but not limited to the dismissal of an employee, except to the extent that the Company or Insured Individual would have been liable in the absence of the contract or implied agreement

This exclusion, relating to pay in lieu of reasonable notice as a corporate responsibility and not an appropriate subject matter for insurance, was discussed at length in Section 6 of the paper.

In the 2003 American decision, *TVN Entertainment Corporation v. General Star Indemnity Company*,⁷³ the insured sued its insurer alleging that an arbitrator’s award in favour of a terminated employee was covered by its EPL policy. The arbitrator, in his final award, ruled that the insured had “*materially breached the express and implied terms of the employee’s Employment Agreement and the covenant of good faith and fair dealing.*” The employee was therefore entitled to an award of damages “*proximately caused by [the insured’s] breach of the Employment Agreement.*” The Court found that the policy language excluding coverage for ‘*damages determined to be owing under a written or express contract of employment*’ was unambiguous. The arbitrator’s award tied the employee’s damages to his written contract and therefore fell squarely within the policy’s exclusion provision.

- (d) Losses related to any (i) future damages or other future economic relief or (ii) any employment-related benefits, stock options, perquisites, deferred compensation or other type of compensation other than salary (including bonuses) or wages

The rationale behind this exclusion is that again, claims for such relief are not an appropriate subject-matter for EPL insurance coverage. They do not relate to “wrongs” in the sense of illegal or improper conduct; and if the claim is that a fiduciary obligation was breached in terms of the administration of any such plan, again D & O coverage and fiduciary coverage is available as a separate cover or endorsement.

⁷³ *TVN Entertainment Corporation v. General Star Indemnity Company*, 59 Fed.Appx. 211, 2003 WL 731698 (9th Cir.).

In *TVN Entertainment Corporation*⁷⁴, the Court also concluded that the employee's stock options granted through his employment agreement fell squarely within the policy's unambiguous exclusion provision which stated that the policy did not cover "Loss" in the form of "commissions, bonuses, profit sharing, or benefits pursuant to a contract of employment."

- (e) Losses flowing from any actual or alleged act or omission of an Insured Individual serving in any capacity other than as director, officer or employee of the Company.

The purpose of this exclusion is to exclude the acts of directors, officers and employees of the Company which are unconnected with their acts while serving in a capacity as a director, officer or employee of the insured. An example would include entirely personal acts, or, for example, acts undertaken in relation to a differing corporate body.

It will be interesting to see what treatment such exclusions receive from our Courts. For example, it has not been uncommon under D & O and professional liability policies for acts of sexual misconduct to be considered entirely personal acts unconnected with employment, even if perpetrated while in the course of employment, since the sexual misconduct was not "one of the duties of employment".

As noted already, once a legal determination has been made that the insured employee's conduct was *not* connected with the company's business, some employees have then looked to their homeowners' policies for personal liability coverage.

- (f) Losses associated with modifying premises or otherwise incurring costs to accommodate any disabled person pursuant to an order, direction, certificate or determination under the ADA, Employment Equity Act of Canada or similar legislation or affirmative action program

Due to the potentially high cost of capital renovations, it is understandable that this exclusion exists in U.S. EPL policies. It is not so consistently written in as an exclusion to Canadian policies, due to the fact that there is no real Canadian equivalent to the ADA. As such, a parallel exclusion in the Canadian context is either redundant, or addresses a remedial order that is only remotely possible or indirectly authorized under Canadian human rights and employment equity legislation.

⁷⁴ *Ibid*

- (g) Losses related to pay equity obligations, collective bargaining or employment standards obligations.

This exclusion is one that is still under debate, at least in Canada. Pay equity legislation is designed to provide an affirmative remedy to one of the most notorious kinds of gender discrimination that can occur in an employment context. It is therefore one of the more prominent EPL risks that employers will be looking to their EPL product to insure. However, as is demonstrated by the Supreme Court of Canada's 2011 decision overturning a decision of the Federal Court of Appeal and reinstating the Tribunal's decision against Canada Post (for an award for lost wages and interest at an estimated at \$250 million)⁷⁵, awards in relation to pay equity have the potential to be an expensive liability. On the other hand, insurers can certainly limit their potential exposure on this issue by making choices as to who to insure and who not to insure, or setting appropriate limits. The author anticipates that the debate on this risk and employment standards risks will continue as claims play themselves out.

- (h) Losses relating to claims for personal injury (other than emotional distress or mental anguish), sickness, disease, or death of any person, or damage to any tangible property including the loss of use thereof.

This exclusion was discussed in detail in Section 6, *supra*.

- (i) Losses relating to claims in respect of which an Insured had prior knowledge of circumstances likely to give rise to EPL Claim.

This exclusion may or may not be found in the "Exclusions" section, but is an exclusion nonetheless. In a claims made and reported policy, a *condition precedent* to coverage is that the claim at hand does not arise out of circumstances known by an insured to be likely to result in a claim, consistent with the insured's "warranty of knowledge of no prior claims" submitted with the EPL application.

Such clauses vary in their wordings. On the one hand, a clause that favours coverage will refer to knowledge of facts by "*the insured or the insured's directors to which a claim arising is "reasonably foreseeable"*". On the other hand, a clause more favourable to the insurer will require knowledge only of facts by "an" insured, without the "*reasonable foreseeability*" requirement.

⁷⁵ See: *Public Service Alliance of Canada v. Canada Post Corp.*, 2011 SCC 57.

A policy dispute relating to the prior knowledge of an insured arose in the 2000 American decision, *Schultze, DDS v. Continental Insurance Company*⁷⁶ when an insured dentist sought a declaration that his insurer had a duty to defend him under an EPL endorsement to his professional liability policy. A former employee sued the insured, alleging sexual discrimination, wrongful discharge, and defamation. One of the allegations was that the insured had made unwanted sexual advances throughout the period of 1993 to 1996. The insurer refused to defend the insured as the claims represented a continuous pattern of conduct that began prior to the effective date of the EPL coverage. It was not determinative that the ‘wrongful discharge’ occurred after the effective date. Ultimately the court found that the insurer did **not** have a duty to defend the sexual discrimination or wrongful discharge claims.

The court did, however, find that the insurer had a duty to defend the defamation claim against the insured pursuant to the EPL coverage as all of the defamatory actions were alleged to have occurred after the policy’s prior acts date. The court found that the defamatory conduct (which consisted of an allegation that the employee had embezzled money) was not necessarily a continuation of the discrimination.

- (j) Losses deemed uninsurable under local or provincial laws (including public policy)

The foregoing is an exclusion that is commonly written into U.S. policies but seen less frequently in Canadian policies. It refers to the common public policy bar to insurance in respect of acts intended to cause loss. An example of an equivalent Canadian provision is Section 5 of the British Columbia *Insurance Act*, R.S.B.C. 2012, c. 1, which provides:

5. Unless a contract otherwise provides, a violation of a criminal or other law in force in British Columbia or elsewhere does not render unenforceable a claim for indemnity under the contract unless the violation is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage, except that in the case of a contract of life insurance this section applies only to insurance payable under the contract in the event the person whose life is insured becomes disabled as a result of bodily injury or disease.

Although the writer is not aware of any “pure EPL” policy which has yet considered this exclusion, the case of *Melugin v. Zurich Canada*⁷⁷ did consider the exclusion in the context of a CGL policy that had some EPL features, namely a definition of “personal

⁷⁶ *Schultze, DDS v. Continental Insurance Company*, 619 N.W. 2d 510, 2000 ND 209 (Supreme Court of Appeals of West Virginia).

⁷⁷ *Melugin v. Zurich Canada*, 50 Cal. App. 4th 658, 57 Cal. Rptr. 2d 781, review denied, No. S057761, 1997 Cal. LEXIS 81 (Cal. Jan. 15, 1997) (California Court of Appeal).

injury” that included “*discrimination, racial or religious discrimination and/or violation of civil rights, humiliation, sexual discrimination, alienation of affection, however damages based on the above offenses are only covered where insurance against same is not prohibited by law.*”

The case involved a claim for coverage in respect of a sex discrimination action by two former employees. The insurer tried to avoid any duty to defend the claim, arguing that insurance for intentional acts was invalid, in light of California’s *Insurance Code* para. 533, which prohibits coverage for intentional acts.

The Court did not accept the insurer’s argument. Ultimately, the Court ruled that the insurer had a duty to defend, finding that there was a possibility of coverage, on grounds either that the discrimination resulted from negligent, unintentional conduct, or that the allegations in the complaint of “unfair personnel management” encompassed more than just intentional, willful conduct.

In *Liberty Mutual Insurance Co. v. Hollinger Inc.*,⁷⁸ the Ontario Court of Appeal dealt with the issue of whether acts of intentional discrimination ought not to be the subject of insurance, on the basis that such insurance would be contrary to public policy, in *Liberty Mutual Insurance Co. v. Hollinger Inc.*⁷⁹. In that decision, a journalist sued Hollinger Inc. for wrongful dismissal, alleging, among other things, that he was subject to intentional discrimination on the basis of his age and race. The insured sought coverage under the terms of its general liability policy. The insurer denied coverage on the basis that the policy was not intended to cover intentional acts. The judge hearing the initial application held that the insurer owed a defence. The insurer appealed.

On appeal, the Ontario Court of Appeal focused on two arguments made by the insurer: that according to the “fortuity principle”, indemnity insurance covers only fortuitous acts of the insured and excludes intentional harm, and, secondly, that it would be contrary to public policy to permit insurance coverage for intentional discrimination.

Ultimately, the Ontario Court of Appeal determined that the insured was not owed a defence in the underlying action on the basis of the “fortuity principal”. The court concluded that the particular policy was, by its terms, an “*occurrence based liability policy that only covers accident or fortuitous losses*” and did not cover claims for intentional discrimination.

⁷⁸ *Liberty Mutual Insurance Co. v. Hollinger Inc.*, [2004] I.L.R. I-4271, 138 O.A.C. 146, 236 D.L.R. (4th) 635, 48 M.V.R. (4th) 20, 10 C.C.L.I. (4th) 200 (Ontario Court of Appeal).

⁷⁹ *Liberty Mutual Insurance Co. v. Hollinger Inc.*, [2004] I.L.R. I-4271, 138 O.A.C. 146, 236 D.L.R. (4th) 635, 48 M.V.R. (4th) 20, 10 C.C.L.I. (4th) 200 (Ontario Court of Appeal).

The court discussed the public policy concern behind insurance for intentional discrimination, noting that it would be undesirable to encourage people to injure others intentionally by indemnifying them from the civil consequences of their wrongful conduct. On the other side of the question, the court noted that denying coverage may result in judgment-proof defendants and that permitting coverage would likely encourage insurers to work with employers to promote good employment practices. While the court pointed to some concerns as to whether public policy ought to permit insurance coverage for intentional discrimination, that question was ultimately left to be determined another day.

The *Hollinger* decision is readily distinguishable in that the policy at issue was not an employment practices liability policy. Further, the policy required an “occurrence” as a triggering event for coverage. The EPL policies discussed in this paper require either an “EPL Claim” or a “Claim for Wrongful Act” in order to trigger coverage, such terms being arguably broader than an “occurrence”. Moreover, in the *Hollinger* decision, the insurer was seeking to deny coverage and thus made the argument that such coverage was excluded by reasons of public policy. It would be virtually impossible for an EPL insurer to make the same argument, after having collected premiums in anticipation of having to possibly provide exactly that coverage.

13. CONCLUSION

EPL claims continue to rise in both the United States and Canada - a response to increased human rights protections in the employment context and the current economy. The impact on business and on the insurance industry, in finding ways to manage this new exposure has been significant, resulting in changes to workplace practices and modifications to existing insurance products.

Traditional products such as D & O and CGL policies have proven unsuitable, prompting the development of an entirely new product, the EPL endorsement or policy, initially in the United States and now in Canada. There is not yet a “standard form” for EPL insurance, so the market is competitive. EPL wordings are still being crafted and/or refined, with an eye to the risk assumed, marketability, and likely treatment by the Courts in light of legal precedent created by EPL litigation in a D & O and CGL context. A special challenge for EPL product development has been adapting American wordings to suit unique Canadian legal concepts and traditions. While Canadian insurers are relatively new to EPL risk planning, using past experience and the American example, Canadian insurers have so far proven both willing and well-equipped to manage this ‘new’ exposure.

Schedule A: Whistleblowing: An Overview of Legislative Protections

JURISDICTION	NAME of ACT	DESCRIPTION
Federal	<i>Competition Act, RSC 1985, c. C-34 - s. 66.1</i>	<p>66.1 (1) <i>Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.</i></p> <p>(2) <i>The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.</i></p>
Federal	<i>Criminal Code of Canada, RSC 1985, c. C-46</i>	<p>425.1(1) <i>Threats and retaliation against employees</i></p> <p><i>No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,</i></p> <p>(c) <i>with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or</i></p> <p>(d) <i>with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.</i></p> <p>425.1(2) <i>Punishment</i></p> <p><i>Any one who contravenes subsection (1) is guilty of</i></p> <p>(c) <i>an indictable offence and liable to imprisonment for a term not exceeding five years; or</i></p> <p>(d) <i>an offence punishable on summary conviction.</i></p>
Federal	<i>Environmental Protection Act, RSC 1985, c. C-15.3</i>	<i>No federal government employee shall be disciplined, dismissed or harassed for reporting on the release of certain toxic substances to a CEPA inspector.</i>

JURISDICTION	NAME of ACT	DESCRIPTION
Federal	<i>Human Rights Act, RSC 1985, c.H-6.</i>	<p>s. 59: <i>"No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so."</i></p> <p>14.1 Retaliation <i>It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.</i></p>
Federal	<i>Labour Code, RSC 1985, c. L-2</i>	<p>147. <i>No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee"... testified, provided info during an investigation, etc.</i></p> <p>Arguably also: 36.1(1) Just cause requirement <i>During the period that begins on the date of certification and ends on the date on which a first collective agreement is entered into, the employer must not dismiss or discipline an employee in the affected bargaining unit without just cause.</i></p>
Federal	<i>National Defence Act,</i> Can. Reg. SOR/2000-14 -- Military Police Professional Code of Conduct SOR/2000-14	<p>s. 4: <i>No member of the military police shall considered, unlawful;</i> <i>(e) intimidate, or retaliate against, any person who makes a report or complaint about the conduct of a member of the military police;</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Federal	<i>Public Servants Disclosure Protection Act, SC 2005, c. 46</i>	<ul style="list-style-type: none"> • <i>Protects whistleblowers in the federal public sector.</i> • <i>The goal of the Act is to require employers in the public sector to establish a code of conduct that provides civil protections for whistleblowers including disciplinary actions against a public servant who takes a reprisal against a whistleblower, and reinstatement or damages in lieu of reinstatement for whistleblowers who have been subject to reprisal.</i> <p>s. 19: <i>No person shall take any reprisal against a public servant or direct that one be taken against a public servant.</i></p>
Alberta	<i>Alberta Human Rights Act, RSA 2000, c. A-25.5</i>	<p><i>Prohibitions regarding complaints</i></p> <p><i>10(1) No person shall retaliate against a person because that person</i></p> <p style="padding-left: 40px;"><i>(a) has made or attempted to make a complaint under this Act,</i></p> <p style="padding-left: 40px;"><i>(b) has given evidence or otherwise participated in or may give evidence or otherwise participate in a proceeding under this Act,</i></p> <p style="padding-left: 40px;"><i>(c) has made or is about to make a disclosure that person may be required to make in a proceeding under this Act, or</i></p> <p style="padding-left: 40px;"><i>(d) has assisted in any way in</i></p> <p style="padding-left: 80px;"><i>(i) making or attempting to make a complaint under this Act, or</i></p> <p style="padding-left: 80px;"><i>(ii) the investigation, settlement or prosecution of a complaint under this Act.</i></p> <p><i>(2) No person shall, with malicious intent, make a complaint under this Act that is frivolous or vexatious.</i></p>
Alberta	<i>Public Interest Disclosure (Whistleblower Protection) Act, SA 2012, c P-39.5</i>	<ul style="list-style-type: none"> • <i>Protects the Alberta public service, provincial agencies, boards and commissions, as well as academic institutions, school boards and health organizations.</i> <p><i>The whistleblowing protections of the Act are contained in Part 4 (sections 24 to 27).</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
British Columbia	<i>Forest and Range Practices Act,</i> SBC 2002, c. 69	119. <i>Whistle-blower protection</i> <i>A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, or otherwise discriminate against, a person because that person complains or is named in a complaint, gives evidence or otherwise assists in respect of a prosecution, a complaint or another proceeding under this Act, the regulations or the standards.</i>
British Columbia	<i>Freedom of Information and Protection of Privacy Act,</i> RSBC 1996, c. 165	s. 30.3: <i>An employer, whether or not a public body, must not dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee of the employer, or deny that employee a benefit, because</i> <i>(a) the employee, acting in good faith and on the basis of reasonable belief, has notified the minister responsible for this Act under section 30.2,</i> <i>(b) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the commissioner that the employer or any other person has contravened or is about to contravene this Act,</i> <i>(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order to avoid having any person contravene this Act,</i> <i>(d) the employee, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention of refusing to do anything that is in contravention of this Act, or</i> <i>(e) the employer believes that an employee will do anything described in paragraph (a), (b), (c) or (d).</i> s. 31.1: <i>Formerly the Act created obligations on public bodies. Now, privacy protection obligations apply to public bodies, employees, volunteers, officers, and to service providers and their employees and associates who have access to personal information under custody or control of a public body. A service provider is anyone retained under a contract to perform services for a public body.</i>

JURISDICTION	NAME of ACT	DESCRIPTION
British Columbia	Personal Information Protection Act , SBC 2003, c. 63, s. 55	s. 55: <i>A person who has reasonable grounds to believe that an organization has contravened or is about to contravene a provision of this Act or the regulations and who, in good faith, notifies the commissioner of the particulars of the matter, whether or not the person makes a complaint under section 46(2), may request that the commissioner keep the person's identity confidential with respect to the notification.</i>
British Columbia	Safety Standards Act , SBC 2003, c. 39, s. 19	19(4): <i>An employer must not dismiss, suspend, lay off, penalize, discipline or discriminate against any person if the reason for doing so is in any way related to the disclosure referred to in subsection (3).</i> 19(3): <i>A licensed contractor or other person performing regulated work must disclose to a safety manager or safety officer any regulated product or regulated work that creates a risk of personal injury or damage to property.</i>
British Columbia	Wildfire Act , SBC 2004, c. 31, s. 57	57. Whistle-blower protection <i>A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, or otherwise discriminate against, a person because that person complains or is named in a complaint, gives evidence or otherwise assists in respect of a prosecution, a complaint or another proceeding under this Act or the regulations.</i>
Manitoba	The Public Health Act , CCSM c. P210	No retaliation 104 No person shall discipline, suspend, demote, dismiss, discharge, harass, interfere with or otherwise disadvantage another person, or threaten to do any of those things to another person who, in good faith, (a) complies with a requirement to report or provide information under this Act; or (b) voluntarily reports or provides information about a health hazard under section 40.

JURISDICTION	NAME of ACT	DESCRIPTION
Manitoba	<i>The Public Interest Disclosure (Whistleblower Protection) Act, CCSM c. P217</i>	<ul style="list-style-type: none"> • <i>Protects the public service of Manitoba, including departments, government bodies and specified offices.</i> • <i>Prohibits a person from taking a reprisal against an employee, or directing that one be taken, because the employee has, in good faith, sought advice about making a disclosure in accordance with the Act, made a protected disclosure or cooperated in an investigation under the Act.</i> <p><i>The whistleblowing protections of the Act are contained in Part 4.</i></p>
New Brunswick	<i>Employment Standards Act, SNB 1982, c. E-7.2</i>	<p>s. 28.</p> <p><i>Notwithstanding anything in this Act an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefore is related in any way to"...</i></p> <p><i>the employee making a complaint or giving info against the employer with respect to any matter covered by this Act/ violation of any Prov/Fed Act;</i></p>
New Brunswick	<i>Public Interest Disclosure Act, SNB 2012, c 112</i>	<ul style="list-style-type: none"> • <i>Protects the New Brunswick public service.</i> • <i>Prohibits a person from taking a reprisal action against an employee, or directing that one be taken against an employee, because the employee has, in good faith, a) sought advice about making a disclosure from a supervisor, designated officer, chief executive or the Ombudsman, b) made a disclosure or c) cooperated in an investigation under the Act.</i> <p><i>The whistleblower protection provision is found at s. 31 of the Act.</i></p>
Newfoundland and Labrador	<i>House Of Assembly Accountability, Integrity And Administration Act, SNL 2007, c H-10.1</i>	<p><i>No reprisal</i></p> <p><i>59. (1) A person shall not take a reprisal against an employee or direct that a reprisal be taken against an employee because the employee has, in good faith,</i></p> <p><i>(a) sought advice about making a disclosure from his or her supervisor, the clerk, the speaker or a member of the audit committee;</i></p> <p><i>(b) made a disclosure; or</i></p> <p><i>(c) cooperated in an investigation under this Part.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Newfoundland and Labrador	<i>Personal Health Information Act, SNL 2008, c P-7.01</i>	<p><i>Non-retaliation</i></p> <p><i>89. A person shall not dismiss, suspend, discipline, demote, harass or otherwise disadvantage or penalize an individual where</i></p> <p><i>(a) the individual, acting in good faith and on the basis of reasonable belief, has disclosed to the commissioner that another person has contravened or is about to contravene a provision of this Act or the regulations;</i></p> <p><i>(b) the individual, acting in good faith and on the basis of reasonable belief has done or stated an intention of doing an act that is required to be done in order to avoid having a person contravene a provision of this Act or the regulations;</i></p> <p><i>(c) the individual, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention to refuse to do an act that is in contravention of this Act or the regulations; or</i></p> <p><i>(d) another person believes that the individual will do an act described in paragraph (a), (b) or (c).</i></p>
Northwest Territories	<i>Environmental Rights Act, RSNWT 1988, c.83(Supp.)</i>	<p><i>s. 7:</i> <i>Potential whistle blowers are protected from employer reprisals when reporting pollution violations.</i></p> <p><i>s. 7 (1):</i></p> <p><i>“No person shall dismiss or threaten to dismiss an employee, discipline, suspend or impose any penalty on an employee or intimidate or coerce an employee because he or she...” reports information, prosecutes a crime under the Act, etc.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Northwest Territories	Human Rights Act , SNWT 2002, c. 18, s. 15	<p>s. 15: <i>Discharge, suspension, intimidation, etc.</i></p> <p><i>No person shall discharge, expel, evict, suspend, intimidate, coerce, impose any pecuniary penalty on, deny a right or benefit to or otherwise retaliate against any individual because the individual</i></p> <p><i>s. Has made or attempted to make a complaint under this Act;</i></p> <p><i>(b) has given evidence or otherwise participated in, or may give evidence or otherwise participate in, a proceeding under this Act; or</i></p> <p><i>(c) has assisted in any way in</i></p> <p><i>(i) making or attempting to make a complaint under this Act, or</i></p> <p><i>(ii) the settlement, investigation or adjudication of a complaint under this Act.</i></p>
Nova Scotia	Fisheries and Coastal Resources Act , SNS 1996, c. 25, s. 99	<p>99(1)</p> <p><i>No employer shall</i></p> <p><i>(a) dismiss or threaten to dismiss an employee;</i></p> <p><i>(b) discipline or suspend an employee;</i></p> <p><i>(c) impose a penalty on an employee; or</i></p> <p><i>(d) intimidate or coerce an employee,</i></p> <p><i>because the employee has reported or proposes to report to any person an act or omission that contravenes, or that the employee has reasonable grounds to believe may contravene, this Act or the regulations.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Nova Scotia	<i>Fisheries and Coastal Resources Act, SNS 1996, c 25</i>	<p><i>Prohibition of retaliation</i> 99 (1) No employer shall</p> <p>(a) dismiss or threaten to dismiss an employee;</p> <p>(b) discipline or suspend an employee;</p> <p>(c) impose a penalty on an employee; or</p> <p>(d) intimidate or coerce an employee,</p> <p><i>because the employee has reported or proposes to report to any person an act or omission that contravenes, or that the employee has reasonable grounds to believe may contravene, this Act or the regulations.</i></p> <p>(2) Any person who wilfully or intentionally provides false or misleading information pursuant to subsection (1) is guilty of an offence.</p>
Nova Scotia	Human Rights Act, RSNS 1989, c. 214, s. 11	<p>11. Prohibition of retaliation</p> <p><i>No person shall evict, discharge, suspend, expel or otherwise retaliate against any person on account of a complaint or an expressed intention to complain or on account of evidence or assistance given in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act.</i></p>
Nova Scotia	Labour Standards Code, RSNS 1989, c. 246	<p><i>No discrimination against complainant or witness</i></p> <p>30 (1) An employer shall not discharge, lay off, suspend, intimidate, penalize, discipline or discriminate in any other manner against any person because</p> <p>(a) that person has made a complaint pursuant to this Act;</p> <p>(c) that person has made or is about to make any disclosure that person is required or permitted to make by this Act</p> <p>....</p>
Nova Scotia	Public Interest Disclosure of Wrongdoing Act, SNS 2010, c 42	<ul style="list-style-type: none"> • <i>Protects the public service of Nova Scotia.</i> • <i>Prohibits a person from taking a reprisal against an employee because the employee has in good faith taken any actions under the Act.</i> <p><i>The whistleblower protection provision is found at s. 31 of the Act.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Nunavut	<i>Human Rights Act</i> , SNu 2003, c. 12, s. 15	<p>15. <i>Discharge, suspension and intimidation</i></p> <p><i>No person shall discharge, expel, evict, suspend, intimidate, coerce, impose any pecuniary penalty on, deny a right or benefit to or otherwise retaliate against any individual because the individual</i></p> <p><i>(a) has notified or attempted to notify the Tribunal with respect to a human rights issue under this Act;</i></p> <p><i>(b) has given evidence or otherwise participated in, or may give evidence or otherwise participate in, a proceeding under this Act; or</i></p> <p><i>(c) has assisted in any way in,</i></p> <p><i>(i) notifying or attempting to notify the Tribunal with respect to a human rights issue under this Act, or</i></p> <p><i>(ii) the settlement, investigation or adjudication of a notification under this Act.</i></p>
Nunavut	<i>Public Service Act</i> , SNu 2013, c 26	<ul style="list-style-type: none"> • <i>Protects whistleblowers in the Nunavut public sector</i> • <i>Whistleblower protection provisions are found in part 6 of the Act.</i> • <i>Reprisal is defined:</i> <i>s. 36(3) In this Part, an act of reprisal against a person includes any action, threat or attempt to suspend, demote, dismiss, discharge, expel, intimidate, coerce, evict, terminate a contract to which the person is a party without cause, commence legal action against, impose a pecuniary or other penalty on or otherwise discriminate against the person because of a disclosure of wrongdoing by that person or because the person assists in the investigation of a disclosure made by another person.</i>

JURISDICTION	NAME of ACT	DESCRIPTION
Ontario	<i>Commitment to the Future of Medicare Act, 2004</i> , SO 2004, c. 5, s. 16	<p>s. 16(9):</p> <p><i>No person or entity shall discipline or penalize any person for reporting, providing or disclosing information under this section unless he or she acts maliciously and the information is not true.</i></p> <p>s. 17(2):</p> <p><i>A prescribed person who, in the course of his or her professional or official duties, has reason to believe that anything prohibited by subsection (1) has occurred shall promptly report the matter to the General Manager.</i></p> <p>s. 17(5):</p> <p><i>No person or entity shall discipline or penalize any person for making a report under subsection (2) or for providing information in connection with the report unless the person who reported or provided the information acted maliciously and the information is not true.</i></p>
Ontario	<i>Environmental Bill of Rights, SO 1993, c.28,</i>	<p><i>PART VII Employer Reprisals, s. 105</i></p> <ul style="list-style-type: none"> • <i>Any person (i.e.: public or private employee) can make a complaint to the Ontario Labour Relations Board alleging an employer has taken a reprisal against an employee on a prohibited ground.</i> • <i>The onus rests with the employer to prove that the reprisal was not taken on a prohibited ground.</i>

JURISDICTION	NAME of ACT	DESCRIPTION
Ontario	<i>Environmental Protection Act, RSO 1990, c. E.19</i>	<ul style="list-style-type: none"> • <i>Extensive protections for employees who have been discharged, disciplined or harassed for complying with Ontario's environmental legislation.</i> • <i>Employees may complain to the Ontario Labour Relations Board.</i> <p><i>Marshall v. Varnicolor Chemical Ltd. (1991), 8 C.E.L.R. 29 (N.S.S.C.T.D.),</i></p> <ul style="list-style-type: none"> • <i>The complainant was fired after he disclosed to the Ministry of the Environment, a local environmental group, the opposition environment critic, and the media, his concerns about the manner in which his employer was disposing of its chemical waste.</i> • <i>The employee brought a complaint under the Environmental Protection Act whistle blowing provisions, asking for compensatory damages, reinstatement and punitive damages.</i> • <i>By the time the complaint reached the Ontario Labour Relations Board, the employer had ceased operations as a result of an order from environmental officials.</i> • <i>The Board awarded the employee compensatory damages.</i> <p><i>Because the employer had ceased operations, the Board concluded that it could not order reinstatement, but indicated that it was prepared to reconsider the matter should the respondent's operation re-open.</i></p>
Ontario	<i>Long-Term Care Homes Act, 2007, SO 2007, c 8</i>	<p><i>17. Every resident has the right to raise concerns or recommend changes in policies and services on behalf of himself or herself or others to the following persons and organizations without interference and without fear of coercion, discrimination or reprisal, whether directed at the resident or anyone else,</i></p> <ul style="list-style-type: none"> <i>i. the Residents' Council,</i> <i>ii. the Family Council,</i> <i>iii. the licensee, and, if the licensee is a corporation, the directors and officers of the corporation, and, in the case of a home approved under Part VIII, a member of the committee of management for the home under section 132 or of the board of management for the home under section 125 or 129,</i> <i>iv. staff members,</i> <i>v. government officials,</i> <i>vi. any other person inside or outside the long-term care home.</i>

JURISDICTION	NAME of ACT	DESCRIPTION
Ontario	<i>Long-Term Care Homes Act, 2007, SO 2007, c 8</i>	<p><i>Whistle-blowing protection</i></p> <p><i>26. (1) No person shall retaliate against another person, whether by action or omission, or threaten to do so because,</i></p> <p><i>(a) anything has been disclosed to an inspector;</i></p> <p><i>(b) anything has been disclosed to the Director including, without limiting the generality of the foregoing,</i></p> <p><i>(i) a report has been made under section 24, or the Director has otherwise been advised of anything mentioned in paragraphs 1 to 5 of subsection 24 (1),</i></p> <p><i>(ii) the Director has been advised of a breach of a requirement under this Act, or</i></p> <p><i>(iii) the Director has been advised of any other matter concerning the care of a resident or the operation of a long-term care home that the person advising believes ought to be reported to the Director; or</i></p> <p><i>(c) evidence has been or may be given in a proceeding, including a proceeding in respect of the enforcement of this Act or the regulations, or in an inquest under the Coroners Act, 2007, c. 8, s. 26 (1).</i></p>
Ontario	<i>Mortgage Brokerages, Lenders and Administrators Act, 2006, SO 2006, c 29</i>	<p><i>Prohibition re reprisals</i></p> <p><i>46. No person or entity shall take adverse employment action against an employee of the person or entity because the employee, acting in good faith, has given information or documents to the Tribunal, the Superintendent or a person designated by the Superintendent.</i></p>
Ontario	<i>Occupational Health and Safety Act, RSO 1990, c. O.1</i>	<p><i>50(1) Prohibits employers from taking reprisals against a worker because the worker has complied with the Act, sought its enforcement, or given evidence in a proceeding brought under the Act.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Ontario	Personal Health Information Protection Act, 2004 , SO 2004, c. 3, Sched. A	70. Non-retaliation No one shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person by reason that, (a) the person, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that any other person has contravened or is about to contravene a provision of this Act or its regulations; (b) the person, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order to avoid having any person contravene a provision of this Act or its regulations; (c) the person, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention of refusing to do anything that is in contravention of a provision of this Act or its regulations; or (d) any person believes that the person will do anything described in clause (a), (b) or (c).
Ontario	<i>Public Inquiries Act, 2009</i> , SO 2009, c 33, Sch 6	No discipline of employees 33 (8) No adverse employment action shall be taken against any employee of any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a person or body conducting the inquiry under the applicable Act or to the staff of a person or body conducting the inquiry.
Ontario	<i>Public Service of Ontario Act, 2006</i> , SO 2006, c 35	<ul style="list-style-type: none"> Protects whistleblowers in Ontario's public sector. Prohibits employers from reprising against a public servant who has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under the Act. <p>The whistleblowing protections of the Act are contained in Part VI (sections 108 to 150).</p>
Ontario	Quality of Care Information Protection Act, 2004 , SO 2004, c. 3, Sched. B	6. Non-retaliation No one shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person by reason that the person has disclosed information to a quality of care committee under section 4.

JURISDICTION	NAME of ACT	DESCRIPTION
Ontario	<i>Regulated Health Professions Act, 1991, SO 1991, c 18</i>	<p><i>Protection for reporters from reprisals</i></p> <p>92.1 No person shall do anything, or refrain from doing anything, relating to another person's employment or to a contract providing for the provision of services by that other person, in retaliation for that other person filing a report or making a complaint as long as the report was filed, or the complaint was made, in good faith.</p>
Quebec	<i>An Act Respecting Health Services and Social Services, CQLR c S-4.2</i>	<p>73. No person shall take reprisals or attempt to take reprisals in any manner whatever against any person who makes or intends to make a complaint under section 34, 44, 45, 53 or 60.</p> <p><i>Intervention.</i> The person responsible for examining the complaint must intervene without delay upon being apprised of reprisals or of an attempt to take reprisals.</p>
Quebec	<i>Anti-Corruption Act, CQLR c L-6.1</i>	<p>32. It is forbidden to take a reprisal against a person who has disclosed a wrongdoing or has cooperated in an audit or an investigation regarding a wrongdoing, or again to threaten to take a reprisal against a person so that he or she will abstain from making such a disclosure or cooperating in such an audit or investigation.</p> <p>33. The demotion, suspension, termination of employment or transfer of a person referred to in section 32 or any disciplinary or other measure that adversely affects the employment or working conditions of such a person is presumed to be a reprisal.</p>
Saskatchewan	<i>The Public Interest Disclosure Act, SS 2011, c P-38.1</i>	<ul style="list-style-type: none"> • <i>Protects the public service of Saskatchewan.</i> • <i>Prohibits a person from taking a reprisal against an employee, or directing that one be taken, because the employee has, in good faith, sought advice about a disclosure in accordance with the Act, made a protected disclosure, or cooperated in an investigation, or declined to participate in any wrongdoing.</i> <p><i>The whistleblowing protections are contained in Part VI of the Act.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Saskatchewan	<i>The Saskatchewan Employment Act, SS 2014, c S-15.1</i>	<p><i>Employer not to take discriminatory action</i></p> <p><i>2 -42(1) In this section, "lawful authority" means:</i></p> <ul style="list-style-type: none"> <i>(a) any police or law enforcement agency with respect to an offence within its power to investigate;</i> <i>(b) any person whose duties include the enforcement of this Act, another Act or an Act of the Parliament of Canada with respect to an offence within his or her power to investigate; or</i> <i>(c) any person directly or indirectly responsible for supervising an employee.</i> <p><i>(2) No employer shall take discriminatory action against an employee because the employee:</i></p> <ul style="list-style-type: none"> <i>(a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada; or</i> <i>(b) has testified or may be called on to testify in an investigation or proceeding pursuant to this Act, another Act or an Act of the Parliament of Canada.</i> <p><i>(3) Subsection (2) does not apply if the actions of an employee are frivolous or vexatious.</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Saskatchewan	<p><i>The Saskatchewan Human Rights Code</i>, SS 1979, c. S-24.1, s. 45</p>	<p>45. <i>Discrimination for Taking Part in Proceedings under this Act Prohibited</i></p> <p>No person shall:</p> <p>(a) <i>refuse to employ or to continue to employ any person;</i></p> <p>(b) <i>threaten to dismiss or to penalize in any other way any person with respect to that person's employment or any term, condition or privilege thereof;</i></p> <p>(c) <i>discriminate against any person with respect to that person's employment or any term, condition or privilege thereof; or</i></p> <p>(d) <i>intimidate, retaliate against, coerce or impose any pecuniary or other penalty, loss or other penalty, loss or disadvantage upon any person; on the grounds that that person:</i></p> <p>(e) <i>has made or may make a complaint under this Act;</i></p> <p>(f) <i>has made or may make a disclosure concerning any matter complained of;</i></p> <p>(g) <i>has testified or may testify in a proceeding under this Act;</i></p> <p>or</p> <p>(h) <i>has participated or may participate in any other way in a proceeding under this Act.</i></p>
Yukon	<p><i>Environment Act</i>, RSY 2002, c76</p>	<p>20 (2):</p> <ul style="list-style-type: none"> • <i>No employer shall dismiss or threaten to dismiss, discipline, impose any penalty on, or commence or prosecute any legal action against, intimidate, or coerce an employee because the employee, for the purpose of protecting the natural environment, or the public trust in relation to the natural environment, from material impairment.</i> • <i>Protects all employees from reporting adverse environmental effects to authorities.</i> <p><i>Protection is granted to employees "notwithstanding any enactment or contractual provision which imposes a duty of confidentiality on an employee."</i></p>

JURISDICTION	NAME of ACT	DESCRIPTION
Yukon	<i>Human Rights Act</i> , RSY 2002, c. 116	<p>14(1):</p> <p><i>No person shall</i></p> <p><i>(a) harass any individual or group by reference to a prohibited ground of discrimination;</i></p> <p><i>(b) retaliate or threaten to retaliate against an individual who objects to the harassment.</i></p> <p>30:</p> <p><i>It is an offence for a person to retaliate or threaten to retaliate against any other person on the ground that the other person has done or proposes to do anything this Act permits or obliges them to do.</i></p>