

HIGHLIGHTS OF MAJOR DEVELOPMENTS IN LABOUR LEGISLATION

September 1, 2002 to August 31, 2003

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INTRODUCTION

By their very nature, Canadian labour laws are subject to frequent amendments. Indeed, year after year, numerous changes are usually made to these laws and regulations in many jurisdictions. However, the number and breadth of legislative developments in the period spanning from September 1, 2002 to August 31, 2003 have surpassed many observers' expectations.

Arguably the most significant labour law developments this year pertained to employment standards. Quebec's National Assembly enacted numerous new provisions, with particular emphasis on improving family-friendly balance and protecting employees against psychological harassment in the workplace, which constitute the most important reform to the province's *Act respecting labour standards* in over a decade. The federal government passed Bill C-28: among other things, it will establish a new compassionate care leave benefit under the *Employment Insurance Act* and provide job-protection for employees taking such leave under the *Canada Labour Code*. Prince Edward Island amended its *Employment Standards Act* to provide more benefits to employees, including unpaid family leave and sick leave. Following recent reforms to their employment standards legislation, British Columbia, Ontario, New Brunswick and Newfoundland and Labrador proceeded with further statutory and regulatory amendments. Furthermore, four jurisdictions modified their minimum wage provisions. With respect to employment equity and human rights issues, the federal government extended the application of the *Employment Equity Act*, with some adjustments, to the Canadian Forces and the Royal Canadian Mounted Police; the Northwest Territories passed a new *Human Rights Code* on which is partially modelled a similar Bill before Nunavut's legislature; and British Columbia substantially amended its *Human Rights Code* by abolishing the Human Rights Commission and Human Rights Advisory Board, altering the powers and responsibilities of the Human Rights Tribunal and amending complaint procedures.

In the area of collective bargaining legislation of wide application, Quebec brought into force most of the unproclaimed amendments to the *Labour Code* enacted in 2001 by Bill 31 (*An Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions*), and the application of the labour relations laws was slightly modified with respect to a long term collective agreement in Saskatchewan and ferry services in British Columbia. In the broader public sector, the labour relations structure was streamlined in the Alberta health sector and in the British Columbia social services sector; Manitoba enacted new rules governing collective bargaining between the City of Winnipeg and the bargaining agent representing its paramedics; Ontario clarified the duties of teachers and the definition of "strike" in collective bargaining statutes applying to them; the federal government proposed a new *Public Service Labour Relations Act*, which will bring many significant changes to the current legislation, while maintaining the existing basic labour relations framework; and Quebec introduced legislation to specify the non-employee status of certain persons in health and social services as well as in childcare centres and services. Moreover, during the period covered by this report, two emergency legislative measures were adopted with respect to the settlement of labour disputes at the University of British Columbia and in the public education sector in Ontario. With respect to the construction industry, Ontario renewed a special collective bargaining framework for the residential sector of the construction industry in certain geographic areas; Quebec adopted a Regulation dealing with the coverage of the installation and repair of

production machinery by the *Act respecting labour relations, vocational training and manpower management in the construction industry*; and, in Newfoundland and Labrador, the construction of an open pit mine and concentrator at Voisey's Bay, Labrador, has been declared a special project for the purposes of the *Labour Relations Act*. Lastly, Newfoundland and Labrador brought some amendments to its *Fishing Industry Collective Bargaining Act*, and Ontario enacted the *Agricultural Employees Protection Act, 2002* as a result of a December 2001 judgment of the Supreme Court regarding the right of agricultural workers to freedom of association under the *Canadian Charter of Rights and Freedoms*.

In the field of occupational health and safety, the laws of general application were amended as follows: in Alberta with respect to Ministerial orders and codes, offences under the legislation and other matters; in Manitoba with respect to administrative penalty amounts; and in British Columbia with respect to the review/appeal process. In addition, several amendments to the Northwest Territories *Safety Act* are before its Legislative Assembly. Other legislative changes include new provisions on investigative warrants in Nova Scotia; legislation, in Ontario, concerning orders requiring the taking of a blood sample from a person, in certain circumstances, when contact with a bodily substance of that person may have resulted in the transmission of a communicable disease to a worker; and, at the federal level, proposed legislation that would establish a legal duty under the *Criminal Code* for all persons directing work to take reasonable steps to ensure the safety of workers, and would set rules for attributing to organizations criminal liability for the acts of their representatives. Moreover, a regulation on radiation protection was revised in Alberta; legislation minimizing exposure to tobacco smoke in workplaces was passed in Prince Edward Island and introduced in Nunavut; mine safety regulations were revised in Saskatchewan, Nova Scotia and the Northwest Territories; and changes to legislation dealing with the safety of boilers, pressure vessels and elevating devices were enacted in British Columbia, while legislation on the safe use of elevators and lifts was brought into force in Nova Scotia.

I. EMPLOYMENT STANDARDS

A. Proclamations and Repeals

In **British Columbia**, amendments to the *Employment Standards Act* regarding hours of work and overtime, statutory holidays, appeals of determinations and administrative penalties came into force on November 30, 2002. These amendments had been passed on May 30, 2002 as part of the *Employment Standards Amendment Act*.

Moreover, section 26 of the *Miscellaneous Statutes Amendment Act, 2003* (Bill 11), once proclaimed into force, will repeal the *Holiday Shopping Regulation Act*. This particular change, however, will have relatively little practical impact. Indeed, municipalities will still be able to regulate business opening hours under the *Local Government Act*. It should also be noted that the *Holiday Shopping Regulation Act's* provisions restricting the opening of retail establishments on Sundays were struck down by the B.C. Court of Appeal in 1989.¹

More than a year after their adoption by **Quebec's** National Assembly, provisions of the *Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions* regarding the *Act respecting labour standards* and the *Pay Equity Act* came into force on November 25, 2002. Consequently, the powers and responsibilities of the Labour Court and the office of the labour commissioner general in relation to these Acts were transferred to the Labour Relations Commission (Commission des relations du travail).

B. Legislation of General Application

Important changes were brought to the employment standards legislation of many jurisdictions. Most noteworthy were the legislative reforms in Quebec and Prince Edward Island, continuing statutory and regulatory changes in British Columbia, and the establishment of new compassionate care leave provisions by the federal government.

In **Quebec**, the National Assembly passed the *Act to amend the Act respecting labour standards and other legislative provisions* (Bill 143) on December 19, 2002.

Bill 143 represents the most important labour standards reform in Quebec since 1990. Its provisions focus on three main objectives: extending the application of the *Act respecting labour standards* (LSA) to more employees, better supporting work-family and work-life balance, and providing greater protection for employees. As a result, many labour standards were amended.

Scope of the LSA

Amendments have extended the application of the LSA to all domestics, including live-in domestic workers. With a few exceptions (such as standard weekly hours of work and overtime provisions), the LSA's provisions now also apply to all agricultural workers, and will apply to employees who take care of or provide care to a child or to a sick, handicapped or aged person, in that person's dwelling. Nevertheless, the LSA will not cover sitters whose duties are performed on an occasional basis (unless the work serves to procure profit to the employer) or solely based on the provision of family

¹ *Canada Safeway Ltd. v. City of Quesnel*, 1989, 58 DLR (4th) 487

assistance or community help. The government will be able to set by regulation, before June 1, 2004, a separate minimum wage for sitters. It will also be possible for such a Regulation to provide for a gradual increase of this minimum wage in order to attain, no later than June 30, 2006, the rate payable to other employees covered by the LSA.

Another amendment ensures, subject to exemptions concerning certain groups, that the LSA applies to all employees, domiciled or resident in Quebec, who perform work outside Quebec for an employer whose residence, domicile, undertaking, head office or office is in Quebec. Previously, the LSA only covered such employees if they were not entitled to a minimum wage under the law of the jurisdiction where they work.

Psychological harassment

Quebec will become the first jurisdiction in North America to expressly provide for remedies against psychological harassment in its labour legislation. Indeed, new provisions of the LSA will stipulate that all employees have a right to a workplace free from psychological harassment. In addition, employers will be required to take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it. Psychological harassment is defined as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee”. A single serious incident of such behaviour could also be deemed to be psychological harassment if it has a lasting harmful effect on an employee.

As a general rule, an employee who believes he/she has been a victim of psychological harassment, or a non-profit organization dedicated to the defence of employees' rights acting on behalf and with the consent of one or more employees, will be able to file a written complaint with the Labour Standards Board (*Commission des normes du travail*) (CNT) within 90 days of the last incidence of the offending behaviour. On receipt of a complaint—unless it is frivolous or made in bad faith—the CNT will be responsible for conducting an inquiry. It will also be able, at any time during the inquiry and with the consent of the parties, to request the Minister of Labour to appoint a mediator for the purpose of trying to reach a settlement. At the employee's request, the CNT will be able to assist and advise him/her during the mediation. Further, if the employee is still bound to the employer by a contract of employment, he/she will be deemed to be at work during the mediation sessions.

If the CNT, following an inquiry and where no settlement has been reached between the parties, agrees to pursue the complaint, it will be able to refer the latter to the Labour Relations Board (*Commission des relations du travail*) (CRT). It will also be possible for the CNT to represent an employee before the CRT. Should the CNT refuse to take action following a complaint, the employee, or an employees' rights organization, could nonetheless make a written request to the CNT to refer the complaint to the CRT.

If it considers that the employee has been a victim of psychological harassment and that the employer has failed to fulfill its legal obligations, the CRT will have the power to render any decision it believes fair and reasonable considering all the circumstances of the matter. In particular, it will be able to order the employer to reinstate the employee, to take the necessary action to put a stop to the harassment, to pay the employee an indemnity for loss of employment or to modify the disciplinary record of the employee who was a victim of psychological harassment. The CRT will also have the power to

order an employer to pay the employee an indemnity of up to the amount of wages lost, to pay punitive and moral damages to the employee, and to pay, for a reasonable period of time it determines, for the psychological support needed by the employee; nevertheless, such payments may not be required for a period during which an employee suffers from an employment injury that results from psychological harassment. (An employee in such a situation could be compensated by the Occupational Health and Safety Commission (Commission de la santé et de la sécurité du travail.))

Certain provisions of the LSA regarding psychological harassment will be deemed to be an integral part of every collective agreement. An employee who wishes to file a complaint for psychological harassment will have to exercise the recourses provided for in his/her collective agreement, where applicable. However, parties to a collective agreement will be able to submit a joint application to the Minister of Labour for the appointment of a mediator. Lastly, these provisions will also be deemed to be part of the conditions of employment of employees appointed under the *Public Service Act* who are not governed by a collective agreement.

Protection of employee status

A new section stipulates that an employee "is entitled to retain the status of employee where the changes made by the employer to the mode of operation of the enterprise do not change that status into that of a contractor without employee status". A recourse is also provided for. An employee who disagrees with his/her employer about the consequences of these changes on his/her employee status may file a complaint in writing with the CNT. Following an inquiry, the complaint may be referred to the CRT for it to rule, within 60 days of the filing of the complaint at its offices, on the consequences of the changes on the status of the employee.

Absences for family reasons

Two important changes have been made to provisions pertaining to absences for obligations related to a child. First, an employee is now allowed to be absent from work not only to take care of a child who is a minor, but also when he/she must fulfil obligations related to the care, health or education of his/her child (regardless of age) or the child of his/her spouse, or because of the state of health of his/her spouse, father, mother, sibling, or a grandparent. Secondly, the maximum number of unpaid days of job-protected absence for family reasons has been increased from five to ten per year. An employee is required to advise his/her employer of the absence as soon as possible and to take reasonable steps within his/her power to limit the use and duration of such leave.

In addition, a new provision allows employees who have completed at least three months of uninterrupted service to be absent from work, without pay, for a period of up to 12 weeks over a period of 12 months when they must stay with their child, spouse, spouse's child, father, mother, sibling or grandparent because of a serious illness or a serious accident. It is possible to extend this period of unpaid absence to 104 weeks where an employee's child, if a minor, has a serious and potentially fatal illness, attested by a medical certificate. An employee must advise his/her employer of such an absence as soon as possible and, at the request of the latter, provide a document justifying the absence. While absent from work, employees are entitled to maintain their participation in any group insurance and pension plans recognized in their place of employment, as

long as they continue to regularly pay their usual contributions (in which case the employer must also pay its share of premiums). At the end of an absence, an employer must reinstate the employee in his/her regular position, with the same benefits and the wages to which the employee would have been entitled had he/she remained at work. If the position no longer exists, or if the employee would have been affected by dismissals or layoffs were it not for the absence, the employee retains all rights and benefits to which he/she would have been entitled had he/she been at work (particularly as regards return to work procedures and any applicable compensation).

Finally, with respect to absences owing to a death in the family, employees are now entitled to an additional day off work without pay in the event of the death or funeral of their spouse, child, the child of their spouse, their father, mother, brother or sister. Hence, in such a circumstance, employees are eligible to take a total of one day off without reduction in pay and four days off without pay.

Absences because of sickness or accident

The period during which an employee may be absent from work without pay, in case of a personal illness or accident, has been increased from 17 to 26 weeks over a period of 12 months (unless provisions of the *Act respecting industrial accidents and occupational diseases* apply to the illness or accident, in which case the LSA does not apply). The employee must advise the employer as soon as possible of the absence and the reasons therefor. As is the case for absences owing to serious illnesses or accidents involving family members (see above), employees can maintain certain benefits during their absence and are entitled to reinstatement in their regular position. However, the LSA provides that an employer may dismiss, suspend or transfer an employee if the consequences of the sickness or accident or the repetitive nature of the absences constitute good and sufficient cause in the circumstances. Furthermore, the government has the power to fix, by regulation, the other benefits an employee may receive during an absence owing to sickness or accident.

Leaves for parental reasons

Bill 143 contains a number of amendments intended to harmonize the LSA's provisions with those of the federal *Employment Insurance Act* and Quebec's *Act respecting parental insurance* (the latter, adopted in 2001, has not yet come into effect). For instance, the LSA will provide for a new unpaid paternity leave of five consecutive weeks. An employee will be entitled to such a leave on the birth of his child. The leave will have to be taken in the period starting the week on which the child is born and ending 52 weeks after that week. At the end of such a leave, an employee will have the right to be reinstated in his regular position.

As was previously provided for in the LSA, an employee is also entitled to take up to five days off work on the birth or the adoption of a child (the first two days being paid for an employee credited with at least 60 days of uninterrupted service). However, an amendment has extended this right to employees when a termination of pregnancy occurs in or after the twentieth week of pregnancy.

Provisions of the *Regulation respecting labour standards* concerning maternity leave duration have been incorporated in the LSA, with some modifications. For instance, should a maternity leave start on the week of delivery, that week is not taken into account when calculating the duration of the leave. Additionally, if required due to the

state of health of the mother or child, a maternity leave may be extended for a duration indicated in a medical certificate. The previous six-week limit for such an extension has therefore been removed. Should a termination of pregnancy occur before the beginning of the 20th week preceding the expected date of birth, the duration of a special maternity leave may exceed three weeks if a medical certificate attests to the need of extending the leave. Moreover, a new section allows an employee, following an agreement with her employer, to suspend her maternity leave for a period during which her child is hospitalized. Lastly, an employee is entitled to a special maternity leave when there is a risk of termination of pregnancy or a risk to the health of the mother or the unborn child. Where applicable, the “regular” 18-week maternity leave is deemed to have started from the beginning of the fourth week (as opposed to the eighth week, as was prescribed previously) preceding the expected date of birth.

Amendments have also brought changes to the LSA’s parental leave provisions. On one hand, their scope has been broadened to cover the adoption of a child under 18 years of age who is not the child of the employee’s spouse (previously, the adoption of a child who has reached or exceeded the age of compulsory school attendance did not give entitlement to parental leave). On the other hand, as is the case for absences owing to serious illnesses or accidents in the family (see above), an employee may maintain certain benefits during his/her absence and has the right to be reinstated in his/her regular position. The government has the power to determine, by regulation, other benefits that can be maintained during an employee’s parental leave and to specify circumstances in which a parental leave may terminate 104 weeks after the birth or adoption of a child. A new provision also enables an employee, with the employer’s consent, to return to work on a part-time basis or intermittently during a parental leave. Lastly, other amendments prescribe that a parental leave may start at the earliest on the “week” (as opposed to the “day”) of the birth of a newborn or the “week” in which an adopted child is entrusted to the employee and, also, that notice requirements for parental leave do not apply if the employee must stay with the mother because of her state of health.

Hours of work

The LSA provides for a new right of refusal with respect to overtime hours. It allows employees, in general, to refuse to work more than four hours in excess of their regular daily working hours or more than 14 hours per 24-hour period—whichever is the shortest period—or more than 50 hours per week. An employee whose hours of work are flexible or non-continuous is allowed to refuse to work more than 12 hours per 24-hour period. For employees working in an isolated area or in the James Bay territory, the right to refuse overtime applies to hours exceeding 60 per week. There are nevertheless some exceptions. First, this right of refusal is in certain cases subject to section 53 of the LSA, which concerns the staggering of working hours on a basis other than a weekly basis. Secondly, this right may not be exercised in defined emergency situations (danger to life, health or safety of workers or of the population; risk of destruction or serious deterioration of property; or other fortuitous events) or if the refusal is inconsistent with the employee’s professional code of ethics.

In addition, an employer is prohibited from dismissing or otherwise taking reprisals against an employee for refusing to work beyond his/her regular hours of work to fulfill obligations related to his/her spouse, child, spouse’s child, father, mother, sibling, or a grandparent. Nevertheless, this only applies where the employee has taken reasonable steps within his/her power to assume those obligations otherwise.

Weekly rest periods

Minimum weekly rest periods have been increased from 24 to 32 consecutive hours. With respect to an agricultural worker, this period can be postponed to the following week, but only with his/her consent.

Statutory general holidays²

Bill 143 has made two significant amendments to the LSA's provisions regarding statutory general holidays. On the one hand, it has eliminated the bulk of eligibility requirements: it is no longer necessary for a statutory general holiday to coincide with the employee's working day or for the latter to have completed 60 days of uninterrupted service to qualify for a statutory general holiday. On the other hand, a new formula applies to the calculation of the indemnity for a statutory general holiday. Thus, it normally must be equivalent to at least 1/20 of wages earned by the employee in the four complete pay weeks preceding the week in which the holiday falls, excluding overtime. However, employees remunerated in whole or in part on a commission basis are entitled to an indemnity equal to 1/60 of wages earned during the 12 complete weeks of pay preceding the week in which the holiday falls. The indemnity is calculated in the same way with respect to St. John the Baptist Day under an amendment to the *National Holiday Act*.

Another amendment specifies certain conditions that must be met when calculating the indemnity of an employee who receives tips and who is covered by a collective agreement or decree.

Annual leave with pay

Two additional paragraphs have been inserted to give more flexibility in determining when an annual leave can be taken. As a result, an employer may allow an employee, at the request of the latter, to take part or all of the annual leave during, rather than after, the reference year. An employer may also agree to defer an employee's annual leave to the following year, if the employee is absent at the end of the 12 months following the end of the reference year by reason of sickness or accident, or for family or parental matters. Should the annual leave not be deferred, the employer must pay to the employee the indemnity to which the latter is entitled.

An employer is also permitted, in regards to an agricultural worker hired on a daily basis, to pay the annual leave indemnity at the same time as the employee's wages.

Moreover, as is the case with respect to maternity leave, the LSA will prescribe measures to ensure that an annual leave indemnity is not reduced by reason of an absence related to a paternity leave.

² With respect to statutory general holidays, Order 1322-2002 designated as "Journée nationale des Patriotes" (National Patriotes' Day) the holiday that falls on the Monday preceding May 25 (known as Victoria Day in the other Canadian jurisdictions).

Payment of wages (employees earning tips)

The LSA now provides that an employer must pay an employee earning tips at least the prescribed minimum wage, regardless of gratuities received. In addition, an employer is not allowed to require that an employee pay credit card costs related to tips. Also, employers are prohibited from imposing an arrangement to share gratuities among employees or from intervening in any manner in the establishment of a tip-sharing arrangement. To be permitted, such an arrangement must result solely from the free and voluntary consent of the employees entitled to gratuities or tips.

Payment of uniform, costs related to the performance of a contract, travel expenses, and costs for training required by the employer

New provisions prohibit an employer from requiring an employee to pay for special clothing that identifies the latter with the establishment of the employer, or requiring that an employee purchase clothing or accessories that are items in the employer's trade.

Moreover, an employer may not require an amount of money from an employee for the purchase, use or maintenance of material, equipment, raw materials or merchandise, if this would result in the employee receiving less than the minimum wage. Nor is an employer allowed to require an amount of money from an employee to pay for expenses related to the operations or to mandatory employment-related costs of the enterprise. The LSA also provides for the reimbursement of reasonable expenses incurred by an employee in relation to travel or training required by the employer. Any time spent in relation to travel, a trial period or training required by the employer must also be counted as time worked.

Collective dismissals

Bill 143 has transferred to the LSA the provisions of the *Act respecting manpower vocational training and qualification* pertaining to collective dismissals. At the same time, it has modified their content to a certain extent.

- The LSA now specifies that a collective dismissal constitutes a termination of employment involving at least 10 employees *of the same establishment* in a period of two consecutive months. Formerly, collective dismissal provisions applied to an employer who dismissed employees at one or more establishments in a given region.
- These provisions do not apply to establishments whose activities are seasonal or intermittent or to layoffs for a period of less than six months, as was previously the case. But, under the LSA, they now also exclude employees who have less than three months of uninterrupted service, whose contract for a fixed term or for a specific undertaking expires, or who have committed a serious fault. Employees in the public service are also excluded.
- The minimum notice period that an employer must give before proceeding with a collective dismissal is now calculated in weeks rather than months. Thus, the required notice period is eight weeks for a collective dismissal involving 10 to 99 employees, 12 weeks for a dismissal involving 100 to 299 employees, and 16 weeks when a termination concerns 300 employees or more.
- Instead of giving the notice of collective dismissal to the Minister of Labour, an employer must now send it to the Minister of Employment and Social Solidarity and

transmit a copy to the Labour Standards Board as well as to any certified association representing the employees affected by the dismissal. The notice must also be posted in a conspicuous and readily accessible place in the establishment concerned.

- An employer that fails to give sufficient notice is now required to pay to each dismissed employee an indemnity equivalent to his/her regular wages, excluding overtime, for a period equal to the difference between the period of notice actually given and the minimum period prescribed by the LSA. This indemnity must be paid at the time of the dismissal, six months after the beginning of a layoff of indeterminate length, or once a layoff expected to last less than six months exceeds that period. However, an employee is not entitled to cumulate this indemnity with the indemnity provided for in cases of individual dismissals (i.e., under section 83 of the LSA): the employee is entitled to the greater of the two indemnities. Moreover, an employer is not required to pay an indemnity in case of a superior force or where an unforeseeable event prevents it from giving the required notice for a collective dismissal.
- An employer that does not give sufficient notice is also liable to a fine of \$1,500 per week or part of a week of failure to comply or late compliance. The fine must be paid into the labour market development fund administered by the Ministry of Employment and Social Solidarity.
- During the period of notice, an employer is not entitled to change either the wages of an employee affected by the collective dismissal or, where applicable, the group insurance and pension plans recognized in his/her place of employment without the written consent of the employee or the certified association that represents him/her.
- The LSA specifies the mission, composition and financing of "reclassification assistance committees". It also indicates explicitly that the parties involved (i.e., the employer and the certified association or, should there be no such association, the representatives chosen by the employees affected by the collective dismissal) are required to collaborate in carrying out the committee's mission. The establishment of a reclassification assistance committee is not required where a collective dismissal involves less than 50 employees. The Minister of Employment and Social Solidarity, on the conditions he/she determines and after giving the interested parties an opportunity to present observations, can also exempt an employer from part or all of the provisions related to reclassification assistance committees, if the employer offers, to employees affected by a collective dismissal, work reinsertion assistance that meets or surpasses the requirements of the LSA.

Recourse against dismissals not made for good and sufficient cause

The minimum period of uninterrupted service that is required to be entitled to present a complaint regarding a dismissal not made for good and sufficient cause has been reduced from three to two years. Consequently, this has expanded accessibility to such recourse.

It should be noted that a person whose exclusive duty is to take care of or provide care to a child or to a sick, handicapped or aged person, and who is considered by the Labour Relations Board to have been dismissed without good and sufficient cause, is only entitled to an indemnity corresponding to the wages and other benefits he/she would have earned were it not for the dismissal. The same provision also covers domestic workers; thus, the limit that previously applied to the amount of the indemnity they can receive (i.e., three months of wages and benefits) has been eliminated.

Recourse against prohibited practices

A paragraph has been added to the list of prohibited practices stipulated in the LSA. Its aim is to protect an employee against dismissal or other forms of reprisal on the ground that the CNT is conducting an inquiry in an establishment of the employer.

In addition, as mentioned earlier under "Hours of Work", employers are prohibited from taking any reprisals against an employee who refuses to work beyond his/her regular hours of work to fulfill certain family-related obligations.

Furthermore, as well as prohibiting an employer or its agent from dismissing, suspending, or retiring an employee by reason of age or years of service, the LSA now also forbids discrimination or reprisals against an employee on the same grounds.

Administration of the LSA

Notwithstanding adjustments required because of additional standards and the broader scope of the LSA, the CNT has been given new powers and responsibilities related to the preparation and dissemination of information documents pertaining to the LSA.

Other amendments

Provisions regarding the creation of a special fund to reimburse employees for lost wages in case of their employer's bankruptcy have been removed. These provisions, initially adopted in 1979, never came into effect.

In addition, a new provision has been added to the *Act respecting the Ministère du Travail*. As a result, the Minister of Labour must conduct or commission studies on changes in conditions of employment in Quebec and make such studies available every five years, in collaboration with the bodies concerned.

Finally, Bill 43 has made a number of consequential amendments to the LSA as well as to other statutes, such as the *Act respecting industrial accidents and occupational diseases*, the *Labour Code* and the *Act respecting manpower vocational training and qualification*.

Coming into force

Most provisions described above came into force on May 1, 2003. Provisions regarding sitters and those pertaining to psychological harassment will become effective on June 1, 2004. Finally, provisions related to paternity leave will come into effect on the same date as section 9 ("Paternity benefits") of the *Act respecting parental insurance*.

Regulatory changes

In light of the legislative amendments mentioned above, the Government of Quebec also adopted the *Regulation to amend the Regulation respecting labour standards and to revoke the Regulation respecting the notice of collective dismissal*. It came into effect on June 26, 2003.

The purpose of this Regulation was to harmonize the provisions of the *Regulation respecting labour standards* (LSR) with those of the *Act to amend the Act respecting labour standards and other legislative provisions*.

The new Regulation has amended the definition of “employee who generally receives gratuities” to restrict its scope. Hence, “employee who receives gratuities or tips” now refers to an “employee who generally receives gratuities or tips” and who works: in a tourist lodging establishment, including a campground; in a place where alcoholic beverages are sold for consumption on the premises; for an enterprise that sells, delivers or serves meals to be eaten off the premises; or in a restaurant (except if it is an establishment where customers order or choose products at a service counter and pay before eating).

The Regulation has also repealed many of the LSR's provisions. Firstly, it has shortened the list of categories of employees who, pursuant to section 2 of the LSR, are excluded from minimum wage provisions. As a result, supernumerary employees hired on an occasional basis for harvest work are now entitled to the minimum wage. However, the exclusion has been maintained for employees principally involved in non-mechanized operations linked to the harvesting of processing vegetables and fruit.

Secondly, the new Regulation has revoked sections 5 and 8 of the LSR. This has removed the special minimum wage rate and the higher threshold for entitlement to overtime pay (i.e., the 49-hour standard workweek) that previously applied to domestic workers living in their employer's home. Consequently, these employees are now entitled to the general minimum wage rate and to the 40-hour standard workweek.

Thirdly, Division VI (sections 15 to 35) of the LSR, which pertained to maternity leave, has been repealed. This is essentially a housekeeping amendment. Indeed, most of these provisions of the LSR were transferred to the *Act respecting labour standards* and therefore became inoperative on May 1, 2003.

A new Division regarding collective dismissals was also added to the LSR. A section specifies that an employer that must provide a notice of collective dismissal under the *Act respecting labour standards* must send it by mail to the operations branch of Emploi-Québec. The notice takes effect from the date on which it has been posted. Another section stipulates what information the notice must contain; this includes the reasons and the anticipated date for the collective dismissal as well as the number of employees likely to be affected. The *Regulation respecting the notice of collective dismissal*, for its part, has been revoked.

The Legislature of **Prince Edward Island** passed *An Act to Amend the Employment Standards Act* (Bill 47), which received Royal Assent on May 23, 2003. It will come into force by proclamation.

This Act will bring a number of amendments to Prince Edward Island's *Employment Standards Act* (ESA). More specifically, it will increase the number of paid statutory holidays, introduce new family leave and sick leave provisions, extend the scope of bereavement leave provisions to cover extended family members, and raise the minimum termination notice that must be given to long-service employees.

Paid Holidays

Remembrance Day will be added to the list of paid holidays provided for in the ESA. Employees who meet eligibility requirements will therefore be entitled to six paid holidays per year.

Family Leave

Employees who have been employed by their employer for a continuous period of at least six months will be entitled to take a total of up to three days of unpaid family leave during a 12-month period. An employee will be able to take such leave to meet responsibilities related to the health or care of specified family members, namely a spouse, common-law spouse, child, parent, sibling, grandparent, grandchild, brother-in-law, sister-in-law, mother-in-law, father-in-law, son-in-law or daughter-in-law. An employee who intends to take a family leave must advise his/her employer of the commencement date and anticipated duration of the leave.

Sick Leave

Employees who have been employed by their employer for a continuous period of six months or more will also be entitled to three days of unpaid sick leave during a 12-month period. The employer will be able to require that the employee provide a medical certificate if the latter takes a sick leave of three consecutive days in length. The employee will also have to advise his/her employer of the anticipated duration of the leave.

Bereavement Leave

Currently, the ESA provides for up to three consecutive calendar days of leave without pay in the event of the death of a member of an employee's immediate family. An amendment will allow an employee to also take one unpaid day of leave on the death of a member of his/her extended family, namely a grandparent, grandchild or a specified in-law (see above under "Family Leave"). This leave will have to be taken during the period of bereavement and no later than the day of the funeral.

Notice of Termination

The minimum period of notice (or pay in lieu) that an employer must give before discharging or laying off a long-service employee will be raised from four weeks to six weeks for an employee who has been employed by the employer for a continuous period of at least 10 years, and to eight weeks for an employee who has completed at least 15 years of continuous service.

As is currently the case, a notice of termination will not be required when an employee is dismissed or laid off for just cause or for other reasons specified in the ESA (e.g., destruction of a plant, weather conditions).

In the year following passage of the *Employment Standards Amendment Act, 2002*, the government of **British Columbia** amended the province's *Employment Standards Regulation* (ESR) on three occasions.

British Columbia Regulation 307/2002, concerning minimum employment standards applicable to certain occupations and industries, record keeping requirements for specified employers and new penalties for contraventions to the *Employment Standards Act* (ESA), came into effect on November 30, 2002.

Record Keeping Requirements

The period during which employment agencies, farm labour contractors and talent agencies are required to keep records was reduced from three years to two years. This brought these record keeping requirements in line with those prescribed in the ESA for other employers.

Administrative Penalties

Minimum penalties for violations of the ESA or ESR are now \$500 for a first offence, \$2,500 for a second offence, and \$10,000 for a third offence. Previous penalties ranged from \$0 to \$500 (although a \$5,000 penalty could be imposed for contraventions related to the employment of children in the motion picture, television and television or radio advertising industries).

In contrast to previous penalties, the new fines represent a fixed amount. They are no longer multiplied, for specified contraventions, by the number of employees affected. In addition, the ESR now specifies that penalties can only be imposed when the Director of Employment Standards renders a determination. Therefore, no fines may be levied where a complaint is settled by means of the "Employment Standards Self-Help Kit" or through a mediated settlement agreement. Furthermore, the higher penalties (i.e., \$2,500 and \$10,000) only apply where an employer contravenes the same section of the Act or Regulation, *at the same location* (or involving the same employee), within three years of a previous violation.

Managers

The definition of "manager" was expanded to include persons whose principal employment responsibilities are to direct or supervise non-staff resources.

Employees of High Technology Companies

The ESR now defines a "high technology professional" as "an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment".³ This definition is broader than the one it replaced. First, it is based on the nature of work performed rather than specific job titles. Secondly, the ESR no longer stipulates, as it previously did, that an employee must receive stock options or other performance based pay, in addition to regular wages, to be deemed a "high technology professional". As was the case before, high technology professionals are not covered by the ESA's provisions regarding hours of work, overtime and statutory holidays (except for the prohibition on excessive hours).

³ This definition is identical to the definition of "information technology professional" found in Ontario's *Exemptions, Special Rules and Establishment of Minimum Wage Regulation* (pursuant to the *Employment Standards Act, 2000*).

Employees of a “high technology company” (as defined by the ESR) who are not high technology professionals are no longer excluded, as a whole, from the ESA’s overtime and weekly rest provisions. However, special rules apply if they enter into an averaging agreement with their employer; such an agreement is exempted from some of the following ESA requirements: it does not need to specify a daily work schedule; it can provide for a work schedule averaging more than 40 hours per week; and an employee it covers is not entitled to daily overtime pay (although the employee must still be paid at time-and-a-half for any applicable weekly overtime⁴).

Livestock Brand Inspectors, Taxi Drivers

Livestock brand inspectors and taxi drivers are now entitled to time-and-a-half for time worked in excess of 120 hours within a two-week period, compared to double time previously.

Truck Drivers

The overtime rate for long-haul truck drivers was reduced from double to 1 ½ times their regular wage for hours worked in excess of 60 in a week.

New provisions also cover “short-haul truck drivers”, defined as persons “employed to drive a truck, usually for a distance within a 160 km radius from their home terminal”. These employees are now entitled to the overtime rate (1 ½ times their regular wage) for hours in excess of nine hours in a day or 45 hours in a week.

Oil and Gas Field Workers

Overtime rates for the oil and gas well drilling and servicing industry have been aligned with the ESA’s general rules.

Specified first aid workers, water truck operators, vacuum workers and camp catering workers who are scheduled for a 24 hour shift and whose rest period is interrupted are now entitled, for the greater of either 2 hours or the hours actually worked during the interruption, to 1 ½ times their regular rate if total hours worked or earned on that day are 12 or less. The double rate only applies where total hours worked or earned exceed 12 hours in the day.

Silviculture Workers

Overtime rates for silviculture workers have been aligned with the ESA’s general overtime rules.

Instead of paying statutory holiday pay as provided for in the ESA, an employer may still pay a silviculture worker 3.6% of gross earnings on each pay cheque or multiply any applicable piece rate by 1.036. However, to meet the requirements of the ESA, employers no longer have the option of paying a silviculture worker a day’s pay, based

⁴ Under an averaging agreement, weekly overtime is payable where an employee’s total hours of work during the averaging period exceed an average of 40 hours per week. However, in calculating the total hours of work, only the first 12 hours worked by an employee in each day of the averaging period is to be counted.

on average earnings in the previous four weeks, for a statutory holiday not worked nor, if the employee works during the holiday, double the employee's piece rate or regular rate.

In addition, the ESR now stipulates that a silviculture worker must agree in writing before his/her employer can charge him/her a fee for lodging provided.

Fish Farm Workers

The ESR contains new provisions concerning fish farm workers. The latter, if they work or earn an average of at least 35 hours per week over a period of one to eight weeks specified by the employer before the work begins, are no longer covered by the ESA's overtime and weekly rest period provisions.

An employee who works at a fish farm site on a 24-hour live-in basis is entitled, in every period of 24 hours, to at least 12 hours of rest without pay, including a rest period of eight or more consecutive hours. If a rest period is interrupted, the employee must be paid the greater of two hours or the hours actually worked during the interruption at time-and-a-half, unless more than 12 hours in total were worked or earned on that day, in which case the employee is entitled to the double time rate. Moreover, an employee working on a 24-hour live-in basis must be paid overtime, at the rate of 1 ½ times his/her regular rate, for all hours worked in excess of an average of 40 hours per week (the hours being averaged over a one- to eight-week period specified by the employer before the work begins).

Mining Workers

Under new provisions, the employer of a person who works for a surface mining operation regulated by the *Mines Act* may institute a work schedule consisting of a cycle of four 12-hour work days followed by four days off, repeated over a period of eight consecutive weeks. Overtime is payable at double time for time worked in excess of 12 hours in a day, and at the rate of 1 ½ times an employee's regular rate for hours worked in excess of 40 hours per week, averaged over the eight-week period. Such a work schedule, if implemented, exempts the employer and employees it covers from the ESA's overtime and averaging agreement provisions.

Foster Care

A new section of the ESR stipulates that the ESA does not apply to persons who provide foster care in their place of residence, in situations that meet established criteria.

Flexible Work Schedules

Provisions of the ESR regarding flexible work schedules were deleted. This is a consequential amendment: flexible work schedule provisions in the ESA were repealed by the *Employment Standards Amendment Act, 2002*. The section of the ESR concerning the calculation of pro-rated holiday pay was also removed, since a new formula has been incorporated in the ESA.

Commission Salespersons

Salespersons paid entirely or partly by commission are now excluded from the ESA's overtime and statutory holiday pay provisions if all of the wages they have earned in a pay period (including base pay at straight time and commissions) exceeds the total amount to which they would have been entitled at their base rate (or the minimum wage, if greater) under these provisions. In practice, this means that sales commissions are not deemed to be part of a commission salesperson's regular wage when calculating overtime and statutory holiday pay, but can be added to the employee's base pay to determine whether overtime and holiday pay requirements have been met.

In addition, "high-end" commission salespersons (i.e., persons employed to sell, or sell lease arrangements for, automobiles, trucks, heavy industrial or agricultural equipment, recreation vehicles or campers, or sailing or motor vessels) were excluded from the ESA's provisions regarding minimum wage, statutory holidays, and hours of work and overtime (except the prohibition on excessive hours of work).

However, the government subsequently adopted *British Columbia Regulation 118/2003* that modified once again minimum wage and statutory holiday pay rules for employees paid entirely or partly by commission who sell certain vehicles.

Under the new Regulation, which came into effect on March 28, 2003, commission salespersons employed to sell—or sell lease arrangements for—automobiles or trucks are now covered by the ESA's statutory holiday provisions, unless their employer pays them 3.6% of their gross earnings for the pay period on each pay cheque. Employees earning commissions to sell recreation vehicles and campers, however, are still not entitled to statutory holidays or statutory holiday pay.

Commission salespersons employed to sell automobiles, trucks, recreation vehicles and campers must also be paid an amount at least equal to the minimum wage for their first 160 hours of work each month. Both commissions and other wages earned by an employee are to be taken into account when determining whether these minimum wage requirements are met.

Agricultural workers and farm labour contractors

Three more regulations (*British Columbia Regulations 195/2003, 196/2003 and 197/2003*) were adopted and came into effect on May 15, 2003. These Regulations have amended provisions of the ESR pertaining to agricultural workers and farm labour contractors.

- Provisions regarding hours of work and overtime no longer apply to farm workers, except for the prohibition on excessive hours of work (i.e., section 39 of the ESA). Previously, farm workers were entitled to 1½ times their regular wage for every hour worked in excess of 120 hours within a two-week period.
- Statutory holiday provisions in the ESR previously covered certain farm workers. They have been repealed so that all farm workers are now excluded from statutory holidays and statutory holiday pay. In addition, the minimum wage for farm workers employed on a piece work basis to hand harvest certain crops has been modified to reflect these changes. Minimum rates that must be paid to these employees, although still calculated on gross volume or weight picked, have been reduced by

3.6%, representing the statutory holiday pay to which farm workers were previously entitled.⁵

- A farm labour contractor who provides transportation to a job site for a farm worker it employs must pay the latter an amount equivalent to at least two hours at the minimum wage rate (compared to four hours previously) in the event no work is available at the site. (If it is greater, the employee is still entitled to the minimum wage rate for the time spent travelling to and from the job site.)
- The amount of security that must be posted to obtain a farm labour contractor's license has been reduced for contractors who have not contravened any "core requirement" of the *Employment Standards Act*—i.e., requirements concerning licensing, paydays, payroll records, vacation pay and the minimum wage—over a specified period. Thus, the standard amount of security (i.e., minimum hourly wage multiplied by 80, multiplied by the number of employees specified in the license) is reduced by a quarter (-25%) where no contravention has occurred for one year or more but less than two years, by one half (-50%) where there has been no contravention for 2 years or more but less than three years, and by three quarters (-75%) where the period of non-contravention is three years or more.
- The time limit for appealing a determination of the Director of Employment Standards regarding the non-issuance, cancellation or suspension of a farm labour contractor's license has been increased from 15 days to 30 days after the date of service of the determination, where it is served by registered mail, and from 8 days to 21 days where it is personally served.
- A farm labour contractor's license is now valid for one full year from the date on which it was issued. Previously, licenses expired on December 31 of the year of issue.

Included among other miscellaneous changes brought by the Regulations is a new formula for calculating interest on money received by the director or collected under a determination or order of the tribunal.

In addition to the above regulatory changes, a Bill was introduced to amend British Columbia's *Employment Standards Act*. Bill 37—the *Skills Development and Labour Statutes Amendment Act, 2003*—which received first reading on May 5, 2003 and is slated to be debated in the fall of 2003, deals with many provisions of the ESA, including those pertaining to the administration of the Act, the banking of overtime wages and, most importantly, the hiring of children.⁶

Employment of Children

Amendments to the ESA's provisions concerning the hiring of children were passed as part of the *Employment Standards Amendment Act, 2002* but have not yet come into force. Current provisions—which require that a permit be obtained from the Director of Employment Standards (the director) to employ a child under 15 years of age—would have been repealed and replaced by hiring or employment conditions set by regulation.

⁵ Before these changes, the minimum piece rate was deemed to include statutory holiday pay (3.6% of gross earnings) and vacation pay (4% of gross earnings). By deducting 3.6% from the piece rate amount (instead of subtracting the actual amount initially added as statutory holiday pay), the Regulation has in fact also reduced the "gross earnings" portion of the minimum rate—i.e., the amount not counting statutory holiday or vacation pay.

⁶ Bill 37 would also amend the *Workers Compensation Act*.

Bill 37 would repeal both the current provisions and the amendments mentioned above. A new section would require a person to obtain the written consent of a parent or guardian in order to employ a child under 15 years of age. Employing a child under 12 years of age would still require the permission of the director. The government would retain the power to make regulations establishing conditions of employment for children under 15 years of age to protect their health, safety, physical or emotional well-being, education or financial interests.

It should be noted that compulsory school attendance requirements under the *School Act* and age restrictions regarding certain occupations under occupational health and safety legislation would remain in place.

Minimum Wage Requirements

A new provision would prohibit an employer from deducting or withholding an amount from an employee's wages in one pay period to recover an amount that must be paid to the employee, in another pay period, to comply with minimum wage requirements.

Assignment of Wages

The director would no longer have the power to authorize an assignment of wages for reasons other than those specified in the ESA.

Banking of Overtime Wages

An employer would be allowed to close an employee's time bank after providing one month's notice to the employee. Within six months of closing the time bank, the employer would be required to pay the employee all overtime wages credited to the bank at the time it was closed, allow the employee to use the credited overtime wages to take time off with pay, or provide a combination of pay and time off.

In addition, the ESA would no longer require that overtime wages credited to an employee's time bank be paid or taken as time off with pay within a six-month time limit.

Administration of the ESA

Among other administrative changes, amendments contained in Bill 37 would:

- add a 30-day time limit for the director to vary or cancel a determination that has been appealed (counted from the date the director receives a copy of the appeal request);
- clarify that liability for unpaid wages extends to directors and officers of corporations, firms, syndicates or associations that are treated by the Director of Employment Standards as one employer under section 95 of the ESA;
- require that a person who wishes to appeal a determination of the director to the Employment Standards Tribunal deliver to the latter, in addition to a written request specifying the grounds for appeal and any prescribed appeal fee, a copy of the director's written reasons for the determination.

Coming into force

If passed, this Bill would come into force by proclamation.

As part of its 2003 budget, the **federal government** announced the creation of new compassionate family care leave benefits under the Employment Insurance program (EI) and the inclusion of related job-protection provisions in the *Canada Labour Code*.

A few months thereafter, Parliament passed the *Budget Implementation Act, 2003* (Bill C-28). It received Royal Assent on June 19, 2003.

Part 4 of the *Budget Implementation Act, 2003* (the Act) will amend the *Employment Insurance Act* and the *Employment Insurance (Fishing) Regulations* to add compassionate care benefits to the other special benefits provided under EI (i.e., maternity, parental and sickness benefits). Claimants who meet eligibility requirements⁷ will be entitled to take up to six weeks of compassionate care benefits within a 26 week period (or such shorter period as may be prescribed) to provide care or support to a defined family member⁸ where the latter, as attested by a medical certificate, has a serious medical condition with a significant risk of death within that period. Two or more individuals will be able to share the six weeks of benefits with respect to a family member. Only one waiting period of two weeks will have to be served prior to receiving benefits, whether or not they are shared.

This Act will also amend the *Canada Labour Code* to add a new section regarding compassionate care leave. Under these provisions, employees covered by the Code will be entitled to take up to eight weeks of leave to provide care or support to a defined family member⁹ if a qualified medical practitioner¹⁰ issues a certificate stating that the family member has a serious medical condition with a significant risk of death within a period of 26 weeks. It will be possible for two or more employees to share the eight weeks of leave where they wish to avail themselves of the Code's provisions to provide care or support to the same person.

Compassionate care leave will have to be taken within a specified period of 26 weeks (a shorter period may be set by regulation). However, should the family member die before the end of this period, the leave will not extend beyond the last day of the week in which the death occurs. Although the eight weeks of leave may be broken up, it will have to be taken in periods of at least one week's duration.

⁷ To be eligible for compassionate care benefits, a claimant must have contributed to the EI fund and worked at least 600 insurable hours in the previous 52 weeks or since the start of the last claim, whichever is shorter.

⁸ For the purpose of compassionate care benefits, "family member" is defined as the claimant's spouse or common-law partner, child (including the child of a spouse or common-law partner), or parent (including the spouse or common-law partner of the claimant's parent). This list of family members may be extended by regulation. A "common-law partner" means a person who has cohabited with the individual in a conjugal relationship for a period of at least one year.

⁹ The definition of "family member" will be the same under the *Canada Labour Code* as under the *Employment Insurance Act*. The Code's definition may be expanded by regulation.

¹⁰ A "qualified medical practitioner" is defined as "a person who is entitled to practise medicine under the laws of a jurisdiction in which care or treatment of the family member is provided". This definition may be expanded by regulation to include other classes of medical practitioners.

It should be mentioned that there will be no length of service or other eligibility requirements under the Code to qualify for compassionate care leave. For instance, an employee could take such a leave even if he/she is not entitled to collect EI benefits. Nor will the Code's provisions require that employees notify their employer prior to taking—or during—a compassionate care leave. An employee will nevertheless have to provide his/her employer a copy of the medical certificate if, within 15 days of returning to work, he/she is requested in writing to do so.

The employee job protections that currently apply with respect to maternity and parental leave will also cover employees taking a compassionate care leave. The latter will have the right to be informed of employment, promotion or training opportunities during the leave and to be reinstated in the same or in a comparable position when returning to work. Pension, health and disability benefits, as well as seniority, will continue to accumulate during the leave period. For the purpose of calculating other benefits, employment before and after the leave will be deemed to be continuous. Finally, employers will be prohibited from dismissing, suspending, laying off, demoting or disciplining an employee for taking a compassionate care leave, or from taking the leave into account in any decision to promote or train the employee.

These amendments will come into effect on a day to be set by order in council (expected date: January 4, 2004).

Bill C-46, *An Act to amend the Criminal Code (capital markets fraud and evidence-gathering)*, was also introduced in the House of Commons on June 12, 2003.

In addition to creating a new offence of prohibited insider trading and increasing maximum penalties for fraud and certain related offences, this Bill would add a new offence to the *Criminal Code* to prevent job-related reprisals against "whistleblowers".

This last measure would prohibit an employer, a person acting on behalf of an employer, or a person in a position of authority from taking disciplinary action, demoting, terminating or otherwise adversely affecting the employment of an employee, or threatening to do so, with the intent of compelling the employee not to provide—or retaliating against him/her for having provided—information concerning an offence believed to have been committed by the employer (or an officer, employee, or one or more directors of the employer) contrary to a federal or provincial/territorial Act or regulation. The maximum punishment for anyone found guilty of contravening the above provision would be five years of imprisonment.

If passed, these amendments to the *Criminal Code* would come into effect on a day to be fixed by order in council.

There were other significant—albeit less extensive—developments related to employment standards in various jurisdictions.

In **New Brunswick**, *An Act to Amend the Employment Standards Act* (Bill 27), which came into effect on February 21, 2003, added new minimum reporting wage provisions to the *Employment Standards Act* (ESA) while also making some administrative and housekeeping changes.

Minimum Reporting Wage

An employee whose terms and conditions of employment are not the subject of a collective agreement, whose regular wage rate is less than twice the minimum wage rate and who is regularly employed for more than three consecutive hours in a shift is now entitled to be paid the equivalent of at least three hours of work at the minimum wage rate when reporting for work as required by his/her employer. Should such an employee already have worked 44 hours or more in that week, he/she is entitled to reporting pay equivalent to at least three hours at one and a half times the minimum wage. The three hours of reporting pay is considered to be time worked.

Other Amendments

- Some technical amendments regarding the filing of certificates for unpaid wages have been brought to the ESA's wage protection provisions.
- A new provision allows the Minister of Training and Employment Development to appoint a Deputy Director of employment standards. The latter has the powers and duties of the Director of employment standards in his/her absence or when the office of Director is vacant.
- In addition to other record keeping obligations, the ESA now requires that employers maintain a record of any period during which an employee was on a leave of absence and the reason for the leave.
- Finally, the ESA provides for the expiration of attaching orders after a prescribed period. This period will have to be set by regulation.

Newfoundland and Labrador adopted Regulation 38/03 to amend the *Labour Standards Regulations*. This amendment repealed new overtime provisions that were slated to take effect on April 1, 2003. Under these provisions, the overtime rate would have been set at one and a half times an employee's regular rate of pay. Consequently, for an indefinite period, the overtime rate will remain fixed at \$9.00 per hour (i.e., one and a half times the provincial minimum wage rate).

A new subsection stipulates that overtime wages must nevertheless be paid at a rate of not less than one and a half times an employee's regular rate of pay where the employee is subject to a collective agreement, negotiated after December 6, 2001,¹¹ which refers to the overtime pay changes originally scheduled to take effect on April 1, 2003.

In **Ontario**, the *Government Efficiency Act, 2002* (Bill 179, hereafter referred to as GEA 2002), which came into force on November 26, 2002, amended numerous provincial laws, including the *Employment Standards Act, 2000* (ESA 2000). Most changes to the latter Act were of a technical nature. The intent was to clarify some provisions as well as to reduce certain administrative requirements for employers.

¹¹ This is the date on which the former Minister of Labour announced changes to provincial labour standards, including overtime provisions.

Vacation and Vacation Pay Requirements

The GEA 2002 has modified the manner in which entitlement to vacation time is determined in particular circumstances. It has also altered record keeping and vacation pay reporting requirements.

- The ESA 2000 now expressly allows employers to designate an “alternative vacation entitlement year” (i.e., a common vacation anniversary date), whereby employees’ vacation time and vacation pay entitlement are calculated on the basis of a recurring 12-month period starting on a date set by their employer. (In contrast, a “standard vacation entitlement year” refers to a 12-month period starting on the first day of employment of an individual employee—which corresponds to the system previously recognized under the ESA 2000.) Where an employee’s start date does not coincide with the first day of his/her first alternative vacation entitlement year, the employee is entitled to a pro-rated vacation and vacation pay for the “stub period” (i.e., the period of time between these two dates), to be taken within 10 months after the end of that period.
- Employers no longer have to provide a vacation pay statement each time an employee takes a vacation. Instead, they are required to keep a record of each employee’s vacation time and vacation pay entitlements for a period of at least three years. On written request, an employee is entitled to receive this information from his/her employer after the end of a vacation entitlement year or stub period. An employer is not required to provide such information to an employee more than once per vacation entitlement year or stub period.
- When an employee does not take his/her vacation in complete weeks and does not have a regular work week, the number of days of vacation to which he/she is entitled is to be calculated on the basis of the average number of days worked per week in the most recently completed vacation entitlement year (or stub period, as the case may be). Previously, entitlement was based on the average number of days worked per week in a specified four-month period.
- The limitation period for recovery of unpaid vacation pay has been extended from six months to 12 months.

Public Holidays

Provisions relating to public holiday pay have been clarified to take into account certain situations.

- A new subsection specifies that employees who perform all of the work that they agreed or were required to do on a public holiday, but who fail without reasonable cause to work all of their regularly scheduled day of work preceding or following the public holiday, have to be paid premium pay for hours worked on the public holiday but are not entitled to public holiday pay or to another day off with pay.
- An employee on a temporary layoff or taking a maternity or parental leave when a public holiday occurs must be paid public holiday pay (if any is due), but is not entitled to a substitute day off work. It should be noted that, under the ESA 2000, minimum public holiday pay is calculated by adding the amount of wages and vacation pay earned by the employee in the four work weeks preceding the work week in which the public holiday falls, and dividing the sum by 20.

Termination and Severance of Employment

With respect to termination and severance of employment, the ESA 2000 now prescribes what is deemed to be a week of layoff for employees who do not have a regular work week. It also indicates how weeks in which an employee is unable to work for various reasons should be taken into account in determining whether or not a layoff is temporary, and what constitutes severance of employment.

- An employee who does not have a regular work week is considered to be laid off for a week if he/she earned, in that week, less than one-half¹² or one-quarter¹³ the weekly average amount earned in a specified period of 12 consecutive weeks. Where such a period includes an “excluded week”,¹⁴ the “average amount earned” is based on average weekly earnings in the period’s non-excluded weeks.
- Moreover, when determining whether or not an employee’s layoff is temporary, an excluded week is counted as a week worked. Under the ESA 2000, a temporary layoff is defined as 13 weeks (or less) of layoff in a period of 20 consecutive weeks or, in certain circumstances, 35 weeks (or less) of layoff in a period of 52 consecutive weeks.
- An amendment has clarified that severance of employment occurs when an employer is unable to continue employing an employee.
- In addition to its other regulatory powers, the Lieutenant Governor in Council can now make a regulation providing that certain payments to an employee (e.g., pension and insurance benefits, bonuses, or similar arrangements) be taken or not taken into account when determining an employee’s entitlement to notice of termination, termination pay or severance pay.
- Furthermore, a new provision specifies that, when an employee’s employment ends, the employer is required to provide him/her a statement of wages—including information on termination, severance and vacation pay—no later than the date on which outstanding wages must be paid.

Other – Miscellaneous Provisions

The GEA 2002 has also modified several other sections of the ESA 2000, including provisions regarding rest periods, averaging agreements and enforcement of the Act.

- With respect to *rest periods*, an amendment has clarified that employees are entitled to 11 *consecutive* hours free from work every day.
- The provision regarding *averaging agreements* (subsection 22(2)) has been clarified. It now stipulates that an employer and an employee may agree to average hours of work over “separate, non-overlapping, contiguous periods” of not more than four *consecutive* weeks each.
- In terms of the ESA 2000’s enforcement provisions, amendments have clarified that warrants must be executed between 8 a.m. and 8 p.m. and that, barring an appeal,

¹² This applies when determining whether employment has been terminated for notice of termination or termination pay purposes.

¹³ This applies when determining whether employment has been severed for severance pay purposes.

¹⁴ An “excluded week” is defined as a week during which, *for one or more days*, an employee is not able to work, is not available for work, is subject to a disciplinary suspension or is not provided with work because of a strike or lockout at the place of employment or elsewhere.

the deadline for payment of a fine and related fees is 30 days after the day notice of contravention has been *served*. (Previously, payment had to be made within 30 days after the day a notice of contravention had been *issued*.)

- In addition, references to amounts “paid” or “received”, as they appeared before in the definition of “regular rate” and various other provisions, have been changed to amounts “earned”. This is meant to ensure that employees are not deprived of certain entitlements, such as overtime or severance pay, if their employer fails to pay them all of their wages.
- Finally, the GEA 2002 contained several transitional provisions and consequential amendments.

The SARS outbreak in Ontario and the ensuing efforts to recover from its health and economic impacts also led to legislative and regulatory changes related to employment standards.

The *SARS Assistance and Recovery Strategy Act, 2003* (Bill 1) was passed on the same day it was introduced in the Legislature (April 30, 2003) and came into effect on May 5, 2003. In addition to amending the *Emergency Management Act* and the *Health Protection and Promotion Act*, this Act provided a temporary sales tax exemption for segments of the tourism sector (with respect to hotels and similar transient accommodation and to admissions to places of amusement) and afforded job protection to employees and other workers in relation to SARS-related leaves of absence.

Under Part I of the new Act, an “employee” (the term includes dependent contractors—as defined in the *Labour Relations Act, 1995*—police officers and any other prescribed individual) is entitled to an unpaid SARS emergency leave for any period during which he/she is unable to work because he/she:

- is under individual medical investigation, supervision or treatment related to SARS;
- is acting in accordance with a SARS related order from a medical officer of health or the Ontario Court of Justice under the *Health Protection and Promotion Act*;
- was directed by his/her employer not to show up for work out of concern that he/she may expose other individuals in the workplace to SARS;
- is needed to provide care or assistance to a specified relative (including a grandparent, grandchild, sibling, or any other relative who is dependent on the employee for care or assistance);
- is in quarantine or isolation or is subject to a control measure in accordance with SARS-related information or directions issued to the public by the Commissioner of Public Security, a public health official, a physician or a nurse or by Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health. In such a case, a person taking a SARS emergency leave must, within two days, contact a public health official or a physician to receive directions on whether to continue his/her absence from work, and to arrange to receive a written confirmation of those directions.

This leave is in addition to the 10-day emergency leave entitlement provided under section 50 of the *Employment Standards Act, 2000* (ESA 2000).

A person taking a SARS emergency leave must advise his/her employer as soon as possible after the leave begins. At the request of the employer, reasonable evidence of entitlement to the leave must be provided after the leave has ended.

Participation in specified benefit schemes—pension, life insurance, accidental death, extended health, and dental plans—and employer contributions for these plans are to be maintained during the period of leave, unless the employee indicates in writing that he/she does not intend to continue his/her contributions. An employee's length of service and seniority also continue to accumulate while on leave.

On conclusion of an employee's leave, the employer must reinstate the employee in the position he/she most recently held, if it still exists, or in a comparable position otherwise. The employee's rate of pay must be equal to the rate of pay he/she most recently earned with the employer or, if greater, the rate the employee would be earning had he/she worked throughout the leave. It should be noted, however, that an employer may still terminate the employment of an employee for reasons unrelated to the leave, or because of a workforce reduction caused by the impact of SARS on the employer's business.

The administration and enforcement provisions of the ESA 2000 apply with respect to this Act. Employers are prohibited from taking reprisals against an employee who takes or intends to take leave, attempts to exercise his/her rights under the Act, or participates in the Act's enforcement procedures.

The application of this Act is retroactive, covering employees who were absent from work because of SARS on March 26, 2003 or thereafter. An eligible employee who had taken an emergency leave under the ESA 2000 for SARS-related reasons is deemed to have taken a SARS emergency leave instead.

In the lead up to the Toronto SARS concert, the Ontario government also adopted Regulation 294/03, *Terms and Condition of Employment in Defined Industries—City of Toronto Public Transit*. This Regulation modified certain terms and conditions of employment, provided by the *Employment Standards Act, 2000*, with respect to employers and employees in public transit services in the City of Toronto for the period from July 29 to August 5, 2003. Under these temporary terms and conditions of employment, an employer was allowed to permit an employee to work any number of hours in excess of the daily and weekly limits specified in the Act, provided the employee agreed to work those hours and did not work more than 78 hours in a week. The regulation also allowed for the minimum 11 consecutive hours free from performing work in each day to be reduced to 8 consecutive hours.

In **Alberta**, a private member's bill, the *School (Compulsory Attendance) Amendment Act, 2003* (Bill 203) was passed on April 7, 2003.

Once proclaimed into force, this Act will raise the age of compulsory school attendance from 16 years to 17 years. It will also restrict the grounds on which a student may be excused from attending school. School boards and the Minister of Education will no longer have the authority to excuse a student, at the request of his/her parent(s), from attending school for a period of time. Both of these changes could have an effect on the employment of children in Alberta.

An additional amendment will eliminate provincial attendance boards.

Nova Scotia's *Regulation Respecting Labour Standards* was amended by Regulation 131/2002. A new subsection specifies that customer contact centres, where they communicate advice by telecommunications or internet technologies to assist in the repair of an article or to respond to a customer complaint or inquiry, are considered to be "industrial undertakings" under the *Labour Standards Code*.

In a separate Regulation, Nova Scotia also declared the Province of Newfoundland and Labrador and the Territory of Nunavut as reciprocating "provinces" with respect to the enforcement of orders, judgements or certificates for the payment of wages (as provided for under section 89A of the *Labour Standards Code*).

Similar provisions regarding the reciprocal enforcement of orders were adopted by **Prince Edward Island** (with respect to Yukon and Newfoundland and Labrador) and **Yukon** (with respect to Prince Edward Island).

C. **Minimum Wages**

Changes to minimum wage provisions were made, or announced, in four jurisdictions.

In **Nunavut**, the *Act to Amend the Labour Standards Act* (Bill 21) raised the territorial minimum wage rate to \$8.50 an hour. It also eliminated "sub-minimum" rates that previously applied to employees who work in certain places or communities and to employees under the age of 16. These changes took effect on March 3, 2003.

The Legislature of the **Northwest Territories** passed very similar legislation (Bill 17), which will come into force on December 28, 2003. This Act will amend the *Labour Standards Act* to eliminate the different minimum wage rates based on age and place of employment, and will also increase the minimum wage to one fixed rate of \$8.25 an hour.

In **Nova Scotia**, three minimum wage orders were adopted (Regulations 88/2003, 89/2003 and 90/2003). These concern the general minimum rate as well as the rates applicable to the road building and heavy construction industry and to logging and forest operations.

The general minimum wage rate will increase by 25 cents on October 1, 2003 and by a further 25 cents on April 1, 2004. As a result, the general minimum wage will rise from \$6.00 to \$6.50 an hour, while the rate for inexperienced employees will grow from \$5.55 to \$6.05 an hour. (Inexperienced employees are employees who have not been employed for more than three months by any employer to do the work for which they are currently employed, and who have been employed by their current employer for less than three calendar months.)

The minimum wage rate for employees engaged in road building and heavy construction and for "time workers" employed in a logging or forest operation will also increase to \$6.25 an hour on October 1, 2003, and \$6.50 on April 1, 2004. Other workers employed in a logging or forest operation who have no fixed work week or whose hours of work are unverifiable (e.g., camp guardians, cooks, stable hands) will be entitled to at least \$1,224.00 per month as of October 1, 2003, and \$1,273.00 as of April 1, 2004 (compared to \$1,175.00 currently).

Maximum deductions for board and lodging will also be raised on the same dates. Maximum deductions per week of board and lodging provided to an employee paid at minimum wage will increase to \$57.50 on October 1, and then to \$59.80 on April 1. The following maximum amounts will also apply on the same dates:

- per week of board only: \$46.55 (October 1), \$48.45 (April 1);
- per week of lodging only: \$12.95, \$13.50;
- for single meals: \$3.00, \$3.15.

An employer in a logging or forest operation will be allowed to deduct from the minimum wage of an employee an amount of up to \$9.05 per day as of October 1, and \$9.45 per day as of April 1 for board and lodging.

Finally, **New Brunswick**'s Minister of Training and Employment Development announced on August 1, 2003 an increase in the minimum wage. Effective January 1, 2004, it will be raised from \$6.00 to \$6.20 an hour. This is the first in a series of increases slated to take place during the current provincial government's mandate, which will bring the minimum wage to \$6.60.

D. Employment Equity

On November 21, 2002, the **federal government** extended the application of the *Employment Equity Act* to the Canadian Forces (SOR/2002-420) and to the Royal Canadian Mounted Police (SOR/2002-422). While the RCMP is now covered by the *Employment Equity Regulations*, a distinct regulation (SOR/2002-421) was adopted in relation to the Canadian Forces.

The purpose of the *Canadian Forces Employment Equity Regulations* (CFEER) is to adapt the provisions of the *Employment Equity Act* (EEA) to accommodate the Canadian Forces, taking into account their role, the structure of military occupational groups, and the need for operational effectiveness. They apply in lieu of the *Employment Equity Regulations*.

The Canadian Forces have to comply with the requirements of the EEA, such as collecting workforce information, conducting a workforce analysis, carrying out an employment systems review, and preparing and implementing an employment equity plan. However, the CFEER provide for certain special rules and exceptions.

- The Chief of the Defence Staff, acting within the scope of the powers, duties and functions conferred to him under the *National Defence Act*, is responsible for carrying out the obligations of an employer under the EEA and for the application of the CFEER in relation to the Canadian Forces.
- The EEA and the CFEER do not apply to Canadian Forces members who are serving in the special force.
- Statutory employment equity requirements regarding the Canadian Forces are limited by the obligation to maintain operational effectiveness. Therefore, the CFEER provide that enrolment, re-engagement or promotion within the Canadian Forces is restricted to persons who meet the applicable mental and physical fitness requirements and who can perform their duties. Likewise, the powers of the Canadian Human Rights Commission (the Commission) and of the Employment Equity Review Tribunal (the Tribunal) have been adjusted to ensure that they do not

give a direction or make an order that would prejudice the operational effectiveness of the Canadian Forces.

- The CFEER specify that the Commission, including its officers and persons acting on its behalf or under its direction, must take into account, when exercising any powers regarding the application of the EEA, that certain Canadian Forces members may choose not to identify themselves as a member of a designated group. This recognizes that in the context of mental and physical requirements for military personnel, there may be some reluctance to self-identify as a person with a disability.
- Any person acting on behalf or under the direction of the Commission or the Tribunal, including their members and officers, must satisfy any applicable security requirements as regards access to and use of information received or obtained for the purpose of the EEA. Where these security requirements restrict or limit access to information that is necessary for the application of the EEA or the CFEER, the Chief of the Defence Staff must provide alternate means, consistent with the *National Defence Act*, for the Commission and Tribunal to carry out their responsibilities.
- Requirements of the EEA related to consultation and collaboration with employee representatives have been altered with respect to the Canadian Forces: although the Chief of the Defence Staff is required to establish a mechanism for consulting Canadian Forces members on employment equity matters, there is no obligation to consult “employee representatives”, nor to collaborate with them in the preparation, implementation and revision of the employment equity plan.
- Record keeping and reporting obligations have been adjusted to acknowledge the structure of the Canadian Forces and of the various military occupational groups.

In addition, the federal government adopted the *Regulations Adapting the Employment Equity Act in Respect of the Canadian Security Intelligence Service* (SOR/2002-423), which also came into effect on November 21, 2003.

These Regulations adapt the *Employment Equity Act* (EEA) to accommodate the Canadian Security Intelligence Service (CSIS), taking into account its operational effectiveness and the need to protect national security information. It should be noted that CSIS has been covered by the EEA since the Act came into force in 1995.

The following additional provisions apply to CSIS as well as to the Canadian Human Rights Commission and the Employment Equity Review Tribunal in terms of their respective enforcement responsibilities.

- Where conducting a compliance audit of CSIS, a compliance officer may not reproduce or remove documents containing national security information. A compliance officer may only review such documents in a secure room provided by CSIS. He/she may nevertheless take notes and make written summaries containing national security information, but must follow security rules with respect to storage of this information.
- A document prepared by Commission staff in relation to a compliance audit of CSIS—including any report or other document prepared by a compliance officer who reviewed documents containing national security information—may not be disclosed to someone who is not Commission staff or a member of a Tribunal unless first reviewed by the Director of CSIS. Any information deemed by the latter to be

national security information must be removed from the document before it can be released. A similar procedure applies where a compliance audit concerning a portion of the public service of Canada or other portion of the public sector covered by the EEA may lead to the disclosure of national security information provided by CSIS.

- A Tribunal formed to deal with an employment equity matter concerning CSIS must notify the CSIS Director before a hearing begins. If the latter determines, after receiving the notice, that the proceedings of the Tribunal are likely to involve national security information, he/she may require that portions of the hearing be held *in camera* and that the Tribunal apply certain security measures. The Regulations specify that *in camera* portions of a hearing must be conducted in a secure room and that persons appearing during these proceedings must satisfy security requirements and take an oath of secrecy. The Regulations also contain provisions pertaining to the storage and examination of exhibits containing national security information. Furthermore, they stipulate that the Tribunal may ask CSIS to prepare, for inclusion in the public record, a summary of the information disclosed during the *in camera* portion of special proceedings, excluding national security information.
- After holding special proceedings (i.e., proceedings involving CSIS likely to entail national security information), the Tribunal must provide the Director of CSIS a copy of its decision 30 days before the date it is intended to be released to any person. The Director must review the decision to determine whether it contains any national security information and notify the Tribunal of his/her determination within a reasonable period. If applicable, the Tribunal must then revise its decision to ensure that no national security information is revealed when it is released.
- Finally, the Regulations provide that a compliance officer must surrender to CSIS all documents containing national security information after certain conditions have been met (e.g., once CSIS has complied with its obligations under the Act). The Tribunal must do the same with respect to documents related to special proceedings.

E. Human Rights in the Workplace

The Legislative Assembly of **British Columbia** passed the *Human Right Code Amendment Act, 2002* (Bill 64) on October 29, 2002.

The contents of Bill 64 are based to a large extent on Bill 53,¹⁵ which was introduced in the Legislature on May 30, 2002 as a basis for public consultations. The latter Bill was subsequently withdrawn.

The Act brought significant changes to the administration of complaints under the *Human Rights Code*, by abolishing the Human Rights Commission and making the Human Right Tribunal (the tribunal) directly responsible for receiving, mediating and adjudicating cases. The tribunal, however, did not inherit the powers of investigation previously given to the commissioner of investigation and mediation and human rights officers. In fact, former provisions regarding the investigation of complaints (sections 23 and 24 of the Code) were repealed. Furthermore, the Human Rights Advisory Board—whose role was to provide information about the human rights system, serve as a channel for the concerns of the public, and advise the Minister responsible for the

¹⁵ Bill 53 was described in *Highlights of Major Development in Labour Legislation 2001-2002*.

Human Rights Code on matters relating to the administration of the Code—was also eliminated.

Following are additional changes of note to the *Human Rights Code*:

- In light of its new responsibilities, the tribunal's powers have been expanded. For instance, it now has the authority to make rules or make an order permitting or requiring that complaints be dealt with through mediation. (A member of the tribunal or a person appointed, engaged or retained by the tribunal is to serve as mediator.) As well, a member or panel of the tribunal can award costs against a party who contravenes a rule or an order of the tribunal. A new provision also specifies that the chair of the Human Rights Tribunal is responsible for the management of the tribunal and for the allocation of work among its members.
- The Minister responsible for the Code is now responsible for public education and information programs and has been given the power to conduct research or to carry out consultations relevant to the Code. These responsibilities were previously assigned to the chief commissioner and deputy chief commissioner of the Human Rights Commission.
- Amendments recognize a new "intervenor" status. A member or panel of the tribunal can allow a person or group to intervene in a complaint at any time after it is filed, on terms specified by the member or panel. A person or group does not need to be affected by an order of the tribunal to be allowed to intervene. Moreover, the definition of "party" (with respect to a complaint) has been expanded to cover not only the complainant and the person against whom the complaint is made, but also any other person added by the tribunal.
- The time limit for filing a complaint under the Code has been reduced from one year to six months after the alleged contravention. A member or panel of the tribunal can accept all or part of a complaint filed after this time limit, but only if it determines that doing so is in the public interest and that no substantial prejudice will result to any person because of the delay. (Previously, the commissioner of investigation and mediation could accept a complaint if the delay in filing it was "incurred in good faith" and no substantial prejudice would result to any person because of the delay.)
- In addition to other grounds for dismissal, a member or panel of the tribunal can dismiss all or part of a complaint if "there is no reasonable prospect that the complaint will succeed". Unlike what was earlier proposed in Bill 53, the Act does not provide a procedure for the review of a dismissal.
- Where a complainant withdraws a complaint or a complaint is settled by the parties involved, the tribunal has to order that the complaint is discontinued.
- Rules regarding evidence have been modified. New provisions stipulate that "nothing is admissible in evidence before a member or panel that is inadmissible in a court because of a privilege under the law of evidence" and that a "member or panel may direct that all or part of the evidence of a witness be heard in private".
- The tribunal is responsible for submitting an annual report of its activities to the Minister, a task which was assigned in the past to the Human Rights Commission. However, the Code no longer expressly requires that the annual report include information on the disposition of complaints during the preceding year or information concerning compliance with specified regulations.

These amendments came into force on March 31, 2003.

In the **Northwest Territories**, the *Human Rights Act* (Bill 1) received Royal Assent on October 30, 2002 and will come into effect by proclamation. Many sections of the Bill, as introduced on February 21, 2002, were amended before passage.

The purpose of this new Act is to replace the *Fair Practices Act* and reform human rights legislation in the Northwest Territories. It will expand the list of prohibited grounds of discrimination, establish an independent Human Rights Commission and put in place modern investigative and adjudicative processes for dealing with complaints.

Interpretation and Application

Provisions specify that nothing in the new Act will abrogate or derogate from the protections provided for existing aboriginal and treaty rights by section 35 of the *Constitution Act, 1982*, or adversely affect any right or privilege regarding denominational schools under the *Northwest Territories Act* (Canada).

Prohibited Discrimination

While covering most of the fundamental principles underlying the *Fair Practices Act*, the *Human Rights Act* has a broader scope. In addition to the prohibited grounds of discrimination that were previously recognized, it will protect individuals against discrimination based on ethnic origin, gender identity, religion, sexual orientation, social condition, family affiliation, political belief, political association and disability (whether a past or current disability is physical or mental, actual or perceived¹⁶). It will also protect an individual from discrimination on the basis that he/she has or is believed to have a predisposition to develop a disability. Moreover, the new Act will specify that the category of sex as a prohibited ground of discrimination is deemed to include protection from discrimination on the basis of potential or actual pregnancy. A provision will also stipulate that an intention to discriminate is not necessary to be found guilty of discrimination.

The *Human Rights Act* will prohibit discrimination on the above grounds with respect to employment and terms and conditions of employment, as the *Fair Practices Act* currently does. There will nevertheless be some exceptions: this will not affect, with respect to age and marital status, the operation of any *bona fide* retirement or pension plan, or the terms and conditions of a *bona fide* group or employee insurance plan. Nor will it apply to practices based on *bona fide* occupational requirements, if it can be established that accommodating the needs of an individual or group of individuals would impose undue hardship on an employer. Furthermore, non-profit organizations, societies and corporations of a charitable, educational, fraternal, religious, social or cultural nature, or operated primarily to foster the welfare of a religious or racial group, will be entitled to give preference in employment to an individual or group of individuals if this preference is solely related to their special objectives. Owners of businesses will also have the right to give preference in employment to members of their family.

New anti-harassment provisions will be added. These will forbid, on the basis of a prohibited ground of discrimination, harassment of any individual or class of individuals in the provision of goods, services, facilities or accommodation, commercial premises or residential accommodation, or in matters related to employment. The new Act will also give a broader definition of harassment—i.e., engaging, with respect to an individual or

¹⁶ The Act will also provide a list of diseases and conditions that fall within the definition of disability.

class of individuals, in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome by the individual or class of individuals.

Equal Pay

As for equal pay provisions, the principle of “equal pay for equal work” will be maintained, but with a broader scope. Hence, no person will be allowed, *on the basis of a prohibited ground of discrimination*, to remunerate an employee at a lower rate than what is paid to other employees in the same establishment who perform, for the same employer, the same or substantially similar work—i.e., work involving the same or substantially similar skills, effort and responsibility and performed under the same or substantially similar conditions. Protection against pay discrimination will therefore no longer apply solely to female employees, but to all categories of employees protected by the *Human Rights Act*. However, it should be noted that paying an employee at a lower rate of pay will be allowed if the difference in the rate is attributable to one of the following: a seniority system; a system that measures earnings by quantity or quality of production or performance; a compensation or hiring system that recognizes the existence of a labour shortage in respect of the field of work or regional differences in the cost of living; a downgrading, reclassification or demotion process or system; the existence of a temporary rehabilitation or training program; or any other system or factor that is not based on a prohibited ground of discrimination.

Human Rights Commission and Director of Human Rights

As previously mentioned, the new Act will establish an independent Human Rights Commission. This Commission, composed of three to five members appointed by the government on the recommendation of the Legislative Assembly, will be responsible for the application of the Act. This will include promoting human rights and supporting the elimination of discriminatory practices through the development of public information and education programs and the undertaking of research. As part of its functions, it will also be called upon to advise the Legislative Assembly on matters related to the Act and to submit an annual report detailing its activities and the disposition of complaints. The Commission will also be given a number of investigative powers, such as making inquiries, removing records and documents for examination and entering and inspecting premises (although a warrant will be required in certain cases).

The Director of Human Rights, also appointed by the government on the recommendation of the Legislative Assembly, will act as the registrar of complaints filed or initiated under the Act, maintain a public register of decisions and orders made by adjudicators, supervise and direct the work of Commission employees and assistants, oversee the work carried out by community organizations, give the Commission a written report on the status and disposition of complaints every three months and generally carry out the administration of the Act.

It will be possible for complaints to be filed either by an individual (or group of individuals) claiming to be aggrieved because of a contravention to the Act or by the Commission itself, where it has reasonable grounds for believing that a person has contravened the Act. In both cases, the complaint will normally have to be filed or introduced within two years of the alleged contravention. Once a complaint has been filed or initiated, the Director will be able, under specified conditions, to have it deferred, dismissed, or referred for adjudication. The Act also provides for the settlement of

complaints by agreement, through mediation or other means, with the assistance of the Director, a Commission employee or assistant, or a community organization.

Where a complaint is referred for adjudication, an adjudicator will be responsible for conducting a hearing to determine whether or not the complaint has merit in whole or in part. If the adjudicator finds that the complaint has merit, he/she will have the power to order a party against whom the finding was made to cease contravening the Act and to make available to any injured party the rights, opportunities or privileges that were denied contrary to the Act, including reinstatement in employment. The adjudicator will also have the power to order compensation for wages or income lost or expenses incurred because of the contravention as well as payment of an amount for injury to feelings or dignity. Where he/she finds that a party has acted wilfully or maliciously or has repeatedly contravened the Act, the adjudicator could also order payment of exemplary or punitive damages not exceeding \$10,000.

In addition to the *Human Rights Act*, the Northwest Territories also passed *An Act to Amend the Public Service Act* (Bill 14) on June 12, 2003. The purpose of this Act is to add new equal pay provisions and related enforcement mechanisms to the *Public Service Act*.

Equal Pay for Work of Equal Value

Under new equal pay provisions, an employer will be prohibited from establishing or maintaining pay rate differences between male and female employees who perform work of equal value in the same establishment. Three groups of public-sector employees—teachers, employees of the Northwest Territories Power Corporation and the group comprised of all other employees of the public sector—will each be deemed to be an “establishment” for the purpose of these provisions.

The Act will allow a difference in rate of pay that is attributable to a seniority or merit system; a system that measures earnings by quantity or quality of production or performance; a compensation or hiring system that recognizes the existence of a labour shortage or of regional differences in the cost of living; a downgrading, reclassification or demotion process or system; or a temporary rehabilitation or training program. Such systems, processes or programs would only be valid as long as they do not discriminate on the basis of sex.

The criteria used to assess the value of the work performed by different employees in the same establishment will be the composite of the skill, effort and responsibility required to perform the work and the conditions under which the work is performed.

Equal Pay Commissioner

An Equal Pay Commissioner (EPC) will be appointed, on the recommendation of the Legislative Assembly, to receive and investigate complaints, assist parties¹⁷ in resolving them, prepare investigation reports and promote awareness and understanding of equal pay issues. An EPC's appointment will be for a term of four years, during which he/she may only be suspended or removed from office for cause or incapacity. The Act also

¹⁷ The Act defines “party” as an employee who files a pay discrimination complaint, his/her employer, and “any employees’ association that is a party to a collective agreement that provides for the pay that is the subject of the complaint”.

allows for the appointment of an acting or of a special Equal Pay Commissioner in specified circumstances.

An employee will be allowed to file a written complaint with the EPC within two years after the last occurrence of circumstances giving rise to the complaint. Following receipt of a complaint, the EPC will be responsible for conducting an investigation in the course of which he/she may request any person to produce documents and/or provide other relevant information. The EPC will be able to apply to the Supreme Court of the Northwest Territories for an order requiring a person to comply with such a request.

Within six months after receiving a complaint, the EPC will have to send an investigation report to the parties, including recommendations regarding the resolution of the complaint.

Arbitration

It will be possible for any party to submit the complaint, with the investigation report, to an arbitrator within six weeks after receiving the report. The arbitrator, whose costs will be paid by the EPC, will then hold an arbitration hearing. Where the arbitrator determines that a contravention of the Act's equal pay provisions has occurred, he/she may, in an award, make one or more directions against the contravening employer: to cease the contravention; to refrain in the future from committing the same or a similar contravention; to make available to any affected employee any rights, opportunities or privileges that were denied because of the contravention; to compensate any affected employee for all or part of any pay lost up to three years prior to the date on which the complaint was filed with the EPC; to pay up to \$10,000 as exemplary or punitive damages where it has acted wilfully or maliciously, or repeatedly contravened the equal pay provisions; and to take any other action to place an affected employee in the position he/she would have been in but for the contravention. In addition, the arbitrator may, in certain circumstances (e.g., frivolous or vexatious complaints), order a party to pay some or all of the costs of another party.

Any party will be allowed to appeal a decision of an arbitrator to the Supreme Court of the Northwest Territories within six weeks after the award is delivered to the appellant.

Coming into Force

This Act will come into effect on a date to be set by the government of the Northwest Territories.

Nunavut introduced Bill 12, the *Human Rights Act*, on October 30, 2002. It received second reading the following day.

The purpose of this Bill is to replace the *Fair Practices Act* and reform human rights legislation in Nunavut, while taking into account Inuit culture. If adopted, it would expand the list of prohibited grounds of discrimination, establish an independent Human Rights Tribunal and put in place a new process for hearing and resolving issues concerning human rights. Although this Bill bears some resemblance to the Northwest Territories' *Human Rights Act*, which was passed in the fall of 2002, there are nevertheless many important differences between the two pieces of legislation. Below are the most significant elements of Nunavut's proposed *Human Rights Act*.

Interpretation and Application

In terms of the Act's application, provisions specify that it would not abrogate or derogate from the protections provided for aboriginal and treaty rights in the Nunavut Land Claims Agreement and by section 35 (Recognition of existing aboriginal and treaty rights) of the *Constitution Act, 1982*.

Prohibited Discrimination

Nunavut's *Human Rights Act* would provide protection against discrimination and harassment on the following grounds: race, colour, ancestry, ethnic origin, citizenship, place of origin, creed, religion, age, disability, sex, sexual orientation, marital status, family status, pregnancy, lawful source of income and a conviction for which a pardon has been granted. Protection against discrimination on the basis of sex would be deemed to include protection against discrimination on the basis that a person may become pregnant or may adopt a child. In addition, individuals would be protected from discrimination on the basis of their association or relationship, whether actual or perceived, with an individual or class of individuals identified by a prohibited ground of discrimination.

As is currently the case in the *Fair Practices Act*, the new Act would prohibit discrimination in employment, which also covers any term or condition of employment, "whether the term or condition was prior to or is subsequent to the employment". However, this provision would not affect, with respect to age and marital status, the operation of any genuine retirement or pension plan, or the terms of a genuine group or employee insurance plan. Nor would it prevent certain employment practices based on justified occupational requirements, if accommodating the needs of an individual or group of individuals would impose undue hardship¹⁸ on an employer. Moreover, not for profit organizations, societies and corporations of a charitable, educational, fraternal, religious, athletic, social or cultural nature, or operated primarily to foster the welfare of a religious or racial group, would, under specified circumstances, be entitled to give preference in employment to an individual or group of individuals. A similar exemption would apply when hiring a person to provide personal services in a private residence.

An additional provision would forbid the harassment of any individual or group of individuals on the basis of a prohibited ground of discrimination in matters related to employment or with respect to membership in an employees' organization, trade union, trade association, occupational or professional association or society, employers' organization or co-operative association or organization. Rules governing employment applications and advertisements in the *Human Rights Act* would be akin to those currently found in the *Fair Practices Act*.

Absence of Equal Pay Provisions

In contrast to the *Fair Practices Act*, Bill 12 does not contain any equal pay provisions. (Currently, the *Fair Practices Act* is the only Nunavut statute requiring employers to pay

¹⁸ The Act would define "undue hardship" as "excessive hardship as determined by evaluating the adverse consequences of a provision in this Act that requires a duty to accommodate, by reference to such factors as (a) health and safety; (b) disruption to the public; (c) effect on contractual obligations; (d) cost; and (e) business efficiency."

female employees the same rate of pay as male employees for similar or substantially similar work.)

Human Rights Tribunal

Bill 12 provides for the establishment of a Human Rights Tribunal (the Tribunal), composed of members appointed by the government who have “an interest in and a sensitivity to human rights and to Inuit culture and values that underlie the Inuit way of life”. The Tribunal would be responsible for enforcing the *Human Rights Act*, including receiving, hearing and settling complaints, as well as preparing an annual report. Contrary to most of the other jurisdictions in Canada, there would be no Human Rights Commission in Nunavut, nor any specific procedures for the investigation of complaints.

Complaints and Adjudication

An individual or group of individuals aggrieved by a contravention of the Act could file a notification with the Human Rights Tribunal, generally within two years of the last alleged instance of the contravention. A notification could also be filed by someone on behalf of another person or a group or class of persons. In that case, however, the Tribunal could refuse to accept the notification if satisfied that it was filed against the will or was not in the interest of the alleged victim(s) of discrimination.

The Tribunal could dismiss a notification that is trivial, frivolous, vexatious or not made in good faith, or filed after the expiration of the two-year delay. It could also dismiss a notification where, in its opinion, there is no evidence of discrimination on a prohibited ground, undisputed facts clearly provide a defence, or the person who filed the notification has refused a reasonable offer of settlement.

Before holding a hearing with respect to a notification, the Tribunal could assist the parties to reach a settlement. Should an ensuing settlement agreement be breached, its terms could be enforced in the same manner as an order of the Tribunal (but only to the extent that the Tribunal has the power to make an order regarding the terms of the agreement).

Where a notification has neither been dismissed nor settled, the Tribunal would hold a hearing. If it found that the notification has merit in whole or in part, it would have the power to order a party to cease contravening the Act or regulations, to compensate an injured party for losses (which could include the payment of an amount for injury to dignity, feelings or self-respect and/or an amount for any malice or recklessness involved in the contravention), to hire or reinstate a person, to adopt an affirmative action program, or to take any other action that the Tribunal deems appropriate having regard to Inuit culture and values. The Tribunal could also make a declaratory order that the conduct that was the subject matter of a notification, or similar conduct, is discrimination contrary to the *Human Rights Act* and its regulations. In addition, the Tribunal could order, in some cases, that a party pay all or some of the costs of another party; with respect to false claims, it could also order the payment of damages for injury to a person's reputation.

A party to a notification would have 30 days to appeal to the Nunavut Court of Justice a decision or order of the Tribunal, from the date it has been served. However, such an appeal could only be made on questions of law.

Moreover, the *Human Rights Act* would provide for special remedies, allowing a person to apply for a court order or an injunction in specified circumstances to ensure compliance with key aspects of the Act.

Fines

A person who fails to comply with an order or decision of the Tribunal or a court under the Act, or who discharges, suspends, intimidates or retaliates against an individual for notifying or attempting to notify the Tribunal of a contravention or for assisting in the application of the Act (e.g., giving evidence in a proceeding), is liable to a fine of up to \$25,000 on summary conviction.

Coming into Force

Most of the Act would come into force one year after receiving Royal Assent, except sections establishing the Human Rights Tribunal (sections 16 to 19), which would come into effect on the date of assent.

Finally, it is worth mentioning that **Ontario** had introduced a Bill to ban mandatory retirement in the province. However, Bill 68—the *Mandatory Retirement Elimination Act, 2003*—which received first reading on May 29, 2003, died on the Order Paper when the provincial elections were called.

II. INDUSTRIAL RELATIONS

A. Legislation of General Application

In **Quebec**, most of the amendments to the *Labour Code* brought in 2001 by Bill 31 (*An Act to amend the Labour Code, to establish the Commission des relations du travail and to amend other legislative provisions*) were proclaimed in force.

November 25, 2002 was set as the date on which the Labour Relations Commission (Commission des relations du travail) started its activities and as the date of coming into force of the amendments to the *Labour Code*, which had not yet taken effect. However, four aspects of the new provisions of the Code were scheduled to come into force at a later date or have not yet taken effect.

The new provisions of the Code dealing with the time limits within which the Labour Relations Commission has to render a decision came into force on September 1, 2003.

Amendments to the *Labour Code* permitting an employee to file a complaint with the Commission, if he/she believes that a certified association of employees representing him/her has acted in bad faith or in an arbitrary or discriminatory manner or has shown serious negligence in respect of the employee, will come into force on January 1, 2004 where the complaint does not pertain to a dismissal or disciplinary sanction. In the meantime, an employee, who is in this situation, can launch an action before the appropriate court.

The new provisions of the Code which empower the government to issue regulations to fix the minimum amount of union dues to be paid by an employee in order to be considered a member and to determine the information to be included in the application for membership have not come into force.

Similarly, no date has been set for the coming into force of certain amendments to the conditions to be recognized as a member of an employee association. Thus, the requirement that the employee has personally paid as union dues an amount of not less than \$2 within the twelve months preceding a petition for certification or a demand for assessment of the representative character of an association remains unchanged.

In **Saskatchewan**, the current *Trade Union Act* contains a provision stipulating that where the term of a collective bargaining agreement exceeds three years, its expiry date for the purpose of giving notice to the other party to negotiate a revision of that agreement is considered to be three years after its effective date. *The IPSCO Inc. and United Steelworkers of America, Local 5890, Collective Bargaining Agreement Act, 2002* (Bill 83), which took effect on December 18, 2002, provides that, notwithstanding that provision, for the purposes of giving notice to bargain, the expiry date of the collective bargaining agreement concluded between IPSCO Inc. and the United Steelworkers of America, Local 5890, that is effective from August 1, 2002, is the expiry date set out in that agreement.

In **British Columbia**, the *Coastal Ferry Act* (Bill 18) received Royal Assent on March 27, 2003. Effective April 1, 2003, this Act contains, among other things, provisions on essential services designation.

It states that, although nothing in the Act affects the application of section 72 of the *Labour Relations Code* (essential services) to British Columbia Ferry Corporation, it is deemed that the delivery of ferry services is necessary for the protection of the health, safety and welfare of the residents of British Columbia.

B. Public and Parapublic Sectors

In **Alberta**, the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003* (Bill 27) was assented to on March 27, 2003. This Act brought amendments to the *Labour Relations Code*, that came into force on April 1, 2003. The *Regional Health Authority Collective Bargaining Regulation* issued under the Code took effect on the same date. The most significant changes brought by the amendments and the new Regulation are as follows:

- Nurse practitioners employed in their professional capacity in accordance with the *Public Health Act* and regulations have been excluded from the application of the *Labour Relations Code*.
- The dispute resolution process of compulsory interest arbitration applicable to hospital employees (these employees cannot strike legally; they represent about 90% of health care employees) has been extended to all other employees of regional health authorities.
- The Lieutenant Governor in Council has been given the power to issue regulations providing for the establishment of region-wide functional bargaining units for all regional health authorities and their employees who are represented by a bargaining agent. The *Regional Health Authority Collective Bargaining Regulation* has established four functional bargaining units: direct nursing care or nursing instruction; auxiliary nursing care; paramedical, professional or technical services; and general support services.
- The Alberta Labour Relations Board has been granted special temporary powers by the above-mentioned Regulation to deal with issues arising out of the establishment of the region-wide functional bargaining units, including union determination and collective agreement reconciliation.
- By virtue of regulatory powers given to the Lieutenant Governor in Council, the *Regional Health Authority Collective Bargaining Regulation* provides that, despite any other law or the terms of a collective agreement, where there is a change in governance or a restructuring of a regional health authority or other prescribed entity, no employee of that organization represented by a bargaining agent is entitled to severance pay, termination pay or other compensation if the employee's position remains substantially the same. This does not prevent an employer from voluntarily giving an employee or former employee severance pay, termination pay or other compensation.
- For the purpose of ensuring that the *Regional Health Authority Collective Bargaining Regulation* is reviewed for ongoing relevancy and necessity, it is scheduled to expire on March 31, 2008.

In **British Columbia**, the *Community Services Labour Relations Act* (Bill 61) received Royal Assent on May 29, 2003 and came into force on June 20, 2003. The purpose of

this Act is to establish a more streamlined labour relations structure in the social services sector. More specifically, the Act:

- Gives the Community Social Services Employers' Association (CSSEA) exclusive authority to bargain on behalf of agencies that are members of CSSEA whose employees are unionized, and to bind them by a collective agreement.
- Creates an association of unions composed of all trade unions representing employees of an agency, who are included in any of the bargaining units established for the community social services sector.
- Provides for an agreement on articles of association for the association of unions, subject to the approval of the Labour Relations Board, which has the power to determine provisions to be included in the agreement in specified circumstances.
- Establishes a bargaining unit for each of the three broad service areas in the community social services sector for the purpose of collective bargaining between the CSSEA and the association of unions (i.e. community living services, aboriginal services, and general services, including child and family services, women's services and other social services), and provides that the Lieutenant Governor in Council may consolidate the bargaining units into a single unit.
- Provides that the Minister of Skills Development and Labour may direct the Labour Relations Board to conduct a vote to designate a union that will represent all of the employees in the respective bargaining units, despite the provisions dealing with the association of unions.
- States that a collective agreement may not prevent an agency from using volunteers, unless this would result in the layoff of an employee, or limit the government or an agency from entering into a contract with a family home provider (i.e. a primary home care provider to a person, who does not provide care to more than three persons at any time).
- Specifies that an arbitrator or the Labour Relations Board must not declare a person who provides services under a contract between the government and an agency, or is an employee of an agency, to be an employee of the government unless that person is fully integrated into its operations and is under its control and direction.

In **Manitoba**, *The Fire Departments Arbitration Amendment Act* (Bill 4) was enacted and took effect on December 12, 2002.

This Act has amended *The Fire Departments Arbitration Act* to make the provisions dealing with collective bargaining between firefighters and municipalities apply, with some changes, to collective bargaining between the City of Winnipeg and the bargaining agent representing its paramedics. These provisions prohibit strikes and lockouts. When, three months after notice to bargain was given, any collective agreement between the city and the bargaining agent for paramedics is no longer in effect and a new one has not been concluded, either or both of the parties may apply to the Minister of Labour and Immigration to establish an arbitration board, and the Minister may take such action. The arbitration board attempts to bring about a settlement of the dispute and, if it is unsuccessful, it makes an award that is binding on the parties.

The title of the Act was changed to *The Firefighters and Paramedics Arbitration Act*. Consequential amendments were also made to *The City of Winnipeg Charter* and *The Labour Relations Act*, and an unproclaimed amendment to *The Essential Services Act* passed in 1999 was repealed; its purpose was to extend the application of that Act to the City of Winnipeg, as it pertains to ambulance services.

In **Ontario**, the *Government Efficiency Act, 2002* (Bill 179) renewed a special collective bargaining framework for the residential sector of the construction industry in certain geographic areas (see under "Construction") and, among other changes, brought amendments to the *Ambulance Services Collective Bargaining Act, 2001* (ASCBA) and the *Crown Employees Collective Bargaining Act, 1993* (CECBA). Effective November 26, 2002, the latter amendments have clarified that subsections 119 (2) and (3) and section 120 of the *Labour Relations Act, 1995*, relating to the non-disclosure of information by conciliation officers and mediators, except to some Ministry of Labour officials, and the non-compellability of various officials before a court or tribunal with respect to labour relations information, also apply to conciliation officers appointed under the ASCBA or CECBA.

Also in Ontario, effective June 3, 2003, Part II of the *Back to School (Toronto Catholic Elementary) and Education and Provincial Schools Negotiations Amendment Act, 2003* (Bill 28) has amended the *Education Act* and the *Provincial Schools Negotiations Act* with respect to the duties of teachers by providing that they must perform all duties assigned under the *Education Act* and regulations. In addition, Part II has clarified the definition of "strike" in both the *Education Act* and the *Provincial Schools Negotiations Act*, and the new definition prevents teachers from engaging in a work-to-rule campaign, unless they have acquired the right to strike.

In the **federal jurisdiction**, the *Public Service Modernization Act* (Bill C-25) received third reading on June 3, 2003 in the House of Commons and is currently before the Senate.

The purpose of this Bill is to modernize staffing procedures, labour relations, learning and human resources management in the public service.

With respect to labour relations, the Bill will provide for a new *Public Service Labour Relations Act* (Part 1 of the *Public Service Modernization Act*), which will bring many changes to the current legislation, while maintaining the existing basic labour relations framework.

Current Law Replaced

The *Public Service Labour Relations Act* will replace the *Public Service Staff Relations Act*.

Preamble

A new preamble will underscore the value of cooperative labour relations, within a context where protection of the public interest remains paramount.

Consultation and Co-development

The new Act will require each deputy head, in consultation with bargaining agents, to establish a labour-management committee for their department for the purpose of exchanging information and obtaining views and advice on workplace issues affecting the employees. Such issues may include, among other things, harassment in the workplace and the disclosure of information concerning wrongdoing in the public service and the protection from reprisal of employees who disclose such information.

It will also include an enabling provision whereby the employer or deputy heads may engage in co-development of workplace improvements with bargaining agents, through the National Joint Council (NJC) or any other forum they choose. Co-development of workplace improvements will be defined as "the consultation between the parties on workplace issues and their participation in the identification of workplace problems and the development and analysis of solutions to those problems with a view to adopting mutually agreed to solutions".

New Public Service Labour Relations Board (PSLRB)

The PSLRB will replace the Public Service Staff Relations Board. Its mandate will be broadened to provide adjudication, mediation and compensation analysis and research services. It will also continue to provide facilities and administrative support to the NJC, which will be recognized in the Act.

Adjudication services will consist of the hearing of applications and complaints dealing with labour relations and occupational health and safety matters, and the referral of grievances to adjudication. Mediation services will assist the employer and bargaining agents in concluding a collective agreement, in managing their relations while a collective agreement is in force and in mediating in relation to grievances. Compensation analysis and research services will consist of conducting compensation surveys, compiling and analyzing compensation data, and sharing the information with the parties and the public, as well as conducting market-based compensation research that the Chairperson of the PSLRB may require. An advisory board will be established to provide advice to the Chairperson on the compensation analysis and research services provided by the Board.

Elimination of Certain Exclusions

Lawyers of the Department of Justice or the Canada Customs and Revenue Agency and employees of the Treasury Board Secretariat will no longer automatically be considered to be in managerial or confidential positions and, as such, be excluded from collective bargaining. Rather, the employer may apply to the PSLRB for an order declaring that any position is a managerial or confidential position under the Act. If an objection is filed by an employee organization seeking to be certified or the bargaining agent in respect of a position, the PSLRB will, after giving the parties an opportunity to make representations, make a determination on a case-by-case basis, depending on the particular functions involved. A transitional provision will ensure that non-excluded Department of Justice and Canada Customs and Revenue Agency lawyers are given the choice of whether they wish to be represented by a bargaining agent.

When the position of an employee in a bargaining unit for which a bargaining agent has been certified is proposed for exclusion by the employer and the bargaining agent files an objection, the membership dues paid by the employee will be held by the employer pending a determination by the PSLRB. If the Board concludes that the position must be excluded or if the objection is withdrawn, the dues held by the employer will be remitted to the employee; otherwise, they will be remitted to the bargaining agent.

Management Rights

Management rights will remain unchanged. The employer will retain the right to determine its own organization, the assignment of duties and classification of positions.

Scope of Bargaining

The scope of bargaining will not change. Matters which currently are not bargainable - notably matters provided for by the *Public Service Superannuation Act* and the *Public Service Employment Act* (e.g. staffing) - will remain non-bargainable.

Two-tier Bargaining

Two-tier bargaining will allow for service-wide bargaining to set the broad parameters for terms and conditions of employment in a bargaining unit, while permitting precise details to be negotiated in departments, if the employer, bargaining agent and deputy head jointly agree. It is designed to result in terms and conditions more appropriately tailored to the needs of the parties.

Mediation

The new Act will enable the PSLRB Chairperson, upon request or on his/her own initiative, to appoint a mediator at any time to assist the parties in resolving a collective bargaining dispute. The techniques at his/her disposal will include mediation, fact-finding and facilitation. The mediator will be able to make recommendations for resolving the dispute, if requested by the Chairperson or the parties.

Mediation services will also be available to assist parties to resolve grievances.

Choice of Dispute Resolution Process

A bargaining agent will continue to be able to choose which dispute resolution process - binding arbitration or conciliation - it wishes to apply to resolve an impasse in collective bargaining.

Arbitration

When the process for the resolution of a collective bargaining dispute is arbitration, the factors to be considered by the arbitration board will be broadened to include the state of the Canadian economy and the Government of Canada's fiscal circumstances.

Enhanced Conciliation

When the process for the resolution of a dispute is conciliation, conciliation boards and conciliation commissioners will be replaced by public interest commissions. A public interest commission (PIC) will be a non-permanent body consisting of one or three persons, appointed by the Minister responsible, to assist the parties to resolve their dispute and to make recommendations for settlement. The Chairperson of the PSLRB will be able to recommend to the Minister the appointment of a public interest commission either at the request of one of the parties or on his/her own initiative.

If a public interest commission is to consist of one person, that person will be appointed from a list of persons jointly recommended by the parties plus, if necessary, persons chosen by the Chairperson of the PSLRB after consultation with the parties. If either party requests that the PIC consist of three members, each party will nominate a person and the two nominees will jointly select a chair from the list (the Minister will nominate a person and/or select a chair from the list, if there is failure to do so).

The factors to be considered in making a PIC report will be the same as for arbitration (see the preceding sub-title). The PIC may be appointed even if the parties have not yet concluded or amended an essential services agreement - both procedures may take place simultaneously.

Essential Services

The current essential services provisions, applicable when the collective bargaining dispute resolution process is conciliation, will be replaced by new ones. Essential services will continue to be based on the safety or security of the public. The employer will continue to have the exclusive right to establish the level at which an essential service must be provided (e.g. the employer may determine the extent and frequency of essential services).

If the employer has given notice to the bargaining agent that employees in the bargaining unit occupy positions considered necessary to provide essential services, the parties will be required to negotiate and make every reasonable effort to enter into an essential services agreement (ESA), determining the types and number of positions needed to provide the essential services at the levels determined by the employer and identifying the specific positions in question. If they are unable to do so, either of them may apply to the PSLRB to determine any unresolved matter. ESAs may be amended from time to time by the parties or, if they are unable to do so, by the Board upon application of either of them. The Act will also provide that the employer or bargaining agent may apply to the PSLRB to temporarily amend, or suspend, an ESA in cases of emergency.

Procedures for notifying employees that they provide essential services will be streamlined by allowing the employer to give a one-time notification. The notice will remain valid so long as the employee continues to occupy the position, unless the employer notifies him/her that the position is no longer necessary to provide essential services.

The right to strike will not be acquired until 30 days after an ESA has been concluded or amended. No employee who occupies a position necessary to provide essential services will be allowed to participate in a strike. It will be prohibited for any person to impede or prevent employees who provide essential services from entering or leaving their place of work.

Strike Votes

Provisions similar to those added to the *Canada Labour Code* in 1999 will require a bargaining agent to hold a secret ballot vote in order to obtain approval for a strike. The Act will ensure that all bargaining unit employees have the right to vote and are given reasonable opportunity to vote. To be valid, a strike vote will have to be held within the

60 days (or any longer period agreed to by the parties) preceding any strike. A majority of those voting will have to be in favour of a strike before it may be declared.

Unfair Labour Practices

Similar to the *Canada Labour Code*, the unfair labour practices provisions will be more comprehensive, including more detailed provisions as to what constitutes prohibited actions by the employer or an employee organization. A provision will state that it does not constitute an unfair labour practice for the employer to permit employees to attend to the business of an employee organization during hours of work.

Prohibitions and Enforcement

The prohibitions provisions will be more comprehensive, including express authority for the PSLRB to make certain compliance orders relating to illegal strikes, as is the case for the Canada Industrial Relations Board under the *Canada Labour Code*.

Informal Conflict Management System

Each deputy head in the core public administration will be required, in consultation with bargaining agents representing employees in the department or organization, to establish an informal conflict management system and inform the employees in the department or organization of its availability.

Grievances Related to Discrimination

Employees will no longer be prevented from grieving if the grievance involves an issue of discrimination, except as it relates to the right to equal pay for work of equal value. If discrimination is an aspect of a grievance that is referred to adjudication, the adjudicator will be able to interpret and apply the *Canadian Human Rights Act* and, if appropriate, give monetary relief in accordance with that Act for pain and suffering and/or special compensation where the behaviour was wilful or reckless.

If a grievance involving discrimination is referred to adjudication, the Canadian Human Rights Commission (CHRC) will receive notice of it and will have standing to make submissions to the adjudicator. This is designed to promote better decision-making by adjudicators in the area of discrimination in employment and to streamline recourse. However, the provisions of the Act will not prevent an employee from making a complaint to the CHRC. Also, the CHRC will continue to have the exclusive responsibility to examine complaints of systemic discrimination such as those filed in respect of the right to equal pay for work of equal value.

Complaints under Internal Policies

In order to minimize duplication, an employee who wishes to have a workplace dispute settled would have to choose between presenting a grievance or making a complaint under any applicable internal policy of the employer (such as, in the case of harassment disputes, the Treasury Board Policy on the Prevention and Resolution of Harassment in the Workplace). This requirement to choose will only apply where the internal policy expressly states that the employee gives up his/her right to present a grievance under the Act when he/she pursues relief under the policy.

Group and Policy Grievances

Group grievances will be allowed under the new Act, subject to some limitations (e.g. a group grievance may not be presented in respect of the right to equal pay for work of equal value). A group grievance will involve two or more employees in a single department who are directly affected by the same interpretation or application of a collective agreement or an arbitral award. Employees will be able to opt into a group grievance and their bargaining agent will present the grievance. If an employee decides that he/she no longer wishes to participate in a group grievance, the employee may opt out at any time before a final decision is made.

A policy grievance may be presented by either the bargaining agent or the employer respecting the interpretation or application of a collective agreement or an arbitral award, subject to some limitations (e.g. a policy grievance may not be presented in respect of the right to equal pay for work of equal value). A party that presents a policy grievance may refer it to adjudication. If the policy grievance relates to a matter that was or could have been the subject of an individual or group grievance, an adjudicator will be limited to determining the correct interpretation or application of the collective agreement or arbitral award.

Unsatisfactory Performance and Grievance Adjudication

If an employee grieves against a termination of employment or demotion for unsatisfactory performance and refers the grievance to adjudication, new provisions in the Act will require the adjudicator to examine the reasonableness of the deputy head's opinion of unsatisfactory performance. Adjudicators will not be allowed to substitute their own opinion for that of the deputy head, if the deputy head's opinion is determined to have been reasonable.

Deployment Grievances

Grievances against deployment will be allowed under the Act. Deployment grievances will only be adjudicable when they relate to deployment without the employee's consent, where consent is required. An adjudicator will be allowed to examine the circumstances of the case to determine whether consent to being deployed was a condition of employment or the grievor harassed another person in the course of his/her employment.

Judicial Review and Enforcement

New provisions will state that every decision of the PSLRB or an adjudicator is final and may not be questioned or reviewed in any court, except on a question of law or jurisdiction.

Other new provisions will make it possible for PSLRB or adjudicators' orders to be filed in the Federal Court for purposes of enforcement.

Restriction on Lawsuits

In order to avoid multiple legal proceedings, a provision will prevent employees from bringing civil actions in respect of disputes relating to their terms and conditions of

employment. Employees may seek redress exclusively under the Act and the *Federal Court Act*.

Five-year Review

There will be a requirement to review the Act five years after its coming into force.

Coming into Force

The provisions of the new *Public Service Labour Relations Act* will come into force on a date or dates to be set by the government.

In **Quebec**, *An Act to amend the Act respecting health services and social services* (Bill 7) was tabled on June 17, 2003.

This Bill would amend the *Act respecting health services and social services* to specify, in a declaratory manner, that an intermediate resource or a family-type resource is deemed not to be in the employ of or an employee of the public institution that calls upon the services of the resource and that any agreement between them to determine the applicable rules of operation is deemed not to constitute a contract of employment.

The Bill would confer on the Minister of Health and Social Services the power to enter into an agreement with one or more bodies representing intermediate resources or family-type resources to determine, among other things, the general conditions according to which the activities of those resources are to be carried on and to establish various measures relating to compensation for their services.

In addition, the Bill would grant to the Minister, rather than to the regional boards, the power to determine, with the approval of the Treasury Board, the rates or scale of rates of compensation applicable to the services of intermediate resources.

If adopted, this Bill would come into force on the date of Royal Assent.

Another Bill, *An Act to amend the Act respecting childcare centres and childcare services* (Bill 8), was also tabled in Quebec on June 17, 2003.

This Bill would amend the *Act respecting childcare centres and childcare services* in order to define, in a declaratory manner, that neither a person recognized as a home childcare provider by a childcare centre permit holder nor any adult assisting him/her or person in his/her employ are employees of the childcare centre permit holder.

The Bill would make it possible for the Minister of Employment, Social Solidarity and Family Welfare to make an agreement, following consultations, with one or more associations representative of home childcare providers. If approved by the government, such an agreement would be applicable to all home childcare providers, whether or not they are members of an association party to the agreement, and to all childcare centre permit holders.

If adopted, this Bill would come into force on the date of Royal Assent.

C. Emergency Legislation

During the period covered by this report, legislative measures were adopted with respect to the settlement of labour disputes at the University of British Columbia and in the public education sector in Ontario.

In **British Columbia**, the *University of British Columbia Services Continuation Act* (Bill 21) was passed on March 12, 2003.

This Act gave the Minister of Skills Development and Labour the power to order a cooling-off period during which strikes and lockouts were prohibited, and employees were required to resume their duties with the University of British Columbia (the employer).

The Minister was given the power to impose one or more cooling-off periods and could do so with respect to any or all of the disputes between the employer and Canadian Union of Public Employees, Locals 2278 and 2950, and any other trade union representing employees of the employer designated by regulation.

The last collective agreement in force between the parties was extended and considered to be in effect from the beginning to the end of the cooling-off period, unless the parties concluded a collective agreement.

Within 72 hours after the coming into force of the Act on March 12, 2003, the trade unions and the employer were required to continue or commence to bargain collectively in good faith and to make every reasonable effort to conclude collective agreements or a renewal or revision of their last collective agreements.

This Act expired on March 31, 2003.

In **Ontario**, the *Back to School Act (Simcoe Muskoka Catholic District School Board)*, 2002 (Bill 211) was passed on November 26, 2002 to resolve a labour dispute between the Ontario English Catholic Teachers' Association representing secondary school teachers and the *Simcoe Muskoka Catholic District School Board*, which impeded the education of pupils.

On November 27, 2002, the school board was required to terminate any lockout and to resume the normal operation of the schools affected by the labour dispute; the teachers' association was required to terminate any strike; and the teachers were required to resume their duties (exceptions were provided for those not returning to work for health reasons or by mutual consent of a teacher and the school board).

Fines were provided for a contravention of these provisions by an individual (maximum: \$2 000) and by a corporation or a union (maximum: \$25 000). These fines were applicable to each day on which the contravention occurred or continued.

The Act maintained the previous terms and conditions of employment of the members of the bargaining unit until a new collective agreement was made with respect to that unit.

If the parties had not concluded a new collective agreement by December 3, 2002, all matters remaining in dispute between them relating to the content of such an agreement

were to be referred to a mediator-arbitrator, each party having to pay one-half of the fees and expenses of the mediator-arbitrator.

An award made by a mediator-arbitrator had to be consistent with the *Education Act* and the regulations made under it, permit the school board to comply with that legislation, and provide for measures that can be implemented in a reasonable manner without causing the board to incur a deficit. In addition, he/she could not make an award that would interfere with the determination by the school board of certain matters relating to the instruction of pupils.

There was a requirement that a new collective agreement implementing the award of a mediator-arbitrator be effective from September 1, 2002 to August 31, 2004.

During the 30-day period after the publication of a regulation under the *Education Act* setting out general legislative grants for school boards, either party may require further mediation-arbitration of wages and benefits for the teachers covered by the new collective agreement for the period to which the regulation applies. The new mediation-arbitration cannot deal with wages and benefits for a period after the expiry of the collective agreement, even if the regulation deals with a longer period. Despite these provisions, the collective agreement remains in force during its complete term.

The Act also contained provisions dealing with the issue of lost instructional time.

Also in Ontario, the *Back to School (Toronto Catholic Elementary) and Education and Provincial Schools Negotiations Amendment Act, 2003* (Bill 28) was enacted on June 3, 2003.

The purpose of Part I of this Act was to end a labour dispute, during which a lockout was declared, between elementary school teachers, represented by the Ontario English Catholic Teachers' Association, and the Toronto Catholic District School Board, and to provide for a dispute resolution mechanism.

On June 4, 2003, the school board was required to terminate any lockout, and to resume the normal operation of the schools affected by the labour dispute. For its part, the teachers' association was required to terminate any strike; and the teachers were required to resume their duties (exceptions were provided for those not returning to work for health reasons or by mutual consent of a teacher and the school board).

Fines were provided for a contravention of these provisions by an individual (maximum: \$2 000) and by a corporation or a trade union (maximum: \$25 000). These fines were applicable to each day on which the contravention occurred or continued.

The Act maintained the previous terms and conditions of employment of the members of the bargaining unit until a new collective agreement was made with respect to that unit.

If the parties had not concluded a new collective agreement by June 11, 2003, all matters remaining in dispute between them relating to the content of such an agreement were to be referred to a mediator-arbitrator, each party having to pay one-half of the fees and expenses of the mediator-arbitrator.

An award made by a mediator-arbitrator must be consistent with the *Education Act* and the regulations made under it, permit the school board to comply with that legislation,

and provide for measures that can be implemented in a reasonable manner without causing the board to incur a deficit. In addition, he/she cannot make an award that would interfere with the determination by the school board of certain matters relating to the instruction of pupils.

A new collective agreement implementing the award of a mediator-arbitrator must be effective from September 1, 2002 to August 31, 2004.

Effective June 3, 2003, Part II of the Act has amended the *Education Act* and the *Provincial Schools Negotiations Act* with respect to the duties of teachers by providing that they must perform all duties assigned under the *Education Act* and regulations. In addition, Part II has clarified the definition of "strike" in both the *Education Act* and the *Provincial Schools Negotiations Act*, and the new definition prevents teachers from engaging in a work-to-rule campaign, unless they have acquired the right to strike.

D. Construction Industry

In **Ontario**, the *Government Efficiency Act, 2002* (Bill 179) brought amendments to many statutes, including the *Labour Relations Act, 1995*.

Sections 150.1 and 150.2 of the *Labour Relations Act, 1995* have been replaced by new sections renewing the special collective bargaining framework for the residential sector of the construction industry in the geographic areas of jurisdiction of the City of Toronto, the Regional Municipalities of Halton, Peel, York and Durham, and the Corporation of the County of Simcoe. These sections provide for the following:

- All collective agreements that are to expire before April 30, 2007 and that apply to residential construction work, in the above-cited areas, are deemed to expire with respect to that work on April 30, 2004. They will expire every three years from that date. Normal collective bargaining procedures remain in place, except as mentioned below.
- For the 2004 round of bargaining only, a strike or lockout will be prohibited after June 15, 2004. If no agreement is reached by that date, the matters in dispute may be referred to binding arbitration by either party. The parties may jointly appoint an arbitrator and agree on a method of arbitration (i.e., mediation-arbitration, final offer selection or any other method). If the parties cannot agree on an arbitrator or on a method of arbitration, at the request of either party, the Minister of Labour will appoint an arbitrator and the method of arbitration will be prescribed by regulation.

The above-mentioned amendments came into force on November 26, 2002.

In **Quebec**, a *Regulation to amend the Regulation respecting the application of the Act respecting labour relations, vocational training and manpower management in the construction industry* came into force on March 27, 2003.

The Regulation deals with production machinery whose installation or repair requires the use of professional expertise mainly from the construction industry. It specifies the cases where, in the industrial, civil engineering and roads sectors, the installation and repair of that machinery are covered by the *Act respecting labour relations, vocational training and manpower management in the construction industry*.

In **Newfoundland and Labrador**, a *Voisey's Bay Special Project Order* was issued under the *Labour Relations Act*. By virtue of this Order, the construction of an open pit mine and concentrator at Voisey's Bay, Labrador, has been declared a special project for the purposes of the *Labour Relations Act*.

The Order defines the parties that may be involved in collective bargaining in relation to employment on the special project (i.e. the Voisey's Bay Employers Association Inc. (the employer) and the Resource Development Trades Council of Newfoundland and Labrador (the union)), and states that the collective agreement entered into by the parties, effective September 9, 2002, is the collective agreement for the purpose of the special project. All persons employed on the special project under that agreement are considered to be members of a single bargaining unit.

The Order will remain in effect until the construction project has been completed.

E. Fishing Industry

In **Newfoundland and Labrador**, *An Act to amend the Fishing Industry Collective Bargaining Act* (Bill 31) was assented to and came into force on December 19, 2002.

The *Fishing Industry Collective Bargaining Act* permits a party to opt out of sections 35.1 to 35.11, which deal with negotiations over the price of fish and other matters between a processor or a processors' organization and a certified bargaining agent for fishers with no right to strike, lock out or cease business dealings. This includes section 35.7, which makes final offer selection, or another form of arbitration to which the parties have agreed at the commencement of the negotiations, mandatory when no collective agreement is reached at least 14 days before the expected opening date of the fishery for the species with respect to which negotiations are taking place. The amendment has changed the date of commencement of that opting out period from September 1, 2002 to September 1, 2003.

In addition, section 90 of the *Labour Relations Act*, which deals with the enforcement of arbitration decisions, has been made applicable to an arbitration decision awarded under the *Fishing Industry Collective Bargaining Act* (except under section 35.7) or a collective agreement under that Act.

F. Agriculture industry

In **Ontario**, as a result of a December 2001 judgment of the Supreme Court¹⁹ regarding the right of agricultural workers to freedom of association under the *Canadian Charter of Rights and Freedoms*, the *Agricultural Employees Protection Act, 2002* (Bill 187) was assented to on November 19, 2002, and came into force on June 17, 2003.

The purpose of that Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.

¹⁹ Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016

The Act gives agricultural employees the following rights:

- The right to form or join an employees' association.
- The right to participate in the lawful activities of an employees' association.
- The right to assemble.
- The right to make representations to their employers, through an employees' association, respecting the terms and conditions of employment.
- The right to protection against interference, coercion and discrimination in the exercise of their rights.

An employer must give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

An employees' association is prohibited from acting in a manner that is arbitrary, discriminatory or in bad faith in representing its members.

On a written application, the Agriculture, Food and Rural Affairs Appeal Tribunal may make an order, in specified circumstances, allowing access to property controlled by an employer for the purpose of attempting to persuade employees to join an employees' association. The order may specify terms and conditions the Tribunal considers appropriate.

Employers are prohibited from interfering with employees' associations and from taking reprisals against a person because of his/her involvement with an employees' association or the exercise of any other right under the Act. The use of intimidation or coercion in connection with membership in an employees' association or employers' organization or with the exercise of any right or the fulfilling of any obligations under the Act is also prohibited.

The Agriculture, Food and Rural Affairs Appeal Tribunal may inquire into complaints alleging a contravention of the Act. If the Tribunal determines that a contravention has occurred, it has the power to make a remedial order. It then determines what, if anything, the employee, employees' association, employer, employers' organization, or other person or body must do or refrain from doing with respect to the contravention, and a determination may include one or more of the following:

- an order directing the employee, employees' association, employer, employers' organization, or other person or body to cease doing or rectify the act(s) complained of; or
- an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Tribunal against the contravener(s).

On an inquiry by the Tribunal into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to the Act with respect to employment, opportunity for employment or conditions of employment, the burden is on the employer or employers' organization to prove that he/she/it did not act contrary to the Act.

A decision of the Tribunal is final and binding on the parties and on any other person or body that the Tribunal may specify. The Tribunal has no jurisdiction to make a decision altering the terms and conditions of employment of employees, except when it allows a person access to property controlled by an employer for the purpose of attempting to persuade employees to join an employees' association or when it issues remedial orders as mentioned previously.

The Act specifies that the *Labour Relations Act, 1995* does not apply to employees or employers in agriculture.

Consequential amendments were made to the *Labour Relations Act, 1995*.

III. OCCUPATIONAL HEALTH AND SAFETY

A. Legislation of General Application

In **Alberta**, effective December 4, 2002, the *Occupational Health and Safety Amendment Act, 2002* (Bill 37) brought a number of amendments to the *Occupational Health and Safety Act*, the most important of which are described below.

Publication of information about employers

The Minister of Human Resources and Employment may take the following measures to encourage good and discourage bad work site safety records: to establish indices and measurements of work site injury prevention; to maintain a register of the names of employers and their performance, as determined by the Minister, in relation to those indices and measurements; to collect any information needed for that register from another public body that provides such information; and to publish, or to authorize a department or agency of the government or any other body to publish, the information contained in that register.

Ministerial orders and codes

The Occupational Health and Safety Council has been given the power to make a code of rules (referred to in the Act as an "OHS code") respecting specific health and safety matters for or in connection with occupations and work sites, including the following: reporting requirements and the maintenance and preservation of documents reported; medical and health requirements; joint work site health and safety committees; the making available of codes of practice and other information and documents required by an adopted code; and the instruction, supervision and qualifications of specified persons.

An OHS Code may also provide for the prevalence of specified provisions of an adopted code over other specified provisions of another adopted code, and may provide for any matter or thing which may or is to be provided for by an adopted code under the Act or the regulations.

The Minister may, after consulting with such representatives of employers and of workers in the industries that will be affected by the code as he/she considers appropriate, make an order adopting any code that is made by the Council in accordance with the Act.

An OHS code may itself adopt or incorporate another specific code (referred to as a "secondary code") or part of a secondary code, as it exists at a particular time, dealing with health and safety matters that are within the Council's jurisdiction.

Any provision of regulations or an adopted code may be made to apply generally or to a particular occupation, work site, prime contractor, owner, employer, contractor, supplier or worker or any class of any such category.

Except to the extent that an OHS code or regulations provide(s) otherwise, the provisions of an OHS code prevail over those of a secondary code, and the provisions of regulations prevail over those of an adopted code.

Offences under the Act

A person who contravenes an adopted code, including an OHS code and a secondary code, is guilty of an offence and is liable to the penalties specified in the Act.

In addition, there has been an increase in the fines that can be imposed when a person contravenes the Act, the regulations or an adopted code or fails to comply with an enforcement order.

The maximum fine for a first offence has been increased from \$150 000 to \$500 000 and, in the case of a continuing offence, the maximum additional fine has been increased from \$10 000 to \$30 000 for each day during which the offence continues after the first day.

The maximum fine for a second or subsequent offence has been increased from \$300 000 to \$1 000 000 and, in the case of a continuing offence, the maximum additional fine has been increased from \$20 000 to \$60 000 for each day or part of a day during which the offence continues after the first day.

The maximum additional fine for failing to comply with an order of an officer made under section 10 of the Act (i.e., a stop work order, an order to leave the work site and/or an order to take specified measures to remove a danger or protect persons from it), whether or not the order was modified as a result of an appeal, has been increased from \$300 000 to \$1 000 000.

The maximum fine that may be imposed on a person who knowingly makes any false statement or knowingly gives false information to an officer or a peace officer engaged in an inspection or investigation under the Act has been increased from \$500 to \$1000.

A prosecution under the Act may be commenced within two years (instead of one year previously) after the alleged offence was committed, but not afterwards.

Additional court powers

Where a person is convicted of an offence against the Act, in addition or as an alternative to taking any other action it provides for, the court may, having regard to the nature of the offence and the circumstances of the case, make an order directing the person to establish or to revise the health and safety policy for the work site and the arrangements to implement that policy or a training or educational program regarding the health or safety of workers at the work site. The court may also make an order directing the person to take specific action to improve health and safety at work sites, or any other action specified in the regulations.

Also in Alberta, effective March 31, 2003, the *Occupational Health and Safety Regulation* under the *Occupational Health and Safety Act* has made changes in the following eight subject areas:

(1) Lead poisoning has been added to the list of notifiable diseases. When a physician discovers that a worker is suffering from lead poisoning, the physician must notify the Director of Medical Services within 7 days.

(2) If an employer is required by the *Occupational Health and Safety Act* to prepare a report or plan, or develop or put procedures in place, the report, plan or procedures must be in writing and available at the work site to affected workers.

(3) Employers are now explicitly responsible for ensuring that workers carry out the safety-related duties required of them. If the Act, a regulation or an adopted code imposes a duty on a worker, the worker's employer must ensure that the worker performs that duty.

(4) Instead of requiring a worker to remove from service any unsafe equipment under his/her control, a new provision requires the worker to immediately report unsafe equipment to the employer.

(5) A change clarifies that a worker must be trained in the safe operation of equipment that he/she is required to operate. The employer need not necessarily provide the training, but must ensure that the worker has received the appropriate training before he/she operates the equipment.

(6) A Director of Inspection may suspend or cancel a blaster's permit if the holder provided false information to obtain, or help others to obtain, a blaster's permit.

(7) A Director of Inspection who suspends or cancels a blaster's permit must provide written reasons for the suspension or cancellation to the worker and his/her employer.

(8) The holder of an underground coal mine manager's certificate, an underground coal mine foreman's certificate, or an underground coal mine electrical superintendent's certificate must demonstrate every five years, to the satisfaction of the Board of Examiners, his/her knowledge of the current occupational health and safety legislation applying to mine operations. If there is failure to do so, a Director of Inspection may suspend the certificate until the Board is satisfied.

In **Manitoba**, *The Workplace Safety and Health Act* includes a system of administrative penalties for non-compliance with improvement orders. Effective April 5, 2003, the *Administrative Penalty Regulation*, issued under that Act, has prescribed administrative penalty amounts. For failing to comply with an improvement order requiring a control measure to be implemented ("control measure" is defined in the Regulation), the penalty for a first contravention is \$2 500 and \$5 000 for a second or subsequent contravention. When there is a failure to comply with an improvement order not requiring a control measure to be implemented, the penalty for a first contravention is \$1000, for a second contravention \$3 000 or \$5 000 for a subsequent contravention.

In **British Columbia**, in addition to many amendments to workers' compensation provisions, the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63) brought changes to Part 3 (Occupational Health and Safety) of the *Workers Compensation Act*, notably with respect to the review/appeal process. These changes took effect on March 3, 2003.

Under the new legislation, requests may be made for a review by a review officer of a Workers' Compensation Board order, a refusal to make a Board order, or a variation or cancellation of a Board order respecting an occupational health or safety matter under Part 3. However, unlike the previous situation, this review process does not apply in the case of a decision of the Board regarding a complaint by a worker for discriminatory action prohibited under Part 3 or the failure to pay wages as required by that Part or the regulations. In such cases, an appeal may be made to an independent body established under the Bill, the Workers' Compensation Appeal Tribunal, which has replaced the appeal division of the Workers' Compensation Board.

In addition, the provisions dealing with the penalty notification process regarding the imposition of an administrative penalty and the opportunity for employers to make representations to the Board before the imposition of such a penalty were repealed. Under the new legislation, employers are permitted to request a review of a decision to impose an administrative penalty and may appeal the decision of a review officer to the Workers' Compensation Appeal Tribunal. Previously, they could lodge an appeal with the appeal division of the Workers' Compensation Board.

In **Nova Scotia**, the *Justice Administration Amendment (Fall 2002) Act* (Bill 144) brought amendments to many Acts, including the *Summary Proceedings Act*.

Provisions added to the *Summary Proceedings Act* stipulate that, when a justice of the peace or a judge of the provincial court is satisfied that there are reasonable grounds to believe that an offence against one of a number of listed statutes, including the *Occupational Health and Safety Act*, the *Elevators and Lifts Act* and the *Steam Boiler and Pressure Vessel Act*, has been, is being or will be committed, he/she may issue an investigative warrant authorizing a peace officer to search for a variety of things, including any equipment, machine, device, material, or biological, chemical or physical agent, and to conduct tests and take samples. The justice of the peace or judge of the provincial court may issue a warrant under those provisions only if there is no other provision in the *Summary Proceedings Act* or other Act that would provide for a warrant or order authorizing the technique or procedure to be used or thing to be done.

The amendments also provide that a warrant may permit experts to accompany and assist a peace officer in the execution of the warrant.

In addition, new provisions of the *Summary Proceedings Act* stipulate that although a search warrant would otherwise be required, a peace officer may act without a warrant if by reason of exigent circumstances it would be impracticable to obtain one. Exigent circumstances include circumstances in which the delay necessary to obtain a warrant would result in danger to human life or the loss or destruction of evidence.

The above amendments took effect on November 28, 2002.

In **Quebec**, *An Act to amend the Act respecting occupational health and safety and other legislative provisions* (Bill 133) was assented to on December 19, 2002 and came into force on January 1, 2003.

Bill 133 has amended the *Act respecting occupational health and safety* to provide for the establishment of a social trust patrimony, known as the Occupational Health and Safety Fund (Fonds de la santé et de la sécurité du travail). The fund is made up, for the greater part, of the assets of the Occupational Health and Safety Commission

(Commission de la santé et de la sécurité du travail), which is the trustee of the fund. The patrimony of the fund is dedicated to the payment of the sums or benefits to which any person may be entitled under the Acts administered by the Commission and to the achievement of any other purpose provided for in those Acts.

Bill 133 has also exempted the Commission from the application of the *Financial Administration Act*, the *Act respecting the Service des achats du gouvernement*, and from a number of other Acts either totally or partially. The Bill, however, imposes certain obligations on the Commission, including the obligation to prepare and publish a statement setting out its objectives as regards the level and quality of the services provided and to prepare a strategic plan that must be transmitted to the Minister of Labour and tabled in the National Assembly. The Commission is also made subject to reporting obligations.

Lastly, Bill 133 provides that the obligation for the Commission to obtain government approval for draft regulations applies to draft regulations adopted under section 223 of the Act, which deals with the power of the Commission to adopt various types of regulations in the field of occupational health and safety, and not to all draft regulations that the Board issues.

In Ontario, the *Health Protection and Promotion Amendment Act, 2001* (Bill 105), which was assented to on December 14, 2001, was brought into force on May 1, 2003.

This Act has amended the *Health Protection and Promotion Act* to allow a medical officer of health to make an order requiring the taking of a blood sample from a person if the officer is of the opinion, on reasonable grounds, that the applicant for the order has come into contact with a bodily substance of the person as a result of being a victim of a crime, providing emergency health care services or emergency first aid or performing a function prescribed by regulation; and it is not possible to accurately determine, in a timely manner, whether the applicant has become infected with a virus causing a prescribed communicable disease, and the order is necessary to decrease or eliminate the risk to his/her health. An applicant must submit to the medical officer of health a physician report made within seven days after he/she came into contact with the bodily substance. The physician making the report must be informed in respect of matters related to occupational and environmental health and all protocols and standards of practice in respect of blood-borne pathogens, and his/her report must assess the risk to the health of the applicant.

The order requires a legally qualified medical practitioner or another designated qualified person to take the blood sample and to deliver it to an analyst. It also requires the analyst to analyze the sample and to make reasonable attempts to deliver a copy of the results of the analysis to the physician of the person from whom the sample was taken and to the physician of the applicant. The analyst must also make reasonable efforts to notify the person who obtained the order of these attempts to deliver the results to his/her physician.

If the medical officer of health refuses to grant the application for such an order, the applicant may appeal the refusal to the Chief Medical Officer of Health within the time and in the manner prescribed by regulation.

In **Alberta**, a revised *Work Camps Regulation* was issued under the *Public Health Act*. It replaced a similar regulation adopted in 1985. The new Regulation took effect on October 22, 2002.

In the **federal jurisdiction**, changes have been made to certain provisions (i.e. subsection 12.10(1)) of the *Canada Occupational Health and Safety Regulations* under the *Canada Labour Code*, which deal with fall-protection systems. The Ontario Court (General Division) ruled in 1996 that trucks and other mobile equipment were not "structures" as the term is used in subsection 12.10(1) of the Regulations and that, therefore, that subsection did not apply to them. This amendment has corrected the situation by ensuring that adequate fall-protection is afforded to employees working on vehicles. This amendment took effect on October 24, 2002.

In the **Northwest Territories**, *An Act to amend the Safety Act* (Bill 23) received second reading on June 10, 2003.

This Bill would amend the *Safety Act* and, if adopted, would be effective on the date it receives Royal Assent. The main proposed changes are as follows:

- to modify the definition of "employer" to include an "owner" and a person having charge of "an establishment in which one or more workers are engaged in work" (currently, the definition refers to "an establishment in which one or more persons are employed");
- to provide that, if two or more employers have charge of an establishment, the principal contractor or, if there is none, the owner of the establishment must coordinate the activities of all employers in the establishment for health and safety purposes;
- to impose duties on suppliers of things used by workers or at establishments;
- to provide that every employer must implement and maintain the applicable prescribed safety program for its work site and, if required by the regulations or if directed by the Chief Safety Officer, must establish a joint work site health and safety committee as part of the program (when there are two or more employers at a work site, they would have to jointly implement and maintain a safety program if it is required);
- to amend the provision relating to disclosure of information, in recognition of the Workers' Compensation Board's responsibility for administering other legislation, in recognition of the need to share information with other governmental agencies or departments in Canada and with regulatory bodies or agencies approved by the Board, and in recognition of the *Access to Information and Protection of Privacy Act*;
- to enable a safety officer to give notice to an employer that, if his/her direction is not carried out, a further direction may be given to address a potential danger, and, in the event of a subsequent non compliance, to give the safety officer the power to order that a place, matter or thing not be used until the direction has been complied with;
- to enable the Chief Safety Officer to issue codes of practice to provide practical guidance with respect to the requirements of the Act and the regulations;
- to permit the adoption of regulations prescribing specific penalties for offences, not exceeding the maximums established by the Act; and

- to provide for the establishment of a Safety Advisory Committee to make recommendations respecting amendments to the Act and regulations.

In the **federal jurisdiction**, *An Act to amend the Criminal Code (criminal liability of organizations)* (Bill C-45) received first reading on June 12, 2003. This Bill would establish a legal duty under the *Criminal Code* for all persons directing work to take reasonable steps to ensure the safety of workers and the public, and would set rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives.

Under current Canadian law, a corporation may be found liable for a *Criminal Code* offence, but it has largely been left to the common law, as developed through the courts, to determine the nature and scope of this liability.

In the proposed legislation, the term "organization" is used rather than "corporation." "Organization" includes "a public body, a body corporate, a society, a company," taken from the existing *Criminal Code* definitions, but adds "a firm, a partnership, a trade union or an unincorporated association," which are new.

The proposed *Criminal Code* amendments build on recent reforms to Part II (Occupational Health and Safety) of the *Canada Labour Code* by imposing a legal duty on employers and those who direct work to take reasonable measures to protect worker and public safety. If this duty is wantonly or recklessly disregarded and bodily harm or death results, an organization could be charged with criminal negligence.

The proposed legislation would also update the law on corporate criminal liability by ensuring that it reflects the current structures of modern organizations. The proposed measures would make corporations criminally liable:

- as a result of the actions of those who oversee day-to-day operations, but who may not be directors or executives;
- when officers with executive or operational authority intentionally commit, or direct employees to commit, crimes to benefit the organization;
- when officers with executive or operational authority become aware of offences being committed by other employees, but do not take action to stop them; and
- when the actions of those with authority and other employees, taken as a whole, demonstrate a lack of care that constitutes criminal negligence.

Organizations cannot be imprisoned and so the *Criminal Code* provides for fines. The proposed legislation would increase the maximum fine on an organization for a summary conviction, a less serious offence, from \$25 000 to \$100 000. There is currently no set limit on fines for indictable or more serious offences, and this would remain unchanged under the proposed legislation.

The proposed legislation also identifies factors that a court must consider in setting the level of fines. For example, judges would be asked to consider aggravating factors like the degree of planning or economic advantages gained by the organization in committing the offence. Mitigating factors could include measures taken by the organization to significantly reduce the likelihood of further criminal activity.

Under the proposed legislation, an organization that takes steps to ensure that it does not commit further crimes could be subject to a probation order, which could result in reduced fines in certain circumstances. A judge could elect to have the organization inform the public of the offence, the sentence and the remedial measures taken. A court could also impose conditions which may possibly avert future criminal occurrences by the organization, including the requirement to develop related policies and procedures and to appoint a senior officer to oversee their implementation.

B. Radiation Protection

In **Alberta**, on June 10, 2003, the *Radiation Protection Regulation*, issued under the *Radiation Protection Act*, replaced a Regulation having the same title that had been in effect, with amendments, since January 1, 1991.

The Regulation contains a new provision that prohibits the use of ionizing designated radiation equipment or an ionizing radiation source by anyone under the age of 18, except for students if they are undergoing a course of instruction involving the use of such equipment or source and, while they are doing so, are under the direct supervision of a competent worker. The maximum dose limits for ionizing radiation prescribed for students in the Regulation are the lower limits applying to persons other than radiation workers.

With respect to non-ionizing radiation, the Regulation prescribes maximum exposure limits for radiofrequency electromagnetic fields in the range from 3 Khz to 300 Ghz for occupationally exposed persons.

Other changes include, among others, the updating of a number of standards referenced in the Regulation.

The new Regulation is scheduled to expire on March 31, 2013. This is to ensure that it is reviewed for relevancy, with the option that it may be re-passed with or without amendments.

C. Protection against Tobacco Smoke

In **Prince Edward Island**, the *Smoke-free Places Act* (Bill 11) was assented to on December 18, 2002 and on May 23, 2003 was amended by Bill 43, *An Act to Amend the Smoke-free Places Act*.

This *Smoke-free Places Act*, as amended, came into force on June 1, 2003. It provides that smoking in public places, including restaurants and bars, and workplaces is only permitted in designated smoking areas that meet certain requirements.

An owner of a public place or workplace or an employer may designate an outdoor area for smoking if the indoor non-smoking areas of the public place or workplace are structurally separated from that outdoor area and meet any further requirements prescribed by regulation.

Except in the case of certain public places or workplaces, such as the part of a building used as a day care centre, a school, or a public area of a retail store or mall, an owner of a public place or workplace or an employer may designate indoor smoking areas that are enclosed rooms equipped with an independent ventilation system, which meet the

requirements of the Act and the regulations. Rooms ordinarily used or occupied by non-smokers may not be designated as smoking areas.

An owner or employer is prohibited from requiring an employee to enter or work in a designated smoking room in a public place or a workplace, and from permitting an employee to enter or work in such a room, except in the circumstances and in accordance with the requirements set out in the regulations. The *General Regulations* state that an owner of a public place or an employer at a workplace may permit an employee to enter or work in a designated smoking room in any of the following circumstances:

1. The employee volunteers to enter or work in the room, he/she spends no more than 20% of a workday or shift in the room, and does not serve food or beverages in the room.
2. The employee is entering the room to respond to an emergency that endangers a person's life, health or property, or to investigate suspected illegal activity.
3. The room is free from second-hand smoke.

An employer or union is prohibited from taking or threatening to take discriminatory action against an employee, which includes disciplinary measures, suspension or dismissal, or from imposing any penalty on an employee, or intimidating or coercing him/her because he/she has acted in accordance with the Act, the regulations or an order of an inspector or sought their enforcement.

The Minister responsible for the new Act may appoint inspectors to monitor compliance. Occupational health and safety officers appointed under the *Occupational Health and Safety Act* are deemed to be inspectors by virtue of their office.

The Act and regulations do not apply to correctional centres, unless that exemption is lifted by proclamation, and prevail over any conflicting provision of an Act, a regulation or a municipal bylaw respecting smoking in a public place or workplace, unless that provision imposes a more stringent requirement or restriction.

In **Nunavut**, the *Tobacco Control Act* (Bill 33) received second reading on March 25, 2003.

This Bill would, among other things, prohibit smoking in any workplace or in the three metre radius surrounding any entrance to or exit from a workplace whether or not a sign prohibiting smoking is posted. The three metre rule would not apply to an enclosed shelter set aside for smoking near an entrance or exit, if persons entering or leaving the workplace are not exposed to smoke from the shelter.

Every employer would be required to ensure compliance with these provisions; to give notice to every employee that smoking is prohibited in the workplace; to post signs prohibiting smoking, as prescribed by regulation, in conspicuous locations at every entrance and every washroom in the workplace; and to ensure that there are no ashtrays or similar smoking equipment in any part of the workplace.

These requirements would not apply to some workplaces, including restaurants and bars for two years after their coming into force, and to areas set aside for smoking in elder homes or other premises designated by regulation, if the area meets prescribed requirements.

An employer or his/her representative would be prohibited from penalizing an employee (i.e. dismissal, disciplinary action, suspension, or threat of any such action) or from intimidating or coercing an employee because he/she has acted in accordance with or has sought the enforcement of the new legislation.

If there is any conflict between the proposed legislation and another Act, a regulation, or a by-law made by a municipal council under the *Cities, Towns and Villages Act* or the *Hamlets Act* that deals with smoking, the provision that is the most restrictive of smoking would prevail.

The Minister of Health and Social Services would be authorized to appoint inspectors for the purpose of enforcing the new Act.

This Bill would come into force, in whole or in part, on a date or dates to be set by the Commissioner in Executive Council.

D. Mine Safety

In the **Northwest Territories**, effective February 28, 2003, numerous amendments were made to the *Mine Health and Safety Regulations* under the *Mine Health and Safety Act*.

Some of the amendments reflect changes and advances in mining technology. Others focus on enlarging the roles and responsibilities of existing occupational health and safety committees within mines and making them more effective. For example, when a committee makes recommendations to the manager of a mine and the employees regarding occupational health and safety, the manager must respond in writing to the committee within 15 days after receiving the recommendations. Many of the amendments serve to update the Regulations to reflect new practices. Some new sections contain safety requirements and operational procedures related to raise mining and slusher operation, and work hour/schedule requirements. Lastly, several sections specifying brake testing requirements for mobile equipment have been replaced by a general provision requiring mine managers to ensure that a procedure is established according to the manufacturer's recommendations for the testing of each braking system of all mobile equipment used in underground or surface operation.

In **Saskatchewan**, on July 16, 2003, *The Mines Regulations, 2003* under *The Occupational Health and Safety Act, 1993* replaced *The Mines Regulations*, which were originally adopted in 1978.

The Mines Regulations, 2003 contain improvements whose purpose is to clarify certain requirements and make mine safety rules consistent with the concepts, definitions and legal language used in *The Occupational Health and Safety Act, 1993* and *The Occupational Health and Safety Regulations, 1996*.

Other improvements have also been made to reduce worker exposure to diesel exhaust. The new Regulations require employers to take the following measures: implement a diesel engine maintenance program; develop a diesel emission testing plan; test for diesel particulates; and reduce the allowable sulphur content of fuel.

In addition, there are new standards for remote controlled mobile equipment and the brakes of heavy equipment as well as revised provisions regarding mine rescue, egress from underground workplaces and fuel/lubricant depots underground.

In **Nova Scotia**, the provisions of the *Occupational Health and Safety Act* repealing the *Coal Mines Regulation Act* and the *Metalliferous Mines and Quarries Regulation Act* will be proclaimed in force as of November 8, 2003. On the same date, the regulations respecting occupational health and safety made under those two Acts will also be repealed.

The province has approved new *Underground Mining Regulations* under the *Occupational Health and Safety Act*. The Regulations define the duties and responsibilities of employers and employees in underground mines. They also establish training requirements and qualifications for mine workers and the technical specifications for the safe operation of mines. They will take effect on November 8, 2003.

E. Boilers, Pressure Vessels and Elevating Devices

In **Nova Scotia**, the *Elevators and Lifts Act*, which received Royal Assent on May 30, 2002, was proclaimed in force on February 28, 2003, and new *Elevators and Lifts General Regulations* came into force on the same date.

In **British Columbia**, the *Safety Standards Act* (Bill 19) will repeal and replace the current *Electrical Safety Act*, the *Elevating Devices Safety Act*, the *Gas Safety Act* and the *Power Engineers and Boiler and Pressure Vessel Safety Act*. Except for some provisions that took effect on May 29, 2003, the Act will come into force on a date to be set by regulation.

The British Columbia Safety Authority, a not for profit corporation capable of administering safety standards in the province, is established by the *Safety Authority Act* (Bill 20), which came into force on June 20, 2003.