# 20 Key Developments In Canadian Labour And Employment Law In 2023



In 2023, Canada saw significant statutory and case law developments in labour and employment law. This Insight provides an overview of notable 2023 developments, with links to more detailed articles and commentary.

1. **Ontario, Canada Court Addresses Statutory Tort of Human Trafficking in Labour Context**

In *Osmani v. Universal Structural Restorations Ltd., 2022 ONSC 6979*, an Ontario court was the first to consider a claim for damages for the statutory tort of human trafficking under the *Prevention of and Remedies for Human Trafficking Act* (*PRHTA*). Although this tort is often thought of in the context of sex trafficking, its application can also be considered in the labour context as it was in *Osmani*. While in this case the court dismissed the employee's claim, the case opened the door for future claims. A more detailed article is available here.

2. **Alberta, Canada Court of Appeal Decides CERB Payments Should Not Be Deducted from Damages for Wrongful Dismissal**

In *Oostlander v. Cervus Equipment Corporation, 2023 ABCA 13*, the employee cross-appealed the Court of Queen's Bench of Alberta's decision to deduct his Canadian Emergency Response Benefit (CERB) payments from his wrongful dismissal damage award. The Alberta Court of Appeal held that the CERB payments should not have been deducted. A more detailed article is available here.

3. **Ontario, Canada Court Finds Employment Contract Frustrated by Employee's Refusal to Become Vaccinated Against COVID-19**

In *Croke v. VuPoint Systems Ltd.*, 2023 ONSC 1234, Ontario's Superior Court of Justice decided that an employee's refusal to comply with mandatory COVID-19 vaccination requirements resulted in the frustration of the parties' employment relationship. The employer, therefore, was entitled to terminate the employee's employment without providing notice of termination or damages in lieu of common law reasonable notice. A more detailed article is available here.

4. **British Columbia Adopts National Day for Truth and Reconciliation (September 30) as a Statutory Holiday**

On March 9, 2023, British Columbia's Bill 2, *National Day for Truth and*

*Reconciliation Act*, received Royal Assent and came into force. Bill 2 amended British Columbia's *Employment Standards Act* to provide eligible workers in the province a new statutory holiday, the National Day for Truth and Reconciliation, which commemorates the history and legacy of Canada's residential school system and is observed annually on September 30. A more detailed article is available here.

5. **British Columbia Employer that Engaged in "Hardball Tactics" to Manufacture Just Cause for Termination Required to Pay over $200k in Damages**

In *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21, the court held that an employer that attempted to manufacture just cause for the termination of a vulnerable employee breached its duty of good faith and fair dealing. The employee successfully claimed damages from the employer for wrongful dismissal for failure to provide reasonable notice of the termination of his employment, and aggravated damages and punitive damages based upon his employer's breach of duty of good faith and fair dealing in the manner of his dismissal. The employee was awarded over $200,000; $58,053 in damages for wrongful dismissal, $50,000 for aggravated damages, and $100,000 for punitive damages. A more detailed article is available here.

6. **Alberta, Canada Arbitrator Finds Grievor's "Off-Duty" Sexual Assault of Co-Worker Just Cause for Employment Termination**

In *Corporation of the City of Calgary v. Amalgamated Transit Union, Local 583*, 2023 CanLII 20867 (AB GAA), Arbitrator James T. Casey dismissed the union's grievance of an employee's job termination, finding that his off-duty sexual assault of a co-worker constituted sufficient just cause for his termination. A more detailed article is available here.

7. **Ontario, Canada Court of Appeal Addresses How Employers Can Preserve Right to Unilaterally Lay Off Employees Without Being Found to Have Constructively Dismissed Them**

In *Pham v. Qualified Metal Fabricators Ltd.*, 2023 ONCA 255, the Ontario Court of Appeal found that unless an employee's employment contract provides otherwise via an express or implied term, an employer's unilateral lay off of an employee will constitute constructive dismissal, even when the layoff is temporary. Such an implied term must be "notorious, even obvious, from the facts of a particular situation." A more detailed article is available here.

8. **British Columbia's Bill 13, *Pay Transparency Act*, Receives Royal Assent**

On May 11, 2023, British Columbia, Canada's Bill 13, *Pay Transparency Act*, received Royal Assent. Section 2 of the Act, which addresses the employer's obligations regarding publicly advertised job opportunities, came into force on November 1, 2023; the balance of the Act came into force on May 11, 2023, the date of Royal Assent. A more detailed article is available here.

9. **British Columbia Tribunal Confirms Time Theft Proven by Time-Tracking Software May Justify Employment Termination for Cause**

In *Besse v. Reach CPA Inc.*, 2023 BCCRT, the Tribunal found the employer had just cause for terminating a remote worker's employment for time theft after it discovered the time-tracking program it had installed on the employee's work laptop revealed that 50.76 unaccounted hours were recorded on her timesheets. The Tribunal ordered the employee to compensate the employer for the theft of the unaccounted-for hours. A more detailed article is available here.

10. **Alberta, Canada Court Recognizes New Tort of Harassment**

Departing from the approach taken by other Canadian courts, in *Alberta Health Services v. Johnston, 2023 ABKB 209*, the Court of King's Bench of Alberta recognized a new tort of harassment. A more detailed article is available here.

11. **Ontario, Canada Appeal Court Upholds Refusal to Impose Constructive Trust Over Proceeds of Sale of Property Owned by Defrauding Employee's Wife**

A recent Ontario Court of Appeal (OCA) decision demonstrates the process an employer may be expected to undertake to recover employee-stolen funds when the proceeds of the fraud are traced to the assets of a "stranger to the fraud," even when this third party is closely related to the employee. In *Sase Aggregate Ltd. v. Langdon, 2023 ONCA 554*, the OCA upheld the lower court's refusal to impose a constructive trust over the proceeds of the sale of property owned by the defrauding employee's wife. A more detailed article is available here.

12. **Ontario, Canada: Licensing Framework for Temporary Help Agencies and Recruiters in Force July 1, 2023**

In December 2021, Ontario passed *Bill 27, Working for Workers Act, 2021*, which amended the *Employment Standards Act, 2000* (ESA) to, among other things, establish a licensing regime for temporary help agencies (THAs) and recruiters. (Originally slated to commence on January 1, 2024, the new licensing requirement for THAs and recruiters was subsequently delayed until July 1, 2024.) These amendments to the ESA did not come into force immediately because the licensing framework first had to be prescribed by Regulation. Accordingly, on June 10, 2023, new Regulations were passed to establish the licensing framework [namely, Reg. 99/23 (Licensing – Temporary Help Agencies and Recruiters), Reg. 101/23 (Termination and Severance of Employment), and Reg. 100/23 (Penalties and Reciprocal Enforcement)]. A more detailed article is available here.

13. **Ontario, Canada Appeal Court Finds Independent Contractors Have Duty to Mitigate Damages When Fixed-Term Contract is Terminated Early**

In *Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413, the Ontario Court of Appeal found that independent contractors have a duty to mitigate their damages upon the early termination of a fixed-term agreement (*i.e.*, take reasonable steps to reduce their damages by attempting to find new work/income). A more detailed article is available here.

14. **British Columbia Appeal Court Finds Employer Vicariously Liable for Employee's Willful Violation of Customers' Privacy**

In *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331, the British Columbia Court of Appeal (BCCA) confirmed that an employer may be found vicariously liable when its employee violates of s. 1 of the province's *Privacy Act* (Act). Section 1 of the Act provides that it is a statutory tort for a person, wilfully and without a claim of right, to violate the privacy of another. A more detailed article is available here.

15. **Canada Adds Exemptions from Hours of Work Requirements for Certain Employees in Banking, Telecommunications and Broadcasting, Rail, and Airline Sectors**

On August 16, 2023, Canada published Regulation SOR/2023-180 under the *Canada Labour Code (CLC)* (Amending Regulation). The Amending Regulation exempts certain classes of employees in the banking, telecommunications and broadcasting, rail and airline sectors from specified hours of work requirements in the CLC. A more detailed article is available here.

16. **British Columbia Appeal Court Finds Employee's Sexual Harassment of Subordinate not Sufficiently Serious to Justify His Dismissal**

In *Café La Foret Ltd. v. Cho*, 2023 BCCA 354, the British Columbia Court of Appeal (BCCA) upheld a lower court's determination that an employee's sexual harassment of his subordinate was not sufficiently serious to justify his dismissal, and only varied the lower court's order to read that the $25,000 award made globally for aggravated and punitive damages would be made exclusively for aggravated damages. A more detailed article is available here.

17. **Ontario, Canada's Bill 79, Working for Workers Act, 2023 Came into Force**

On October 26, 2023, Ontario's Bill 79, Working for Workers Act, 2023 (Bill 79) received Royal Assent and came into force. The statutes amended by Bill 79 include the *Employment Standards Act, 2000* (ESA), the *Occupational Health and Safety Act* (OHSA) and the *Employment Protection for Foreign Nationals Act, 2009* (EPFNA). Amendments to the ESA include the expansion of eligibility for Reservist Leave; that when determining whether there has been a mass termination at an employer's "establishment," the "location at which the employer carries on business" will include an employee's private residence, subject to certain conditions; that employers must provide a notice of mass termination to each affected employee; and also amends the licence application provisions in Part XVIII.1 of the ESA (Temporary Help Agencies and Recruiters). The OHSA is amended by increasing the fine for corporations convicted of an offence under the OHSA. The EPFNA is amended to provide that the Ontario Labour Relations Board must reduce the penalty set out in a notice of contravention where certain conditions apply; and to establish higher maximum fines for a conviction relating to contraventions of subsection 9(1) or (2) of the EPFNA in respect of a passport or work permit. A more detailed article is available here.

18. **Supreme Court of Canada Confirms "Owners" of Construction Projects Are "Employers" Under OHSA**

The Supreme Court of Canada's (SCC) decision in *R. v. Greater Sudbury (City)*, 2023 SCC 28 was equally divided (4-4). In the absence of a majority SCC decision, the City's appeal was dismissed, and the decision of the Court of Appeal of Ontario (OCA) was upheld. The OCA had decided that an "owner" of a construction project can be considered an "employer" within the meaning of the *Occupational Health and Safety Act*. As such, it can be held liable, subject to a due diligence defence, for a contractor's violations of workplace safety on a construction project site, even when it properly engages a reputable contractor to act as the project's "constructor," and none of its employees are involved in the construction project. The decision of the SCC upholding the OCA's decision is significant for the construction sector. A more detailed article is available here.

19. **Alberta, Canada Court Holds Placing Employee on Unpaid Leave for Failure to Comply with Mandatory COVID-19 Vaccination Policy is Not Constructive Dismissal**

In *Van Hee v. Glenmore Inn Holdings Ltd.*, 2023 ABCJ 244, the Alberta Court of Justice found that an employer's mandatory vaccination policy was a reasonable, justified and lawful response to the extraordinary circumstances of the COVID pandemic. Furthermore, when the employer placed the employee on unpaid leave, it did not constructively dismiss the employee. Rather, the employee resigned while on unpaid leave when she sent a draft claim to her employer claiming she had been constructively dismissed and seeking damages in lieu of reasonable notice, as of the date her leave commenced. Accordingly, the court dismissed the employee's claim for constructive dismissal and found that she was not entitled to pay in lieu of notice

of dismissal from the employer. A more detailed article is available here.

20. **British Columbia Appeal Court Upholds Finding that Employee's Surreptitious Recording of Conversations with Colleagues Justified His Dismissal for Just Cause**

In *Shalagin v. Mercer Celgar Limited Partnership*, 2023 BCCA 373, the British Columbia Court of Appeal upheld the lower court's dismissal of an employee's wrongful dismissal claim and its finding that his surreptitious recording of conversations with his colleagues justified the termination of his employment for just cause. A more detailed article is available here.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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