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**Legal Aspects of the Utilization of Human Resources in the
Canada-U.S. Context: A Comparative Look at Hiring and
Termination and Regulation of the Workplace**

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Hiring, Termination and Regulation of Employees In The Canadian Workplace

Roy L. Heenan and Thomas Brady***

A comparative look at Canadian and American rules and practices governing employment relationships is particularly *apropos* at this time as the two national economies develop closer ties in the wake of the Canada-U.S. Free Trade Agreement. While many of the Canadian "rules of the game" in employment relations broadly resemble those in the United States, there are some important differences and subtle nuances which a comparison between the two systems reveals. This paper concentrates on some of the more important aspects of employment relations in Canada, particularly those which have seen considerable change in the past decade. The focus will be on Canada, highlighting the more important differences between American and Canadian law.

I. THE CONSTITUTIONAL CONTEXT

In Canada, the general rule is that the provinces have legislative jurisdiction over all aspects of employment relations under their powers over "property and civil rights" and matters of "a merely local or private nature in the Province." Since the Canadian constitution assigns power to legislate in regard to a given subject matter exclusively to the federal government or exclusively to the provincial governments, this means that federal legislation does not override provincial legislation in regard to any aspect of employment relations under provincial jurisdiction. In Canada, federal law does not establish national standards which can take precedence over provincial laws in case of conflict between the two.¹

Rather, the federal government and the ten provinces each have full control over all aspects of the labor and employment relations which fall within their respective spheres and neither level of government can affect employers or employees under the jurisdiction of the other. Thus, provincial human rights² or minimum wage³ laws have no effect on federally

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¹ Constitution Act, 1867, 30 & 31 Vict., ch. 3; *Toronto Electric Commissioners v. Snider* 1925 A.C. 396; *Montcalm Construction v. Minimum Wage Comm'n*, 1 S.C.R. 754 (1979). A good brief discussion of the federal-provincial division of powers in labor and employment law may be found in P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 461-66 (Carswell 2d ed. 1985)[hereinafter HOGG].

² *Canadian Pacific Ltd. v. Attorney General of Alberta*, 108 D.L.R.3d 738 (Alta. C.A. 1980).

³ *Comm'n du Salaire Minimum v. Bell Canada*, 1966 S.C.R. 739.

regulated employers. Conversely, provincially regulated employers are unaffected by federal legislation on these subjects.

Though provincial legislative jurisdiction over labor and employment relations is the general rule, the federal government has jurisdiction over these matters in industries whose regulation is assigned to it. These are listed in section 91 of the Constitution Act 1867 and generally are ones whose activities necessarily cross provincial or international boundaries.

The most important matters are interprovincial and international transportation, broadcasting, telecommunications of all types and banking. An important contrast with the American position lies in the fact that a manufacturer whose products are sold interprovincially or internationally remains under provincial jurisdiction, due to the fairly narrow scope given to the federal power over "the regulation of trade and commerce."⁴

A further, and important, contrast between the two constitutional contexts lies in the differing effects of the Canadian *Charter of Rights and Freedoms*⁵ and the American *Bill of Rights*. The *Charter* does not apply to relations between private parties. Hence, it will not apply directly to labor and employment relations and the rights guaranteed by it cannot be relied upon by parties to employment related disputes.⁶ The *Charter* can indirectly affect labor and employment relations, however, parties to an employment relationship are free to argue that a statute or common law rule governing the relation is contrary to the *Charter* and, hence, of no force or effect.

II. STARTING THE EMPLOYMENT RELATIONSHIP: REGULATION OF HIRING

The most important form of regulation at the beginning of an employment relationship lies in the federal and provincial human rights acts. These all prohibit "intentional discrimination" on a number of specified grounds such as sex, race, color, national origin and religion. The exact scope of the list varies from jurisdiction to jurisdiction. Thus, the Quebec statute prohibits discrimination on the ground of "sexual orientation," while the legislation in most other provinces does not.

"Intentional discrimination," as in the United States, covers consciously-made decisions to refuse to hire a person where the decision is based in whole or in part on one of the prohibited grounds of discrimina-

⁴ On the "trade and commerce" power, see HOGG, *supra* note 1, at 440-52. The tests for determining whether a given enterprise, which might normally fall under provincial jurisdiction, is so entwined with another enterprise which is under federal jurisdiction as to come under the latter are set out in Northern Telecom Canada Limited and Canadian Union of Communication Workers v. Communication Workers of Canada and the Attorney General, 1 S.C.R. 733 (Nos. 1 & 2)(1983).

⁵ Constitution Act 1982, ch. 11 (U.K.), sched. B. part I. [hereinafter the *Charter*].

⁶ Retail, Wholesale and Department Store Union Local 580 v. Dolphin Delivery, 2 S.C.R. 573, 574 (1986); *Charter*, *supra* note 5, § 32.

tion. The position in regard to what is known as “constructive,” “indirect” or “adverse impact” discrimination is slightly less clear. Some jurisdictions (e.g., Ontario Human Rights Code) expressly prohibit such discrimination. Other jurisdictions do not, but in an important decision, Ontario Human Rights Commission and O’Mally v. Simpsons-Sears Ltd.,⁷ the Supreme Court of Canada held that no proof of intent to discriminate was necessary where it was shown that a job requirement had an adverse impact on persons identifiable on a prohibited ground of discrimination. In light of this decision, it is highly probable that any Canadian human rights statute would be interpreted as prohibiting adverse effect discrimination even where this is not expressly mentioned in the statute.

The Canadian position on affirmative action programs, the use of numerical quotas or goals for the employment of persons identifiable on the basis of sex or ethnicity, is similar. Three provinces, Ontario, Quebec and Manitoba,⁸ expressly allow voluntary affirmative action programs and give the provincial human rights commission power to impose one. In Saskatchewan, Nova Scotia and Newfoundland,⁹ such programs may be imposed by the human rights commission or court order, but cannot be voluntarily introduced without the appropriate commission’s approval. The remaining provinces (British Columbia, Alberta, New Brunswick and Prince Edward Island) make no provision for affirmative action programs in the statutes.

The various statutory schemes must now be read in the light of the Supreme Court of Canada’s decision in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission).¹⁰ The Court dealt in this case with an order of a human rights tribunal sitting under the federal human rights statute.

The federal statute contains no express authorization for the imposition of affirmative action programs, but the tribunal ordered Canadian National to set goals for the hiring of women in its mechanical workshops aimed at bringing the percentage of women in them into line with the percentage of women in similar types of work in the general labor force. The Supreme Court upheld the tribunal’s jurisdiction to impose

⁷ Ontario Human Rights Comm’n and O’Malley v. Simpsons-Sears, Ltd., 2 S.C.R. 536, 551-52 (1980). The case was decided on the basis of the Ontario Human Rights Code, *infra* note 8, before it was amended to expressly prohibit “constructive” discrimination.

⁸ Ontario Human Rights Code, ONT. REV. STAT. § 13; Manitoba Human Rights Act, MAN. REV. STAT. ch. H-175, § 10 (1987); Charter of Human Rights and Freedoms, QUE. REV. STAT. c.C-12 §§ 86.1 -2 (1977).

⁹ Saskatchewan Human Rights Code, SASK. STAT. c.S-24.1 § 47 (1979); Nova Scotia Human Rights Act, N.S. REV. STAT. ch. 130, § 14 (1967); Newfoundland Human Rights Code, NFLD. REV. STAT. ch. 62, § 20 (1988).

¹⁰ Canadian Nat’l Ry. Co. v. Canada (Canadian Human Rights Comm’n), 1 S.C.R. 1114 (1987), (referred to as *Action Travail des Femmes*, after the group which brought the complaint before the Canadian Human Rights Commission).

such a remedy once it had been established as a fact that women had been systematically discriminated against in the types of jobs at issue.

The court reasoned that human rights acts are aimed at preventing the adverse consequences of discriminatory conduct and that, on the particular facts of the case, the affirmative action program imposed was an appropriate means of combating the systemic discrimination found to exist. The tribunal thus had jurisdiction to order the program. Given this decision, it is likely that even Canadian human rights statutes not expressly allowing affirmative action programs would be construed as permitting them where they are the most suitable means of countering proven discrimination. To date, however, affirmative action programs have not become a pervasive feature in the Canadian workplace. Very few have been imposed by human rights tribunals or the courts. Voluntary programs of the complexity sometimes found in the United States are rarer still.

Moreover, Canadian courts have barely begun to grapple with many of the issues raised by affirmative action in the United States. Some indications of the courts' possible orientations in these matters are, however, available now.

In the *Action Travail des Femmes* case, the Supreme Court upheld an affirmative action program where it rested on extensive findings of fact as to the existence of systemic discrimination against women in the particular type of work in question. This had resulted in a very large disparity between the percentage of women in such non-traditional, blue-collar jobs in the work force as a whole and the percentage of Canadian National.¹¹ The order aimed at bringing the size of the female work force in such jobs at Canadian National into line with that in the work force as a whole. The objective of the order, as the Chief Justice "underscores" in the court's unanimous judgment, was not an arbitrary one.¹² This suggests that future affirmative action programs will have to be based on the objectively established facts particular to each case, and firmly tied to them, rather than being an arbitrary quota incapable of fulfillment under practical workplace conditions they will be proportionate to the problem. Programs which fail to meet these criteria may themselves be struck down as discriminatory.

An instance of a program with just these problems occurred in *Apsit v. Manitoba Human Rights Commission*,¹³ where the Manitoba Court of Queen's Bench quashed an affirmative action program which had given preference to Manitoba native people (Indians) in the nurture and production of wild rice on Crown waterbodies. The program was struck down as being discriminatory under section 15(I) of the Canadian Charter

¹¹ *Id.* at 1123-24, -27, -32.

¹² *Id.* at 1141.

¹³ *Apsit v. Manitoba Human Rights Comm'n*, 9 C.H.R.R. D/4457 (Man. Q.B. 1988).

of Rights and Freedoms¹⁴ because the Human Rights Commission had failed to demonstrate:

A real nexus between the object of the program as declared by the Government and its form and implementation. It is not sufficient to declare that the object of the program is to help a disadvantage group if, in fact, the ameliorative remedy is not directed toward the cause of the disadvantage.¹⁵

In the *Action Travail des Femmes* case, dealing with the requirements for affirmative action programs, the Supreme Court gave a possible indication of how it will deal with an issue which has caused much litigation in the United States: How are the seniority rights of unionized employees to be affected by affirmative action programs?¹⁶ The Supreme Court of Canada held that the program imposed would not take effect until all laid-off employees in the bargaining units had been recalled.¹⁷ This may indicate that the courts will be reluctant to interfere with existing seniority rights when affirmative action programs are put into effect.

An important exception to the current lack of large scale affirmative action efforts in most Canadian jurisdictions is the federal Employment Equity Act.¹⁸ This statute requires employers in the federal jurisdiction with over one hundred employees to gather data on the ethnic and gender composition of their work forces and report it to the Canadian Employment and Immigration Commission. These employers are also required to develop "employment equity" (affirmative action) plans if the data gathered show under-representation of four "designated groups" (women, native people, the disabled and visible minorities) named in the Act.

It must be emphasized that, though the legislation imposes sanctions in the form of fines for failure to file the required data, no agency is designated in the Act to review the sufficiency of plans developed under it. The Canadian Human Rights Commission has been attempting to act as an enforcement agency for the Employment Equity Act by reviewing data filed under the Act and endeavouring to persuade employers to col-

¹⁴ The Charter is a constitutional document and any federal or provincial legislation which is contrary to its provisions is of no force or effect, unless the relevant legislature makes an express declaration that the legislation applies "notwithstanding" the Charter § 15(1) of the Charter provides as follows:

Every individual is equal before and under the law and has the right of equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁵ 9 C.H.R.R. D/4457, D/4463. It should be noted that this decision is under appeal.

¹⁶ See e.g., *Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

¹⁷ *Canadian Nat'l Ry. Co.*, 1 S.C.R. 1114, 1127 (1987).

¹⁸ Employment Equity Act, CAN. REV. STAT. ch. 23 (2d ed. Supp. 1985).

laborate with it in voluntary reviews of their employment practices. Failure to agree to this has, in some instances, resulted in the Commission's filing a complaint against the employer for a breach of the Canadian Human Rights Act¹⁹ as allegedly revealed by the Employment Equity Act data. The Commission's jurisdiction to act in this matter is currently before the courts and a hearing in the challenge brought by a major Canadian corporation is scheduled to be heard in 1990.

Contract compliance programs inspired by U.S. practice have also been introduced by a number of Canadian governmental purchasers. The most ambitious and legally dubious, is that of the federal government, whose program essentially provides for the application of the scheme of the Employment Equity Act to provincially-regulated employers with over one hundred employees who have a contract for the supply of certain types of goods worth \$200,000 or more to the federal government. No statutory basis exists for this program, in contrast to the situation in the United States where the Federal Property and Administrative Services Act of 1949 has been relied on by the courts in a number of instances to uphold the legality of the U.S. federal government's equivalent program.²⁰ The Canadian program, however, may require employers to do acts which are prohibited as discriminatory by the applicable provincial human rights statute. Because of the constitutional division of powers over labor relations in Canada, however, neither a federal statute, nor a federal program could override such provincial legislation. This makes the legality of the federal contractors program quite dubious and could place an employer sought to be made subject to it in the position of being able to comply with the program only by breaching a statute binding upon it.

A final area of regulation of hiring practices which is currently receiving much attention is whether an employer can require pre-employment drug testing or medical examinations and how they can be put to use. Under either of Canada's two legal systems, an employer is entitled to establish the requirements of a job and to verify that employees are physically and mentally capable of performing their jobs. These employer interests can offer *prima facie* justification for pre-employment medical examinations, including drug and alcohol tests as well as tests during the course of employment.

These employer interests are counterbalanced by the general common law and civil law principles protecting persons from the intrusion of medical examination at the insistence of another person to whom the results will be revealed. But while a person has a right not to submit to a medical examination at another's request, this right can be waived in a

¹⁹ Canadian Human Rights Act., CAN. REV. STAT. ch. H-6 (1985).

²⁰ 40 U.S.C. §§ 471 et seq. (1969). See also, *United States v. Mississippi Power and Light Co.*, 638 F.2d 899 (5th Cir. 1981) cert. denied, 454 U.S. 892 (1981); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980).

number of ways. Further, where it is not waived, an employer may be justified in refusing to hire a person or in refusing to continue to employ him.²¹

In some contexts, legislation requires employees to submit to medical examinations. Such legislation currently exists primarily in the area of workers compensation. In Ontario and Quebec, for example, claimants must submit to a medical examination if their employers so request.²² Similarly, the occupational health and safety acts of these two provinces require employees to submit to examinations where necessary to carry out the purpose of the act.²³ The recently announced "substance use strategy" issued by the Federal Minister of Transport may indicate another type of legislative intervention in this field, as it foresees new regulations requiring, *inter alia*, random drug testing for employees in federally regulated transportation industries who hold jobs where safety requires that they be unimpaired at work.²⁴

More commonly, collective agreements or individual employment contracts may give an employer such a right, either implicitly or expressly. Where the right is implicit, collective agreement arbitrators have normally required that the employer have reasonable grounds for desiring to examine the employee in the circumstances of the case.²⁵ Blanket policies requiring all employees to submit to examinations periodically during employment have not, under this reasoning, fared well on arbitral review.²⁶ Conversely where medical information was needed to enable the employer to decide on replacing a particular employee or finding him another job which his health would permit him to occupy, the employer's right to require an examination was upheld.²⁷ While very little Canadian case law exists on the propriety of tests on drug or alcohol usage by employees, it indicates that such tests will be allowable on much the same reasoning as is applied to other types of medical examination. Such testing, though, may be confined to instances where safety of employees and the public is involved.²⁸

These basic rules have not been altered by Canadian human rights legislation or the Canadian Charter. In the case of the latter, the

²¹ D. BROWN & D. BEATTY, *CANADIAN LABOUR ARBITRATION*, 325-26 (2d ed. 1984); *Re W.S. Tyler Co. of Canada Ltd.*, 4 L.A.C.2d 335 (1973).

²² *Workmen's Compensation Act*, QUE. REV. STAT. ch. A-3, § 23(1) (1977); *Ontario Workmen's Compensation Act*, ONT. REV. STAT. ch. 539, § 21(1) (1980).

²³ *Workmens Compensation Act*, *supra* note 22, § 23(2); *Ontario Occupation Health and Safety Act*, ONT. REV. STAT. ch. 321, § 17(1)(e) (1980) [hereinafter *Ontario Health Act*].

²⁴ MINISTER OF TRANSP., *Strategy on Substance Use in Safety-sensitive Positions in Canadian Transp.*, Press Release (Mar. 16, 1990).

²⁵ BROWN & BEATTY, *supra* note 21, at 380; *Re Catelli Inc.*, 1985 T.A. 306; *Re Communauté Urbaine de Montreal*, 1984 84T-519; *Re Xception Design Ltee* 1987 87-T370; *Re Keeprite Inc.*, 7 L.A.C.3d 112 (1982).

²⁶ *Re Cite de Dorval*, 1984 T.A. 455; *Re Air Canada*, 8 L.A.C.3d 82 (1982).

²⁷ *Re Brewer's Warehousing Co. Ltd.*, 4 L.A.C.3d 257 (1982).

²⁸ *Re Canadian Nat'l Ry. and United Transp. Union*, 6 L.A.C.3d 381 (1989).

Supreme Court's holding in the Dolphin Delivery case,²⁹ that the Charter does not apply to parties in private litigation, largely rules out an invocation of the Charter in contractual relations between employer and employee. Human rights statutes, on the other hand, do not limit an employer's otherwise existing rights to require medical examinations. Rather, they limit the use an employer can make of the information such examinations might reveal.

Human rights statutes in Canada invariably prohibit discrimination on the basis of "handicap" or "disability," terms which are sufficiently broadly defined as to include any physical or mental condition which an employer might consider as a ground for terminating an employee or for refusing to hire a job applicant. Only where freedom from a given physiological abnormality is a *bona fide* occupation for the job in question will the abnormality be a permissible ground for refusing to employ a job applicant or for discharging an employee.

III. ENDING THE EMPLOYMENT RELATIONSHIP

Regulations of termination of employment in Canada is litigated in three forums. The courts deal with actions for breach of contract or tort (quasi-delict in the Quebec civil law system) in case of discharge of non-unionized employees. Unionized employees have discharge grievances dealt with by arbitrators named in accordance with the terms of the collective agreement. Since the late 1970s an additional remedy has been available to non-unionized employees: arbitration of the discharge by an adjudicator named under employment standards legislation. These adjudicators have broad remedial powers modeled on those of arbitrators sitting under collective agreements, including the right to order an employee's reinstatement in his former job. This section will first consider some of the developments in the courts' and adjudicators' treatment of termination of employment in the non-union context, then deal with changes in labor arbitration.

A. The Courts

The most striking difference between Canadian and American treatment of the termination of individual employment contracts is that the "employment at will" doctrine has never been the law in any Canadian jurisdiction. Following the English common law, the common law provinces of Canada have required that a dismissal must be for cause or, in the absence of cause, on reasonable notice or pay in lieu thereof.³⁰ In the civil law jurisdiction of Quebec, articles 1065 and 1668 of the Civil Code are interpreted, in the context of individual employment contracts, as requiring reasonable notice, or pay in lieu, when an employer wishes to

²⁹ 2 S.C.R. 573 (1986).

³⁰ I. CHRISTIE, EMPLOYMENT IN CANADA 337-62 (1980) [hereinafter CHRISTIE].

put an end to an employment contract unless the employee has given cause for immediate dismissal.³¹ In both Canadian legal traditions, then, an employer will be required to reckon with the likelihood of being obliged to give a dismissed employee a considerable sum on terminating his employment unless the employer can prove that cause for dismissal existed.³²

An employee's cause of action in complaining of an allegedly wrongful dismissal has traditionally been for the breach of the employer's implied contractual obligation to give reasonable notice of dismissal.³³ From the early 1980s employees have sometimes been able to supplement this by claims for mental distress caused by the firing.³⁴ The basis for such a claim was initially not clear, as the early decisions sidestepped the Canadian common law rule that damages for mental distress cannot be awarded for breach of contract unless the likelihood of such distress is known to both parties at the time the contract is entered into.³⁵ Several courts of appeal in common law provinces held that damages for mental distress from a wrongful dismissal either cannot be awarded or can only be awarded where the mental distress:

would be the probable result of a failure to give proper notice, and the mental distress suffered by the discharged employee must flow from the want of reasonable notice, and not from the fact of dismissal.³⁶

³¹ G. AUDET & R. BONHOMME, *LE CONGÉDIEMENT EN DROIT QUÉBÉCOIS EN MATIÈRE DE CONTRAT INDIVIDUEL DE TRAVAIL* 4-8, 43-48 (2d. ed. 1988). An English translation of this work is now available as *Wrongful Dismissal in Quebec* (Montreal and Markham, Ont.: Les Edition Yvon Blais and Butterworth's (1990)).

³² It should be noted that trials of wrongful dismissal actions in Canada will virtually always be before a judge alone. Juries are only rarely used in civil matters in the common law provinces in Canada and very seldom in wrongful dismissal actions. As a civil law jurisdiction, Quebec does not use juries for civil matters, with a few unimportant exceptions and a judge alone must dispose of actions for breach of the obligation to give reasonable notice of the termination of an employment contract.

³³ *Bordeleau v. Union Carbide of Canada Ltd.*, 1984 C.S. 974; *Brown v. Waterloo Regional Bd. of Commissioners of Police*, 150 D.L.R.3d 729, 735 (Ont. CA 1984). The parties can, of course, stipulate the notice period on their contract, in which case it will generally govern the length of notice.

³⁴ *Pilon v. Peugeot Canada, Ltd.*, 114 D.L.R.3d 378 (Ont. H.C. 1980); *Speck v. Greater Niagara General Hospital*, 2 D.L.R.4th 84 (Ont. H.C. 1983).

³⁵ *Addis v. Gramophone Co.*, 1909 A.C. 488 (H.L.); *Peso Silver Mines Ltd v. Cropper*, 1966 S.C.R. 673 (Ont.H.C.).

³⁶ *Brown v. Waterloo Regional Bd. of Commissioners of Police*, 150 D.L.R.3d 729, 735 (1984); *See also*, *Abouna v. Foothills Provincial General Hosp. Bd.* (No. 2), 83 D.L.R.3d 333 (Alta. C.A. 1978) (holding that, where a physician's appointment at a hospital is terminated through incorrect procedures, a legal right has been infringed which is compensable in damages, regardless of whether proper termination procedures would have led to the same result); *Lockart v. Chrysler Canada Ltd.-Chrysler Canada Ltd.*, 19 D.L.R.4th 392, 399 (B.C. C.A. 1985) (holding that, in a wrongful dismissal action, misconduct falling short of grounds for summary dismissal does not affect period of reasonable notice, but eighteen months notice is excessive, damages should be calculated with respect to a twelve-month period, and damages for mental distress, absent a showing of wanton or reckless breach are disallowed).

The Supreme Court of Canada has now settled this rule for the common law provinces in the decision in *Vorvis v. Insurance Company of British Columbia*.³⁷ The Court held that, while the damages for mental distress were not absolutely prohibited, in wrongful dismissal actions, strict limitations were to be imposed on such claims. The mental distress must arise from an act other than the mere fact of the dismissal itself, must be sufficiently serious to be an independently actionable wrong, and must be the result of this wrongful act.³⁸ The court also held that punitive damages for breach of an employment contract would be awarded, but placed narrow limitations on their being allowed: The defendant must have acted in a "harsh, vindictive, reprehensible and malicious" manner and the conduct relied on to found the punitive damages must be actionable independently of the dismissal.³⁹

In Quebec, the courts have awarded "moral damages" in appropriate cases, generally where the manner in which an employee was dismissed has such an element of wantonness or recklessness as to amount to an abuse of the employer's right to put an end to the contract of employment. This abuse of right theory is now the predominant basis for the granting of such damages. It should be noted that an employer may have also acted so as to make itself liable, in addition, for damages in quasi-delict if its actions at the time of the dismissal also amount to a quasi-delict independent of its abuse of contractual right.⁴⁰

The Quebec Court of Appeal, for example, upheld an award at trial of \$5,000 where the defendant had dismissed the plaintiff in a "malicious and abusive manner" which had damaged his business reputation.⁴¹ Other courts have awarded sums to compensate for "damage to [the plaintiff's] reputation and to his personal pride"⁴² or for the moral damages incurred by an employee dismissed under a false imputation of alcoholism.⁴³

In Canada, as indicated above, dismissal without notice or pay in lieu is lawful only where an employee has given cause for dismissal. The courts in both the civil and common law systems have developed similar concepts of what types of actions on an employee's part can justify dismissal. The most common relied on grounds are dishonesty, untrustworthiness, breach of the fiduciary duty which certain senior employees owe and incompetence. In practical terms, cause has become more difficult to prove in recent years, particularly where incompetence is alleged; it should also be noted that an economic necessity to reduce staff will never

³⁷ *Vorvis v. Ins. Co. of British Columbia*, 1 S.C.R. 1085 (1989).

³⁸ *Id.* at 1102-04.

³⁹ *Id.* at 1107-10.

⁴⁰ G. AUDET & R. BONHOMME, *supra* note 31, at 18-20.

⁴¹ *Les Imprimeries Stellac Inc. v. Plante*, 1989 C.A. 256.

⁴² *Faule v. Sun Life du Canada*, 1984 J.E. 84-363 (S.C.).

⁴³ *Clement v. Simpsons Sears Ltd.*, 1983 J.E. 83-844 (S.C.).

be cause for dismissal without notice.⁴⁴

The courts, however, have continued to expect fairly strict standards of honesty and trustworthiness from employees, particularly senior ones. In *Jewitt v. Prism Resources Ltd.*⁴⁵ the president of the corporation was dismissed for having his secretary “trace” the name of an absent director on the company’s annual report, despite the fact that the president’s intentions were entirely honest and were taken out of deference to the director’s presumed wish to have his name appear on the report. This “revelation of character” was held to justify the dismissal. Lower down in company hierarchies, dismissal of a foreman for selling property of no value to the Company to one of his neighbors was upheld, as was the dismissal of an employee involved in a series of thefts on the employer’s premises, even though he was acquitted of criminal charges arising from the same actions.⁴⁶ Similarly, in Quebec, a sales manager’s dismissal was upheld when he used a mobile home unit belonging to the company for his personal benefit when going on vacation.⁴⁷

Breaches of fiduciary duties by senior employees have also been strictly dealt with. The leading case is *Canadian Aero Service Ltd v. O’Malley*⁴⁸ in which the Supreme Court of Canada held that such employees were bound by duties of “loyalty, good and avoidance of a conflict of duty and self-interest” and awarded the employer damages for the formation of a competing company by several senior employees. In *Wilcox v. G.W.G. Ltd.*⁴⁹ a breach of fiduciary duty involving negotiations for the purpose of a competing company by G.W.G.’s general production manager was held to be cause for summary dismissal despite the potential, rather than actual nature of the conflict at the time of the dismissal. Similarly, a dispute between a company and the manager of one of its subsidiaries over patent rights to an invention he had made while in the company’s service was held to be cause for dismissal.⁵⁰ The Ontario Court of Appeal held that an employee who has reached the level of the manager was in a fiduciary position “apart from the usual master-servant relationship;” as such he owed a duty to the employer to use all his “energy, ability and imagination” in the employer’s interests and any success he has in developing business opportunities must benefit the employer exclusively.

⁴⁴ Christie, *supra* note 30, at 362; *McNair v. J.C. Bremner & Son Ltd.*, 58 N.S.R.2d 222, 227-30 (T.D. 1983); *Smith v. Tramblyn (Alberta Ltd.)*, 9 Alta. L.R.2d 274 (T.D. 1979); *Bohemier v. Storwall Int’l Inc.*, 40 O.R.2d 264 (H.C. 1983).

⁴⁵ *Jewitt v. Prism Resources Ltd.*, 110 D.L.R.3d 713 (B.C.S.C. 1980), *appeal dismissed*, 127 D.L.R.3d 190 (B.C.C.A. 1981).

⁴⁶ *Beyea v. Irving Oil Ltd.*, 8 C.C.E.L. 128 (N.B.Q.B. 1985); *Hughes v. R.T. Holman Ltd.*, 40 Nfld. & P.E.I.R. 190, 192 (P.E.I. 1982).

⁴⁷ *Vacanciers Mobiles (1979) Inc. v. Duchesne*, 1985 J.E. 85-51 (C.A.).

⁴⁸ *Canadian Aero Service Ltd. v. O’Malley*, 1974 S.C.R. 592.

⁴⁹ *Wilcox v. G.W.G. Ltd.*, 8 C.C.E.L. 11 (Alta. C.A. 1985).

⁵⁰ *Helbig v. Oxford Warehousing Ltd.*, 51 O.R.2d 421 (C.A. 1985).

The Quebec courts, after some debate over whether the common law fiduciary duty could be imported into the civil law in regard to senior employees, now hold that such employees are bound by an equivalent "duty of loyalty."⁵¹

If an employee is not found to have acted so as to justify summary dismissal, he will be entitled to damages in lieu of notice. In both the common and civil law systems these (are determined by fixing the length which the employee) ought to have been given and awarding a sum equivalent to the salary and benefits the employee would have earned during the notice period. This will be reduced by an payments previously made by the employer and is subject to the usual duty to mitigate applicable to breaches of contract.

Both systems, again, have evolved very similar sets of considerations to be used in determining the length of the notice period. In the common law, the leading case is *Bardal v. Globe & Mail Ltd.*,⁵² which held that the reasonableness of a notice period must be fixed according to the employee's age, the nature of his job, the length of service and the availability of similar employment in the light of the employee's experience, training and qualifications. In Quebec, the Court of Appeal in *Columbia Building Supplies Co v. Bartlett*⁵³ decided that the length of notice should be determined by the circumstances of the hiring, the type and importance of the work performed, the parties' intentions at the time of the hiring, the employee's likely degree of difficulty in finding equivalent work, the length of the employee's service and his age.

Applying these general considerations to particular facts is more of an art than a science and the exact length of a notice period cannot be easily predicted in any particular case. Nevertheless, it is clear that the courts increase the period of notice with the employee's age, length of service and position in the company hierarchy. Very senior, or highly specialized, employees who will have difficulty finding equivalent work will usually have their notice periods increased on these grounds.⁵⁴

The recession of the early 1980s in Canada saw a dramatic increase in the length of notice awarded to wrongfully dismissed employees. In one case thirty months notice was granted (though reduced on appeal to twenty-four) and awards of eighteen to twenty-four months' notice were upheld by courts of appeal.⁵⁵ As the economy and re-employment prospects improved, the length of notice has decreased. At the present time

⁵¹ *Nat'l Fin. Brokerage Centre Inc. v. Investors Syndicate*, 9 C.P.R.3d 497 (Que. C.A. 1986); *Enterprises Rock Ltée v. Les Habitations C.J.C. Inc.*, 1986 C.S. 2671, 2673. The common law concepts of "fiduciary" and "trusts" do not, of course, exist as such in the civil law.

⁵² *Bardal v. Globe & Mail Ltd.*, 24 D.L.R.2d 140 (Ont. H.C. 1960).

⁵³ *Columbia Building Supplies Co. v. Bartlett*, 1967 B.R. 111.

⁵⁴ *Sorel v. Tomenson Saunders Whitehead*, 9 C.C.E.L. 226 (B.C.S.C. 1985), 16 C.C.E.L. 223 (B.C.C.A. 1987); *Suttie v. Metro Transit Operating Co.*, 9 C.C.E.L. 19 (B.C.C.A. 1985).

⁵⁵ 1 WRONGFUL DISMISSAL PRACTICE MANUAL 1053-1200 (1984) (tabulations of lengths of notice periods).

notice period of between eight and twelve months are common, and the latter figure is being seen in some courts as the normal maximum.⁵⁶ The Quebec courts, which have traditionally been more modest in their assessment of notice periods than those of the common law provinces, have already fixed on twelve months as the normal maximum, to be executed only in very unusual circumstances.⁵⁷

B Adjudicators Named Under Employment Standards Acts

In 1976 Nova Scotia established a new remedy for non-unionized employees who considered themselves to have been wrongfully dismissed: instead of bringing an action in the courts they could have their complaints dealt with by an adjudicator. Quebec and the federal jurisdiction introduced similar schemes in 1989 and 1978 respectively.⁵⁸

Adjudicators named under all three statutes have the power to order than an employee be reinstated with or without compensation for salary and benefits lost in the interval between dismissal and reinstatement, to order the payment of damages in lieu of reinstatement and to award other relief as appears "fair and reasonable, taking into account all the circumstances of the matter."⁵⁹ The persons named as adjudicators are invariably ones who have served as arbitrators under collective agreements and the case law which has developed under these provisions has been very strongly marked by concepts imported from grievance arbitration in a unionized workplace. This characteristic of the case law is most strikingly exemplified by the requirement typically imposed in such arbitrations that the employer show just cause for dismissal and that it normally make use of progressive discipline before dismissing an employee.⁶⁰

The proportion of claims under these statutes which are allowed is high. Under the federal statute, for which statistics are most readily available, adjudicators have allowed 66.6% of all complaints disposed of on the merits between 1978 and 1989. Reinstatement was ordered in 44.4% of these successful claims.⁶¹ When it is remembered that most non-unionized employees, including middle and even senior manage-

⁵⁶ *McHugh v. City Motors (Nfld.) Ltd.*, 58 D.L.R.4th 753, 755 (Nfld.C.A. 1989).

⁵⁷ *R.C.A. Ltd. v. Cohen*, 1978 C.A. 212, 213; *Steinberg's Ltée. v. Lecompte*, 1985 C.A. 223; *P.H. McCarthy Transport Inc. v. Rajotte*, 1985 D.T.E. 85T-235 (C.A.); *Steward v. Standard Broadcasting Corp.*, 1990 D.T.E. 90T-20 (S.C.).

⁵⁸ Nova Scotia: *Labour Standards Code* § 70 (1990) S.N.S. c.L-1; Canada: *Canada Labour Code*, R.S.C. 1985, ch. L-2 §§ 240-6; Quebec: *Act Respecting Labour Standards*, R.S.Q. ch. N-1.1, §§ 124-35.

⁵⁹ *Act Respecting Labour Standards*, § 128 (3). The powers of federal and Nova Scotia arbitrators are in similar broad terms (§§ 242(2) and 24(2) respectively). On the scope of the Nova Scotia Act, see *Sobeys Stores Ltd. v. Yeomans*, 64 D.L.R. 4th 234 (N.S.C.A. 1989).

⁶⁰ *Roberts v. Bank of Nova Scotia*, 1 L.A.C. 3d 258 (1981) is an important decision based on this view which is now firmly established in the case law.

⁶¹ This is based on the information in the April issue of Labour Canada's publication *Arbitration Services Reporter* for the years 1979-89.

ment, may bring complaints,⁶² the significance of this new remedy becomes apparent. One important limitation on it, however, is the requirement that an employee making use of it have been dismissed for alleged cause. Non-disciplinary dismissals due, for example, to reductions in staff for economic reasons or following administrative reorganization cannot form the basis of complaints.⁶³

Proceedings before arbitrators named under these statutes are modeled on the relatively informal ones found in grievance arbitration under collective agreements. This can result in a quicker and cheaper resolution of modest claims from relatively low level employees than would be possible in the courts. A considerable procedural disadvantage arises from this informality and from the absence of any form of discovery or pleadings when middle or senior management employees bring claims involving complex legal issues and potentially large sums of money. In such cases hearings can be extremely protracted and the quickness and cheapness promised by arbitration becomes illusory.

The adjudicators appointed under these statutes, as noted above, have their main experience in industrial collective bargaining. This has often led to their being insensitive to the degree to which a viable employment relationship in managerial positions, or in positions calling for a high degree of confidence on the employer's part in the employee's personal trustworthiness, can be rendered impossible by conduct which might not merit dismissal in a production line employee.

Examples of this can be seen in a series of cases in which bank employees dismissed for dishonesty or untrustworthiness have been ordered reinstated. In *Roblee and Toronto Dominion Bank*⁶⁴ the complainant, a supervisor, had participated in a scheme whereby she holds cheques until funds are available to meet them. She was ordered reinstated after a six month suspension. A teller in *Hamel and Bank of Montreal* who had participated in a scheme to divert money both from the bank and its clients to a slush fund for office parties had her dismissal reduced to a six month suspension.⁶⁵ Perhaps most egregiously, the arbitrator in *Chaver and Canadian Imperial Bank of Commerce* ordered the reinstatement of a bank accountant who lived with a man with a series of convictions for bank robbery. She had access to information on the bank's security system and the fact of the relationship was discovered when police arrested the man and several confederates in her apartment as they were dividing

⁶² In one Quebec case, *Consoltex Canada Inc. v. Taran*, 84T-76 (S.C. 1984) the Court held that an arbitrator named under § 124 of the Quebec statute could deal with a complaint by the president of a corporation who had been removed from office following a change in the control of the corporation and that it would be within the arbitrator's jurisdiction to order his reinstatement.

⁶³ *Canadian Broadcasting Corp. v. Munak*, dec. no. 872, unreported, Dec. 30, 1987; *Purolator Courier Ltd. v. Range*, dec. no. 1011, unreported, Jan. 5, 1989; *Conohue Inc. v. Simard D.T.E.* 88T-819 (Que. C.A. 1988).

⁶⁴ Decision under § 61.5 (now 240) of *Canada Labour Code*, unreported, Dec. 8, 1981.

⁶⁵ Decision under § 61.5 (now 240) of *Canada Labour Code*, unreported, Dec. 26, 1981.

money from the second robbery of the branch at which she worked. The adjudicator held that the accountant was not in a conflict of interest situation.⁶⁶

Such decisions are not confined to the federal jurisdiction. In *Blanchard and Control Data*, an arbitrator ordered the reinstatement of a middle management employee discharged for accepting free airline tickets from a client for a trip to Jamaica. This was contrary to the company's policy and the discharge took place after the second such incident in six months. The adjudicator considered a four month suspension sufficient discipline.⁶⁷

Equally problematic decisions have been rendered in the transportation industries. One arbitrator ordered the reinstatement, with full backpay, of a pilot who had been dismissed for consuming alcohol less than eight hours before flying, in contravention of both company policy and air safety regulations.⁶⁸ In another case, an employee rejected as an aircraft inspector by Transport Canada was held to have been wrongfully dismissed from his inspector's position with an airline.⁶⁹ Similarly, a truck driver dismissed for driving a company vehicle while under the influence of alcohol was ordered reinstated after a thirty day suspension. This was done on the basis that the drinking had not affected his driving, despite the driver's conviction on a criminal charge of operating his vehicle while under the influence of alcohol in connection with the same incident.⁷⁰

Decisions such as these show a certain debasement of the reinstatement remedy. This can become particularly evidence in instances involving middle or senior managerial employees who may have no desire to actually return to their former jobs but are happy to exploit the high nuisance value an order for reinstatement has when negotiating a settlement.

C Arbitration Under Collective Agreements

The arbitration of grievances under collective agreements in Canada bears a general resemblance to that in the United States. Adjudication may be a sole arbitrator or by a board. In either case the parties normally choose their own adjudicators and define, in their collective agreement, the exact scope of their powers and their remedial authority. Procedure

⁶⁶ This decision was quashed on judicial review by the Federal Court of appeal on the ground that the employee was in an evidence conflict of interest which justified her dismissal *Sub nom Canadian Imperial Bank of Com. v. Boisvert*, 2 F.C. 431 (C.A. 1986).

⁶⁷ D.T.E. 82T-163. This decision was ultimately upheld by the Supreme Court of Canada on the ground that any error the arbitrator committed in ordering the reinstatement was within his jurisdiction: *Blanchard v. Control Data Canada Ltd.*, 2 S.C.R. 476 (1984).

⁶⁸ *Paradis and Air Inuit*, decision under § 61.5 (now 240) of *Canada Labour Code*, unreported, Jan. 8, 1983.

⁶⁹ *Redhead and Worldways Canada Ltd.*, dec. no. 343, unreported, May 22, 1984.

⁷⁰ *Beaulieu v. Purolator Courier Ltd.*, dec. no. 403, unreported, Jan. 24, 1985.

before the arbitrator or board is generally informal, though collective agreements may contain fairly elaborate grievance mechanisms whose purpose is to clearly define the issues to be resolved in arbitration. If a grievance is upheld the arbitrator or board can typically choose among a range of remedies which can include a declaration that a party has violated the collective agreement, an order for monetary compensation to an affected person or party, or the reinstatement of an employee with or without a period of suspension.⁷¹ Legislation in all Canadian jurisdictions makes the arbitrator's decision final and binding. The Supreme Court has recently emphasized in the case of *St. Anne Nackawic Paper Co. v. Canadian Paper workers Union Local 219* that grievance arbitration is the sole forum for the litigation of differences concerning the interpretation or application of a collective agreement.⁷²

Over the last decade perhaps the most striking development in Canadian labor arbitration has been the increasing tendency for arbitrators to intervene in discipline imposed by the employer, particularly where discharge is involved. The origin of this tendency can be seen in the Supreme Court of Canada decision in *R. v. Arthur et al. ex parte Port Arthur Shipbuilding Co.*⁷³ and the legislative reactions to it. In *Port Arthur* the collective agreement provided that the employer could discharge for proper cause. The Supreme Court held that the arbitration board exceeded its jurisdiction by deciding the question not of whether proper cause for discharge existed, but of whether the company *ought* to have discharged grievors where proper cause for so doing admittedly existed on the facts of the case. The Court held that in so doing the board had usurped a management function by determining the exact discipline to be imposed after having found that proper cause for discipline existed.

Legislation expressly giving arbitrators the power to substitute a lesser penalty in discipline and discharge cases regardless of the provisions of the collective agreement was passed in all Canadian jurisdictions in response to this decision. This broadened review power has been coupled with the view embraced by some arbitrators that industrial discipline must be concerned very largely with the rehabilitation and correction of the employee, with general or specific deterrence being assigned but little weight.⁷⁴ Along with a broad interpretation of their powers of review, these concepts have rendered the upholding of discharges a very exceptional result with many arbitrators.

This manner of dealing with discharge grievances has often produced highly questionable results. In *Re Cara Operations*,⁷⁵ for example,

⁷¹ *Beaulieu v. Purolator Courier Ltd*, dec. no. 403, unreported, Jan. 24, 1985.

⁷² *St. Anne Nackawic Paper Co. v. Canadian Paper Workers Union Local 219*, 1 S.C.R. 704, 720-21 (1986).

⁷³ *R. v. Arthur, ex parte Port Arthur Shipbuilding Co.*, 1969 S.C.R. 85.

⁷⁴ *Galco Food Products*, 7 L.A.C.2d 350 (1974); *Toronoto East General Hospital*, 9 L.A.C. 2d 311 (1975) are early and influential examples of this reasoning.

⁷⁵ *Cara Operations*, 278 I.A.C.3d 424, 428-29 (1987).

a hotel employee who had started a fire in a “senseless fit of rage” to protest the lack of non-smoking facilities for employees was reinstated because the risk of a “serious problem” occurring as a result of the particular fire set was too small to justify discharge. In another case the discharge of an employee who was working for a competitor of his employer in his off hours was annulled; instead the employee was ordered to choose between his two jobs.⁷⁶

In other instances, arbitrators have reinstated nursing personnel who have assaulted elderly residents of chronic care nursing homes. Reinstatement was ordered for three out of four nursing assistants involved in a “20 to 30 minute struggle” which ended by the grievors “dragging or half dragging the resident by the cane into the hallway.” Following this they had attempted to forcefully administer a drug to him, then rolled him up in a sheet before leaving him alone on the floor a spare room in the facility. Even such “serious patient abuse” was insufficient to justify the discharges, which were changed to six month suspensions.⁷⁷ Similarly a kitchen aide who struck an elderly patient suffering from Alzheimer’s disease after the latter began tugging at a table cloth during a meal period was ordered reinstated, on the basis that the aide’s act was a reflex reaction to the danger of coffee being spilled.⁷⁸

Sexual misconduct on the part of employees can place employers in an invidious position. On the one hand certain types of sexual misconduct can seriously harm the employer’s reputation, particularly when it is a public one; on the other, arbitrators have often allowed the employee’s interest in retaining his job to outweigh any other considerations. In one case, *Re Emergency Health Services Commission*⁷⁹ an ambulance attendant was convicted of sexually assaulting the teenage baby sitter who was minding the children of the woman with whom he was having an extra-marital affair. Despite the nature of the conviction, and his recognition that the Commission had to be “cognizant of and sensitive to the character and reputation of its employees,” the arbitrator held that dismissal was too severe a penalty and ordered the employee reinstated after an eight month suspension. Similarly, in *Re Dartmouth District School Board*,⁸⁰ a janitor had hugged and kissed various female high school students at the school where he worked and had sent one of them a birthday card. While recognizing the heavy responsibility which lay upon the school board in regard to the children under its charge, the arbitration board considered that the employer had not met the heavy burden which lay upon it to support the discharge of a long service employee with no prior record of similar offenses and ordered the grievor’s

⁷⁶ *Food Group Inc.*, 30 L.A.C.3d 250 (1987).

⁷⁷ *Baptist Housing Society*, 5 L.A.C.3d 430, 436 (1982).

⁷⁸ *Tuxedo Villa Nursing Home and C.U.P.E.*, Local 2180, 4 L.A.C.4th 366 (1989).

⁷⁹ *Emergency Health Services Comm’n and C.U.P.E.*, Local 873, 35 L.A.C.3d 400, 409 (1988).

⁸⁰ *Dartmouth Dist. School Bd.*, 12 L.A.C.3d 425 (1983).

reinstatement. He was not, however, to be reassigned to duties at a school for at least one year.

Sexual harassment of fellow employees has received, until very recently, similar treatment from most Canadian arbitrators. While the Supreme Court of Canada has approved a very strict standard of employer liability for sexual harassment by employees,⁸¹ the reported arbitration cases contain no instances of discharges for sexual harassment being upheld until 1988.⁸² Even such conduct as an elaborate scheme to peep into the shower set up for the first female on the production line of a cement factory has been held not to merit discharge.⁸³

This tendency to exalt the employee's interest in his job over any other considerations and thus make it extremely difficult to justify a discharge is not universal among Canadian arbitrators. But it has become sufficiently broad as to be cause for serious concern among all parties affected by the impact of such decisions in the work place. If employers are not well served by arbitral decisions which reinstate employees who are dismissed for throwing chairs and injuring co-workers, and afterwards threatening a foreman with a knife and scissors, then neither are the fellow employees of such a grievor.⁸⁴

IV. OCCUPATIONAL HEALTH AND SAFETY LEGISLATION: THE RIGHT TO REFUSE UNSAFE WORK

In the late 1970s, several Canadian jurisdictions, among them Quebec, Ontario and the federal government, introduced legislation putting the right to refuse unsafe work on a statutory footing.⁸⁵ This legislation did not, however, give such a right for the first time. For a good number of years before its passage, Canadian labor arbitrators had recognized the existence of such a right and absolved an employee from the duty to obey instructions which would compromise it. This section will first briefly consider the right to refuse unsafe work as it has developed in Canadian labor arbitration, then deal with this right as it has fared in its statutory form.

Arbitrators in Canada have recognized a right to refuse work when the following conditions are met:

⁸¹ *Robichaud v. Canada (Treasury Board)*, 2 S.C.R. 84 (1987), where the employer was held liable for acts of sexual harassment which it was unaware of and which were contrary to its policy against sexual harassment.

⁸² *Re Canadian Nat'l Ry*, 1 L.A.C.4th 183 (1988).

⁸³ *Re Canada Cement Lafarge Ltd. and Energy Chem. Workers Unions, Local 219*, 24 L.A.C.3d 202 (1986). Other instances where discharges for sexual harassment were overturned include *Re Canadian Union of Public Employees*, 4 L.A.C.3d 385 (1986); *Re City of Nanticoke*, 29 L.A.C.2d 64 (1980) and *Re Ottawa Bd. of Educ. and Ottawa Bd. of Educ. Union*, 5 L.A.C.4th 171 (1989).

⁸⁴ *Re Galco*, 7 L.A.C.2d 350.

⁸⁵ Quebec: *Act Respecting Occupational Health and Safety*, R.S.Q. ch. S-2.1, §§ 12-34; Ontario *Health Act*, *supra* note 23, § 23(3); Federal: *Canada Labour Code*, R.S.C. 1985, ch. L.-2 §§ 128-35.

1. The employee has an honest belief that his health or well being is endangered;
2. The employee must inform his superior of this belief in an adequate and reasonable manner;
3. The belief must be objectively reasonable in view of all circumstances; and
4. The danger must have been sufficiently serious to justify the action taken by the employee.⁸⁶

The case law thus calls for a combination of a subjective, honestly held belief in the existence of the danger relied on with the requirement that the belief be reasonable by objective criteria. Normally, the objective standard used has been that of whether an average employee in the work place, having regard to his training and experience, would consider the work presented an unacceptable degree of hazard in the circumstances of the case.⁸⁷ In some instances this objective standard condition has been modified somewhat to take into account some medical condition peculiar to the employee.⁸⁸ A main theme running through the case law on this issue on which decisions most commonly turn, in fact, is this requirement of objective reasonability of the apprehension of danger. A second one, related to the first, is that the danger apprehended, assuming it can be reasonably apprehended by objective standards, must be of some seriousness. Discomfort, for example, will not be equated with danger.⁸⁹

The statutory rights of refusal, particularly at the time first following their coming into force, were frequently misinterpreted or abused. As a result, numerous stoppages of work occurred which could not be justified under either the legislation or by the standards of arbitral jurisprudence. The Quebec experience provides a good illustration of these points.

The Quebec Act, provides, in section 12, that:

a worker has the right to refuse to perform particular work if he has reasonable grounds to believe that the performance of the work would expose him to danger to his health, safety or physical well being, or would expose another person to a similar danger.

This wording was at first frequently interpreted by employees as establishing a purely subjective standard: work could be stopped without an employer being permitted to take any disciplinary action if an employee believed he was in danger, regardless of the objective reasonability of his belief. In the first year of the act's operation, for example, 71% of

⁸⁶ *Steel Co. of Canada Ltd.*, 4 L.A.C.2d 315 (1973); *Meat Connection Inc.*, 23 L.A.C.3d 159 (1985); *Nomental Mines Ltée.*, 1970 R.D.T. 37; *Industries Armstrong Cork Ltée.* 1978 S.A.G. 1957; *Continental Metal Inc.*, 1986 T.A. 4474.

⁸⁷ *Pharand v. Inco Metals Co.*, 1980 D.L.R.B. rep. 980; *Crossley Carpet Mill Ltd.*, 3 L.A.C.4th 199 (1989).

⁸⁸ *Burns Foods Ltd.*, 16 L.A.C.2d 377 (1977).

⁸⁹ *Ateliers d'ingenierie Dominion Ltée.*, 1979 S.A.G. 775.

all refusals to work were judged by workers compensation inspectors to have been unjustified and the following two years the proportion remained at 66.6%.⁹⁰ Moreover, some early decisions held that the employee's subjective belief in the existence of a danger was sufficient to justify a refusal to work.⁹¹

More recent case law, however, has restored the requirement of the existence of circumstances which can objectively be considered dangerous before the right under the act can be exercised.⁹² This point is further borne out by the objective nature of the criteria used by worker compensation inspectors who are called on to verify whether a situation exists which might justify the exercise of the right of refusal under the act.⁹³

Canadian law, then, whether statutory or the "common law of the shop" developed by arbitrators, requires both that an employee have a subjective belief in the existence of a danger to his safety and the objective existence of reasonable grounds on which such a belief could be held before a refusal to work will be justified.

V. CONCLUSIONS

Canadian law regulating the hiring of employees has undergone considerable change in the last decade insofar as the human rights considerations embodied in anti-discrimination legislation are concerned. A number of aspects of these changes will be familiar to employers in the United States, but the degree to which American approaches to these problems will be possible or appropriate to Canadian conditions remains to be worked out. The sensitive area of drug testing for potential or current employees is just developing, but it appears that it will be allowed, or required, in jobs where the safety of employees or the public is at stake.

Termination of employment of non-unionized employees can frequently be a more costly process from an employer viewpoint than in the United States. In the absence of cause, the invariable rule in Canada is that reasonable notice of termination of employment must be given and reasonable notice will often be a period of time considerably in excess of what might be expected in the United States. This aspect of Canadian employment law is emphasized by the case law which has been developed by statutory wrongful dismissal adjudicators, who also have also have a power to reinstate employees which is virtually unknown in the United States outside the unionized sector.

Some trends in Canadian labor arbitration, which carry concern the employee's interest in preserving his job to an excessive degree, have pro-

⁹⁰ Commission de la sante et de la securite du travail du Quebec *Rapport annuel* 1981 et 69, 1982.

⁹¹ *Faustex v. Int'l Granit Inc.*, unreported CSST-81-10-M-005, Nov. 11, 1982.

⁹² *Procureur Gen. de la Prov. du Quebec v. C.A.L.P.*, 1988 C.A.L.P. 241 (S.C.).

⁹³ *Metallurgistes Unis d'Amerique et C.C.R.*, 1989 B.R.P. 169.

duced questionable decisions. The weakness of this approach is well illustrated by the difficulty employers which take strong action against sexual harassment have often faced in having disciplinary action upheld.

As in the United States, Canadian employees have both a statutory right and one which has developed from arbitral case law to refuse to perform unsafe work. An initial exaggeration of the subjective elements of the statutory right led to results which cannot be reconciled with the standards developed over the course of a considerable number of years arbitral experience with this issue. Nor, indeed, can they be reconciled with a realistic evaluation of the proper scope of this right.

