Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers

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YEAR END WRAP-UP

A Review of Legislative, Labour and Employment Law Developments in 2008

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Session Overview
Case Law Update

- *Keays v. Honda* (S.C.C.) (June 2008)
- *Mulvihill v. Ottawa (City)* (Ont. C.A.) (March 2008)
- *Wronko v. Western Inventory Services* (Ont. C.A.) (April 2008)
- *McNeil v. Brewers Retail Inc. et al.* (Ont. C.A.) (May 2008)
- *Evans v. Teamsters* (S.C.C) (May 2008)
- *Hydro-Québec v. SCFP-FTQ* (S.C.C.) (July 2008)
- *ADGA v. Lane* (Ont. Div. Ct.) (August 2008)
- *Markovic v. Autocom Manufacturing* (H.R.T.O.) (September 2008)
- *RBC v. Merrill Lynch* (S.C.C.) (October 2008)

Session Overview
Legislative Update

- The New Ontario Human Rights Regime
- *Canada Labour Code*: Occupational Health and Safety Regulations – *Violence Prevention in the Work Place*
- Ontario Consultation Paper on Workplace Violence Prevention
- *Canada Labour Code* and Ontario *Employment Standards Act* – Military/Reservists Leave
- Federal Wage Earner Protection Program (WEPP)
- *Regulatory Modernization Act*
- Bill 119: *Workplace Safety and Insurance Amendment Act*, 2008
- Bill 108: Ontario *Apology Act*

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Case Law Update

Keays v. Honda (S.C.C.) (June 2008) Facts

- Keays developed Chronic Fatigue Syndrome
  - Was on disability for 2 years until insurer terminated benefits on basis of no objective evidence of total disability
- Keays returned to work but had attendance problems
  - Knowing of his disability, employer exempted him from attendance management program but required him to provide doctor's notes for his absences relating to illness
- Keays complained of obligation
- In response, employer cancelled the program and requested he see an occupational medicine specialist
  - Keays refused and was terminated for insubordination

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Keays v. Honda (S.C.C.) Previous Findings

- Ontario Superior Court
  - Found Honda engaged in a "corporate conspiracy" to terminate
  - Awarded: 15 months notice
  - Additional 9 months "*Wallace* extension" and $500,000 punitive damages
- Ontario Court of Appeal
  - Reduced punitive damages to $100,000

Keays v. Honda (S.C.C.) Findings

- Clarified factors for calculating reasonable notice:
  - Character of employment
  - Length of service
  - Age of employee
  - Availability of similar employment
- Character of employment is determined by looking to employee's actual functions, not employer's organizational structure
- 15 months notice was reasonable

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Keays v. Honda (S.C.C.) Findings

- *Wallace damages*:
  - Restated *Wallace* damages
  - Employer still liable for breach of obligation of good faith in manner of dismissal
  - **But:** Now calculated based on actual, proven damage
  - Honda's conduct fell short of this – No "*Wallace"* damages
- *Punitive damages:*
  - Must be linked to an 'independent actionable wrong'
    - Does not include breach of human rights obligations
  - Conduct must be harsh, vindictive, malicious, reprehensible
  - Honda's conduct did not rise to this level

Keays v. Honda (S.C.C.) Practical Implications

- Potential for "run-away" *Wallace* and punitive damages alleviated
  - Employee will have to show actual loss to recover *Wallace* damages
  - Test for punitive damages is high
- Protection against duplication
  - Courts have to examine whether *Wallace* damages adequately punish before awarding punitive damages
- Employer's ability to monitor and manage attendance of employees recognized as legitimate

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Mulvihill v. Ottawa (Ont. C.A.) (March 2008) Facts

- Mulvihill worked for the City of Ottawa for approximately 3 years
- Relationship became strained
- Mulvihill filed a harassment complaint and went on stress leave
- Employer's investigation revealed no harassment
- Requested Mulvihill return to work but she refused
- Terminated for insubordination while she was on sick leave

Mulvihill v. Ottawa (Ont. C.A.) Facts

- In early stages of trial, employer removed argument that termination was for cause and provided 3 months notice
- Trial Judge awarded notice plus 5 ½ months *Wallace* damages:
  - Dismissal for cause not warranted
  - Employer made mistake of terminating while on sick leave

Mulvihill v. Ottawa (Ont. C.A.) Findings

- Overturned *Wallace* damage award
- Alleging then later abandoning claim of just cause:
  - Employer had been candid, honest, and forthright in reasons
  - Different from where an employer fabricates just cause
- Terminating employee on sick leave does not automatically attract *Wallace*:
  - Damages relate to the manner of dismissal, not the when
  - No evidence that employer was untruthful, misleading or insensitive when it dismissed while on sick leave
- An employer can make a "mistake" - it is not necessarily or automatically unfair or bad faith conduct

Mulvihill v. Ottawa (Ont. C.A.) Practical Implications

- Decision is still consistent with *Keays*
  - *Wallace* damages are not automatic when dismissing an employee on sick leave
  - Employers must ensure action does not offend human rights obligations
- Employers can be wrong when claiming just cause and not be automatically responsible for *Wallace* damages

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Wronko v. Western Inventory (Ont. C.A.) (April 2008) Facts

- Employer provided 2 years notice that severance package in his contract would be changed
- Wronko continued to reject change and when notice expired refused to sign the new contract
- 2-year mark told he had to sign new agreement or would be considered dismissed
- Wronko still refused and was subsequently terminated

Wronko v. Western Inventory (Ont. C.A.) Facts

- Wronko sues for constructive dismissal
- Trial Decision
  - Employer was entitled to unilaterally change the contract upon working notice. Wronko had effectively resigned when he refused to accept the new terms.

Wronko v. Western Inventory (Ont. C.A.) Findings

- Three options available to employee when employer makes a unilateral change to contract:
  1. Accept the change and continue under the new terms
  2. Reject the change and sue for damages for constructive dismissal
  3. Reject the new terms and continue to work

Wronko v. Western Inventory (Ont. C.A.) Findings

- Fell under third situation, consistently rejected new term
- Employer did **not** indicate *when it gave the notice* that refusal to accept would result in termination
- Mere continuance of employment does not amount to acceptance by employee of a unilateral change

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Wronko v. Western Inventory (Ont. C.A.) Findings

- Awarded 2 years damages and costs
- $286,000 pay in lieu of notice and severance pay, less mitigation
- $100,000 in costs

Wronko v. Western Inventory (Ont. C.A.) Practical Implications

- Confirms the right of employers to make unilateral changes to terms of employment on reasonable notice
- **But**: must take extra steps:
  - Be clear at time of giving notice that failure to reject new terms will lead to dismissal
  - Then re-offer employment on new terms for when notice ends
- **S.C.C. denied leave to appeal on October 9, 2008**

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McNeil v. Brewers Retail (Ont. C.A.) (May 2008) Facts

- Employer experiencing cash shortages and inventory losses
- Employer installed covert surveillance cameras
- Tapes showed McNeil removing money but later replacing it
- The employer gave the tapes to police, minus the exculpatory portions
- McNeil was subsequently convicted and his termination grievance dismissed as he did not initially have the exculpatory portions of the surveillance tapes to rely on

McNeil v. Brewers Retail (Ont. C.A.) Facts

- Eventually used surveillance tapes to exonerate himself
- Sued employer for malicious prosecution
- Jury awarded damages of over $2 million

McNeil v. Brewers Retail (Ont. C.A.) Findings

- The issue was no longer the exclusive jurisdiction of the arbitrator
  - Once an employer takes the dispute to a criminal court, it becomes more than a labour relations dispute
  - Does not bar employee from claiming lost wages and damages in civil court through tort action if that is the "essential character" of the dispute

McNeil v. Brewers Retail (Ont. C.A.) Findings

- Withholding the tapes was sufficient to find employer initiated the malicious prosecution
  - May be regarded as prosecutor if person puts the police in possession of information which compels an officer to lay a charge
- The Employer in this case became liable not only for damages for loss of employment income and benefits
- Civil liability for damages such as
  - For future loss of income
  - For punitive damages
  - *Family Law Act* – loss of , care, guidance and companionship
  - Legals
  - Interest and Costs

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McNeil v. Brewers Retail (Ont. C.A.) Practical Implications

- Employers must be careful when taking steps to charge employees with a crime
  - Ensure that <u>all</u> evidence is brought to the police
- Employers cannot always hide behind collective agreements to avoid jurisdiction of the Court
  - Particularly important when employer commits a tort against employee
- Employer may be liable in tort to employee for its conduct
  - Potential for damages often higher in tort

Evans v. Teamsters (S.C.C.) (May 2008) Facts

- Evans was a Business Agent for the Teamsters Union for 23 years
- Backed unsuccessful incumbent in union election
- New President sent a letter of termination to Evans
  - Parties began negotiating the notice period
  - Paid throughout negotiations but did not report to work
  - Negotiations failed

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Evans v. Teamsters (S.C.C.) Facts

- Employer requested employee return to work to serve balance of 2-year notice period
  - If Evans failed to return, would be considered just cause for termination and would be terminated without notice
- Evans refused unless the initial notice of termination was rescinded
  - Would have extended notice period by 5 months
- Employer refused, Evans was terminated
- Evans sued for wrongful dismissal

Evans v. Teamsters (S.C.C.) Findings

- Court held that an employee might have to accept re-employment in duty to mitigate
- Question is whether a reasonable person would accept the offer to return to work to mitigate his or her damages
  - Objective test assessed using tangible and non-tangible factors
- Critical element at the forefront of this question: "that an employee not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation"
- Evans failed in the duty to mitigate his damages
- Employer relieved of obligation to pay notice damages and was awarded costs

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Evans v. Teamsters (S.C.C.) Practical Implications

- Reinforces employee's duty to mitigate damages
  - Protects employers from unreasonable employee responses to wrongful dismissal
- Encourages employers to terminate in most sensitive way if potential for re-employment
- Offers of re-employment will have to be in good faith

Hydro Québec v. SCFP-FTQ (S.C.C.) (July 2008) Facts

- Hydro Québec dismissed an employee who suffered from various physical and mental health problems
  - Missed 960 days of work in 6 ½ years
- This led to a high absence rate as well as difficult relationships with co-workers and supervisors
- Employer had made various adjustments to her conditions of work
- Dismissed because of lack of foreseeable regular and continuous attendance
- Union argued could have completely changed her work environment

Hydro Québec v. SCFP-FTQ (S.C.C.) Previous Findings

- Arbitrator found:
  - Employer had accommodated to the point of undue hardship
  - Union's proposed accommodation, which would require continuous, periodic changes to the employee's work environment and colleagues, would constitute undue hardship
- Superior Court upheld the decision on judicial review
- Court of Appeal reversed the decision on the basis that the employer failed to show accommodation was impossible

Hydro Québec v. SCFP-FTQ (S.C.C.) Findings

- Issue was meaning of "impossibility" in "*Meiorin* Test"
- Test for impossibility not total unfitness for work in the foreseeable future
- Proper test is:
  - Whether the characteristics of the illness are such that the proper operation of the business is hampered excessively, or
  - If an employee with such illness will remain unable to work for the reasonably foreseeable future even though the employer has tried to accommodate the employee

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Hydro Québec v. SCFP-FTQ (S.C.C.) Findings

- Employer's duty to accommodate ends when employee is no longer able to fulfill basic obligations associated with the employment relationship
  - i.e. being present and providing work to the employer in exchange for wages
- Accommodation must be approached individually and flexibly by the Courts
  - Must be assessed in a "global" way and not be mechanistic or strict

Hydro Québec v. SCFP-FTQ (S.C.C.) Practical Implications

- Duty to accommodate remains a flexible mechanism for employers faced with employees who have disabilities
- Employer may not have to tolerate excessive absenteeism as part of its duty to accommodate
  - Employee must be able to fulfill basic obligation that he or she will be present and work
- BUT employers still remain bound to the high threshold of undue hardship

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ADGA v. Lane (Ont. S.C.J. – Div. Ct.) (August 2008) Facts

- Lane was diagnosed with bipolar disorder
- Interviewed and accepted a job with ADGA in 2001
  - Did not disclose his disorder
  - Was advised it was a stressful environment
- Four days after he commenced work, informed employer of his disorder
  - Explained that it could be managed if employer looked for signs of him becoming manic and called his wife or doctor

ADGA v. Lane (Ont. S.C.J. – Div. Ct.) Facts

- Employer was concerned that Lane would not be able to perform his job:
  - Job was too stressful
  - Absenteeism was a major concern
  - Safety concerns as project was NATO military software development

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ADGA v. Lane (Ont. S.C.J. – Div. Ct.) Facts

- Lane, probationary employee terminated 5 days after disclosing mental disorder. Was not offered another position or discussed needs relating to his condition.
- As a result, Lane went into a manic period then successive depressive periods, hospitalized, lost his house and his marriage
- Lane filed a human rights complaint – failure to accommodate and termination due to disclosure of mental illness

ADGA v. Lane (Ont. S.C.J. – Div. Ct.) Facts

- Employer did not demonstrate that it could not accommodate to the point of undue hardship i.e. safety concerns/costs
- Human Rights Tribunal found employer failed in its duty to accommodate and awarded over $80,000 in damages

ADGA v. Lane (Ont. S.C.J. – Div. Ct.) Findings

- Employees have no duty to disclose disability when applying for a job
  - Lane did not have to tell employer before they hired him that he suffered from bipolar disorder
- Even probationary employees are entitled to accommodation and significant damages
- Affirmed that accommodation is an individualized process

ADGA v. Lane (Ont. S.C.J. – Div. Ct.) Findings

- Two aspects to accommodation:
  - Procedural: obtaining all relevant information about employee's disability and evaluate; seek professional advice
  - Substantive: duty to accommodate employee's disability to the point of undue hardship
- When using "risk" or "safety" as a factor in undue hardship, risk must be serious and tangible
- ADGA failed in both by not exploring both Lane's conditions and options for accommodation with Lane prior to termination
- **Court of Appeal denied ADGA's Leave Application November 17, 2008**

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ADGA v. Lane (Ont. S.C.J. – Div. Ct.) Practical Implications

- Employers must be cautious about making assumptions about employees with mental disabilities
- Undue hardship must be based on tangible, actual evidence and not speculation
- Employers should always address possible accommodation options with the employee and not explore options unilaterally
  - Accommodation is a dynamic, individualized process

Markovic v. Autocom Manufacturing (H.R.T.O.) (September 2008) Facts

- Markovic filed a complaint with the Ontario Human Rights Commission when he did not get 2 days leave with pay to celebrate Eastern Orthodox Christmas in January
- Autocom developed a policy, which gave its employees a "menu of options" to accommodate time off work for religious observance
  - Options included scheduling changes, vacation, unpaid time but *not* paid days
- The OHRC argued employers were required to first prove that providing paid leave would constitute undue hardship or at least include it as one of the options
  - Argument in accordance with longstanding OHRC policy

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Markovic v. Autocom Manufacturing (H.R.T.O.) Findings

- A work calendar is discriminatory in effect when it grants time off to celebrate Christmas and Good Friday but requires work on the holy days of other religions
- Rejected that an employer is required to accommodate by granting 2 days paid leave to reflect/mirror 2 public holidays, short of undue hardship
- The provision of options for scheduling changes that do not result in loss of pay satisfies the employer's obligations
- Employer **not required** to include **paid leave** as an option

Markovic v. Autocom Manufacturing (H.R.T.O.) Practical Implications

- Permits employers to adopt a practically feasible way to meet its obligations
- Reflects human rights obligations and the individualized nature of the process
- Employer not required to first establish that providing 2 days of paid leave would result in undue hardship
- BUT if other scheduling options are not feasible or an option results in loss of pay the employer will likely be required to explore other options including paid leave

RBC v. Merrill Lynch (S.C.C.) (October 2008) Facts

- Parties investment business competitors
- Branch manager orchestrated a mass branch departure of virtually all investment advisors from RBC to ML
- The office was effectively hollowed out and all but collapsed
- No advance notice was given
- In the preceding weeks, RBC's client records were surreptitiously copied and transferred to ML

RBC v. Merrill Lynch (S.C.C.) Facts

- RBC sued its former employees (and ML) for compensatory, punitive and exemplary damages, claiming:
  - Against its former employees: breach of fiduciary duty, breach of implied contractual term to give reasonable notice and not to compete unfairly (when left), misuse of confidential information
  - Against ML and branch manager: inducing employees' to breach above duties
  - Against all the respondents: actions in tort for conspiracy and conversion (removal of documents-property of RBC)

RBC v. Merrill Lynch (S.C.C.) Previous Findings

Trial Judge found

- Employees:
  - Breached duty to give adequate reasonable notice
  - Breached duty not to compete unfairly
  - Liable in tort for conversion (RBC's confidential client records)
- Branch manager:
  - Breached contractual duty of good faith (secretly promoted and co-ordinated the departure)
  - Liable for $1,493,239 in damages (loss profits) and punitives
- Majority of CA reversed certain damage heads

RBC v. Merrill Lynch (S.C.C.) Findings

- Reinstated award against branch manager:
  - Managerial duties involve responsibility for running branch and hiring, coaching, counselling and supervising employees
  - By his own admission was implied term to retain employees
  - In organizing mass exit breached duty of good faith in discharging his employment duties
  - Damage award reasonable, appropriate

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RBC v. Merrill Lynch (S.C.C.) Findings

- DID NOT reinstate damages against investment advisors for losses due to unfair competition:
  - The contract of employment ends when either side terminates the employment relationship
  - An employee is not prevented from competing with his or her employer during the notice period.
  - Employer is confined to damages for failure to give reasonable notice
  - BUT caveat: still liable for residual duties or specific wrongs: improper use of confidential information during the notice period, or if subject to restrictive covenant or fiduciary duty

RBC v. Merrill Lynch (S.C.C.) Practical Implications

- Emphasizes importance of restrictive covenant (non-compete, non-solicit)
  - Without one, unless employee is a fiduciary, no obligation not to compete once employment relationship ends
- Employee DOES have a duty to give reasonable notice and duty of good faith
  - These obligations go both ways – is a "two-way street"
  - But some findings turned on branch manager's duties
- Is value to setting out employer's expectations regarding an employee's obligations
  - "Good faith" finding driven by those duties so flagrantly breached

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Legislative Update

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New Ontario Human Rights Regime: Bill 107

- Ontario has moved to a "direct access" model
- In full effect June 30, 2008
- Main changes:
  - Ontario Human Rights Commission no longer serves a "gatekeeper" function
    - – Complaints filed directly to the Human Rights Tribunal of Ontario
  - $10,000 "cap" for mental anguish damages eliminated
    - – potential for higher remedial awards
  - Human Rights Legal Support Centre offers legal and support services to assist complainants with their claims
    - – http://www.hrlsc.on.ca/

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New Ontario Human Rights Regime: Bill 107

- Contains "transitional rules"
  - The Tribunal was empowered to make rules to ensure transitional applications were dealt with in an expeditious manner
  - The Tribunal has commenced a public consultation on its proposed rules for transitional applications
  - The consultation ends December 1, 2008

http://www.hrto.ca/NEW/whatsnew/whatsnew.asp

Canada Occupational Health and Safety Regulations – Violence Prevention in the Work Place

- Federal Occupational Health & Safety Regulations under the *Canada Labour Code* amended, effective May 8, 2008
- Expands obligations of an employer in addressing workplace violence by requiring the employer to:
  - Establish/post a workplace prevention policy
  - Identify all factors that contribute to workplace violence
  - Provide information, instruction and training on the factors that contribute to work place violence
  - Conduct periodic reviews of the effectiveness of these workplace prevention measures
  - Can lead to directions and prosecution for non-compliance

Ontario Provincial Consultation Paper on Workplace Violence Prevention

- Under the OHSA, workers have a right to refuse to work where they have reason to believe,
  - any equipment, machine, device or thing the worker is to use or operate; or
  - the physical condition of the workplace,

  is likely to endanger either themselves or another worker
- The Ontario Ministry of Labour is considering revising the legislation to require employers to develop violence prevention strategies – issued Consultation Paper on September 17, 2008 – consultation completed in October 2008

Ontario Provincial Consultation Paper on Workplace Violence Prevention

- The Ministry is contemplating requiring employers to develop workplace violence prevention programs that could contain the following elements:
  - A risk assessment of the workplace
  - Workplace violence prevention measures and procedures;
  - Training for workers;
  - A workplace violence response plan; and
  - A requirement to address behaviors that contribute to workplace violence (such as bullying or teasing)

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Military/Reservists Leave *Canada Labour Code*

- Federal Bill C-40 (in effect April 18, 2008) amends the *Canada Labour Code* and the *Public Service Employment Act*:
  - A legally protected leave of absence for members of the reserve force for military activities and operations (15 days for training and operations/call for service unlimited)
  - Provides right of reinstatement and prohibits discriminatory actions
  - Seniority will continue to accumulate during the leave
  - Qualifying conditions – continuously employed for 6 months and 4 weeks notice to employer
  - Not entitled to a leave if, in the opinion of the Minister, it would adversely affect public health/safety or cause undue hardship

Military/Reservists Leave *Employment Standards Act*

- Similar amendments made to Ontario *Employment Standards Act*
- Provincial *Fairness for Military Families Act* (Royal Assent December 3, 2007)
- Unlimited leave to engage in operation including pre-deployment and post-deployment activities
- Provincial leave more automatic. No exceptions like Federal legislation if, in the opinion of the Minister, it would:
  - Adversely affect public health/safety
  - Cause undue hardship

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Federal Wage Earner Protection Program (WEPP)

- Employees often have limited recourse to claim unpaid wages when their employer becomes insolvent or bankrupt
- WEPP Act, in place as of July 7, 2008:
  - Entitles employees to a payment of up to $3,000 (approx) from the Federal government
  - Covers unpaid wages and vacation pay earned in the 6 month period prior to bankruptcy or receivership
  - Does not include amounts owing for unpaid termination or severance pay

Regulatory Modernization Act Integrated Approach to Enforcement

- RMA in force since January 17, 2008
- Information Sharing
  - Act permits government ministries to share information collected in course of their enforcement activities
- Publicizing of Information
  - Permits publication of information about organizations related to regulatory compliance matters
- Enforcement and prosecution under multiple acts
  - Prior convictions a factor in sentencing
- April 4, 2008 and August 4, 2008 – Designations Regulation (O. Reg. 75/08) passed – designated legislation under the RMA (i.e. ESA, OHSA)

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Workplace Safety and Insurance Amendment Act, 2008 (Bill 119)

- Introduced October 28, 2008. Passed November 26, 2008.
- Amends *WSIA* regarding insurance coverage for certain segments of the construction industry
- Currently, optional insurance is available for independent operators, sole proprietors, partners in partnerships and executive officers of corporations (s.12 *WSIA*)
- Bill 119 would amend *WSIA* to make insurance coverage mandatory for these categories of persons in the construction industry
  - Does not apply if only construction work is home renovation work performed in specified circumstances
  - Other exemptions to be established by Regulations
- Act in effect no earlier than 2012

Proposed Ontario *Apology Act* (Bill 108)

- Introduced October 7, 2008. Referred to Standing Committee.
- States an “apology” does not constitute an express or implied admission or acknowledgement of fault or liability
- Can’t be used in court as evidence of fault or liability
- Media coverage has focused on applicability in health care context
- But "court“ defined broadly: includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity
- Could apply to most labour/employment related forums and to both employees and employers

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Questions?