## Federal Post

# Federal Post – First Edition

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Dear Friends,

We are excited to bring to you our first edition of the *Federal Post*, a newsletter designed exclusively for federally regulated employers.

The *Federal Post* discusses issues that are topical, timely and important. It will cover the gamut of matters which impact your workplace, from human rights to minimum standards to labour relations to pensions, and so on.

In our inaugural issue, we discuss key changes to the *Canada Labour Code* governing the federal certification and decertification process.

Greg Power, a partner in our Toronto Office, and Sean Porter, an associate in the same office, bring you an up-to-date analysis of the recent decisions which have found that the *Canada Labour Code* permits dismissals without cause, but that an evidentiary inquiry into that determination is needed. Stay tuned – the final word on these questions may yet to be spoken as two cases in this area are being appealed.

Finally, Joseph Cohen-Lyons, an associate in our Toronto office, reviews an important privacy tribunal decision out of Quebec which, in a province that has private sector privacy legislation, found that a federal employer was subject to the terms of that legislation in addition to the PIPEDA.

We hope you find the information in our *Federal Post* interesting. We'd appreciate any feedback you may have on the newsletter, and, as always, please contact us if you have any questions about the issues raised.

Simon E. Mortimer and Jodi Gallagher Healy
Co-Editors

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# NEW FEDERAL UNION CERTIFICATION AND DECERTIFICATION PROCESS: REGULATORY AMENDMENTS PROPOSED

By: Simon E. Mortimer

Significant changes to the federal certification and decertification process came into force on June 16, 2015. Among other things, the changes eliminate the "card check" certification process and provide for a secret ballot certification vote where there is 40% employee support. For employees in a bargaining unit who no longer wish to have the union represent them, the threshold of evidence required to trigger a secret ballot decertification vote is reduced from a 50% +1 majority to 40% employee support.

These changes have been brought about by the *Employees' Voting Rights Act* ("EVRA") which amends the *Canada Labour Code*, the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act.*

Following a consultation process, the Canadian Industrial Relations Board ("CIRB") has posted proposed amendments to the *Canada Industrial Board Regulations, 2012* ("*Regulations*") regarding the implementation of EVRA. The proposed amendments, as well as a brief summary of the comments received, are available on its website.

With respect to the issue of a certification application, the CIRB proposes the following:

- eliminate the requirement for evidence of payment of $5.00 to support an application for union membership;
- require a full response from the employer within five days of the service of the certification application (which it proposes occurs at the same time as the application is delivered to the CIRB) rather than the current 10 days from the day of notice of the application; and
- require that requests to intervene be made within five days rather than the current 10 days and require full written submissions on the merits of the case and all supporting documents.

The EVRA does not define the timing or processing of the vote although the proposed

amendments state that the intent is to have the vote commence within 10 to 12 days of the certification application.

Note that the current Regulation defines “days” as calendar days and that no change to the following provision of the *Regulation* has been proposed:

9. If the time limit for the completion of any task or the filing of any document expires or falls on a Saturday or a holiday, as defined in subsection 35(1) of the *Interpretation Act*, it is extended to the next day after that.

Therefore, based on the proposed amendments, where an application is filed and delivered to the employer on Wednesday, a response must be filed within five calendar days, or the following Monday. The response must still include the information set out in section 12(1) of the current *Regulation*.

The proposed amendments do not indicate how the CIRB will assess whether there is 40% employee support nor what information will be used in determining the numerator, the denominator, the validity of individual employee memberships or disputes around the appropriateness of the unit for which there is claimed support. These are areas where there may be employer disagreement and thus disputes may arise.

How the CIRB will address these disputes and determine whether or not a vote is justified is not specified in the proposed amendments. Depending on the system developed, these disputes could either delay the vote or result in unnecessary and unwarranted votes.

The proposed removal of the requirement for payment of a $5.00 membership fee within the last six months as part of the proof of membership is unrelated to the introduction of voting. The CIRB continues to have an obligation to determine whether there is sufficient membership support to hold a vote. It is unclear how it will be determined that an application for membership was signed by the employee and how long that application remains valid.

The voting procedure itself is not addressed in the proposed amendments. Comments found with the proposed amendments suggest that the CIRB expects to be able to use a full array of secret ballot voting systems including in person, online and mail in ballots.

The CIRB has proposed that it may introduce forms or information bulletins which will further guide the process. These are not yet available.

Federally regulated employers which may be subject to organizing drives or certification applications will need to stay abreast of these regulatory developments and the introduction of any new procedures. As the rules crystallize, we recommend that you implement appropriate training as well as a systems review to enable you to respond within the short period required without

impairing your rights or the rights of your employees.

## *WILSON AND SIGLOY*: AN IMPORTANT ANSWER AND SOME NEW QUESTIONS ABOUT "WITHOUT CAUSE" TERMINATIONS UNDER THE *CANADA LABOUR CODE*

By: Gregory J. Power and Sean P. Porter

Early 2015 was marked by significant development in the case law regarding a federally regulated employer's ability to terminate a non-union employee without cause under the *Canada Labour Code* (the "*Code*"). As a result, the view that the *Code* extends the just cause protection frequently seen in the unionized setting to non-unionized employees has been dispelled. Review of without cause terminations by adjudicators remains possible, however, and the extent to which an employer must defend its actions in such cases has been called into question.

### FEDERAL COURT OF APPEAL BREAKS THE TIE: *WILSON V ATOMIC ENERGY OF CANADA LTD.*

For decades there have been two diametrically opposed schools of thought regarding whether without cause terminations are permitted under the *Code*. Some adjudicators have found that Parliament intended the protections under Part III of the *Code* to give non-unionized federal employees the sort of just cause protections usually seen in collective agreements. Other adjudicators have found that in the absence of express language, without cause terminations are permitted under the *Code*.

In *Wilson v. Atomic Energy of Canada*, an employee had been terminated without cause and provided with six months' severance pay. He filed a complaint under Part III of the *Code* challenging his termination and the adjudicator considered whether without cause terminations were permitted under the *Code* in situations other than lack of work or discontinuance of a function. The adjudicator determined that the *Code* only permitted dismissals for just cause, lack of work or discontinuance of a function but did not make any orders regarding remedy, referring the matter back to the parties. The employer sought judicial review of this decision from the Federal Court.

The Federal Court overturned the adjudicator's finding. It ruled that such an interpretation of the *Code* was inconsistent with its notice and severance provisions. Without cause terminations were permitted by the *Code* but employees terminated without cause could still bring complaints and such terminations may still be found to be unjust in cases of discrimination, reprisal or other *mal fides*. The employee appealed this decision to the Federal Court of Appeal.

In January 2015, a unanimous Federal Court of Appeal determined that the continued existence of the contradictory views among adjudicators was untenable, and definitive judicial direction on this

question was warranted. The Court determined that a “dismissal without cause is not “unjust” under Part III of the *Code*.” In other words, the *Code* does not create a “right to a job” or extend just cause protection to non-unionized employees. However, the Court also confirmed the Federal Court’s finding that without cause terminations may still be subject to adjudicative review, and may be found to be otherwise “unjust”. The definition of what may render a without cause termination otherwise “unjust” was left to future adjudicators to develop.

An application for leave to appeal to the Supreme Court of Canada has been filed by the employee.

## WITHOUT CAUSE TERMINATIONS STILL REQUIRE AN EVIDENTIARY HEARING: *SIGLOY V. DHL EXPRESS (CANADA) LTD.*

*Sigloy v. DHL Express* raised a similar issue. An adjudicator granted the employer’s preliminary objection that he had no jurisdiction to consider an “unjust dismissal” complaint. The dismissal had been without cause and both notice/severance entitlements under the *Code* and the employee’s employment contract had been provided. The employee appealed and the Federal Court found that when considering a without cause termination, an adjudicator must still conduct some form of evidentiary hearing in order determine whether the termination is unjust. While the exact scope of the hearing that must be conducted is at the discretion of the adjudicator, “there must be an evidentiary inquiry, whether cursory or extensive, into the circumstances of the dismissal.” The scope of the hearing conducted by the adjudicator in this case was insufficient.

Interestingly, the Federal Court indicated its support for the “outcome” of the adjudicator’s decision in *Sigloy*, notwithstanding the finding that the process employed violated the procedural fairness owed to the employee. Consistent with *Wilson*, the Court also explained that an adjudicator has discretion over the precise scope of the inquiry, but it is procedurally unfair to dismiss such a complaint on the basis of a “preliminary legal determination”.

The employer is appealing this decision to the Federal Court of Appeal.

## THE CURRENT STATE OF THE LAW

As a result of these decisions, it is clear that:

(a) without cause terminations are permitted under the *Code*; but

(b) without cause terminations may still be found to be “unjust”.

Adjudicators must now resolve the manner in which without cause terminations may be found to be otherwise “unjust” and the scope of the inquiry required to make this determination. The complication arising from the *Sigloy* decision is that the sole allegation in the complaint was that there was no just cause for the termination and yet the Federal Court determined that a more in-

depth process was required. Thus, the extent to which an employer must defend a without cause termination is unknown, considering that such terminations are now clearly acceptable under the *Code*.

While not defining precisely what will constitute an otherwise “unjust” termination, the Federal Court of Appeal provided some guidance in *Wilson*, suggesting that terminations may be otherwise unjust where they are discriminatory, based on untrue/incorrect/bad faith allegations or an employer fails to provide statutory/contractual entitlements.

### CONCLUSION

The precise consequences of these decisions will continue to take shape as they are considered and applied by adjudicators in future cases. However, the following considerations should be taken into account by federal employers:

1. **Employment Contracts:** A contractual entitlement in excess of that provided by the *Code* may help an employer narrow the scope of the hearing and circumvent some concerns raised by *Sigloy* (as occurred in a prior case, *Klein v. Royal Canadian Mint*).
2. **Reasons Given Upon Termination and to ESDC:** The fact without cause terminations are permitted will not protect an employer which asserts cause and then ultimately fails to prove it at adjudication. Where applicable, employers should clearly communicate that the termination is without cause and provide appropriate entitlements. Making a false allegation against an employee at, or subsequent to, termination may give rise to a finding that the termination is otherwise “unjust”.

## RECENT CHANGES TO FEDERAL PENSION RULES

By: Lisa J. Mills and Alyson Frankie

The operation of defined benefit (“DB”) and defined contribution (“DC”) pension plans for federally regulated employers has been affected by recent amendments to the *Pension Benefits Standards Regulations, 1985* (“PBSR”) and the *Pension Benefits Standards Act.*

### OPTION TO PAY PENSION BENEFITS DIRECTLY FROM A DC PLAN

Previously, the retirement income options for DC benefits were limited to annuity purchases and transfers into life income funds. As of April 1, 2015, pension plan sponsors have the option to amend their DC pension plans to provide a variable benefit option. This option allows a former member (or surviving spouse) to retain a DC account under the pension plan and receive annual variable payments directly from his or her account under the pension plan. For each year of retirement, the amount of the annual variable payment must be within a specified range determined by the *Income Tax Regulations* and the PBSR. There are also spousal consent and disclosure

requirements respecting the establishment of a variable benefit account.

Administrators of plans that elect to provide the new variable benefit payment option will need to review the DC plan's investment line-up to determine if it offers appropriate choice during the decumulation or payout phase. Agreements with the plan's trustee, insurance company, or third-party administrator will need to be changed and member communications and educational materials will also need to be reviewed.

## SPOUSAL CONSENT FOR CERTAIN TRANSFERS

Spousal consent for pension benefit transfers to prescribed retirement savings plans applies if the transfer occurs after the plan member is eligible to commence an immediate pension. Spousal consent must be obtained on the prescribed form (to be made available effective July 1, 2016) when transfers are made from a registered pension plan to a life income fund, a restricted life income fund or a locked- in registered retirement savings plan.

## ELECTRONIC COMMUNICATIONS WITH PLAN BENEFICIARIES

As of April 1, 2015, the PBSR allows plan administrators to fulfill member disclosure obligations through electronic communications under certain conditions. Required communications to members from the administrator (for example, annual statements and notices of plan amendment) are now permitted to be sent electronically to plan beneficiaries. Consent of the beneficiary is required and the beneficiary must designate an email address (or other information system) for this purpose. The new regulations also detail how website postings can be used to communicate with plan beneficiaries and how beneficiaries may revoke their consent to electronic communications.

Electronic communication may be a more cost effective method for communicating with plan beneficiaries once the initial consent requirements are satisfied.

## STATEMENT OF INVESTMENT POLICIES & PROCEDURES

The requirement to have a Statement of Investment Policies & Procedures for a pension plan with only member-directed investments has been eliminated as of April 1, 2015. A new term, "member choice account", has been defined to include most DC accounts and may include DB flex accounts or additional voluntary contribution accounts where, under the plan terms, plan members, former spouses, or survivors are permitted to direct the investment of the assets held in the account.

## ENHANCED DISCLOSURE TO PLAN BENEFICIARIES

The PBSR amendments also increase disclosure obligations for both DB and DC pension plan administrators as of July 1, 2016.

### Annual Statement Requirements

The changes add additional disclosure requirements for the annual statements issued to active pension plan members and will require annual statements to be issued to retired and deferred vested plan members. Annual statements must include information about:

- the pension fund's 10 largest assets based on market value;
- the pension fund's target asset allocation; and
- for DB plans, solvency assets and solvency liabilities at the latest valuation date, the solvency ratio, valuation date, the next valuation date and the employer's total payments made to the plan in the period.

Annual statements for deferred vested and retired members must include the information above in addition to basic member, spousal, and beneficiary information. The regulations list additional disclosure obligations unique to specific types of pension plans (for example negotiated contribution plans), and for variable benefit recipients.

### Member-Directed Investment Annual Disclosure Requirements

Other changes affect only pension plans that provide "member choice accounts". As of July 1, 2016, administrators will need to provide a detailed written statement annually to each person who directs the investment of a member choice account including a description of each investment option, a description of how the account is currently invested, and any timing requirements that apply to making an investment choice. In particular, for each investment option, the annual disclosure must include the investment objective and target asset allocation, the types of investments and risks inherent in the investment option, the 10 largest asset holdings based on market value, performance history and an appropriate benchmark for the investment option, and the fees associated with each investment option. Compliance with these new disclosure obligations will assist in protecting plan administrators from liability for failing to act prudently in making investment choices available to pension plan members.

Employers offering group registered retirement savings plans and deferred profit sharing plans may wish to adopt similar investment disclosure requirements in order to ensure that the information employees receive about investment options conforms to best practices.

## CHANGES TO INVESTMENT RULES

The PBSR set out prescribed limits on how pension funds may be invested. There are several changes to the PSBR investment rules, which take effect on July 1, 2016. The amendments include modifications to the existing limit on investing more than 10% of plan assets in an entity or any associated or affiliated entities. Another significant change involves the related party investment rules, which restrict investment in parties such as a participating employer and affiliated

corporations. More information on these amendments is available in our *FTR Now* "Changes to the Federal Pension Investment Rules." It will be necessary for most administrators to review investment manager agreements, investment fund documentation, compliance processes and SIP&Ps, and make changes leading up to July 1, 2016.

### CONCLUSION

This brief summary of recent amendments for federally-regulated pension plans includes some opportunities to streamline administration. Although certain amendments reviewed above will not take effect until July 1, 2016, the amendments will require attention in the coming months to ensure compliance.

## FEDERAL UNDERTAKING FOUND SUBJECT TO PROVINCIAL PRIVACY LEGISLATION

By: Joseph Cohen-Lyons

Quebec's privacy regulator recently issued a significant decision affecting the privacy obligation of a federally regulated company. In X c. Rogers Communications Inc, the Commission d'Access a l'information ("CAI") held that a telecommunications company subject to the provisions of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") was required to comply with the additional obligations imposed under the provisions of Quebec's private sector privacy law.

## THE DECISION

In *Rogers Communications*, the CAI considered the propriety of the company's practice of collecting and holding the complainant's social insurance number ("SIN") and driver's licence number in the context of activation of a cell phone. In doing so, it scrutinized the company's practice in comparison to the provision of the Act *Respecting the Protection of Personal Information in the Private Sector* ("*Act*"). The CAI ultimately held that the company's practice was inconsistent with the Act and ordered the company to cease engaging in such practice.

In response to the claim, the company argued that as a federal undertaking to which PIPEDA applied, it was not subject to the requirements of the Act. It relied on the principle of paramountcy of federal legislation to support its position that only PIPEDA applied to its actions and thus it had complied with all of its obligations in relation to privacy regulation. The company also relied on existing jurisprudence of the federal privacy regulator that held the impugned practice to be in accordance with the principles of PIPEDA.

The CAI rejected the company's argument and held that it was subject to the provisions of the *Act*.

It relied on recent jurisprudence of the Supreme Court of Canada which held that the doctrine of paramountcy does not apply where the provincial legislation at issue does not relate to or interfere with the core federal power. In this case, the *Act*'s regulation of the collection, use and disclosure of personal information did not relate to or affect the federal power over telecommunications. To the extent that it was possible for the company to comply with the *Act* without violating the provisions of PIPEDA, it was required to do so. The company was therefore required to comply with the stricter provisions of the Quebec *Act* which resulted in an order banning a practice that had previously been approved as consistent with PIPEDA.

## CONCLUSION

The decision in *Rogers Communications* is worthy of note for federally regulated companies, including banks, telecommunications companies, inter-provincial transportation companies and others. Certainly in Quebec, it sets a precedent that federally regulated companies must not only be compliant with PIPEDA but must also be in line with the provincial privacy legislation.

If you have any questions about the issues raised in this newsletter or any matters affecting your federally regulated workplace, please contact Simon Mortimer at 416.864.7311, Jodi Gallagher Healy at 519.931.5605 or your regular Hicks Morley lawyer.

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