Webcast: Key Distinguishing Features of Canadian Employment and Labour Law
Date and Time: Tuesday, September 19, 2006 at 1:00 PM ET
Presented by ACC's Employment & Labor Law Committee and Osler, Hoskin & Harcourt LLP
Panel: Jim Hassell, Osler, Hoskin & Harcourt LLP, Jason Hanson, Osler, Hoskin & Harcourt LLP, Allan Wells, Osler, Hoskin & Harcourt LLP, Richard Lococo, Manulife Financial

Moderator: Diane Lank, Desire2Learn Incorporated

ASSOCIATION OF CORPORATE COUNSEL

Moderator: Diane Lank
September 19, 2006
12:00 p.m. CT

Female: Please go ahead, (Diane).

(Diane Lank): Good morning or good afternoon, everyone, as the case may be. Welcome to the ACC Web conference on key distinguishing features of Canadian employment and labor law.

A couple housekeeping items to begin with. First of all, I'd like to introduce the folks who will be participating with me today. I have with me (Jim Hassel), (Jason Hansen), and (Allen Wells), all of whom are with the (Osler) law firm here in Toronto, as well as (Richard Lacocco) who is counsel at ManuLife. All four are licensed to practice in Ontario, or as they call it up here (call to the bar). I am (Diane Lank). I am U.S. counsel with Desire To Learn. For more bio information I urge you to click on the links portion of the Webcast. I won't go into it more here.

A couple other matters. We'd like to urge you to take a look at the info pack. Many of us here were involved in writing that info pack. And a link to that can be found on the link site. Finally, we want to remind you to fill out the evaluation form for the – this session. And that evaluation form can also be found in the links site. If you have any questions during the presentation, please type them in the lower left corner of your screen and don't forget to click the send button. We'll be – try to take some time at the end to end your questions.

We've got a very full agenda, so without further ado I'd like to start with our first subject, which is the legal landscape and themes in Canadian law. And I'm going to start by calling on (Jim Hassel). (Jim).

(Jim Hassel): Thanks, (Diane). By way of background, our federal government and all of the 10 provincial governments, which are equivalent I guess to your state governments, each have their own employment and labor laws. However, unlike in the U.S., the federal and provincial employment and labor laws do not overlap. So a workplace is governed either by federal or by provincial employment and labor law, not both. So a U.S. employer considering expanding its operations into Canada needs to determine if they will be covered by federal or provincial employment and labor laws, and the laws do vary by jurisdiction. Federal labor laws apply to a limited list of business sectors, referred to as federal works or undertakings, shipping, railways, airlines, radio/ television broadcasting, banking and inter-provincial transportation. Provincial employment labor laws apply to all the other business sectors. And as a result, approximately 90 percent of all employees in Canada are provincially regulated and not covered by federal labor or employment laws. In most cases,

the applicable jurisdiction is clear, but there are gray areas where labor boards and courts ultimately have to decide whether an operation is federal or provincial.

Richard.

(Richard Lacocco): A real-life example of how this works in practice, ManuLife is an insurance company in Canada. It's – the holding company and chief operating company are Canadian federally incorporated life insurance companies. Our main government regulator, insurance regulator, on prudential matters is the federal superintendent of financial institutions. But Canadian employment law matters for ManuLife are generally governed by the provincial regimes since insurance is not an area that exclusive federal jurisdiction under the Canadian constitution. Same with human rights matters and with privacy matters. An exception, though, for us is that ManuLife Bank, one of our subsidiaries and a – and a relatively small part of the business, is subject to federal legislation in these areas.

(Jim).

(Diane Lank): Jason.

(Richard Lacocco): Oh, Jason. Right.

(Jason Hansen): Thanks, (Richard).

In Canada there is no such thing as employment at will. So employment at will does not exist and instead in Canada we have the legal theory that the employment relationship is

contractual. Every Canadian employee has an employment contract. Now, for most of them it's not written down, so that the common law or the judge-made law, fills in the gaps. They do that by saying that there are implied terms of the employment contract between the employer and the employee. Some of these employed terms impose obligations on the employer, like the obligation to give reasonable notice of termination, to treat employees fairly on termination. On the other hand, there are implied obligations on employees to give reasonable notice of a (quit), to treat confidential information confidential, and, indeed, senior employees have fiduciary duties some of which can extend beyond the term of the employment. Of course in Quebec, Quebec's a little bit like Louisiana. It's a bit different. They have the civil code and language laws so that employees are entitled to be communicated to in French if that is their desire. The overall theme: Canada is a bit like a colder California. The legislation, the courts, the tribunals are a bit more pro employee, pro union than is the case in front of the United States.

(Diane).

(Diane Lank): Thank you, Jason. Just as a personal note here. As I mentioned before, I'm U.S. licensed and have been working in house counsel up here for about nine years. And I think the biggest shock I had to my system with the difference of U.S. law in general and Canadian law was in the area of employment law. You must remember, anybody who has Canadian employees must remember that the courts expect employers to treat employees with utmost respect. And if they don't, that employer is going to get slammed in court. And it's always a duty of an employer to treat employees with sensitivity and fairly.

Now we're going to segue from the overall employment situation to what really will point out the differences between U.S. law and Canadian law. And that's in the area of termination of employment. Remember, there is no employment at will in Canada. Therefore, it's always going to be more expensive to terminate employees in Canada than it is typically in the U.S.

(Allen).

(Allan Wells): Thanks, (Diane). As Jason said, it's an implied term of every employee's employment contract that you can only terminate their employment with reasonable notice. So how does an employer determine reasonable notice. There is no formulation or calculation. And if the parties themselves cannot agree on what is reasonable, ultimately a judge will determine what is reasonable for any employee. It's going to be a fact-specific inquiry, but the judge will take into account the following factors. The employee's age. And there's magic about age 40 in Canada, although generally speaking employees who are older will be given longer notice periods because it's perceived that they have a longer time to find new employment. They will also consider the employee's position. The more senior the employee the longer the notice period. The employee's years of service. And longer service employees will be awarded a longer notice period. Other factors include the circumstances of hiring, particularly where an employee has been lured away from secure employment elsewhere. A judge will look at that an award a longer notice period. The judge will also take into account the circumstances of the termination. And as (Diane) said, if the employee is terminated in an insensitive or an unfair way, that will attract longer notice period.

There is sometimes a rule of thumb that notice periods can be as – based on one month per year of service. That rule of thumb, though, is extremely misleading. It may have some application for employees in the range of five to 10 years of service. But for short service senior employees, for example an executive who has been employed for less than two years, it's not uncommon for them to be awarded a notice period of say nine to 12 months. Similarly or – if you take, say, clerical employees with long service, for example 20 or 30 years, such employees are often awarded notice periods of only 12 months. Again, it's always going to be fact-specific, but the one month per year of service rule of thumb does not often apply.

Now, the concept of reasonable notice is -- the ideal would be to give an employee advanced notice that his or her employment would terminate on some date in the future. And the employee would continue to work until that future date. In practice, that is not how it works. Most employers will tell the employee that their employment terminates on the date of notice and they would therefore have to pay the compensation to the employee that he or she would have been paid had they worked out the notice period. Now, that's significant, because it means that the damages your paying for compensation to a terminated employee are well beyond base salary. They would include such things as bonus payments, commissions, overtime wages, group benefits, pension participation, car allowances, and other perquisites. All of these subject to the terms of a particular employment contract would have to be taken into account when determining the employee's entitlements upon termination of employment.

Now, one other point on the way courts interpret termination of employment as a phrase. They will understand that to be the end of the notice period, the reasonable notice period,

for purposes of such compensation plans as stock option, stock purchase plans. So if you have an employee or a plan that says the employee will – any (un-vested) options will cease to vest upon termination of employment or an employee has to exercise his or her vested options upon termination of employment, under that that may be interpreted to mean the end of the notice period which could be up to 24 months after the actual date that the employee is told to cease working for the employer. So all benefit plans have to be interpreted in the context of this concept of reasonable notice.

Now, finally I just wanted to explain that because the reasonable notice concept is a contract – based on contract, the employee is under a duty to mitigate his damages her damages by looking for other employment. And if the employee does find another job during their reasonable notice period, all of their earnings from that other employment will be reduced from the damages that otherwise would be owed by the employer.

(Diane).

(Diane Lank): Thanks. I just wanted to add a little bit to that because I think a lot of people in the U.S. don't understand the whole notice period, and I wanted to re-emphasize what (Allan) said, is if you figure that – if you want to terminate an employee and that person is – you figure six-month notice period, that means typically on the day that that person departs you will arrange to pay that person per six-month salary or promise the person that they will be paid for six months salary and a little bit later – and a little bit later we're going to be getting into sometimes (six) reduced to sort of a present value calculation – but that is sort of an immediate kind of obligation to pay.

(Richard).

(Richard Lacocco): Well, I guess when we're making the offer of severance, the offer has to bear some reasonable relationship to what the employee ((inaudible)) employee would be awarded by a court. And the rules of thumb that (Allan) talked about and subject to the caveat that he gave on that are useful guides in designing those packages. An employee will, of course, push for a lump payment because or she will want to have the money up front. But an employer would ideally like to structure the payments in installments ending on re-employment or reduced on re-employment ideally or on breach of any pre-existing employment restrictions. For example, on solicitation of employees. So that's something that you may want to try to big into your severance packages, but the negotiation between the two parties will determine at the end of the day what features will be there.

(Diane Lank): (Jim).

(Jim Hassel): OK. Well, (as if) reasonable notice is sufficiently expensive for employers, the Canadian courts will extend the notice period by three, six, nine, maybe 12 months if the courts have the view that the termination was not handled in a fair manner. And these are called (Wallace) damages after a Supreme Court of Canada decision involving an employer which asserted cause when the court decided there was no cause. But essential any form of bad faith or harsh conduct in carrying out the termination can result in (Wallace) damages extending the notice period.

The courts can also award additional damages by way of punitive damages or emotional distress damages. Currently in Ontario there is a case on punitive damages which is very

worrying for employers – it's under appeal and a decision on the appeal is expected shortly – but in the case the trial court awarded a 14-year employee 15 months by way of reasonable notice, an additional nine months of (Wallace) damages for a total of 24 months, and $500,000 in punitive damages. And that's where the area of concern is. That $500,000 award was significantly more than what we've seen in the past where the punitive damages tend to be in the $50,000 range to the maximum in any event. But basically the court did not like the way the employer administered its attendance management policy by requiring doctors notes for each absence and asking the employee to go for an independent medical examination.

The concept of reasonable notice and the cost of giving that notice is has other consequences as well. There's an exception to the reasonable notice requirement where the employer has cause. And as a result, employers are often anxious to assert cause. However, the concept of cause is a great source of frustration in Canada for employers because it is very narrowly interpreted by the courts. Cause means very serious misconduct or a pattern of behavior where there have been clear and escalating warnings in the past.

Another consequence is that employees can quit and allege a constructive termination and demand substantial termination pay where the employer unilaterally alters fundamental terms of employment, such as affecting the employees salary or bonus, position, reporting duties and responsibilities, et cetera. It can be very costly in Canada for employers to try to reorganize the workplace and restructure jobs. The courts have also applied the concept of reasonable notice at common law to contractors where the contractor is dependent on the relationship and the contract with the contractor does not contain notice of termination – notice of termination provisions.

Quite apart from the reasonable notice of common law, the federal and provincial employment standards statutes set a minimum notice of termination and severance pay obligations. And these statutory obligations apply to both union and non-union employees. Union employees are not entitled reasonable notice. They get what's in the statute and the collective bargaining agreement. For non-union employees, the statute sets out the minimum they're entitled to. And that statutory notice is basically a year – one week per year of service to a maximum of eight weeks. In a couple of the jurisdictions, Ontario and federally, there's also severance pay on top of that. And where 50 or more employees are terminated within a four-week period, that may well trigger mass notice provisions in the provinces. And the trigger in Quebec is actually much lower. It's 10 employees. So where there are a group of employees affected, you have to be careful. And in any event you have to be mindful of those statutory minimums.

(Diane).

(Diane Lank): Thank you, Jim. And now we're going to cover the subject very briefly about employment disputes, including what forum governs.

(Allen), would you like to start us out on that topic, please?

(Allan Wells): Thanks, (Diane).

When an employee thinks that he or she has not been given reasonable notice of termination by their employer – that is they disagree with the amount of severance pay

they're being offered – they will most likely bring an action in the superior court of the province in which they reside. That will be essentially a breach of contract claim and it will processed by the court as would any other civil claim such as a tort action or another breach of contract action. (Jason Hansen) will talk a little bit more about the actual court process in a few moments.

A wrongful dismissal action are almost – all – almost always brought before judges and judges alone. It's quite unusual for employment disputes in Canada to be heard by a jury. And the – I think the typical view of a Canadian plaintiff counsel is that jury trials take twice as well and therefore they are twice as expensive. And, further, the law is relatively – well, well known by the judges and the counsel and there's, in my view, a perception that juries are more likely to get it wrong. And therefore plaintiff counsels think they're better off simply with a judge.

There will be cases, of course, that don't involve the court, and they involve employment standards disputes. So for example if an employee does not get his or her minimum entitlement or if there an issue involving over-time pay, hours of work, or a statutory leave such a pregnancy leave, a parental leave, or a family emergency leave, all of these types of actions will be brought in the provincial ministry of labor where the employee is provincially regulated and with the federal minister of labor where the employee federally regulated. These are bureaucratic processes. The advantage to the employee is that he or she does not need counsel in order to process their claim under a statute. There is also a human rights commission in almost all of the provinces in Canada with the exception at the moment of British Columbia which simply has a human rights tribunal. And I – the correction is they have a commission in all the provinces, but in some cases employees bring their complaints

either to the commission or directly to a human rights tribunal. And these of course would be discrimination cases based on age, disability, race or any other prohibited ground of discrimination in Canada. Again, human rights tribunals or commissions have the advantage of processing and adjudicating complaints without the employee incurring the cost of his or her own legal counsel.

In at least three jurisdictions employees – non-union employees have the right to reinstatement if they believe their employment has been terminated without just cause or without good and sufficient cause. These jurisdictions are the federal jurisdictions where an employee only has to have been employed one year in order to bring a request for reinstatement before an adjudicator and in the province of Quebec where the employee needs two years of service to have that remedy, and in Nova Scotia an employee has to have 10 years of service. So, again, in those three jurisdictions a non-unionized employee can go to the provincial ministry of labor and seek reinstatement through an adjudicative process.

The employees can not contract out of their remedies under statute such as the employment standards act or the human rights code. So you – an employee will always have the option of bringing a claim to the ministry of labor or to a human rights commission. However, employees may contract out of their common law right. That is to say they may contract out of their right to go to a court. And this would be typically done in a arbitration agreement between the employer and the employee.

And, (Richard), can you mention more about that.

(Richard Lacocco): Well, private arbitration provisions are relative uncommon in employment agreements generally. They may be more common, though, and are more common in change of control agreements, which we'll talk about later, and those can actually be quite employee friendly. An employer might consider use of arbitration clauses as something to propose in employment agreements with its most start employees. And the – and the employees – executives may want this as well because it would avoid an employment dispute being a matter of public record.

(Diane).

(Diane Lank): Thank you, (Richard).

(Jason).

(Jason Hansen): Yes, just a couple of comments on wrongful dismissal litigation. That's the litigation process that's involved if an employee threatens to or in fact sues the employer for failure to give reasonable notice or not a good enough severance package. The proceeding is brought in provincial or state court, other our federal courts. The rules are pretty well the same throughout the provinces. The deck sets have some bullet points here on key points to keep in mind based on the Ontario rules of procedure, Ontario being the most populous state. Note, in Ontario we have mandatory mediation. And as well we have pre-trial mediation by a sitting judge who will not actually hear that case. We also have a useful rule that's a bit like the – in terms of legal fees and settlement offers that's a bit like the U.S. federal court rule 68. Basically it says that if an employer makes a settlement offer for at least as much damages as the former employee is awarded at trial, the employer is awarded a

portion of the lawyer's fees incurred by the employer following the date of the offer. That's an exception to the general rule that the loser pays the winner's legal fees.

(Richard).

(Richard Lacocco): Well, one point to remember in terms of multiple court jurisdictions. This sometimes arises in cross-border situations where employees are hired in one jurisdiction and then transferred across the border to another jurisdiction, they're hired in Canada and end up being transferred to the United States. If such an employee is later terminated, the employee will want to bring action in the jurisdiction where his or her position is most favorable, and that will often be Canada. In those circumstances the first thing to do is look to the employment contract if it exists and see whether there are jurisdiction provisions, but that may not be determinative. It really is a fact-based determination by the court, and the Canadian court is likely to take jurisdiction if the employee can reasonably show that the – that relocation was not intended to be permanent.

(Diane Lank): Thank you, (Richard). I just wanted to emphasize one thing that (Allen) said. He did not misspeak. It is true that up here the plaintiff's lawyer is the one who decides that a jury is not in the employee's best interest. And I know that that's a little different from the U.S.

Because of the landscape of Canadian employment law, drafting employment contracts becomes extremely important. Jason, you want to start handling that subject for us?

(Jason Hansen): Well, thanks, (Diane).

First thing to remember about employment contracts in Canada is that these written contracts do not need to be very formalistic documents. They can in fact be in the form of a letter agreement that the employee signs back. Like the United States, employment contracts require an exchange of consideration. Therefore, typically these kinds of contracts are signed pre-hiring, perhaps at the last step in the hiring process. In other words, the employee signs before not after they've become an employee.

Now, why do businesses want employment – written employment contracts. Well, they want them for the same reasons they have – they want them in the United States, to deal with confidentiality, inventions, post-employment restrictions. Plus – plus, in Canada contracts can be used to get around the common law guesswork of what's reasonable notice. So if you as an employer have a valid written contract that says this is what the employee gets on termination, well, that's what the employee gets and the contract governs and the common law rules that (Allan) talked about do not apply. So a contract in Canada gives the employer some certainty.

Now, in most provinces the employer with the contract can also be less generous than the common law rules, and in doing so remove the ability of judges to second guess the severance package the employer's prepared. Of course, the devil's in the details. I said valid contract. And under Canadian law that means that the severance provisions have to at least match the statutory obligations on the employer. And also in Quebec the civil code – remember, Quebec's a bit like Louisiana that way – the civil code requires fixed notice periods to be reasonable.

Jim.

(Jim Hassel): The other thing that employers look at when they do decide to use an employment contract, of course, is post-employment restrictions. When drafting post-employment non-competition clauses in employment contracts, employers are best advised to resist the impulse to draft broadly. Instead, the restriction should be narrowly drafted to increase the likelihood that the restriction will in fact be enforceable. And the reasons for that are set out on the slide at page 13. You'll see essentially our courts consider non-competition covenants illegal and unenforceable as being in restraint of trade, unless you can convince the court that you are protecting a valid right, going no further than necessary to do that, that you're not unduly restraining the employee from earning a livelihood and that it's not contrary to the public interest.

If you can get over those hurdles, then when you're actually drafting the contract, the non-compete must also be reasonable in duration, and by duration usually the courts aren't going to tolerate much more than 12 months, and six months would be the better approach. In geographic scope, you know, where did the employee work. They're not going to be interested in – or they're not going to put up with limiting the employee and working where – everywhere where the employer operates, only where the employee was working. And, third, in the scope of activity covered. So you can't restrict, for example, a sales person from getting involved in a manufacturing type of function with a competing employer. Our courts also not use a blue pencil or read down a clause. The employer has to get it right and enforceable. The courts are going to help make it enforceable. The employer must also be in a position to demonstrate that a non-solicitation clause offers insufficient protection.

So at the end of the day, then, what employers are often thrown back on is to rely on non-solicitation clauses, non-solicitation of customers, and also drafting self-help type clauses, as I refer to them. This is drafting non-competes and other documents such as SERPs, stock options and severance agreements. Because the courts will enforce those because the employee still can compete, it just costs the employee to do so.

As Jason mentioned earlier, quite apart from employment contract provisions there are fiduciary obligations for departing senior executives that can be helpful in some circumstances as well.

(Richard).

(Richard Lacocco): One perhaps related area is change of control provisions where the perhaps the landscape is similar to what there is in the United States. And we're talking about special severance arrangements that apply on change of control, which in Canada tend to be at the most senior level. Our experience with U.S. companies is that those arrangements perhaps reach down to somewhat lower levels than in Canada. Nevertheless, such arrangements often encompass other persons who would be key in the transitional business in order to keep – in the transitional period, rather, in order to keep the business running. Sometimes these change of control arrangements are embedded in stock option plans or (other) equity incentive plans, for example causing the acceleration of vesting of stock options, but my impression is that such provisions are more common in the U.S. than they are with – in Canada.

One area of difference between Canada and the U.S. is in respect to tax treatment, although in Canada Canadians are generally in a worse position than Americans on the personal tax front. In Canada, unless in the U.S., there's no additional income tax or excess – excise tax on excess change of control payments beyond a stated threshold.

(Diane Lank): Thank you, (Richard).

I think that to sum up this subject you'll find that employment contracts are – written employment contracts are far more common in Canada than they are in the U.S., even for typically lower-level employees. In addition, you'll find up here that offer letters can often be construed to be an employment agreement. So as I said opening this subject, if you're going to be doing business in Canada and have Canadian employee, I strongly urge you to look at the employment contract possibility. And I can say that because I don't have a self-interest in this. You really ought to get good outside counsel advice if you're just starting your foray here. And our friends here at (Osler) do a – do a terrific job with that.

No, they didn't pay me for that one, but we're going to move on to adapting U.S. employment policies for use in Canada. We only have a few minutes to devote to this subject. And if you take anything away from this, my advice would be very, very cautious.

With that, (Allen).

(Allan Wells): Thanks, (Diane).

Because most employers are provincially regulated and because the employment laws vary somewhat from province to province, the challenge in Canada for those employers who have operations in more than one province is to either adopt different policies for each province to take into account the differences from jurisdiction to jurisdiction or to adopt single policies that are drafted so as to apply in all jurisdictions, even if it might mean giving some employees in some jurisdiction greater benefits than they might otherwise be entitled to under the – under the laws of their own province. The preferred approach is to adopt a single policy that applies in all provinces, although perhaps with some exceptions for ((inaudible)) of work.

U.S. policies will almost invariably require some amendment to be consistent with the Canadian framework. And for those U.S. policies that do not get amended they will receive typically criticism from a court because the court will see that these are policies that really don't fit in our legal culture. So as a – as a preliminary observation, typically American policies will have language about at will employment which doesn't work and they will also have language that says these policies do not constitute an employment contract, whereas in Canada we would say that these policies, if they're – if they're certainly not part of the employment contract, compliance with them is a fundamental term of their employment contract.

Some differences that we can note would be, for example. the categories of exempt and non-exempt employees is not recognized in Canada, although we do have exceptions for certain categories of employees who are not subject to over-time and hours of work legislation. These employees would be managers, and in Canada that's a bonafied (e-manager) or someone who truly does exercise managerial duties. Courts and more likely

ministry of labor people will not be persuaded by titles alone. And so, for example, in the retail industry there is a number of cases where store managers are not recognized as true managers because they spend most of their time doing the same work as non-managerial employees.

In human rights, veteran status is not a prohibited ground of discrimination in Canada, so that would not be continued – be recognized in an employment policy in Canada.

The other differences that you might be alert to would be mandatory retirement. It's lawful in some Canadian provinces but not all Canadian provinces. And statutory leaves are much more generous in Canada. Statutory leaves would include parental leave, pregnancy leave, emergency leave for employees who are – who are sick or have other family emergencies to attend to, or family medical emergencies such as caring for a dying family member. Typically pregnancy and parental leave combined in Canada is a 12-month period, 52 weeks. (That's unpaid). Initial Quebec the combined period of pregnancy and parental leave is 70 weeks. The – because the periods of time are so lengthy it's not at all uncommon for larger employers to have (top-up) programs whereby they will pay some additional money to the employee while he or she is on their leave. Statutory leaves may also permit an employee to apply for employment insurance benefits, which is a federal program and provides a maximum of $413 a week for employees on leave.

(Diane Lank): (Allen), could you briefly address background and drug and alcohol testing.

(Allan Wells): Background checks typically include the credit checks and criminal checks. Credit checks are lawful in Canada, however, they have to be done with the written consent of the

employee. And because you need the employee's social insurance number to conduct the credit check – and you cannot ask for an applicant's social insurance number until you have made a conditional offer of employment – credit checks can only be done after a conditional offer of employment and again with the written consent of the employee or the applicant.

Criminal checks are, again, lawful with some exceptions from province to province. For example, in British Columbia you could not discriminate against an applicant because he or she had a criminal record unless such criminal record was related to the job that the employee was being hired to do. In Ontario, you can discriminate against an employee for a – with a criminal record unless the employee has received a pardon for that criminal record.

On drug and alcohol testing, it's a different regime in Canada. And that's because addiction to drugs or alcohol is seen as a disability. And it – drug testing is therefore seen as a form of discrimination on the basis of disability. Well, no employer has to put up with an employee being impaired in the workplace. The view in Canada is that drug testing doesn't measure impairment, it simply – it may determine that an employee has consumed a drug sometime in the past. But, again, the only employment issue is whether or not there's impairment at the workplace. There may be some scope for limited drug testing in safety sensitive positions, but where courts have permitted drug testing even for safety sensitive positions, it's been very fact-specific and we can't draw any general rules that it is permitted as a – for all employees in safety sensitive positions. Pre-employment testing is not permitted, random drug testing is certain not permitted. There may be – because the issue here is impairment at work, if there is a suspicion that an employee may be under the influence of a drug at work, drug testing may be permissible to determine or confirm whether there is a impairment.

(Diane Lank): Thank you, (Allen). Jason, you want to say a word about privacy?

(Jason Hansen): Sure, just a couple of them and I'll give you three takeaways. The detail is in the slides. Firstly, Canadian privacy legislation is similar to the European EEC approach. Point one. Point two. In terms of privacy legislation that applies to employees in the private sector, there's the federal legislation and legislation in place in three provinces, British Columbia, Alberta, and Quebec. So if you're regulated by the employment laws of any of those four jurisdictions, you should have a privacy policy.

(Diane Lank): Thanks.

(Jason Hansen): The third point is, a lot of employers have had privacy policies that apply across the country, and you can harmonize them with your e-mail and your Internet policy as well. Thanks, (Diane).

(Diane Lank): Thank you, Jason. The trick here is not only that – especially in the areas of privacy, background checks, drug and alcohol testing is different from the U.S., the trick can also arise that I face every day in the negotiating contracts with U.S. companies or vice versa where a U.S. country will purport to say, well, we want to have full access to your data or we want you to have a drug-free workplace or that you promise that nobody there uses drugs or alcohol when the Canadian law is somewhat is conflict. So just realize that that's an issue.

Next we're going to go onto corporate transactions, labor and employment implications. (Jim).

(Jim Hassel): Thanks, (Diane). Briefly, U.S. business looking at acquiring Canadian business should keep in mind a couple of key considerations. First is that the because terminating employees can be so costly in Canada the issue of whether the purchaser will offer employment to the work force may be an important negotiating point and may ultimately affect the purchase price. Second is that if there is a union involved the purchaser will be subject not only to the union's bargaining rights but also will be bound by the vendors collective agreement. And as a result, the purchaser, at least under labor law, will be responsible for any outstanding obligations under the collective agreement. These can include outstanding grievances, pension under-funding and retiree benefits if those are referred to in the collective agreement. So those are important considerations for an employer in those circumstances.

Canadian employment laws can also complicate outsourcing arrangements. The existing workforce is going to be expensive if it's going to be terminated at the time of outsource, and this is going to be a significant cost to the company looking to outsource. But on the other hand, if the service provider takes on the employees, then the service provider's going to inherit their service and therefore considerable expense if the outsourcing arrangements are later terminated. One of the more common solutions here to address that risk in the outsourcing agreement is that there's an apportionment of employee termination costs between the two parties if the outsourcing agreement is terminated or not renewed at the end of its term.

If there is a union and you're looking at an outsourcing arrangement, you need to look at the collective agreement regarding whether contracting out or not is permitted to determine whether or not the service supplier is going to inherit the collective agreement obligations. And certainly keep in mind that without proper precautions the service supplier and the client may end up being considered related or common employers under both employment standards and labor relations legislation, or the service provider may end up being a successor employer under employment legislation. If they are related employers, of course, then you're looking at joint responsibility and liability on employee matters.

Richard.

(Richard Lacocco): I guess on corporate transactions, and this is more a non-legal point, where you're rationalizing the business and it's going to mean job losses or dislocations affecting particular localities, it's advisable to get advice on government relations and public relations and to make sure you tailor your response to the particular location. That is, identify key government officials in the relevant jurisdiction, make sure they're aware of the positive aspects of your plans as well as your efforts to mitigate the negative aspects of what you're doing. You may be able to head off public relation difficulties that you might otherwise have.

Diane.

(Diane Lank): Thank you, (Richard). (Allen) is going to address very briefly corporate ((inaudible)) labor relations implication.

(Allan Wells): Thanks, (Diane).

As you've already heard, given provincial jurisdiction over most employers in Canada, the – each province would have its own labor board and all union issues would be determined by that labor board in the province in which the unionized employees are carrying on their duties. As you'll see from the slides, a couple of quick points on this. There is no duty to – if there is a sale of a business during the course a collective agreement, there is no re-opening of the collective agreement. The wage rates continue to apply to the purchaser. And during bargaining, at the – at the end of the collective agreement an employer has a positive obligation to disclose to the union effective decisions that have been made but not yet communicated that will affect the bargaining (unit). So, for example, if a decision has been made to outsource, that would have to be disclosed at bargaining.

The – if a union believes that there has been some un – action taken by the company based on anti-union animus and it asserts such a claim at the labor board, the onus shifts to the employer to disprove the allegations. And it would not be enough to simply say that the predominant motive of the employer was unrelated to a union reason Any, any taking into account of union – anti-union reasons would be enough to taint the entire decision. So, for example, even if you closed your plant in Canada because your customers up here have gone out of business and because you had excess capacity in the U.S. and all of your new customers were right beside the new plant in the U.S., if you happen to say that the fact that the union was just recently certified, didn't help the case, that additional comment would likely constitute an unfair labor practice. Labor boards in Canada have broad remedies to address these issues. For example, they can expand an employer's bargaining rights beyond the scope of the original certification if the employer is moving out of the jurisdiction of the

– of the union. Where an employer moves work to a non-unionized facility, the – the board can order the employer to bring the work back and to re-hire employees that were laid off. While we haven't seen a board yet re-open a closed facility, our board has said that they do have jurisdiction to do so, they just haven't exercised that jurisdiction yet.

(Diane Lank): Thank you, (Allen). Jim, could you address briefly the union organizing campaigns and what employers should be aware of?

(Jim Hassel): Certainly. In our experience, U.S. employers may under-estimate the risk of union organizing at their Canadian operations, because the percentage of unionized employees in Canada is more than double that in the U.S. and is not declining at the same rate as it is in the U.S. Unions in Canada have also been trying to and have been somewhat successful in expanding their traditional base to new areas in the financial sector, retail sector, call centers, et cetera. Unions tend to look for an employer which has been paying sufficient attention to positive employee relations and proceed with a union organizing campaign.

The Canadian labor laws offer unions considerable assistance in organizing employees and in reaching a first collective agreement. And you'll see on the screen some of the things that the legislation has done to assist employers in that regard. Our advice to U.S.-based employers is never under-estimate the risk of union organizing. If there is a campaign, it may move very, very quickly and can result in certification simply on the acquisition of a majority of cards, or in Ontario in a five-day expedited vote. We also suggest that it'll – a U.S.-style employer response to an organizing campaign will likely be too aggressive for our Canadian labor boards to accept, and that employers are in a much better position where they have been proactive and taken steps before a union campaign starts to reduce the risk of a

successful union organizing drive. Ontario is sort of unique up here because we do have in Ontario for the provincially regulated employers a five-day quickie vote campaign. And what in effect happens is that many employers in Ontario have five-day campaigns in the can which they can take out, dust off and modify as necessary and implement them quickly.

Diane.

(Diane Lank): Thank you, (Jim). (Jason), can you address collective bargaining, strikes and picketing in two minutes or less?

(Jim Hassel): Sure. ((inaudible)) In Canada there can be no strikes or lockouts during the terms of a collective agreement. And, further, there can't be a strike until after the collective agreement is expired, the conciliation process is complete, and the union has undertaken a supervised – a union supervised strike vote. Most jurisdictions do not require the union to announce a strike date, but do require the union supervised strike vote. Like in the United States, picketing is seen as a form of expression, constitutionally protected expression. So our Supreme Court has recently said that secondary picketing is OK as long as there's no other illegal conduct.

Thanks, (Diane).

(Diane Lank): Thank you, (Jason). Now, we do have a couple questions that have arisen. One, someone asked what SERPs meant, S-E-R-P. (Jim), you want to take care of that one?

(Jim Hassel): A SERP – and I was talking about SERPs in the context of restrictive covenants and non-competes – a SERP is a supplemental retirement pension arrangement with a – usually a fairly senior employee who is topped up (that) would not be able to receive a full pension under our registered pension plan regime here. So we call them a supplemental employee retirement plan, or SERP.

(Diane Lank): Thank you, (Jim). There was also a question about where people could find more information about Canadian labor and employment law. And I'm again going to direct you to the info pack that you can find from the link on the left-hand side of your page. The info pack is quite lengthy and give a lot of good information about Canadian labor and employment law.

There was another question that came up about for cause determinations and whether someone could get rid of an employee, for example, for stealing. Anybody want to field that one?

(Jim Hassel): Well – it's (Jim Hassel) – that's an interesting question, because there's a Supreme Court of Canada decision that says that theft is not necessarily cause. You have to look at the whole situation, the context that it occurred in, the employee's length of service, et cetera, et cetera. So this is one of the many cases that has made employees disappointed, if I will – you might say, with the way that the courts have headed on the interpretation of cause. Theft and dishonesty isn't necessarily cause. It might be under certain circumstances. But it would have to be fairly serious theft or, you know, a fairly junior employee.

(Diane Lank): There was also another question about whether a federally regulated employer would still be covered by provincial laws for some areas such as workers comp. (Jason), do you want to handle that one?

(Jason Hansen): ((inaudible)) goes with one of the complicating – complicating factors for Canada, like any federal jurisdiction, is, you know, there is some overlap. Workers comp is one area. Another area is sometimes there are federal provincial agreements that – sharing of allocation of resources, for example, in the area of occupational health and safety. And of course all employees are subject to federal taxation issues, the what we call unemployment insurance or unemployment insurance is a federal regime for most provinces. So there is some granularity there in terms of the division between the federal and the provincial or state sphere.

(Diane Lank): OK. We have one more question. Are employers required to give notice to temporary employees of a staffing agency? (Allen).

(Allan Wells): If they're employees of a staffing agency, then theoretically the staffing agency is their employer and should be giving these employees the notice to which they're entitled. However, it's a risk in Canada that depending on of course the fact that situation the client of the staffing agency and the staffing agency could be found to be co-employers. That is to say a judge might say, you know, you're both – you're both the employers because this employee has been working for the client for so long. In that case an employee may be able to assert that the client should be giving the reasonable notice if the staffing agency has not given enough notice.

(Diane Lank): Thank you, (Allen).

You know, I can remember being in law school and how many of my professors would say your job here is to be an issue spotter. And I think that's what we've tried to do today, is present to you not all of Canadian employment law but rather to show you where there might be some significant differences between U.S. and Canadian employment law, and to emphasize that you really do need to get someone who's familiar with the Canadian legal landscape to help you out here.

That being said, it's not all bad. I have to give a little plug for Canada here. Just within the last couple years there have been a number of manufacturers who have decided to move their plants to Canada instead of the U.S. because of various decisions, including health care, for example, that Canada offers that the U.S. doesn't. So it doesn't mean that Canada is necessarily unfriendly to business by any means, it just means that it does think a little bit differently here.

With that I want to thank (Jason) and (Allen) and (Jim) from (Osler's) and (Richard) from ManuLife for joining us today. And have a great rest of the day. Thanks, folks.

END