



*Overview of British Columbia
Labour and Employment Law*

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The purpose of this document is to provide an overview of the law in British Columbia in matters of labour and employment. It does not contain a full analysis of the law nor does it constitute an opinion of Ogilvy Renault or any member of the Firm on the points of law discussed.

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Overview of British Columbia Labour and Employment Law

INTRODUCTION

Employers in most Canadian provinces are governed by both legislation and the common law. The common law is “judge-made”; it continuously evolves based on past case law or “precedent”. Quebec is unique in that its employers are subject to the civil law system, based on a comprehensive written code of rules. “Legislation” refers to laws written by government.

The Constitution of Canada divides legislative authority between the federal and provincial branches of government. Provinces have jurisdiction over education, municipal institutions and local works, etc., as well as “generally all matters of a merely local or private nature in the province”. The majority of companies in Canada are provincially regulated. The federal Parliament governs banking, and the postal service and shipping, as well as other employers whose core *Activities* are cross-provincial. Airlines, railways and telecommunication companies generally fall within the federal sphere. Federally-regulated companies must abide by the common law and federal statutes. Provincially-regulated businesses are subject to the common law and provincial statutes. This paper addresses employment and labour laws relevant to employers governed by British Columbia provincial law.

1. HUMAN RIGHTS ISSUES

The *Charter of Rights and Freedoms* prohibits government actors (at both the provincial and federal levels) from discriminating against individuals. The *Canadian Human Rights Act* applies to federally-regulated employers, and the *British Columbia Human Rights Code* protects individuals employed by British Columbia companies.

(a) Prohibited Grounds of Discrimination

- The *B.C. Human Rights Code* (the “*Code*”) provides that a person must not refuse to employ or continue to employ, or discriminate against a person with respect to employment or any term of employment because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age (applies to those 19 or older and less than 65) or because a person has been convicted of a criminal or summary offence that is unrelated to the employment or intended employment of the person.
- The prohibition of discrimination on the basis of sex means that a woman must not be discriminated against because she is or may become pregnant.
- While the *Code* does not define “disability”, that term has been given a broad interpretation. For example, “disability” has been applied to individuals who are alcohol or drug (including nicotine) dependent, HIV positive, suffering from depression or a movement-limiting injury, or recuperating from surgery.

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- Every person has a right to freedom from workplace harassment on the basis of any of the grounds listed above.
 - Sexual harassment includes all types of unwanted behaviour (conduct, comments or gestures) of a sexual nature. Sexual harassment includes both verbal and non-verbal conduct. All employers are obligated to prevent workplace sexual harassment.
 - Special programs designed to assist disadvantaged groups do not infringe the *Code*.

(b) “*Bona fide Occupational Requirement*” and the Duty to Accommodate

- Both the provincial and federal human rights statutes exempt discriminatory conduct that is based on a “*bona fide occupational requirement*”.
- This means that an employer which imposes a discriminatory workplace rule or qualification may defend the rule or qualification if the employer can show that the rule or qualification is reasonable and *bona fide*.
- To be reasonable and *bona fide*, the qualification must be imposed honestly and with the good faith belief that it is necessary for the adequate performance of the work.
- The qualification must also be adopted for a purpose that is rationally connected to the performance of the job.
- The qualification must be reasonably necessary for the accomplishment of that legitimate work-related purpose. To show that the qualification is reasonably necessary, the employer must demonstrate that it is *impossible* to accommodate an individual employee without imposing undue hardship upon the employer.
- Each employer has a duty to accommodate individual employees to the point of undue hardship, even though the *Code* does not expressly set out this duty. The duty to accommodate has been incorporated into the statutory prohibition against discrimination in the workplace by the Supreme Court of Canada’s interpretation of the *Code*.
- To determine whether accommodation will result in undue hardship to the employer, the following are some of the factors that should be assessed:
 - disruption of the collective agreement, if any;
 - morale problems among other employees;
 - effect on the rights of other employees;

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- interchangeability of work force and facilities;
 - size of the employer’s operation;
 - safety concerns (the magnitude of risk and the identity of those who would bear it);
 - whether the employee’s job itself exacerbates the disability; and
 - costs to the employer, including the impact on efficiency, wage increases and other direct financial costs.
- The onus is on the employer to establish that it has met its duty to accommodate to the point of undue hardship.

(c) Recruitment

- Employers may not recruit employees (through written or oral processes) or advertise employment opportunities in a manner that discourages applications from individuals who are protected under the *Code*.
- The test used by the British Columbia Human Rights Commission (the “Commission”) to determine whether an employer’s recruitment procedures are discriminatory is whether all qualified candidates are encouraged to apply.
- The Commission’s Guidelines respecting recruitment can be found at www.bchrc.gov.bc.ca. These Guidelines suggest that when recruiting, an employer may ask the following questions:
 - “Have you reached BC’s legal working age?”;
 - “Are you legally entitled to work in Canada?”;
 - “Are you bondable?”;
 - “Are you available to work during [the required work time]?”;
 - “Are you willing to travel or to be transferred?”;
 - those relating to educational qualifications that relate to the job; and
 - those relating to physical capabilities, only if they concern the ability to perform the essential requirements of the job.
- The Commission’s Guidelines also suggest that employer should avoid asking questions relating to the following:

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- age (requests for birth certificates or other documents, such as a driver’s licence, which indicate age should also be avoided);
 - physical characteristics, or limitations to physical ability or health-related questions (including questions relating to illness, mental disorders, medical history, workers’ compensation claims, accommodation of disability-related needs, and membership in medical/patient organizations);
 - political or religious affiliations, or customs observed;
 - an individual’s race, colour, ancestry, or place of origin (including questions relating to an individual’s citizenship or social insurance number); and
 - a person’s maiden or birth name, relationship with person to be notified in case of emergency, child care arrangements, pregnancy (or plans for having children), sex, sexual orientation, marital or family status.

(d) Post-Hiring

- Questions that should be avoided in the pre-employment stage (because they could lead to a complaint of discrimination from an individual who is not awarded the job) may be asked in the post-hiring stage if the employer has a legitimate need for the information (for example, for insurance, benefit plans or taxation).

(e) Benefit Plans

- The right to equal treatment with respect to employment will be infringed where a condition of employment is enrollment in a benefit plan that discriminates based on a protected ground.
- The prohibition against discrimination related to marital status, physical or mental disability, sex or age does not apply to the operation of a *bona fide* retirement, superannuation or pension plan or to a *bona fide* group or employee insurance plan.
- Similarly, the prohibition of discrimination related to age does not apply to a *bona fide* scheme based on seniority.

(f) Enforcement

- The *Code* is enforced either through a complaint mechanism or by investigation commenced by the Deputy Chief Commissioner of the Commission.
- When the Commission receives a complaint, unless it can be summarily dismissed, it appoints a Human Rights Officer (an “Officer”) to investigate it. The Officer will receive written submissions from all parties and may conduct appropriate interviews.

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- The Officer will assess the complaint to determine whether there are legitimate grounds for the complaint and whether there are valid reasons to dismiss the complaint in whole or in part.
 - The Officer has the power to require the production of documents, to question any person about the matter, and to enter and inspect premises (with consent or pursuant to a warrant).
 - Following the investigation, the Officer will issue a Report. The Report will recommend that the complaint be dismissed in its entirety, or that some or all of it be referred to the Human Rights Tribunal (the “Tribunal”) for a formal hearing. The Commission almost always accepts the Officer’s recommendation.
 - If a hearing takes place, the Tribunal will determine whether a right has been infringed, who infringed the right, and the appropriate remedy.
 - The Commission, an Officer, or another person appointed by the Commission may, through mediation, assist the parties in settling the complaint.
 - Complaints can be withdrawn at any time by the complainant.

(g) Remedies

- The Tribunal may dismiss the complaint, or may do the following:
 - order the offending party to cease contravention of the *Code*;
 - make a declaration that the conduct complained of is discriminatory;
 - order the offending party to ameliorate the effects of the discriminatory conduct or to implement an employment equity program;
 - order the offending party to make available the right or opportunity that was denied the complainant (e.g. offer the complainant a job);
 - order the offending party to compensate the complainant for lost wages and expenses that arose as a result of the discrimination;
 - order the offending party to pay the complainant an amount of damages for loss of dignity and humiliation suffered as a result of the discrimination; or
 - order the offending party to apologize to the complainant.
- Orders of the Tribunal may be enforced as court orders.
- The Tribunal may require information respecting the implementation of its order.

(h) Employers' Liability

- Employers are liable under the *Code* for all discriminatory acts of their employees “in the course of employment”, interpreted broadly as being in some way related or associated with the employment. This statutory liability is similar to, but broader than, vicarious liability.
- Employers may also be liable for harassment caused by their supervisors, co-workers, clients and customers.
- A harassment policy that establishes a process through which employees can seek assistance may minimize an employer’s liability if it effectively addresses the harassment and reduces the harm suffered as a consequence of the harassment.

2. EMPLOYMENT STANDARDS

(a) General

- The *Employment Standards Act* (the “*Act*”) applies to all employees, other than those excluded by regulation.
- The *Act* defines “employee” as a person an employer allows, directly or indirectly, to perform work normally performed by an employee, and trainees and persons who have a right of recall.
- The employment standards prescribed by the *Act* constitute a minimum requirement only; any condition of employment under a contract which provides a greater benefit prevails over the requirements of the *Act*.
- Parties cannot contract out of the *Act*; any agreement to waive the requirements of the *Act* is of no effect.
- Employers must display a statement of employees’ rights under the *Act* in a form provided by the Employment Standards Branch, in a location where it can be read by employees, in each workplace.

(b) Hiring Employees

- Employers are prohibited from inducing applicants to become employees, or inducing employees to work, by misrepresenting the availability of a position, the type of work, the wages, or the conditions of employment.
- Children under age 15 may not be employed without the Director’s permission.
- A person must not receive a payment from a person seeking employment, for (a) obtaining employment for that person, or (b) providing information about employers seeking employees.

- Employment agencies and farm labour contractors must be licensed under the *Act*.
- The *Act* requires written employment contracts for, and registration of, domestic workers working in private residences.

(c) Wages, Special Clothing and Records

- The *Act* establishes a minimum wage for all employees as prescribed in the Employment Standards Regulation (the “Regulation”). The minimum wage is currently \$8.00 per hour. As of November 15, 2001, an entry-level wage of \$6.00 per hour may be paid to workers who are new to the paid labour market until they accumulate 500 hours of paid employment with one or more employers.
- Paydays are at least semi-monthly and within 8 days after the end of the pay period.
- Each payday, an employer must pay an employee all wages earned by the employee in the preceding pay period.
- If employment is terminated, the employer must pay all wages owing to the employee: (a) within 48 hours, if the employee was dismissed; or (b) within 6 days, if the employee has quit.
- Employers must not deduct or withhold an employee’s wages for any purpose.
- Employers must not require an employee to pay any of the employer’s “business costs”.
- Employers must honour an employee’s written assignment of wages for various purposes specified in the *Act*, and make payments according to the terms of that assignment.
- Employers requiring employees to wear special clothing must provide and clean the special clothing without charge.
- On every payday, employers must provide employees with a written wage statement containing various details required by the *Act*.
- Employers must also maintain payroll records containing various details required by the *Act*; these must be retained by the employer for 5 years after the employee’s employment terminates.

(d) Hours of Work and Overtime

- Employers must display hours of work notices in each workplace indicating scheduling of shifts and break times.

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- Employers must give an employee 24 hours' notice of a shift change unless the change will entitle the employee to overtime, or unless the shift is extended before it ends.
 - Employers must ensure that an employee receives a half-hour meal break if the employee works 5 consecutive hours; the break does not have to be paid unless the employer requires the employee to be available for work during the break.
 - Split shifts must be completed within 12 hours of starting work.
 - An employee who reports for work is entitled to be paid a minimum of four hours if the employee starts work, or two hours in any other case, unless the employee is unfit to work or has not complied with workers' compensation legislation.
 - Employers must not allow employees to work more than 8 hours a day or 40 hours a week without paying them overtime, unless a "flexible work schedule" has been adopted (which requires, among other things, the approval of 65% of the employees).
 - In a given day, overtime wages must be paid at time and a half after 8 hours, and double time after 11 hours.
 - In a given week, overtime wages must be paid at time and a half after 40 hours, and double time after 48 hours.
 - Employees on a "flexible work schedule" who work more than an average of 8 hours a day or 40 hours a week are entitled to overtime as calculated in the Regulation.
 - At the written request of an employee, employers may establish a "time bank" of overtime wages to be taken as time off with pay at a time agreed between the employer and the employee; the employee may ask the employer to pay out all credits in the time bank at any time.
 - Employers must ensure that employees have at least 32 consecutive hours free from work each week, or else pay double time for any hours worked during that 32 hour period.
 - Employers must ensure that employees have at least 8 consecutive hours free from work between each shift, except in an emergency.
 - Notwithstanding any other provisions of the *Act*, employers must not require or allow an employee to work excessive hours or hours detrimental to the employee's health or safety.
 - Various types of employees are excluded from the hours of work provisions of the *Act* by regulation, including a "manager", defined as someone "employed in an

executive capacity” or “whose primary employment duties consist of supervising and directing other employees.”

- For unionized employees, if the hours of work, overtime and special clothing provisions of a collective agreement, taken together, “meet or exceed” the requirements of the *Act* in that regard, those provisions of the *Act* do not apply.

(e) Statutory Holidays

- For each statutory holiday, employers must give *all* employees (including part-time and casual employees) who have been employed for more than 30 calendar days: (a) the day off with pay; or (b) time and a half for hours worked on the statutory holiday, and a day off with pay in lieu.
- For employees who have a regular schedule of hours and have worked at least 15 of the last 30 days, the pay for the day off is the same as if the employee had worked regular hours on that day; otherwise, it is a pro-rated amount calculated in accordance with the Regulation.
- For unionized employees, if the provisions of the collective agreement relating to statutory holidays, taken together, “meet or exceed” the provisions of the *Act*, the provisions of the *Act* do not apply.

(f) Leaves and Jury Duty

Pregnancy Leave

- A pregnant employee is entitled to up to 17 consecutive weeks of unpaid leave. If, for reasons related to the birth or the termination of the pregnancy, she is unable to work when her leave ends, she is entitled to up to 6 additional consecutive weeks of unpaid leave.
- Alternatively, an employee who requests leave *after* the birth of a child or the termination of a pregnancy is entitled to up to 6 consecutive weeks of unpaid leave. If, for reasons related to the birth or the termination of the pregnancy, she is unable to return to work when her leave ends, she is entitled to up to 6 additional consecutive weeks of unpaid leave.

Parental Leave

- A birth mother who takes pregnancy leave (as described above) is entitled to 35 weeks of unpaid parental leave which can be taken immediately at the end of the pregnancy leave.
- A birth mother (who does not take pregnancy leave with respect to the same child), a birth father, or an adoptive parent is entitled to 37 weeks of unpaid parental leave which can be taken after the child’s birth and within 52 weeks after the event.

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- If the child has a physical or psychological condition requiring an additional period of parental care, the employee is entitled to up to 5 additional weeks of unpaid leave.
 - For birth mothers, parental leave is in addition to pregnancy leave.

Family Responsibility

- Employees are entitled to up to 5 days of unpaid family responsibility leave each year to meet responsibilities related to the care, health or education of a child in the employee's care, or the care or health of any other member of the employee's immediate family.

Bereavement Leave

- employees are entitled to up to 3 days' bereavement leave on the death of a member of their immediate family.

General

- Employers must not (a) terminate employment; or (b) change a condition of employment without the employee's written consent, because of an employee's pregnancy or a leave allowed by the *Act*.
- Furthermore, as soon as the leave ends, the employer must place the employee in the same or a comparable position.

Jury Duty

- The above requirements also apply to jury duty.
- The services of an employee who is on jury duty or leave under the *Act* are deemed to be continuous for the purposes of (a) calculating annual vacation or termination entitlement under the *Act*; and (b) any pension, medical or "other plan beneficial to the employee."
- The employer must continue to make payments to a pension, medical or other plan beneficial to an employee while the employee is on jury duty or leave under the *Act* if (a) the employer pays the total cost of the plan; or (b) if the cost of the plan is shared and the employee continues to pay his or her share.
- An employee is entitled to all increases in wages and benefits that the employee would have been entitled to if he or she had not been on jury duty or leave under the *Act*.

(g) Annual Vacation

- After one year of employment, employees are entitled to 2 weeks' vacation, and vacation pay pro-rated accordingly; after 5 consecutive years of employment, employees are entitled to 3 weeks' vacation and vacation pay pro-rated accordingly.
- Employers must ensure that an employee takes the vacation to which he or she is entitled under the *Act*; it cannot be carried over.
- The *Act* does not address the scheduling of vacations, except to provide that employees must be allowed to take it in periods of one or more weeks.
- The annual vacation entitlement under the *Act* is exclusive of statutory holidays that an employee is entitled to.
- For unionized employees, if the provisions of the collective agreement relating to vacation and vacation pay, taken together, "meet or exceed" the requirements of the *Act*, the provisions of the *Act* relating to vacation do not apply.

(h) Termination of Employment

- *Employment standards relating to termination are addressed under the general heading "Termination of Employment" in the next section of this paper.*

(i) Variances

- An employer may apply to the Director of Employment Standards for a variance of the time for a "temporary lay-off"; pay days; special clothing; notice of a change in shift; minimum daily hours; maximum hours of work; hours free from work; overtime wages; and notice and termination pay requirements for group terminations.
- The Director may approve a variance if satisfied that a majority of the employees approve, and the variance is consistent with the intent of the *Act*.

(j) Complaints, Investigations and Determinations

- Anyone may make a complaint that a person has contravened the *Act*, including a complaint disputing an employer's assertion that a dismissal was for just cause.
- A complaint must be in writing and must be delivered to the Employment Standards Branch.
- A complaint relating to an employee whose employment has terminated must be made within 6 months after the last day of employment.

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- The Director may refuse to investigate a complaint on various grounds, including untimeliness, a lack of evidence, settlement, or that the matter is the subject of a proceeding before a court, tribunal, arbitrator or mediator, or has been decided by a court, tribunal or arbitrator.
 - The Director may also initiate an investigation to ensure compliance with the *Act* without the necessity of any complaint.
 - After investigation, the Director may make a “determination” which may include orders to require a person to comply with a requirement of the *Act*; require a person to remedy or cease doing an Act; impose a penalty; hire a person and pay lost wages; reinstate a person (in limited circumstances) and pay lost wages; pay compensation instead of reinstatement; or pay a person “reasonable and actual out-of-pocket expenses” incurred because of the contravention.
 - The amount of wages an employer may be required to pay by a determination is limited to 24 months before the earlier of the date of the complaint or the termination of the employment, or, in the case of investigation without a complaint, 24 months before the employer was advised of the investigation.
 - Once a determination has been made requiring payment of wages, an employee can commence another proceeding to recover them only if the Director has consented in writing or the determination has been overturned.
 - Employers must not threaten, discriminate against, intimidate or refuse to employ a person because of complaints or investigations under the *Act*.
 - The Director has broad powers under the *Act* to enter and inspect workplaces, inspect and remove records, require production of records, and require disclosure under oath of a matter required under the *Act*.
 - The Director may, on reconsideration, vary or cancel a determination.
 - Unpaid wages constitute a lien against the employer.
 - The Director may also make orders against anyone who is indebted or is likely to become indebted to anyone who is required to pay money under a determination or an order.
 - The Director may also file a determination or order in British Columbia Supreme Court, in which case it is enforceable as an order of the Court.
 - The Director may also seize assets as necessary to pay a determination or order.
 - If the Director considers that businesses are carried on through more than one corporation, individual or firm under common control or direction, the Director

may treat them as one for the purposes of the *Act* and they are jointly and separately liable.

- A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
- Where all or part of a business or a substantial part of the assets of a business is disposed of, the employment of employees is deemed to be continuous and uninterrupted for purposes of the *Act*.
- The Director may impose penalties for violations of the *Act* in accordance with the Regulation.
- If a penalty is imposed against a corporation, an "employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty."
- The Director may publish the names of persons who have violated the *Act*.

(k) Employment Standards Tribunal

- A determination of the Director may be appealed to the Employment Standards Tribunal. The hearing before the Employment Standards Tribunal is generally a completely new hearing, as opposed to a review of the Director's determination.
- Decisions of the Tribunal are described as final and are protected by a strong privative clause. However, they may be reviewed by the B.C. Supreme Court on limited grounds.
- The appellant may request the Tribunal to stay the determination pending appeal.
- The Tribunal may dismiss an appeal without a hearing if it is untimely, outside its jurisdiction, frivolous, vexatious, trivial or not brought in good faith.

3. TERMINATION OF EMPLOYMENT - NON UNIONIZED EMPLOYEES

(a) General

- Non-unionized employees are covered by a "contract of service" even if there is no written employment contract. Employment contracts are assumed to be indefinite unless the parties expressly agree to a finite term of employment.
- An employer may terminate an employee subject to certain legal rights that the employee may have.

- A terminated employee’s legal rights to receive notice of termination are derived from two overlapping sources: the *Employment Standards Act* (the “Act”) and common law principles.
- The *Act* sets out minimum standards for notice of termination pay, or payment instead of notice. The common law obligations, if applicable, are often considerably more onerous.
- The common law obligations will generally apply unless a written employment contract expressly limits those obligations.

(b) *Employment Standards Act*

- A termination under the *Act* includes a layoff longer than 13 weeks in any 20 consecutive week period, or a layoff of a person, with a right of recall, whose layoff exceeds the duration of the person’s right of recall.
- Both individual terminations and group terminations attract specific notice requirements under the *Act*.

(i) *Individual Termination Notice Provisions*

- An employee is entitled to written notice of termination after he/she has worked for three consecutive months.
- An employer may either give the employee the required working notice or may pay the employee an amount equal to the compensation the employee would have received during the required notice period.
- An employer’s liability for compensation/notice is based on the length of an employee’s continuous service as follows:

<u>Length of employment</u>	<u>Notice</u>
3 months to 1 year	1 week
more than 1 year but less than 3 years	2 weeks
more than 3 years but less than 4 years	3 weeks
more than 4 years but less than 5 years	4 weeks
more than 5 years but less than 6 years	5 weeks
more than 6 years but less than 7 years	6 weeks
more than 7 years but less than 8 years	7 weeks
8 years or more	8 weeks

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- The amount an employer is liable to pay is calculated by averaging the weekly pay of the employee over the last 8 weeks worked, and multiplying the average weekly rate by the number of weeks due.

- If an employee is terminated for cause, no notice is due or payable.

(ii) Group Terminations

- If an employer intends to terminate the employment of 50 or more employees, special group termination notice is required.

- Group termination notice is in addition to regular termination notice for those employees who are not covered by a collective agreement.

- The employer must give notice to the affected employees, the union (if any) and the Minister of Labour.

- The notice must include the number of employees affected, the effective date or dates of the termination, and the reasons for the termination.

- The notice of group termination is based on the number of affected employees and must be given as follows:

– 50 to 100 employees	8 weeks
– 101 to 300 employees	12 weeks
– 301 or more employees	16 weeks

- If the employer does not give the affected employees the required working notice, the employer must pay the affected employees an amount equal to what they would have earned during the notice period.

- Employers are not required to give statutory notice, with respect to group termination, in the following circumstances:

- employees are offered and refuse alternate work through the seniority process;
- employees are laid off as a result of normal seasonal reductions; or
- workers are laid off and do not return to work within a reasonable time after being requested to do so by the employer.

(iii) Exemptions from Individual Notice Requirements

- Employees terminated for cause are not entitled to notice under the *Act*. The general principles of “just cause” described below under the heading “Common Law” also apply to terminations under the *Act*.

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- The following types of employees are not entitled to individual notice under the *Act*.
 - most members of recognized professions;
 - teachers employed by a board of school trustees;
 - teachers employed by a francophone education authority as defined in the *School Act*;
 - an employee covered by a collective agreement who is employed in a seasonal industry where it is the practice to lay-off employees each year and call them back to work; was notified of the seasonal nature of the employment, and was laid off as the result of a normal seasonal reduction.
 - student employees; and
 - sitters.
 - (iv) *Exemptions from both Individual Termination Notice and Group Termination Notice*
 - The *Act*'s provisions for Individual Termination Notice and/or Group Termination Notice do not apply in the following circumstances:
 - the employee is terminated for just cause;
 - the worker is employed under a temporary arrangement where the employer may request that an employee come into work at any time for a temporary period and the employee has the option of accepting or rejecting the temporary assignment;
 - the employee is employed for a definite term;
 - the employee is employed for specific work to be completed within 12 months;
 - the employee has lost his or her employment due to an unforeseen event or circumstance other than receivership, an action under section 427 of the *Bank Act*, or insolvency;
 - the employee is employed at a construction site by an employer whose principle business is construction; or
 - the worker has been offered and refused reasonable alternative work by the employer.

(c) **Common Law**

(i) *General*

- A terminated employee may have common law rights that are separate and apart from the requirements of the *Act*.
- Where the employer has just cause, the employer may be validly terminated without notice.
- In the absence of just cause, the common law requires that employers give terminated employees reasonable notice of termination, or a payment in lieu of notice.
- The employment contract can set out the length of notice. However, care must be taken in this regard because, if the court deems the contractual notice period to be unjust, or finds that the parties did not expressly agree on the notice, the contractual notice period will be set aside and common law principles of reasonable notice will apply. Any contractual notice period that provides less than the minimum requirements of the *Act* will be void.

(ii) *Just Cause*

- If an employer summarily dismisses an employee, the employer bears the heavy onus of proving that the employee was dismissed for just cause.
- Even if an employee demonstrates behaviour that would ordinarily constitute just cause, the court may find otherwise if the employer failed to warn the employee that the behaviour in question could lead to dismissal.
- If an employer fails to act on an employee's inappropriate behaviour or has treated similar behaviour more leniently in the past, the employer may not be able to justify a termination for just cause.
- Certain acts are so serious that just cause may exist without a duty to warn the employee. Theft of company property, assault on a supervisor, or acts of serious dishonesty are examples of such conduct.

(iii) *Reasonable Notice*

- The common law reasonable notice period depends on a number of factors including the employee's age, length of service, character of employment, salary and market conditions. The court will also examine whether the employee was enticed from another job by the employer.
- The common law notice period may be extended if the employer acts in an inappropriate manner when terminating the employee. An example of such

conduct would be if an employer claimed that the employee was dismissed for just cause without valid reason, and then abandoned that position just before trial.

- Some rough examples of notice periods follow. For these examples, assume that the employee was not enticed from another job, and the employer did not act in a manner that would extend the notice period.
- ***Please note that there is no formula for accurately determining notice periods and that each case depends upon its unique facts.***

Position	Length of service	Estimated Common Law Notice period*
Senior management	0-5 years	6-12 months
	6-10 years	10-12 months
	11 years or more	13-24 months
Middle management	0-5 years	4-9 months
	6-10 years	6-12 months
	11 years or more	12-24 months
Lower management	0-5 years	3-6 months
	6-10 years	7-9 months
	11 years or more	10-21 months
Non-management	0-5 years	1-6 months
	5-10 years	5-12 months
	11 years or more	9-18 months

** These notice periods include notice required under the Act.*

(iv) *Constructive Dismissal*

- An employee may be deemed by the court to have been “constructively dismissed” even if the employer has not actually terminated the employment.
- A constructive dismissal will occur if an employer changes a fundamental term or condition of an employee’s contract of employment without the employee’s consent. If that happens, the employer will have breached the contract and the employee can elect to treat the matter as a dismissal and sue his or her employer for wrongful dismissal.
- If an employee does not object to a fundamental change to his or her contract of employment within a reasonable period of time, the employee may be deemed to have condoned the change and will lose the opportunity to claim damages for the constructive dismissal.

(v) *Damages*

- If an employer is unable to prove just cause, the employee is entitled to be put in the same position as if he or she had received the notice of termination to which he or she was entitled.
- Employees on fixed term contracts are typically entitled to notice equal to the amount of time remaining in the contract.
- The court will award a monetary amount equal to what the employee would have received, including any raises or bonuses, that would have been paid to the employee during the notice period.
- An employee may also receive damages for costs incidental to finding a new job.
- Stock options may give rise to significant damage issues.

(vi) *Mitigation of Damages*

- A terminated employee has a duty to mitigate the damages flowing from his or her wrongful dismissal.
- The employee must discharge that duty by seeking reasonable alternative employment.
- If the employee is successful in finding alternative work, the amounts earned from that work during the notice period are deducted from the damages owed by the original employer.

4. WORKERS' COMPENSATION

(a) General

- Under the *B.C. Workers' Compensation Act* (the "Act"), the cost of compensable injuries and diseases is paid entirely by the employers in the province. Those costs are collected from employers in the form of assessments.
- The collective liability of employers is part of the insurance plan. Employers are grouped within subclasses for the purpose of establishing rates. The basic assessment rate that an employer pays is also varied by its individual Experience Rating Assessment ("ERA") plan. The ERA adjusts the assessment rate according to the claims costs experience.
- Because of collective liability, an injured worker and his or her dependants are provided with guaranteed benefits, whatever the financial status of the employer.

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- The employer cannot be sued by a worker for a work-related injury or disease. Workers' compensation is the "sole remedy".
 - The system is "no-fault" with some minor exceptions (e.g. where the injury is attributable to the serious and wilful misconduct of the injured worker).
 - Coverage is compulsory for all employers that come within the scope of the *Act* (virtually all employers). These employers must register and cannot instead buy private insurance.
 - Excluded from the workers' compensation scheme are independent contractors, proprietors and their spouses, unincorporated companies, partners, and people whose employment is of a casual nature and who are employed otherwise than for the purposes of an employer's business.
 - Some individuals who are not covered through an employer may apply for Personal Optional Protection ("POP").
 - Employees are entitled to compensation for personal injury caused by accident, or occupational illness, arising out of and in the course of employment.

(b) Costs of Coverage

- Remittance of funds to the Board is the exclusive responsibility of the employer.
- It is an offence for an employer to deduct, directly or indirectly, from an employees' wages any amount the employer must pay to the accident fund.
- Upon registration with the Board, the Assessment Department determines the industry classification in which the employer will be registered and assessed. The industrial classification includes all occupations within the industry, including office and clerical staff.
- The classification system groups similar employers to form self-sufficient units large enough to constitute valid insurance bases.
- Once the classifications have been established, each industrial group is self-sufficient when it comes to cost. The cost of injuries and diseases which occur to the employers in each group are paid by all of the employers in that group.
- The assessment rate for each group is determined by establishing the group's costs in terms of injuries and disease and dividing that cost by the total assessable payroll for the group. Each employer in the industrial group pays the same assessment rate, subject to individual ERA adjustments.
- There is a 20% cap on changes to the subclass assessment rates.

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- Where the Board considers that sufficient precautions are not taken by an employer for the prevention of injuries and occupational disease; the place of employment or working conditions are unsafe; or the employer has not complied with regulations, orders or directions of the Board, the Board may assess and levy on the employer an additional assessment determined by the Board.

(c) Experience Rating

- The ERA system is a mechanism that adjusts the basic assessment rate for a company based on its actual claims experience. It modifies the basic subclass rate that an employer pays.
- The ERA was adopted to provide an incentive for injury prevention and to provide some equity among employers in the same industrial group. An employer with low claims costs pays less than an employer with high claims costs.
- The Workers' Compensation Board (the "WCB") compares the employer's claims costs and assessments paid with the total claims costs and assessments paid by that employer's subclass. The calculation is then applied to set the employer's rate for the coming year.
- The ERA system uses two full years of claims cost experience to calculate the employer's rate.

(d) Vocational Rehabilitation

- In contrast to Ontario's legislation, the *B.C. Act* does not require an employer to re-employ a worker who is injured or to accommodate a worker who has physical restrictions. However, if an employer refuses to re-employ or accommodate, the worker may seek redress under the *Human Rights Code* as described in the first section of this paper.
- The *Act* provides for vocational rehabilitation to assist workers in their efforts to return to their pre-injury employment or to comparable employment.
- The Vocational Rehabilitation Services, established by the WCB, provide the following services to workers:
 - counselling;
 - vocational assessment and planning;
 - job readiness/skill development;
 - placement assistance; and
 - residual employability assessment.

- Referrals to vocational rehabilitation are made by WCB claims adjudicators, medical practitioners, unions, social service agencies and/or claimants themselves. Referrals are made where medical evidence indicates that a worker will experience difficulty in returning to the pre-injury employment or where the pre-injury employment is no longer available.

(e) Additional Employer Obligations

- Employers must provide for an injured worker's transportation to a hospital, physician or qualified practitioner for initial treatment.
- Within three days of injury, disease or death of a worker, an employer must report, in writing, to the WCB the details of the accident, injury, or disease.
- A failure to report constitutes an offence under the *Act*.
- Employers in certain industries can be required to install and maintain any first aid equipment and services that the WCB deems appropriate.

(f) Appeal Process

- The Workers' Compensation Review Board (the "Review Board") is an external tribunal independent of the WCB. It judges appeals on decisions that involve workers. Appeals to the Review Board can be made within 90 days of a WCB decision by a worker or employer, or by a child, spouse or common-law partner of a worker.
- The Appeal Division is an independent appeal body within the WCB. The Appeal Division considers appeals in worker claims matters, and matters related to employer assessments, classifications and monetary penalties. Matters must generally be appealed to the Appeal Division within 30 days of the finding, decision or notice. In claims matters, the Appeal Division hears appeals from the Review Panel and is the final level of appeal for non-medical issues.
- An appeal on a medical finding or decision can be brought to the Medical Review Panel (the "Panel") after a decision by a WCB officer, the Review Board, or the Appeal Division. Requests for Panel appeals must be made within 90 days of a decision made by one of these groups. The Panel is the last avenue for appeals on medical issues, and the Panel's decision is binding. During an appeal, the Panel will conduct a physical examination of the injured worker.

(g) Access to Records by the Employer

- The WCB grants employers access to claim files if an appeal has been filed by either a worker or his or her dependent. An employer is also entitled to the claim file if it is appealing a decision. Written request must be made to the Records Management Department of the WCB.

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- All information in the claim file is strictly confidential and protected by the *Freedom of Information and Protection of Privacy Act*.
- (h) Offences**
- The following are offences under the *Act*:
 - disclosure by an employer of any personal information received from the Board;
 - failure to furnish a payroll statement;
 - an employer’s attempt to recover the costs of workers’ compensation from employees;
 - failure to comply with an order or regulation under the *Act*;
 - an employer’s attempt to discourage, dissuade or impede a worker from reporting to the WCB an injury, disease, death or hazardous condition;
 - an employer’s failure to close its operations pursuant to an order of the WCB; and
 - an employer’s failure to comply with an order or regulation to maintain first aid equipment and service commits an offence.
 - Any director or officer of a corporation who commits an offence or who authorizes or acquiesces in the commission of an offence is also guilty of the offence.

B. OCCUPATIONAL HEALTH AND SAFETY

(a) General

- Part 3 of the *Act* (“Part 3”) and the *Occupational Health and Safety Regulation* (the “*Regulation*”) contain the legal requirements that must be met by all workplaces under the inspectional jurisdiction of the WCB.
- The WCB has jurisdiction over most workplaces in British Columbia, except mines and workplaces that fall under federal jurisdiction.
- The *Regulation* sets out the rights and responsibilities of employers and workers and outlines the general conditions required in the workplace.

(b) Duties of Employers

- Every employer must ensure the health and safety of all workers working for that employer and any other workers present at a workplace at which that employer's work is being carried out.
- An employer must remedy any workplace conditions that are hazardous to the health or safety of the employer's workers.
- An employer must ensure that its workers are made aware of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed and are made aware of their rights and duties under Part 3 and the *Regulation*.
- An employer must establish occupational health and safety policies and programs in accordance with the *Regulation*.
- An employer must provide and maintain, in good condition, protective equipment, devices and clothing as required by regulation and ensure that they are used by its workers.
- An employer must provide its workers with the information, instruction, training and supervision necessary to ensure their health and safety at work and to ensure the health and safety of other workers at the workplace.
- An employer must make a copy of the *Act* and the *Regulation* readily available for review by workers at each workplace where workers are regularly employed. An employer must post, and keep posted, a notice advising where the copy is available for review.
- An employer must consult and cooperate with the joint committees and worker health and safety representatives.
- An employer must cooperate with the WCB, its officers, and any other person carrying out a duty under Part 3 or the *Regulation*.

(c) Duties of Workers

- Every worker must take reasonable care to protect their own health and safety, the health and safety of other persons who may be affected by their acts or omissions at work, and must comply with Part 3, the *Regulation* and any applicable orders.
- A worker must also carry out his or her work in accordance with established safe work procedures as required by Part 3 and the *Regulation*, use or wear protective equipment, devices and clothing as required by the *Regulation* and must not engage in horseplay or similar conduct that may endanger the worker or any other person.

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- A worker must ensure that his or her ability to work without risk to his or her health or safety, or to the health or safety of any other person, is not impaired by alcohol, drugs or other causes.
 - A worker must report to the supervisor or employer any contravention of Part 3 and the *Regulation*, the absence of or defect in any protective equipment, device or clothing, or the existence of any other hazard that the worker considers is likely to endanger the worker or any other person.
 - A worker must cooperate with the joint committee or worker health and safety representative for the workplace.
 - A worker must cooperate with the WCB, its officers and any other person carrying out a duty under Part 3 or the *Regulation*.

(d) Duties of Supervisors

- Every supervisor must ensure the health and safety of all workers under the direct supervision of the supervisor, be knowledgeable about Part 3 and those regulations applicable to the work being supervised, and comply with Part 3, the *Regulation* and any applicable orders.
- A supervisor must ensure that the workers under his or her direct supervision are made aware of all known or reasonably foreseeable health or safety hazards in the area where they work, and comply with Part 3, the *Regulation* and any applicable orders.
- A supervisor must consult and cooperate with the joint committee or worker health and safety representative for the workplace.
- A supervisor must cooperate with the WCB, its officers and any other person carrying out a duty under Part 3 or the *Regulation*.

(e) Duties of Directors and Officers of a Corporation

- Every director and every officer of a corporation must ensure that the corporation complies with Part 3, the *Regulation* and any applicable orders.

(f) Joint Health and Safety Committee

- An employer must establish and maintain a joint health and safety committee (the “Committee”) at its workplace if it regularly employs 20 or more workers.
- The joint Committee must have at least 4 members and it must consist of worker representatives and employer representatives. At least half of the Committee members must be worker (non-managerial) representatives.
- Some of the Committee’s duties and functions include:

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- identification of situations that may be unhealthy or unsafe for workers;
 - consultation with workers and the employer on issues related to occupational health and safety;
 - the making of recommendations to the employer and the workers for the improvement of the occupational health and safety and occupational environment of workers;
 - ensuring that accident investigations and regular inspections are carried out as required by Part 3 and the *Regulation*; and
 - participation in inspections, investigations and inquiries as provided in Part 3 and the *Regulation*.
- The employer must respond in writing to the Committee within 21 days of receiving any recommendation, and must either indicate acceptance of the recommendation or give reasons for not accepting the recommendation.
 - The employer must provide the Committee with the equipment, premises and clerical personnel necessary for it to carry out its duties and functions.
 - Employers must post and keep posted the names and work locations of the Committee members, the reports of the three most recent joint Committee meetings and copies of any applicable orders for the preceding 12 months.

(g) Accident Reporting and Employer Investigation

- An employer must immediately notify the WCB of the occurrence of any accident that resulted in the serious injury or death of a worker involving a major structural failure or collapse, or involving the major release of a hazardous substance.
- An employer must immediately investigate the cause of any accident that injured or could have seriously injured a worker.
- An employer must ensure that an incident investigation report is prepared in accordance with the *Regulation* and must provide a copy of the incident investigation report to the Committee and the WCB.

(h) WCB Inspections and Investigations

- A WCB officer has broad powers of inspection and investigation.
- A person must not hinder, obstruct, molest or interfere with an officer in the exercise of a power or the performance of a function or duty under Part 3 or the *Regulation*.

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- If an officer makes a written report, the employer must promptly post the report at the workplace to which it relates and give a copy of the report to the Committee or worker health and safety representative, as applicable.
 - (i) *WCB Orders*
 - The Board may make orders for the carrying out of any matter or thing regulated, controlled or required by Part 3 or the *Regulation*, and may require that the order be carried out immediately or within the time specified in the order.
 - The WCB has the authority to make orders, including:
 - establishing standards that must be met and requirements that must be adopted in any work or workplace for the prevention of work related accidents, injuries and illnesses;
 - requiring a person to take measures to ensure compliance with the *Act*;
 - requiring an employer to install and maintain first aid equipment and service in accordance with the order; and
 - doing any other thing that the WCB considers necessary for the prevention of work related accidents, injuries and illnesses.
 - If the WCB has reasonable grounds to believe that a thing that is being used or that may be used by a worker is not in safe operating condition, or does not comply with Part 3 or the *Regulation*, the WCB may order that the thing not be used until it cancels the order.
 - If the WCB has reasonable grounds to believe that an immediate danger exists that would likely result in serious injury, serious illness or death to a worker, the WCB may order that work at the workplace or any part of the workplace stop until it cancels the order.
 - An officer may post at a workplace a copy of an order or a notice related to that order.
 - An order may include a requirement for compliance. The employer must then prepare a compliance report that specifies what has been done to comply with the order, and if compliance has not been achieved at the time of the report, a plan of what will be done to comply and when compliance will be achieved.
 - (j) **Review of WCB Decisions**
 - An employer, worker, supplier, union or other person aggrieved by a WCB decision may have the decision reviewed. In order to have a decision reviewed,

the person must apply in writing to the WCB within 60 days after the date of the decision.

- Unless the reviewing officer directs otherwise, a review does not operate as a stay or suspend the operation of the decision under review.
- In the case of a review requested by an employer, the employer must post a notice of the application for review at the workplace, provide notice of the application to the Committee, and, if workers are represented by a union, send notice of the application to the union.
- A decision of a reviewing officer, on any matter in which the reviewing officer has jurisdiction, is final.

(k) Offences under Part 3 and the Regulation

- A person who contravenes a provision of Part 3, the *Regulation* or an order commits an offence.
- If a corporation commits an offence, an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence.
- The time limit for laying an information in respect of an offence is 2 years after the last occurrence of the act or omission on which the prosecution is based.
- An information in respect of an offence may be laid only with the approval of the WCB.
- A person is not guilty of an offence if the person proves that the person exercised due diligence to prevent the commission of the offence.
- A worker is not guilty of an offence if the worker proves that the offence was committed as a result of instructions given by the worker's employer or supervisor, and despite the worker's objection.
- On conviction for an offence, a person is liable to the following penalties:

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- (a) in the case of a first conviction,
- (i) a fine of not more than \$528,610.36 and, in the case of a continuing offence, to a further fine of not more than \$26,430.52 for each day during which the offence continues after the first day,
 - (ii) imprisonment for a term not exceeding 6 months, or
 - (iii) both fine and imprisonment;
- (b) in the case of a subsequent conviction,
- (i) a fine of not more than \$1,057,220.72 and, in the case of a continuing offence, to a further fine of not more than \$52,861.04 for each day during which the offence continues after the first day,
 - (ii) imprisonment for a term not exceeding 12 months, or
 - (iii) both fine and imprisonment.

(l) Work Refusals

- All employees have the legal right to refuse to do unsafe work, so long as that person has reasonable cause to believe that doing the work would create an undue hazard to the health and safety of any person. The refusal must be reported to the employee's supervisor or employer.
- The supervisor or employer receiving the report must immediately investigate the matter and ensure that any unsafe condition is remedied without delay or if in his or her opinion the report is not valid, must inform the person who made the report.
- If the employee continues to refuse to carry out his or her work, the supervisor or employer must investigate the matter in the presence of the worker who made the report and in the presence of a worker member of the Committee, or a worker selected by the trade union representing the worker.
- If the investigation in the presence of the employee does not resolve the matter and the worker continues to refuse to carry out his or her work, both the supervisor or employer and the worker must notify a WCB officer, who must investigate without undue delay and issue whatever orders are deemed necessary.
- An employee must not be discriminated against for refusing to carry out unsafe work.

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- Discriminatory action includes suspension, layoff, dismissal, demotion, transfer of duties, change in location of workplace, and reduction in wages.
 - A temporary assignment to alternative work at no loss in pay to the worker until the matter is resolved is deemed not to constitute discriminatory action.

5. LABOUR RELATIONS

(a) General

- The British Columbia *Labour Relations Code* (the “Code”) regulates all aspects of unionized employment in British Columbia.
- The purposes of the *Code* include:
 - encouraging collective bargaining between employers and trade unions;
 - encouraging co-operative participation between employers and trade unions;
 - minimizing the effects of labour disputes on third parties;
 - promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;
 - ensuring that the public interest is protected during labour disputes; and
 - encouraging the use of mediation as a dispute resolution mechanism.

(b) Unfair Labour Practices

- Any conduct on the part of an employer that interferes with the right of employees to join a trade union or participate in its affairs constitutes an unfair labour practice.
- An employer must not participate in or interfere with the administration of a trade union.
- An employer must not attempt to prevent an employee from becoming a union member or exercising other rights under the *Code* in the following ways:
 - by refusing to employ or continue to employ an individual;
 - by imposing conditions in an individual’s contract of employment;
 - by intimidation, coercion, threats of dismissal or other discipline; or

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- through promises, wage increases, or other alterations to terms and conditions of employment.
 - An employer may discipline or discharge an employee for proper cause, and may change its operations for genuine business reasons. However, if anti-union animus is *one* of the reasons for an employer's decision, an unfair labour practice will have been committed and the employer's action will be reversed.
 - In certain situations, including employee terminations, the employer will bear the onus of proving that anti-union animus was *not* one of the reasons for its action.
 - A union must not attempt to organize employees at their places of work during working hours.
 - During an organizing campaign, employers must be careful when communicating with employees. Employers can communicate factual information and reasonably held opinions regarding their businesses to their employees.
 - The Board is empowered to inquire into complaints of unfair labour practices and other violations of the *Code* and possesses broad remedial powers.

(c) Acquisition of Bargaining Rights

- Where there is no certified bargaining agent and no applicable collective agreement, a trade union may apply to the Board for certification if it claims to have at least 45% of the employees in the proposed bargaining unit as members.
- If there is an existing certification but no collective agreement, a certification application (an "Application") can be made if 6 months have elapsed since the date of the first union's certification and the second union claims to have at least 50% support from the affected employees.
- If a collective agreement is in force, a union claiming at least 50% support can make an Application within the 7th and 8th months in each year of the term of the collective agreement. An unsuccessful raiding union cannot make an Application within 22 months.
- An Application cannot be made without the Board's consent where a strike or lockout is in effect.
- If a union is not certified, or if a request to cancel the certification is refused by the Board, the Board may designate a length of time, not less than 90 days, that must elapse before the same union can bring another Application.
- Union membership is evidenced by signed membership cards. Membership cards must be dated on the day they are signed. No membership fee is required.

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- Membership cards must be dated no more than 90 days before an Application is made or there must be evidence of active membership maintained by the payment of dues.
 - An employee may revoke a membership card by delivering a written, signed statement to the union and to the Board *before the Application is filed*. A revocation delivered to the Board after the date of the Application will not be accepted.
 - When the Board receives an Application, it sends a Notice to the employer and to any other trade union with a collective bargaining relationship with the employer, advising that it has received the Application.
 - Once the employer receives Notice from the Board that the union has made an Application, the employer cannot alter the conditions of employment without the written consent of the Board. However, the employer retains the right to suspend, transfer, layoff, discharge or discipline an employee for proper cause.
 - Employers must immediately post the Notice in a conspicuous place for five consecutive working days.
 - Strikes and lockouts are permitted while an Application is pending only with the written consent of the Board.
 - Within two or three days of receipt of an Application, the Board will appoint an Industrial Relations Officer (“IRO”) to determine the size of the bargaining unit by examining the payroll records of the employer. The IRO will also determine whether membership cards demonstrate that the union has at least 45% support among the employees.
 - It is the Board’s practice to hold a hearing within 7 to 8 days of receiving an Application. The IRO will complete a report of his or her findings and will fax a copy of the report to both the union and the employer prior to the hearing. Names of union members are confidential and will not be disclosed to the employer.
 - At the certification hearing the employer will have an opportunity to raise any objections to the Application. The Board will invite the parties to engage in informal settlement discussions prior to the hearing on a “without prejudice” basis in an attempt to reach a consensus on outstanding issues. The following are issues which the Board considers:
 - whether the applicant is a “trade union”;
 - whether the unit applied for is an “appropriate bargaining unit”; and
 - whether the applicant has the necessary employee support.

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- If the Board is satisfied that at least 45% of employees in the unit are members in good standing, it must order that a representational vote be taken among the employees in that unit.
 - The vote will be held within 10 days of the date of the Application. Certification votes are by secret ballot. If the Board is satisfied that the majority of employees who cast ballots support the union, and that the unit is appropriate for collective bargaining, the union will be certified.
 - If the employer contravenes the *Code*, and in the Board's opinion the union would have obtained the requisite support for certification had it not been for the prohibited *Act*, the Board may certify the union regardless of the level of employee support.
 - If the Application is successful, the Board will issue a formal Certification Order stating that the union is certified to represent the employees.
 - The employer must not alter rates of pay or any other term or condition of employment of the newly certified employees for a period of four months following certification, or until a collective agreement is reached, whichever occurs first.
 - The Board has exclusive jurisdiction to determine the appropriateness of a proposed bargaining unit. In making that determination, the Board may include additional employees or exclude them from the unit.
 - Voluntary recognition is an alternative means for a union to acquire bargaining rights. An employer and trade union can agree that the employer recognizes the union as the exclusive bargaining agent for its members.

(d) Revocation of Bargaining Rights

- If at least 45% of employees in a bargaining unit apply to cancel a certification, the Board will order a vote. The certification will be cancelled if the majority of votes are against having the union represent them.
- The Board can order a second vote if less than 55% of eligible employees cast ballots.
- A decertification application cannot be made in the first 10 months following certification.
- If a certification is cancelled, the collective agreement between the employer and union is void. Unless the Board consents, unions are prohibited from making a new certification application within 10 months of their decertification.

(e) Successor Rights

- If all or part of a business is sold, leased, transferred or otherwise disposed of, the recipient is bound by all proceedings under the *Code*, including outstanding grievances, applications and potential liabilities.
- An employer that takes over all or part of a business is bound by the collective agreement as if it was a party to it.

(f) Common Employers

- The Board may declare two or more enterprises, that carry on associated or related businesses under common control and direction, to be a single employer for the purposes of the *Code*. In that event, the related company will be bound by the union certification and the collective agreement. The Board will make this discretionary declaration only if to do so would serve a valid labour relations purpose, such as preventing the erosion of employees' bargaining rights.

(g) Collective Bargaining Procedures

- After certification, either party can provide the other with written notice to begin collective bargaining.
- The parties must then meet within 10 days, begin bargaining in good faith, and make every reasonable effort to conclude a collective agreement.
- Within the period of 4 months before the agreement ceases to operate, either party may notify the other party in writing of its desire to bargain to renew the agreement. Notice to bargain is deemed to be given 90 days before the agreement ceases.
- Collective agreements cannot have a term less than one year.

(h) Adjustment Plans

- If an employer intends to introduce a measure, policy or change that affects the terms, conditions or security of employment of a significant number of employees, the employer must give the union 60 days' notice of the change.
- After notice is given, the parties must meet in good faith to consider alternatives and attempt to agree upon a plan that will address various issues.

(i) First Collective Agreement

- Either party can apply to the Board to have a mediator assist them in negotiating a first collective agreement if they have attempted but have failed to conclude an agreement and if the union has a strike mandate.

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- Once an application for a mediator is made, strikes and lockouts are prohibited and any such action in progress is terminated.
 - A mediator will be appointed within 5 days of the application.
 - If the first collective agreement is not concluded within 20 days of the appointment of the mediator, the mediator will recommend the terms of the agreement and/or a process for concluding the agreement such as further mediation, arbitration, or allowing the parties to strike or lock out.
 - If the collective agreement is not concluded within 20 days of the mediator's recommendation, the Board will direct that the parties engage in further mediation or arbitration, or allow the parties to strike or lock out.
 - If the Board directs further mediation or arbitration, the parties must not strike or lock out and the mediator or arbitrator may determine binding terms of the first collective agreement. However, it is rare for the Board to impose terms, and every opportunity will be given to the parties to reach agreement.

(j) Strikes, Lockouts and Picketing

- Strikes and lockouts are prohibited during the term of a collective agreement and all collective agreements are deemed to contain such a prohibition.
- A union cannot declare a strike unless a lawful lockout has occurred and has not been discontinued for a period longer than 72 hours or in the following circumstances:
 - it has majority support for a strike demonstrated by a strike vote;
 - the strike is declared within 3 months of the strike vote;
 - the employer and Board have been given 72 hours written notice of the union's intention to strike, or longer if the Board directs;
 - mediation is not ongoing; and
 - essential services issues, if any, are resolved.
- An employer cannot declare a lockout unless a lawful strike has occurred and has not been discontinued for a period longer than 72 hours or in the following circumstances:
 - the employer and Board have been given 72 hours written notice of the employer's intention to lockout, or longer if the Board directs;
 - mediation is not ongoing; and

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- essential services issues, if any, are resolved.
 - Picketing can lawfully occur at or near a striking employee’s worksite, or at the worksite of an employer that is helping the struck employer resist the effects of the strike.
 - The Board will generally restrict picketing so as to minimize its effect on third parties.
 - Employers are restricted in how they may use replacement workers during a strike. Generally, persons hired or transferred to the worksite after notice to bargain has been given cannot perform struck work.
 - Before a strike or lockout occurs, an employer can have the Board direct that employees vote on its last offer to the union. An employer can only have one last offer directed in respect of the same dispute.

(k) Collective Agreement Provisions

- Every collective agreement must be in writing and have a term of at least one year.
- Every collective agreement is deemed to provide that there will be no strikes or lockouts during its operation.
- Every collective agreement must provide that employees can be disciplined or discharged only for just and reasonable cause. A different standard can be negotiated for probationary employees.
- Every collective agreement must provide for the final and conclusive settlement without work stoppage, of disputes arising from the interpretation, application, operation, or alleged violation of a collective agreement, including whether a matter is arbitrable.
- Grievances are resolved by way of arbitration. Arbitration awards may be reviewed and reconsidered by the Labour Relations Board and may ultimately proceed to Court under judicial review.

(l) Jurisdiction and Remedial Powers of the Board

- The Board has exclusive jurisdiction to decide all issues arising under the *Code*.
- The Board has wide discretion to determine its own procedures.
- The Board has broad remedial powers for contraventions of the *Code* and in appropriate circumstances will do one or more of the following:
 - order a person to do any thing to comply with the *Code*;

- order a person to stop doing any thing in contravention of the *Code*;
- order a person to rectify a contravention of the *Code*;
- order an employer to reinstate an employee;
- reject an application or complaint that it considers to be without merit; and
- make any other order it considers appropriate.

6. PRIVACY

(a) *The Freedom of Information and Protection of Privacy Act*

- The *Freedom of Information and Protection of Privacy Act (FIPPA)* came into force in British Columbia in 1992. The *FIPPA* governs the protection of personal information collected by public bodies in the province.

(b) *The Privacy Act*

- The *Privacy Act*, (the “*Act*”) came into force in British Columbia in 1968. The *Act* makes it an offence to violate the privacy of another except when to do so would be in the public interest, when authorized by law, when protected by the rules of law relating to defamation, or where consent is obtained. It does not place obligations on individuals or organizations to safeguard private information, nor does it require disclosure of information. Essentially, the *Act* codifies the principles of the common law torts of defamation, libel and slander. It also makes unauthorized use of an individual’s name or likeness an offence and protects individuals from surreptitious eavesdropping or surveillance.

(c) **Proposed Legislation**

- The *Personal Information Protection and Electronic Documents Act* does not immediately apply to provincially regulated employers and after three years will apply only in respect of “commercial activities”. Provincially regulated employers will not be subject to the employment provision. However, the British Columbia government has indicated that it may introduce provincial privacy legislation.
- On March 20, 2001, the provincial Special Committee on Information Privacy in the Private Sector released its recommendations for privacy protection in British Columbia. The Committee’s recommendations reflect its four primary findings, which are as follows:
 - Any policy adopted by British Columbia on the matter of information privacy in the private sector must consider the implications of the federal legislation for the province. Effective January 2004, that legislation will apply to British

Columbia and any other province that has not passed similar privacy legislation for the provincial private sector.

- The Committee found that British Columbians, both businesses and consumers, solidly support legislation to regulate information privacy in the private sector.
 - British Columbians insist that any proposed privacy law must balance the private sector's needs to use personal information with consumers' rights to information privacy.
 - There is consensus among individuals, businesses, private advocates and legislators that private sector privacy laws must be harmonized among all jurisdictions in Canada and international jurisdictions.
 - It appears likely that the provincial government will enact privacy legislation covering the private sector before January 2004.
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