



# 2018 Year in Review:

Atlantic Canada Labour &  
Employment Law Developments

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## INTRODUCTION FROM THE EDITORS

[Killian McParland](#) & [Sheila Lanctôt](#)

We can all make 2019 a success by building on the year that was. For employers, 2018 was a year of many notable developments in labour and employment law across the country. We saw Ontario enact significant legislative changes only to roll many of them back following a turnover in government; the federal government propose significant changes to its own legislation; the #metoo movement march forward; and the legalization of cannabis put its workplace impact in the spotlight.

Atlantic Canada experienced a number of its own legal developments that regional employers should be aware of as they plan for the year ahead. In this 2018 Year in Review, lawyers from our [Labour & Employment practice group](#) recap notable legislative and case law updates from each of the four Atlantic provinces.

Inside we cover developments from Atlantic Canada such as:

- Across the Atlantic region, the introduction of new domestic/family violence leaves as well as longer parental and maternity leaves after the federal government extended the corresponding employment insurance benefits;
- In New Brunswick, the Queen's Bench finding that video surveillance equipment in the workplace had not violated an employee's privacy rights;
- In Newfoundland and Labrador, a labour arbitrator determining that accommodating medical cannabis use in a safety sensitive position would amount to undue hardship, in the form of a safety risk, given the unavailability of accurate impairment testing;
- In Nova Scotia, the Court of Appeal affirming the ability of employers to make policy decisions on what drugs are and are not covered as part of a benefits plan, and finding that not including medical cannabis had not constituted discrimination; and
- In Prince Edward Island, the Court of Appeal reminding us to ensure that programs do not discriminatorily exclude individuals with mental illness.

At the conclusion of this publication you will find a catalogue of our client updates from 2018 with links to the articles, in case you missed any.

While we reflect on the year that was, we are also looking to the year ahead and will continue to provide you with regular updates of developments in the ever-evolving world of labour and employment law.

## NEW BRUNSWICK

[Timothy Bell](#)

### Legislative changes

#### 1. Maternity and parental leave

Following on the heels of the federal government's changes to maternity and parental leave, the Government of New Brunswick enacted *An Act to Amend the Employment Standards Act* to implement similar changes which came into effect March 16, 2018.

An employee can now begin maternity up to 13 weeks before the expected due date and the employee may be granted up to a total of 17 weeks' leave. Parental leave can now be taken for up to a total of 62 weeks but must be taken within the first 78 weeks after the date on which the newborn or adopted child came into the employee's care and custody. The total amount of time that may be taken by one or two employees for maternity and parental leave with respect to the same birth has been extended from a maximum of 52 weeks to a maximum of 78 weeks.

Despite the changes to employees, employers remain under no obligation to "top-up" benefits for maternity or parental leave. However, employers may find it more challenging to find replacement workers and prepare for an employee's absence of up to 18 months, as well as their return.

#### 2. Critical illness leave

In addition to the changes made regarding maternity and parental leave, the Government of New Brunswick further amended the *Employment Standards Act's* "Critically Ill Child Leave" provisions to reflect changing family dynamics. Previously, only the parent of a critically ill child could be granted leave to take care of the child. The amendments removed the definition of "parent" and the provisions now provide that either "parents" or "family members" may take leave to care for a critically ill child. This leave may be granted up to a maximum of 37 weeks. This expansion will give families more flexibility to decide who will take leave to care for a family member.

In March 2018, "Critically Ill Adult Leave" provisions of the *Employment Standards Act* came into force. These new provisions provide for leave of up to 16 weeks to allow parents or other family members to provide care and support for a critically ill adult who is 18 years of age or older.

3. Domestic violence, intimate partner violence or sexual violence leave

On September 1, 2018, provisions and regulations of the *Employment Standards Act* (“Act”) dealing with domestic violence, intimate partner violence and sexual violence leave came into effect. The new regulations allow leave of up to 10 days to be used intermittently or continuously, and up to 16 weeks could be used in one continuous period. The first five days of this leave are paid and the balance of the leave is unpaid. To be eligible, the employee requesting the leave must have been in the employ of the employer for more than 90 days and the leave must be taken for a specific purpose set out in the Act.

4. General regulation under the *Occupational Health and Safety Act* (upcoming)

The Government of New Brunswick has amended the general regulation under the *Occupational Health and Safety Act* to address the labour market and the public’s concerns regarding harassment and violence in the workplace. Currently, New Brunswick is the only province that does not have explicit legislation governing violence and harassment in the workplace. The amendments seek to impose requirements on employers to actively prevent workplace harassment and violence. While the amendments only come into force April 1, 2019, this delay is meant to give employers time to complete any necessary risk assessments and put the necessary policies and procedures in place.

Under the new regulatory changes, harassment and violence are defined as workplace hazards that affect health and safety. The new regulations require all employers to perform a risk assessment analyzing the likelihood of violence in their workplace. They will also be required to develop and implement a written code of practice for the prevention of harassment in their workplaces. Employers will be required to provide training on these policies to all employees and managers. To help facilitate the development of this harassment code of practice, the regulations outline for employers the elements that must be included.

**Case law updates**

1. Conflicting decisions on language proficiency requirements (*CUPE, Local 1252 and Ambulance NB, Re*, 135 C.L.A.S. 114 (John P. McEvoy, Q.C.))

On April 10, 2018, arbitrator John McEvoy held that Ambulance New Brunswick (“Ambulance NB”) should relax its hiring practices where there is not a need for bilingual paramedics and hire based on seniority in those locations rather than on language proficiency. The decision also ordered Ambulance NB to review its policy requiring paramedics to be fully bilingual for job postings in areas where the demand for such is low.

After the decision, the Liberal government announced it was seeking judicial review claiming the decision contradicted the November 2017 consent order by Justice Dionne of the Court of Queen’s Bench requiring Ambulance NB to provide services “of equal quality” in both languages “uniformly across the entire territory of the province”.

In December 2018, the PC government announced it was going ahead with the judicial review to resolve the apparent contradictions between the arbitrator’s ruling and Justice Dionne’s consent order. The judicial review is scheduled to be heard in January 2019.

2. Workplace video surveillance and privacy (*Irving Paper v Unifor Local 601N*, 2018 NBQB 93)

The Court of Queen’s Bench recently held that employees do not have a reasonable expectation of privacy when using a vending machine in the hallway of their place of work. This decision arose from a grievance in 2017 where seven Irving Paper employees were disciplined and suspended for varying lengths as a result of their dishonest and inappropriate use of the consumable goods vending machines located on their job site.

The evidence of the alleged misconduct obtained by the employer was from two video surveillance cameras which were located in the hallway where the vending machine was located. The first camera had been placed in the hallway, the second camera was placed within the vending after the employer became aware of the potential inappropriate use of the vending machines. This camera identified the individuals misusing the vending machine.

At the grievance arbitration, the union argued that the video evidence was inadmissible because it violated the employees’ reasonable expectation of privacy. The arbitrator agreed, finding the video surveillance disproportionate to the problem and unreasonable in the circumstances. As a result, there was no evidence identifying the employees misusing the vending machines. The discipline was therefore withdrawn.

The employer applied for judicial review claiming the decision was a breach of natural justice as it prevented them from being heard. The Court of Queen’s Bench ruled in the employer’s favour and found the arbitrator’s decision was a breach of natural justice. The court remitted the grievances to be heard by a different arbitrator but a decision has yet to be given.

This decision is important for both employers and employees alike. This decision confirmed that employers have the ability to put video surveillance equipment in public areas at work and that employees do not have a reasonable expectation of privacy in common work spaces.

3. Series of fixed term contracts did not create reasonable notice entitlement  
(Burns v University of New Brunswick, 2018 NBCA 11)

In 2018, the Court of Queen’s Bench confirmed that employers are not required to give notice to a fixed term employee that their contract would not be renewed. This decision arose from a grievance of a professor against the University of New Brunswick (“UNB”). The grievor began his employment with UNB in 1978 as a language monitor for the English Language Program (“ELP”) under a fixed term contract and continued to work for ELP under a series of fixed term contracts. Each of the contracts set a start and an end date and did not contain a clause dealing with renewal – they were not arbitrary.

In January 2016, due to a decline in enrolment, the grievor was not offered a new contract. In the trial decision, Justice J. L. Clendening held that “an employee whose contract is not renewed at the conclusion of a fixed term contract is not entitled to reasonable notice. The case law indicates that the contract is simply terminated and neither party is under any obligation to continue the contract of hiring”.

The Court of Appeal upheld Justice Clendening’s decision and confirmed that a fixed-term contract simply ends and an employer is under no obligation to rehire the employee. The case confirms longstanding employment law principles that fixed-term contract employees are not entitled to reasonable notice, even if they have been hired for successive fixed terms.

## NEWFOUNDLAND AND LABRADOR

[Ruth Trask](#) & [Anthony Granville](#)

### Legislative changes

1. Changes to parental leave as well as critically ill child and adult care leaves

*An Act to Amend the Labour Standards Act*, SNL 2018 c. 1 came into force March 12, 2018, amending the *Labour Standards Act*, RSNL 1990, c L-2 to align more closely with the *Canada Labour Code*, RSC 1985, c L-2. It increases parental leave to 61 weeks from 35 weeks; expands the class of persons who are entitled to take critically ill child care leave; provides for critically ill adult care leave; and allows nurse practitioners to issue medical certificates for existing and new leaves from employment.

2. Increased workers' compensation income replacement

*An Act to Amend the Workplace Health, Safety and Compensation Act*, SNL 2018 c. 2 came into force April 1, 2018, increasing the income replacement rate from 80% to 85% for workers following a workplace accident.

3. Addition of family violence leave

As of January 1, 2019, the *Labour Standards Act*, RSNL 1990, c L-2 provides for up to three days paid leave and seven days unpaid leave in a year where an employee or a person to whom the employee is a caregiver has been impacted by family violence. The Act has also been amended to impose new confidentiality obligations for employers who obtain information about employees relating to their need for workplace leave, including parental, bereavement, sick, compassionate care, reservists', critical illness, crime-related child death or disappearance, or family violence leave.

4. Presumptive coverage for work-related PTSD

As of July 1, 2019, the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c. W-11 will prescribe presumptive coverage for work-related post-traumatic stress disorder for all workers covered under the act.

5. Changes to pension replacement benefits

*An Act to Amend the Workplace Health, Safety and Compensation Act*, SNL 2018 c. 36 came into force January 1, 2019, and replaced the current pension replacement benefit under this Act with a lump sum retirement benefit.

**Case law updates**

1. Post-Incident testing under drug and alcohol policy (*Hibernia Platform Employers' Organization v Communications, Energy and Paperworkers' Union (Unifor, Local 2121)*, 2018 NLCA 45 (appeal to SCC discontinued))

The Newfoundland and Labrador Court of Appeal confirmed a labour arbitrator's interpretation of *Hibernia Platform Employers' Organization's* drug and alcohol policy. The employer argued that the arbitrator had improperly interfered with management's right to order drug testing in accordance with the policy and the collective agreement. The policy required: (1) a "significant incident" as determined by management; (2) the testing to be part of an individualized assessment of the possibility of substance abuse or dependence; and (3) the testing to be for the purpose of helping eliminate substance use as a cause and to determine whether substance use was a possible contributing factor in an incident. Although the policy did not specifically state other requirements discussed in the arbitral authorities, the arbitrator found that the policy was subject to such additional requirements, including an investigation that considers the likely causes of the incident and whether the employee's actions contributed to the incident, includes the employee's explanation of the incident, and the exercise of managerial discretion having regard to all the circumstances of the case.

2. Undue hardship to accommodate medical cannabis in safety sensitive positions (*Lower Churchill Transmission Construction Employers' Association and IBEW, Local 1620 (Tizzard)*, (April 30, 2018) (Arbitrator: John F. Roil, Q.C.))

In *Lower Churchill and IBEW, Local 1620*, an arbitrator dismissed a grievance relating to use of medical cannabis in safety sensitive positions. The unavailability of accurate testing devices was recognized by the arbitrator as a legitimate concern regarding workers in safety sensitive positions. The arbitrator concluded that the regular use of medically-authorized cannabis products can cause impairment of a worker in a workplace environment and that the length of cognitive impairment can sometimes exist for up to 24 hours after use. The arbitrator was ultimately satisfied that undue hardship, in terms of unacceptable increased safety risk, would result to the employer if it employed the grievor in this position with his authorized daily medical cannabis use.

3. Termination for cannabis possession contrary to policy (*Terra Nova Employers' Organization v Communications, Energy and Paperworkers Union, Local 2121, 2018 NLCA 7*)

Prior to boarding a flight to an offshore platform, an employee was found in possession of a small quantity of cannabis wrapped in tinfoil, in violation of the employer's drug and alcohol policy. The union grieved the employee's termination, alleging that the employee was not aware that he was in possession of cannabis and that he did not possess the drugs while at a company facility or while performing company business. An arbitrator upheld the grievor's termination.

The issue before the Court of Appeal was whether the arbitrator's interpretation of the policy using the concept of strict liability was reasonable, or whether the interpretation of strict liability was unreasonable by virtue of the exclusion of an element of intention or *mens rea*, as the applications judge had held on judicial review. The Court of Appeal restored the decision of the arbitrator, holding that the arbitrator's strict liability approach to the policy was reasonable.

4. Discrimination complaint against pre-employment fitness testing company dismissed (*Howe v. Surehire (Board of Inquiry, Newfoundland & Labrador Human Rights Commission)* (March 26, 2018))

In *Howe*, the complainant was denied a temporary position as a carpenter when he received an unfavourable result in his pre-employment fitness to work testing, which was administered by Surehire. In his complaint, Howe alleged that Surehire had discriminated against him on the basis of a perceived disability in violation of the *Human Rights Act, 2010*. The adjudicator found in favour of Surehire and granted its motion for non-suit, concluding that Surehire could not have discriminated against the complainant given its role in the hiring process. Notwithstanding that Surehire's testing may have had a negative impact on Howe's employment prospects, Surehire had no authority to decide how this information was to be used by Howe's potential employers. It was the potential employers, and not Surehire, who ultimately decided whether or not to hire the Complainant.

5. Fixed term contract's early termination clause found unenforceable (*Lawis v. Pro Cabinet Design Limited and Coastal Marine Limited, 2018 CarswellNfld 376* (NLPC))

In *Lawis*, an employee claimed against his employer for unpaid wages after being terminated without cause. The employee was a resident of the Philippines and was hired by the employer as a Temporary Foreign Worker on a 24-month contract of employment. Citing a shortage of work, the employer terminated the employee roughly 12 months before the contract expired. A primary issue in this case was the interpretation of a provision in the contract which allowed the

employer to terminate the employment relationship by providing one week’s notice in writing. The judge found that notwithstanding this language, the contract was silent on how the employee would be compensated (i.e. with notice) if the employer elected to terminate the agreement before the end of the 24-month term. The provincial court judge took into account the “factual matrix” of the contract and held, in light of the fact that the agreement was for a term of two years and involved the employee leaving his employment in the Philippines and travelling to Canada at his own expense, that it would be unreasonable to interpret the clause to permit the employer to terminate the agreement without cause on one week’s notice. The employer was required to pay the employee the balance of the wages due under the 24-month term of the agreement.

6. Employer’s letter found to violate duty to bargain in good faith (*Unifor, Local 597 and D-J Composites, Inc.*, 2018 L.R.B.D. No. 8)

The legal issue to be decided in this case was whether the employer failed to bargain in good faith and failed to make reasonable efforts to conclude a collective agreement contrary to section 75 of the *Labour Relations Act*, RSNL 1990, c. L-1. In June 2017 the employer wrote a letter to employees with language that could be categorized as attempting to: (1) persuade employees to return to work despite the role of the union and the ongoing lockout; (2) criticize the union with respect to its handling of negotiations; and (3) directly engage union members in discussions related to collective bargaining. The Labour Relations Board concluded that whether intentionally or not, the letter had the result of unduly influencing union members with respect to collective agreement negotiations. Therefore, in light of the relevant case law in this area and the contents of the letter, the board found that the employer violated its duty to bargain in good faith. It is also noteworthy that the board found that the employer did not breach its duty to bargain in good faith by strongly asserting its bargaining position on merit-based pay steps and wages.

## NOVA SCOTIA

[Brian Johnston, QC](#) & [Guy-Etienne Richard](#)

### Legislative changes

#### 1. Automatic PTSD presumption for emergency response workers

On October 26, 2018, the *Workers' Compensation Act* was amended to create a presumption that a post-traumatic stress disorder ("PTSD") diagnosis in a front-line or emergency response worker has arisen out of, and in the course of, the worker's employment (unless the contrary can be shown). Front-line or emergency-response workers will not, however, be entitled to benefits if their PTSD is shown to have been caused by a decision or action of the worker's employer which relates to the worker's employment (i.e. a decision to change the workers' working conditions, the work to be performed, or a decision to discipline or terminate a worker).

#### 2. Domestic violence leave

Bill 107 came into effect January 1, 2019 and amended the *Labour Standards Code*, RSNS 1989, c 246 to provide leave of up to 16 continuous weeks, plus 10 intermittent days, including three days paid leave, for employees experiencing domestic violence, or who have a child experiencing domestic violence, to allow them to seek:

- medical attention for themselves or their children;
- obtain services from a victim services organization;
- obtain psychological or other professional counselling;
- relocate temporarily or permanently;
- seek legal or law enforcement assistance; or
- for another purpose prescribed by the regulations.

Employers are entitled to require the employee to file a verification form to obtain leave, and must maintain confidentiality with respect to any information received in relation to the matter.

### 3. Pregnancy and parental leave

On January 1, 2019, changes to the *Labour Standards Code Regulations* came into effect and provide that there now is no eligibility period for pregnancy and/or parental leave. As such, employees are eligible for pregnancy and/or parental leave as soon as they are hired.

### 4. NSLB Policy Update on Casual Employees

The Nova Scotia Labour Board (“Board”) completed a review of its policy with respect to casual employees in certification proceedings under the *Trade Union Act*, RSNS 1989, c 475, saying:

- Where a union has filed an application for certification, it may apply for whatever unit it believes has the support of and wants to represent. If this proposed unit includes casual employees, an employer may challenge the appropriateness of casuals being included.
- Where contested, genuine casual employees generally have not been included, but the Board retains jurisdiction to determine if the unit is appropriate for the purposes of collective bargaining.
- The Board’s policy provides a list of non-exhaustive factors it may consider relevant in its determination of whether to include casual employees in the bargaining unit, namely:
  - the views of the employer and union;
  - the nature and organization of the employer’s business;
  - community of interest among the employees;
  - the proportion of casual/temporary employees in the total work force;
  - the current practice and history of collective bargaining in the workplace or industry, in Nova Scotia or elsewhere; and
  - the Board’s desire to avoid fragmentation.

The Board also outlined how it intends to include casual employees when determining membership support and counting a vote.

## Case law updates

The Nova Scotia Court of Appeal rendered four decisions that may be of note to employers:

1. Workers' Compensation Board – post-traumatic stress disorder (*Henderson v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2018 NSCA 59)

The decision in *Henderson* precipitated change in the way the Workers' Compensation Board ("Board") will address post-traumatic stress disorder ("PTSD") in "front-line or emergency-response workers". On August 27, 2009, a woman was arrested. While in police custody, she suffered a stroke and passed away. The appellant ("Henderson") was the police officer working as shift supervisor at the time the woman was taken into custody. Henderson filed a workers' compensation claim seeking benefits for psychological injury resulting from the incident. The Workers' Compensation Appeals Tribunal found that Henderson developed PTSD in response to the incident; however, Henderson's claim was dismissed on the basis that his claim did not meet the statutory definition of "accident" in section 2(a) of the *Workers' Compensation Act*, SNS 1994-95, c 10. In order for Henderson's PTSD to be compensable, it needed to have arisen from "an acute reaction to a traumatic event". The Appeal Tribunal found that the incident was not a "traumatic event" as defined by Board Policy 1.3.9. The Nova Scotia Court of Appeal dismissed Henderson's appeal finding that the Appeal Tribunal's conclusion fell within a range of reasonable outcomes and there was no error in its interpretation and application of section 2(a) of *Workers' Compensation Act* and related Board policies.

2. Employer benefit plans (*Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31)

On April 12, 2018, the Nova Scotia Court of Appeal issued a significant decision relating to an employer's autonomy to make policy decisions as to what drugs and benefits will be covered by their benefit plans. In *Skinner*, the board of trustees of the Canadian Elevator Industry Welfare Trust Fund made the policy decision not to cover the cost of drugs which were not approved by Health Canada. The complainant ("Skinner"), was a plan member using medical cannabis on advice of his psychologist to treat chronic pain disorder, anxiety and depression. Skinner was denied coverage for his medical cannabis because the drug had not been approved by Health Canada. A Nova Scotia's Human Rights Board of Inquiry ("Board") allowed Skinner's complaint under the *Human Rights Act*, RSNS 1989, c 214, having found that Skinner had demonstrated a *prima facie* case of discrimination. The Nova Scotia Court of Appeal allowed the Trustees' appeal holding that the Board had applied the wrong *prima facie* test for discrimination. The Court of Appeal agreed with the Board's declaration that benefit plans "*need not cover 'the sun, the moon and the stars'...*", but held that the Board had based its decision "on Mr. Skinner's

personal needs rather than the statutory criteria.” The statutory criteria required Mr. Skinner to establish a connection between his disability and the Trustees' decision not to cover medical cannabis. The Court of Appeal concluded that no such connection could reasonably be made.

3. *Ocean Nutrition Canada Ltd. v Mathews, 2018 NSCA 44*

In *Ocean Nutrition*, the Nova Scotia Court of Appeal considered the issue of entitlement to a bonus/incentive during the reasonable notice period. This case dealt with a constructive dismissal claim and whether Mathews was entitled to payments in excess of \$1 million dollars under a long term incentive place (“LTIP”). The terms of the LTIP provided that Mathews had to be “*actively employed*” at the time payment was due. The trial judge had found that Mathews was constructively dismissed, and along with an award of 15 months of pay in lieu of notice, held that the employee was entitled to damages in relation to the LTIP. Writing for the majority of Nova Scotia Court of Appeal, Justice Farrar upheld the finding of constructive dismissal and notice period, but overturned the decision regarding entitlement to the LTIP. The Court of Appeal stated that the hearing judge confused an employee’s common law right to reasonable notice, with the employee’s ability to recover damages arising under the incentive plan. The Court of Appeal held that the appropriate question in this case was not whether the employer was seeking to limit the employee’s common law rights, but whether Mathews qualified for the LTIP benefits pursuant to the terms of the agreement. Mathews has applied for leave to appeal to the Supreme Court of Canada.

4. *Lengthy absences from work (Nova Scotia (Environment) v. Wakeham, 2018 NSCA 86)*

On November 14, 2018, the Nova Scotia Court of Appeal in *Wakeham* issued a decision that the frustration doctrine's emphasis on lengthy absence does not mean that an employee can preserve employment through brief, intermittent and unpredictable appearances at work. Ms. Wakeham performed clerical duties for the Nova Scotia Department of Environment (“Department”). Between 2009 and 2012, Ms. Wakeham was unable to work for the majority of that time. In 2012, Ms. Wakeham briefly returned to work for three weeks before claiming to be unable to work. The Court of Appeal concluded that the frustration doctrine focuses on lengthy absence and an inability to work for the foreseeable future, therefore; sporadic appearances at work did not preserve a right to employment. The decision of the Human Rights Board of Inquiry was set aside and the Court of Appeal concluded that the Department had not discriminated against Ms. Wakeham by failing to accommodate her.

## PRINCE EDWARD ISLAND

[Murray Murphy, QC, CPHR](#) & [Hilary Foster](#)

### Legislative updates

1. New leave for victims of domestic, intimate partner & sexual violence

Bill 116 received royal assent June 12, 2018 and will come into force upon proclamation. Bill 116 amends the *Employment Standards Act*, RSPEI 1988, c E-6.2 ("*Employment Standards Act*") to provide for domestic, intimate partner, and sexual violence leaves of absence. To be eligible for the leave, the employee must have been employed by the employer for a continuous period of at least three months. An employee will then be eligible for a three day leave of absence with pay and an additional seven day leave of absence without pay during a 12 calendar-month period.

2. Changes to maternity, paternity & sick leaves; new leave to care for sick family

Bill 32 received royal assent December 5, 2018 and was proclaimed into force December 29, 2018. Bill 32 amends the *Employment Standards Act* to allow an employee to commence maternity leave at any time during the period of 13 weeks immediately preceding the estimated date of birth. Previously, maternity leave could commence at any time during the period of 11 weeks preceding the estimated date of birth.

Bill 32 also increases employee entitlement to parental leave without pay from 35 weeks to 62 weeks. Adoptive parent employee entitlement to parental leave without pay is also increased from 52 weeks to 65 weeks. Additionally, the aggregate amount of leave that may be shared between two parents with respect to the birth or adoption of one child is increased from 52 to 78 weeks.

Bill 32 decreases the amount of time an employee must work for an employer in order to be eligible for sick leave to "at least three months". Following which, the employee is entitled to sick leaves of absence without pay of up to three days in total during a 12 calendar-month period. Previously, an employee was required to work for an employer for "six months or more" before that employee would be eligible for three days of sick leave.

Bill 32 requires employers to grant an unpaid leave of absence to an employee of up to 28 weeks for the purpose of providing care and support to a sick family member of the employee. Previously, employers were required to grant an unpaid leave of absence to an employee for the same purpose of only eight weeks. The aggregate amount of leave that may be shared

between two or more employees with respect to the care of the same family member is also increased from eight weeks to 28 weeks.

3. Workers' compensation – new presumption related to post-traumatic stress disorder

Bill 102 received royal assent December 20, 2017 and was proclaimed into force June 2, 2018. It amends the *Workers Compensation Act*, RSPEI 1988, c W-7.1 ("*Workers Compensation Act*") to create a presumption that post-traumatic stress disorder ("PTSD") in a worker has arisen out of, and in the course of, that worker's employment, provided that in the course of the worker's employment he or she is exposed to a traumatic event. This presumption applies to workers who are diagnosed with PTSD on or after June 2, 2018.

4. Workers' compensation – new requirement to establish and implement a harassment in the workplace policy

Bill 42 received royal assent December 5, 2018 and will come into force upon proclamation. Bill 42 amends the *Workers Compensation Act* by adding a section which requires employers to establish and implement policy measures to prevent the investigate occurrences of harassment in the workplace. Bill 42 further requires that workers, while at work, comply with any policy or program established by an employer pursuant to the *Workers Compensation Act* or its regulations. Finally, Bill 42 allows the Workers Compensation Board, subject to the approval of the Lieutenant Governor in Council, to make regulations respecting measures that employers shall establish and implement to prevent and investigate harassment in the workplace.

5. Workers' compensation – new broader definition of "impairment" & other changes

Bill 40 received royal assent December 5, 2018 and was proclaimed into force January 1, 2019. Bill 40 amends the *Workers Compensation Act* by broadening the definition of "impairment" from a "medically measurable permanent anatomical loss or disfigurement", to the "loss of physiological function, anatomical function or anatomical structure, or abnormality of psychological function, physiological function, anatomical function or anatomical structure". Bill 40 also extends the application of some parts of the *Workers Compensation Act* to volunteer firefighters. The municipality or organization responsible for operating the fire department in which a volunteer firefighter serves is considered the volunteer firefighter's "employer". Bill 40 creates a presumption that where a worker who is a fire inspector or firefighter suffers from a prescribed disease, the worker is presumed to suffer from an "occupational disease due to the nature of the worker's employment". The worker's employment is presumed to be the dominant cause of the occupational disease under prescribed circumstances. Lieutenant Governor in Council may make regulations prescribing occupational diseases, the minimum periods of

employment a worker must be employed, and any additional requirements in order for the presumption to apply.

Bill 40 also creates a presumption that a “personal injury by accident arising out of and in the course of employment” has been caused to a worker who is a fire inspector or firefighter in circumstances where the worker suffers a heart attack, cardiac arrest or heart arrhythmia within 24 hours of responding to an emergency call or dispatch.

Bill 40 makes several other amendments to the *Workers Compensation Act*, these changes include a new deadline by which the Workers Compensation Board must provide its annual report (June 30 of each year) and a change to the lump sum payment payable to the sole dependent of a deceased worker. Previously a sole dependent would receive \$10,000, Bill 40 amends this to 40% of the deceased’s maximum annual earnings in the year that the death occurred.

### **Case law updates**

1. Human rights – discrimination on the basis of mental illness (*King v Govt. of P.E.I. et al*, 2018 PECA 3)

Private and public institutions on Prince Edward Island may not exclude persons with mental illnesses from programs and services available to disabled members of the public without reasonable explanation for doing so. In *King v Govt. of P.E.I. et al*, 2018 PECA 3, the Prince Edward Island Court of Appeal upheld a decision of a Human Rights Panel (“Panel”), which determined that a Provincial Disability Support Program (“Program”) had discriminated against persons suffering from disability caused by mental illness. The Program set out a policy which indicated that every person with a disability had the right to seek support in attempting to overcome barriers, to attain a satisfactory quality of life, and to achieve financial independence. However, another one of the Program’s policies specifically excluded applicants with disabilities arising from a mental illness. The Panel recognized that the province was entitled to determine what benefits that it would provide as a matter of public policy, but held that these benefits could not be conferred in a discriminatory manner. The province did not provide qualitative or empirical evidence to show that allowing applicants with mental illness to apply for Program benefits would cause a significant financial impact to the Program. Excluding individuals suffering from mental disability was not rationally connected to the Program’s goal. The fact that the Program was not designed to support applicants with mental illness and did not have an assessment tool with which to assess an applicant’s degree of mental illness was not a reasonable explanation for excluding those applicants altogether, and was held to be discriminatory.

2. Hearsay evidence at Labour Relations Board (CUPE, Local 2523 and PEI Atlantic Baptist Nursing Home Inc. (Gajodi), Re, 135 C.L.A.S. 67)

The Prince Edward Island Labour Relations Board confirmed its ability to accept hearsay evidence at arbitration hearings pursuant to section 37(6.1)(a) of the *Labour Act*, RSPEI, c. L-1 (the “*Labour Act*”):

*An arbitrator or an arbitration board, as the case may be, has power*

*(a) to accept such oral or written evidence as the arbitrator or the arbitration board as the case may be, in its discretion considers proper, whether admissible in a court of law or not;*

In *CUPE, Local 2523 and PEI Atlantic Baptist Nursing Home Inc. (Gajodi), Re, 135 C.L.A.S. 67*, a panel of the Prince Edward Island Labour Relations Board (“Panel”) determined that the above section of the *Labour Act* allowed it to retain a discretion to admit hearsay evidence. The Panel further concluded that if hearsay was admitted, the Panel may ascribe to it whatever weight they believe proper, subject to the caveat that it cannot be the sole basis for a finding of fact. The facts of this case involved the PEI Atlantic Baptist Nursing Home Inc. (“Nursing Home”), which terminated the grievor for her alleged mistreatment of a resident. The resident suffered from a medical condition that made it impossible for him or her to testify in an arbitration hearing. The Nursing Home had no direct evidence to indicate that the grievor had mistreated the resident, and relied on circumstantial evidence and hearsay evidence from another employee to terminate the grievor. The Panel found that there was no reason to reject the hearsay evidence submitted by the Nursing Home at the hearing. Although it accepted the hearsay evidence, this did not mean that this evidence conclusively established the Nursing Home’s case. Based on the lack of clear evidence that the grievor mistreated the resident, including the hearsay evidence of the fellow employee, the Panel determined that the Nursing Home had not established just and reasonable cause to terminate the grievor.

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