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# A cross-country year in review of notable Canadian Labour & Employment law cases

**WEBINAR SERIES**
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

大成 DENTONS

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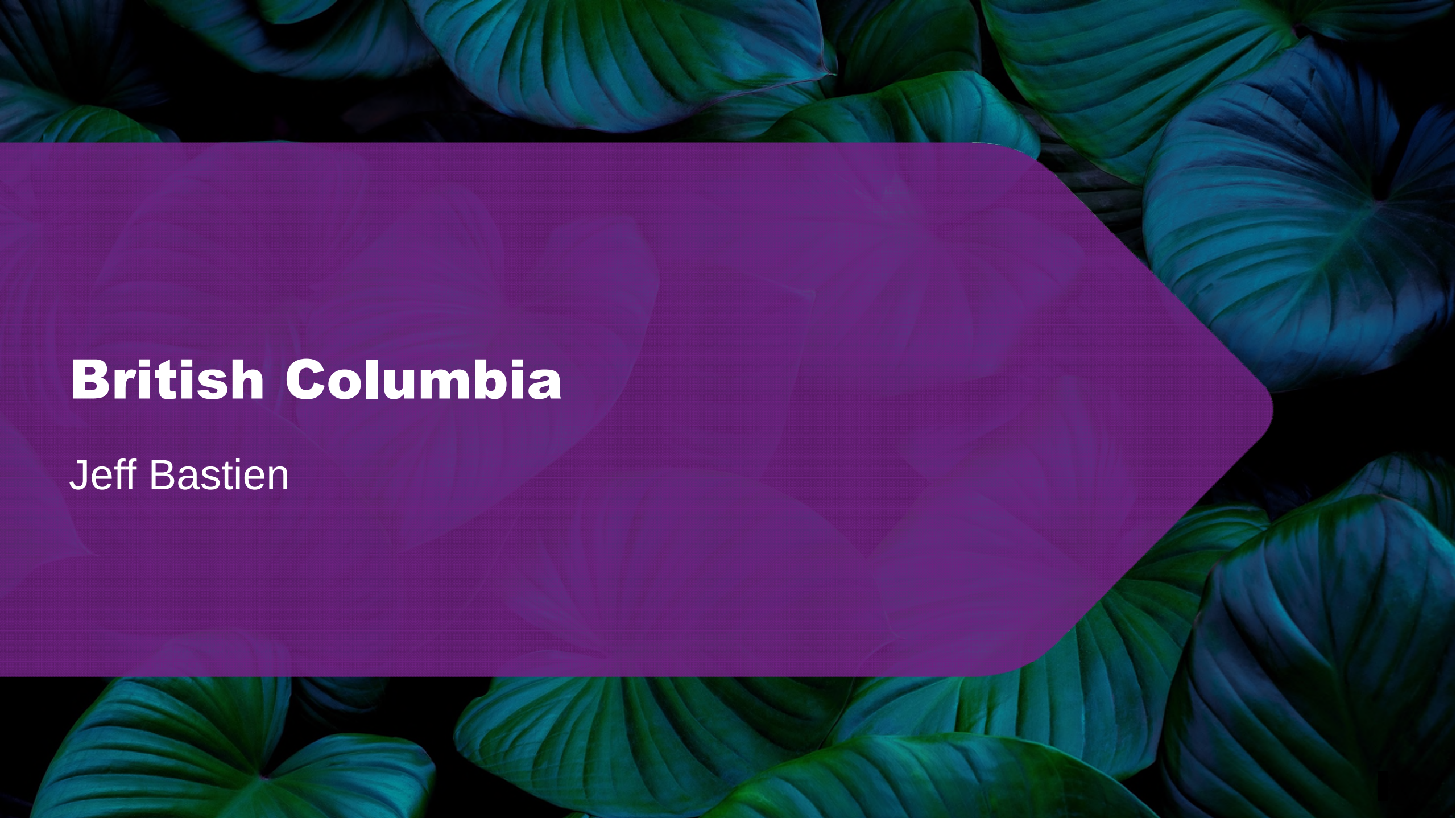


# British Columbia

Jeff Bastien

# British Columbia

## Overview

- Two interesting cases:
  - Inconsistent findings of “employment” status by Tax Court of Canada and Employment Standards Tribunal
  - Deduction of CERB payments from wrongful dismissal damage awards?

- Quick 2022 legislative update

- On the horizon for 2023

# British Columbia

## *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147

- Overarching issue: whether three individuals were employees or independent contractors

- Background:
  - Status of three taxi drivers as employees vs. independent contractors was in dispute under the *Employment Standards Act*
  - Meanwhile, the Tax Court of Canada issued a decision that one of the taxi drivers was not an employee for tax purposes.
  - The Employment Standards Tribunal concluded the taxi drivers were employees for the purposes of the ESA
  - The taxi companies sought to quash the Tribunal's decision through judicial review and argued that:
    - the taxi drivers' status as independent contractors was *res judicata* because it had already been determined by the Tax Court, so the Tribunal should have been estopped from finding that the drivers were employees; and
    - the Tribunal's interpretation of "employee" was overly expansive

# British Columbia

## *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147

BCCA decision: appeal dismissed

1. The Tribunal was not bound by the Tax Court decision
   - The meaning of “employee” must always be assessed in the context of the particular statutory scheme
   - There is a well-supported distinction between the ESA (a remedial statute with a policy focus on protecting employees) and the statutes under the jurisdiction of the Tax Court

# British Columbia

## *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147

BCCA decision: appeal dismissed

2. The Tribunal did not apply an erroneous interpretation of the ESA

- Rejected appellants' argument that there should be a concise, consistent, fixed legal test of what constitutes an employee
- What constitutes an employee under the ESA is necessarily framed by the statutory definitions in the ESA, the ESA itself and relevant jurisprudence which directs that there is no single conclusive test which can be universally applied.
- The Tribunal properly considered factors including those identified in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59, which the SCC indicated are relevant to answering the central question (from a common law perspective) of whether the person is performing services as a person in business on their own account:
    - Level of control and direction
    - Who provides equipment
    - Whether the worker hires others
    - Degree of financial risk to the worker
    - Degree of responsibility for investment and management
    - Worker's opportunity for profit
- The common law provides interpretive context to the ESA, but it is not necessary to interpret the ESA in a manner that mirrors the common law

# British Columbia

## *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147

Takeaways:

- No single precise legal test to determine “employee” status
- Common law factors (e.g. *Sagaz*) provide interpretive context for ESA
- A decision that a person is an employee or an independent contractor by one court or adjudicator does not mean that the same decision will be made by other courts or adjudicators in other contexts or applying different statutes

# British Columbia

## *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398

- Issue: should CERB benefit payments be deducted from wrongful dismissal damage awards?

- Facts:
  - Employee was placed on temporary layoff due to COVID-19
  - Employee received $10,000 under the CERB program
  - Temporary layoff became a deemed termination under the *Employment Standards Act* when employee was not recalled
  - At trial:
    - Employee was awarded $25,000 in lieu of 5 months' notice, but this was subject to a $10,000 deduction given the CERB payments received

# British Columbia

## *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398

- A “compensating-advantage” problem arises when a plaintiff receives a benefit that would over-compensate them beyond their actual loss, and the benefit is sufficiently connected to the employer’s breach of the employment contract.
- When should a compensating-advantage benefit reduce the damages otherwise payable by a defendant?
  - *IBM Canada Ltd. v. Waterman*, 2013 SCC 70 provides clear analytical framework
  - Generally, damages should put plaintiff in economic position they would have been in if the contract was performed.
  - Deductibility of the benefit depends on justice, reasonableness and public policy. Recognized exceptions where compensating-advantage benefits are not deductible:
    - Charitable gifts
    - Private insurance benefits

# British Columbia

## *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398

- BC Court of Appeal allowed the appeal
  - There was a compensating-advantage issue in this case – the benefits were clearly intended to be an indemnity for the sort of loss resulting from the employer's breach
  - BUT, a weighing of the broader policy considerations favoured a conclusion of non-deductibility:

    - If a windfall is to result from the CERB payment, it "seems to better reflect the intention of Parliament that it go to the worker" instead of employer
    - CERB payments are a matter between the employee and appropriate authority and do not concern the employer
    - Desirability of equal treatment for those in similar situation favours not deducting CERB
    - CERB benefits were an emergency measure to mitigate harm during great uncertainty and many people lost their livelihoods – it is out of step with reality to conclude that the combination of CERB benefits and damage awards leaves individuals "better off" after their employment was terminated.

# British Columbia

## Legislative Update - 2022

- Paid sick leave introduced under the *Employment Standards Act*
  - 5 paid sick days and 3 unpaid sick days per calendar year

- Note: federally-regulated workers now entitled to up to 10 days of paid sick leave under the *Canada Labour Code*

- Bill 10 - Changes to union certification requirements under the *Labour Relations Code*
  - Introduction of single-step certification if union has signed membership cards from at least 55% of the proposed bargaining unit
  - Unions can request secret ballot representation vote before determination of appropriate bargaining unit

# British Columbia

## On the horizon for 2023

- Bill 41: Certain amendments to the *Workers Compensation Act* expected to come into force in 2023:
  - Employers that regularly employ 20+ workers are required to maintain employment of workers with workplace injuries for at least 2 years post-injury (to come into force by regulation, at date to be determined)
  - Establishment of fair practices commissioner to address complaints regarding alleged unfairness in dealings with the Board and make recommendations to the Board (May 1, 2023)
  - Allowing workers and employers to request a review by independent health professionals at the WCAT (April 3, 2023)
  - WorkSafeBC to pay interest on delayed benefit payments following review or appeal where benefits unpaid for 180 days (April 3, 2023)

# Alberta

Adrian Elmslie

# Human rights

## Significant increases in General Damage Awards

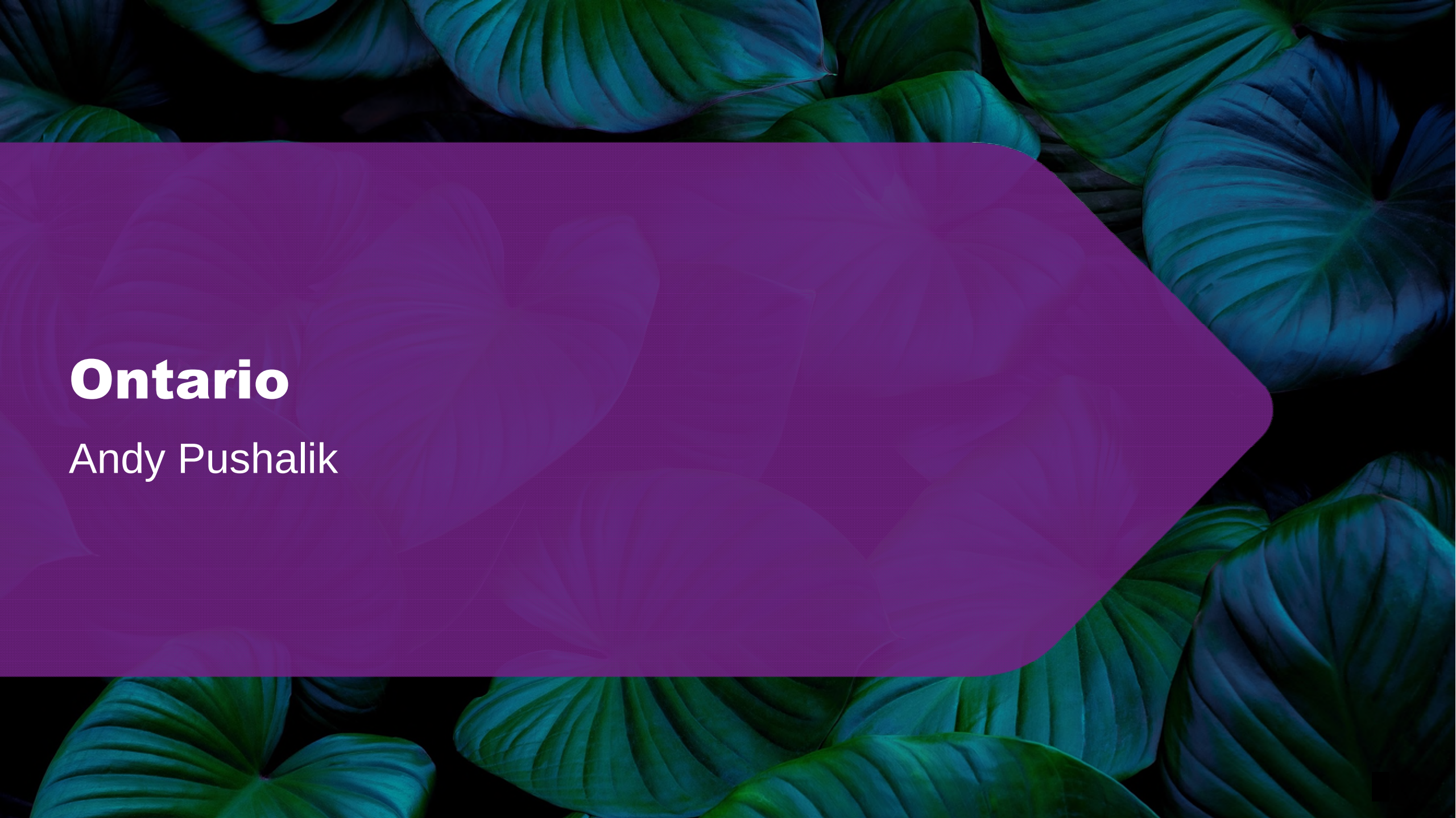
- 2022 saw a significant increase in general damage awards by the Alberta Human Rights Tribunal
- Exemplified by 3 cases:
    - Yaschuk v Emerson Electric Canada Limited, 2022 AHRC 62
        - Sexual harassment / improper employer investigation - $50,000 award
    - Euchner v EZ Motors Ltd., 2022 AHRC 111
        - Poisoned work environment (racial slur used in workplace / belittling of Complainant's use of medications) / improper employer investigation - $50,000 award
    - McCharles v Jaco Line Contractors Ltd., 2022 AHRC 115
        - Sexual harassment - $50,000

# Independent contractor vs. employee

- In 2022 the Alberta Court of Appeal provided guidance on how it will approach the employee vs. independent contractor question in Gerling v Camrose Regional Exhibition & Agricultural Society, 2022 ABCA 210
- Key Findings:
  - ❑ The parties' clear understanding of their legal relationship at the time the agreement is signed should "be accorded significant weight particularly when the agreement is in plain language, contains no fine print and is not, on its face, oppressive, unfair or difficult to understand.
  - ❑ Wider latitude for the parties to determine the nature of their relationship if the determination does not affect the interests of third parties.
  - ❑ Greater scrutiny and caution where the nature of the relationship will affect third party interests.
  - ❑ Will still consider whether the contractor "performed his services as a person in business on his own account".

# Changes to the Provincial Court

- Provincial Court of Alberta will be officially called the “Alberta Court of Justice,” effective April 1, 2023.
- Government plans to introduce the *Justice Statutes Amendment Act* will amend the jurisdiction of the Provincial Court by increasing the civil claims limit for the provincial court.
- This is the first change in the court’s jurisdictional limits since 2014 when the limit was raised from $25,000 to $50,000.
- If passed, the new changes will increase the jurisdictional limits of the court to from $50,000 to $200,000.



# Ontario

Andy Pushalik

# Unenforceable termination language anywhere invalidates termination clause

## *Henderson v. Slavkin et al.*, 2022 ONSC 2964

- Wrongful dismissal case brought by receptionist with 30 years of service.
- In addition to challenging the termination provision, employee also challenged the Conflict of Interest clause and Confidentiality clause.
- In both clauses, the contract stated that non-compliance would result in termination for cause.
- Court found that termination clause was enforceable.
- Court found that Conflict of Interest clause was unenforceable:
  - Clause was ambiguous/overly broad.
- Court found that Confidentiality clause as unenforceable:
  - Court said that it was not clear in what circumstances the disclosure of confidential information could occur without immediate termination for cause without notice.
  - Court noted that there could be a situation where confidential information may have been inadvertently disclosed in a situation where it is not wilful and/or where it is a trivial breach.

# Unenforceable termination language anywhere invalidates termination clause

## *Henderson v. Slavkin et al*., 2022 ONSC 2964

- Key Takeaways:
  - Unenforceable termination language anywhere in an employment contract can be used to invalidate an otherwise enforceable termination provision.
  - Employers need to be careful when crafting employment contracts, policies and compensation agreements.

# Two-tiered cause

## *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310

- Employer dismissed manager with 30-years of service for cause after he slapped a female colleague on the buttocks.
- Conduct occurred 8 days after employer had conducted workplace harassment training which specifically introduced a zero-tolerance policy for harassment, including sexual advances and touching.
- Trial judge upheld cause; employee appealed.
- On appeal, employee argued that the slap was an accident.
- Court of Appeal upheld trial judge's finding that employee's conduct constituted just cause at common law BUT Court of Appeal granted the employee's appeal that his conduct did not constitute wilful misconduct and therefore he was entitled to his minimum statutory termination entitlements.

# Two-tiered cause

## *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310

- Key Takeaways:
  - Test for Just Cause: Court stated that core question on a case of just cause dismissal is “whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship”
  - Test for disentitlement of statutory termination entitlements is higher than just cause for dismissal at common law.
    - For an employee to lose their statutory termination entitlements under the “wilful misconduct” standard, the employee must do something deliberately, knowing they are doing something wrong.
    - “Being bad on purpose”

# *Working for Workers Act, 2022*

- Key Elements:
  - Creates Digital Platform Workers Rights Act, 2022.
  - Written policy about electronic monitoring.
  - Amends Occupational Health and Safety Act
    - Limitations period for prosecutions extended from 1 to 2 years
    - Maximum fines increased
    - Employers to provide a naloxone kit in workplaces where opioid overdoses are a potential hazard

# Pay transparency on the horizon?

- New York and California passed pay transparency laws in 2022.
  - Covered employers required to list pay ranges in job postings.
  - In California, larger employers must submit annual pay data reports to California Civil Rights Division.
- Colorado, Washington, Maryland and Connecticut previously passed similar laws.
- UK has launched a pilot scheme requires participating employers to list salaries on job advertisements and to refrain from asking about salary history during the recruitment process.

# Pay transparency on the horizon?

- Ontario passed *Pay Transparency Act, 2018* in April 2018.
- Law was to become effective January 1, 2019.
- Law was subsequently amended to become effective “on a date proclaimed by the Lieutenant Governor” – the law has never come into force.
- If law had come into effect, Ontario employers would be required to comply with the following obligations:
  - a prohibition on employers intimidating, dismissing or otherwise penalizing employees for disclosing their compensation rates to colleagues or inquiring with their employers about compensation;
  - a requirement for employers to include salary rates or ranges in public job postings;
  - a prohibition on employers asking job applicants about their compensation from previous employment; and
  - a requirement for employers with 100 or more employees to track and report on compensation gaps based on gender in pay transparency reports, and to publicly post the reports.

# Québec

Charles-Antoine Lessard-Tremblay

# Landmark decisions rendered in 2022 in Quebec

- Caisse populaire Desjardins de Saint-Raymond — Sainte-Catherine v. Girard, 2022 QCCA 1171
  - ❖Impact of disability insurance benefits on the calculation of the indemnity in lieu of notice

- Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec, 2022 QCCA 180 (Application for leave to appeal granted, 2022 CanLII 88686 (SCC))
  - ❖Supreme Court of Canada to rule on the right of first-level managers to unionize

# ***Caisse populaire Desjardins de Saint-Raymond — Sainte-Catherine v. Girard*, 2022 QCCA 1171**

## Facts

- Ms. Girard had 30 years of seniority with Desjardins Group in a managerial position when her employer met with her and asked her to leave (without formally dismissing her) because of her authoritarian management style and because he no longer had confidence in her ability to turn things around.
- Ms. Girard fell into depression and received disability benefits under her group insurance plan for several months.
- About a year after the beginning of her disability period, the employer proceeded with her formal dismissal.
- Following her dismissal, Ms. Girard initiated proceedings in order to obtain:
    - An indemnity in lieu of notice of termination;
    - Payment for moral damages;
    - Compensation for the loss of certain benefits related to her employment; and
    - Reimbursement of certain costs related to her reintegration into the labour market.

# ***Caisse populaire Desjardins de Saint-Raymond — Sainte-Catherine v. Girard*, 2022 QCCA 1171**

## Facts (*Cont.*)

- At trial, the Superior Court ordered the employer to pay Ms. Girard $213,404.17 in severance pay to compensate her for a 24-month notice of termination, non-monetary damages and certain costs and benefits related to her employment.
- Ms. Girard, in her cross-appeal, argued that the trial judge erred in deducting a portion of the disability benefits paid by the insurer from the compensation in lieu of notice.
- The employer argued that the trial judge erred in ordering it to pay non-pecuniary damages in connection with the meeting notifying Ms. Girard that she had to leave, since this event constitutes an industrial accident within the meaning of an *Act respecting industrial accidents and occupational diseases* (AIAOD).

# ***Caisse populaire Desjardins de Saint-Raymond — Sainte-Catherine v. Girard*, 2022 QCCA 1171**

## Decision - Disability benefits received during the disability period

- The Court of Appeal reiterated that, under article 1608 of the *Civil Code of Québec* (CCQ), the trial judge should not have deducted the disability benefits from the compensation in lieu of notice.
- The Court confirmed that article 1608 of the CCQ applies when disability benefits are paid by an insurer to an employee, regardless of whether the cost of insurance premiums is paid in whole or in part by the employer.
  - ❖The employer's contribution (as part of an employee's working conditions) must not be confused with the disability benefits paid by an insurer.
  - ❖Consequently, the employer's obligation to pay damages is not mitigated or modified by the fact that the employee received benefits from a third-party insurer during the notice period.
- However, the Court of Appeal specified that it would be different if the employer did not pay the insurance premiums, but paid the wages or part of the wages in the event of disability, since in such a situation, the employee would not receive a benefit from a third party within the meaning of article 1608 of the CCQ.

# ***Caisse populaire Desjardins de Saint-Raymond — Sainte-Catherine v. Girard*, 2022 QCCA 1171**

## Analysis

- According to the Quebec Court of Appeal, disability benefits received by an employee following termination of employment are not to be deducted from the indemnity in lieu of reasonable notice, regardless of who contributes to the plan and in what proportion.

- Surprising conclusion given the approach taken by Quebec courts since the Supreme Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, where it was held that:
  - ❖ Absent an intention by the parties to provide otherwise, an employee who is dismissed while not working but receiving disability benefits and an employee who is dismissed while working should be treated equally.
  - ❖ Therefore, the Supreme Court held that deducting disability benefits ensures that all affected employees receive equal damages consisting of the salary the employee would have earned had the employee worked during the notice period.

- It appears that article 1608 of the CCQ distinguishes Quebec from the rest of Canada on this issue.

# ***Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (Application for leave to appeal granted, 2022 CanLII 88686 (SCC))**

## Facts - Right of first-level managers to unionize

- The Société des casinos du Québec inc. (the Employer) is a Crown corporation with five or more levels of management.

- In 2009, the Association des cadres de la Société des casinos du Québec (the Association) filed a request for certification to represent certain “first-level” executives, namely operations supervisors (SDO).

- The Employer opposed this request on the basis that:
  - ❖ Executives are excluded from the concept of "employee" provided for in the *Labour Code* (the Code); and
  - ❖ Giving such status to these individuals would place them in a conflict of interest.

# ***Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (Application for leave to appeal granted, 2022 CanLII 88686 (SCC))**

## Facts (*Cont.*)

- The Administrative Labour Tribunal (the TAT) declared constitutionally ineffective the exclusion of executives from the application of the Code, on the grounds that this exclusion infringes on their freedom of association guaranteed by (i) paragraph 2(d) of the *Canadian Charter of Rights and Freedoms* (the Canadian Charter); and (ii) by section 3 of the *Charter of Human Rights and Freedoms* (the Québec Charter).

- The Superior Court allowed the appeal for judicial review and declared "*applicable, valid and operative*" the exclusion of executives from the concept of "*employee*" provided for in the Code.

- In turn, the Association appealed this last decision before the Quebec Court of Appeal.

# ***Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (Application for leave to appeal granted, 2022 CanLII 88686 (SCC))**

## Decision

- In such context, the Court **first** had to determine whether the definition of "*employee*" provided for in the Code, which automatically excludes any person holding a management position, violates the freedom of association guaranteed to members of the Association by the Charters.

- **If so**, the Court of Appeal **then** had to decide whether this infringement is justified on the basis of the test developed in the *R. v. Oakes* decision.
  - ❖In *Oakes,* the Supreme Court of Canada developed a test to determine in what circumstances an infringement of a fundamental right may be justified under the Canadian and Quebec Charters.
  - ❖ According to this test, the restriction must first be motivated by "*an objective related to concerns which are pressing and substantial in a free and democratic society*," and secondly, it must be shown "*that the means chosen are reasonable and demonstrably justified*."

# ***Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (Application for leave to appeal granted, 2022 CanLII 88686 (SCC))**

## Decision (*Cont.*)

- Following its analysis, the Court welcomed the appeal and restored the TAT decision declaring inoperative, in the case of the operation supervisors, the paragraph of the Code which excludes executives from the definition of "employee", given that, in their case, the provision constituted a substantial and unjustified hindrance to their freedom of association.

- As a result of this decision, operations supervisors members of the Association will be able to benefit from certain rights protected by freedom of association, in particular the right to collectively negotiate their working conditions, to go on strike and to have access to a tribunal specializing in labour law.

- Given the potential effect of its decision on the Québec labour relations regime for executives in general, the Court suspended for a period of 12 months the inoperative nature of the exclusion of executives from the application of the Code.

# ***Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (Application for leave to appeal granted, 2022 CanLII 88686 (SCC))**

## Analysis

- The repercussions of this judgment are crucial and go beyond the situation of the litigants since it decides a constitutional question that has been the subject of a long-standing debate.

- As expected, the case was appealed to the Supreme Court of Canada, which agreed to hear the case. The Supreme Court of Canada's decision will settle this long-debated constitutional issue for good, and could have the effect of transforming the Québec labour relations regime.

# To Watch in 2023

## Obligations under the *Charter of the French Language*

Employers with employees in Québec have until June 1, 2023 to have application forms, documents relating to conditions of employment and training documents that existed before June 1, 2022, translated in French if they were not already available in French.

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