



# Newsletter



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## Application of *Human Rights Code* to Federal Undertakings

The issue of whether the Ontario *Human Rights Code* applies to federal undertakings, such as interprovincial trucking and freight forwarding was recently looked at in *Peterson v. Ceva Logistics ULC*, 2016 HRTO 698 (CanLII).

In the Fernandes Hearn LLP July 2016 newsletter we reviewed the decision of the Supreme Court of Canada in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, where the Court held that employees governed by federal legislation, namely the *Canada Labour Code*, could not be terminated absent just cause. The decision has wide application in the transportation field, in trucking, aviation and rail. Trucking companies that operate outside the borders of one province are subject to the *Canada Labour Code* and this decision. On the other hand, for industries subject only to provincial regulation, an employee can be terminated provided the employee is given notice and/or paid out for the notice time period.

Recently, in the Fernandes Hearn LLP October 2016 newsletter we reviewed an arbitrator's decision that held that the TTC had a duty to take proactive steps to protect its workers from harassment by the public through a Twitter account that the TTC controlled. In *Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re* 2016 CarswellOnt 10550. During the course of argument, reference was made to a number of provincial statutes, including the *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1 (the "OHS"), and the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "HRC").

For trucking companies, rail companies, aviation companies and other industries subject to federal regulation, it is important to keep in mind that different sets of rules and legislation may apply.

In *Peterson v. Ceva Logistics ULC*, 2016 HRTO 698 (CanLII) the employee brought an application under section 34 of the Ontario *Human Rights*



## FIRM AND INDUSTRY NEWS

- **Rui Fernandes** will be speaking at the annual meeting of the *Canadian Board of Marine Underwriters* on “Legal Update/Recent Cases” in Toronto on November 29<sup>th</sup>.
- The **CBMU** Fall Conference will be in Toronto on November 29<sup>th</sup>. The **Transportation Club of Toronto** dinner will be on December 1 in Toronto and the **Grunt Club** dinner will be on December 2nd in Montreal.
- **Kim Stoll** will be speaking at the Ontario Bar Association Insurance Law Seminar *Brokers, Claims Examiners, Lawyers and Experts – How to Work Cooperatively When Managing Claims in Local and International Settings* on Cross-Border Transportation Casualty Claims on in Toronto on November 30, 2016.
- **Fernandes Hearn LLP** has been recommended as a TOP-TIER FIRM in Canada in Transportation Law on the *Legal Leading 500*. **Rui Fernandes** and **Gordon Hearn** have been listed in elite “Leading Lawyers” list in the *Legal 500 Canada 2017’s* guide to outstanding lawyers nationwide.

## MARK THE DATE:

**Fernandes Hearn LLP 17<sup>th</sup> Annual Maritime and Transportation Conference**

**Date:** Thursday January 19<sup>th</sup>, 2017

**Location:** The Advocates’ Society Education Centre  
250 Yonge Street, Suite 2700 Toronto

**Cost:** \$65.00 - Includes light lunch and materials on USB Drive

**Registration Soon.**



*Code* seeking compensation and other relief for infringement of her rights. The employer filed evidence that it operated a business in Canada providing contract logistics, freight forwarding and interprovincial trucking services to clients in Canada and elsewhere throughout the world. It submitted that its labour relations were governed by the *Canada Labour Code*.

The Adjudicator held that the *Human Rights Code* only applies to matters that fall within provincial jurisdiction and does not apply to federally regulated businesses. Pursuant to subsection 92(10)(a) of the *Constitution Act, 1867*, (U.K.), 30 & 31 Victoria, c. 3, transportation works and undertakings that extend beyond the limits of the province are within federal jurisdiction. The Adjudicator

dismissed the employee's application as the provincial Tribunal had no jurisdiction over a federally regulated business. The Adjudicator noted that the Canadian Human Rights Commission has the power to deal with human rights that fall under federal jurisdiction. The Adjudicator followed a prior decision of the Tribunal in *Henry v. Ceva Logistics Inc.* 2012 HRTO 321 (CanLII).

*Rui M. Fernandes*

Follow *Rui M. Fernandes* on Twitter @RuiMFernandes and on LinkedIn. See also his blog at <http://transportlaw.blogspot.ca>



## 2. Electronic Logging Devices: Coming Soon to a Federally-Regulated Truck Near You!

Transport Canada has announced that it will be proposing amendments to the federal *Commercial Vehicle Drivers Hours of Service Regulations*, SOR/2005-313 (the "Regulations"). The proposed amendments are expected to be finalized in 2017, with a compliance date of sometime in 2018 or 2019. The new Regulations will require federally regulated motor carriers and commercial vehicle drivers to use devices known as "electronic logging devices" (or "ELDs") for logging required information in the course of their duties.

In simple terms, ELDs are devices that are integrated with a commercial vehicle's on-board electronic systems. ELDs are used to monitor and track driver compliance with existing regulations, concerning drivers' permitted hours of service. According to Transport Canada, ELDs can increase the accuracy of tracking a driver's hours on the road, thereby increasing safety and decreasing fatigue related accidents. ELDs can also reduce the administrative burden and driver time associated with filling out paper logbooks.

The existing regulations require commercial drivers to maintain paper logbooks to capture certain information, and then submit it to their employers periodically. The Regulations currently allow for the use of ELDs, but do not require it.

The new Regulations will bring Canada's federal regime into line with a similar incoming regime in the United States. On December 16, 2015, the United States Department of Transportation issued a "final rule" in which it also mandated the use of ELDs for all drivers currently required to maintain a logbook. The compliance date in the United States is December 18, 2017.

Transport Canada intends to publish draft amendments in the Canada Gazette early in 2017. There will then be a 60-day consultation period during which members of the public may provide feedback. The final draft of the

amendments will be released thereafter, with a compliance date in Canada expected to be sometime in 2018 or 2019.

ELDs will need to meet new technical specifications currently being finalized by a working group under the aegis of the Canadian Council of Motor Transport Administrators. The technical specifications will be consistent with the corresponding requirements for the United States. Carriers currently using ELD technology that does not meet the new specifications are expected to be given additional time to comply with the new Regulations.

The new federal regulations will cover commercial drivers who cross provincial or national boundaries. However, Canada's federal and provincial transportation ministers have said that they will create a task force to harmonize truck-related regulations "wherever possible". Thus, it is expected that drivers who currently must maintain logbooks but are subject only to provincial regulations (i.e. intra-provincial drivers and carriers) will also be required to use ELDs.

Transport Canada completed a cost-benefit analysis on the above proposal in July 2015, which demonstrated roughly a 2:1 benefit to cost ratio. The analysis included the following information, from various sources:

- GDP from Canadian transportation services totals about \$58 billion, or about 3.7% of total GDP
- 83.2% of shipments transported by Canadian trucks is domestic, with the remainder being cross-border into the U.S. or Mexico
- the total Canadian trucking industry includes about 56,800 firms
- small trucking firms (100 or fewer workers) represent 98.7% of all carriers



- there are about 750,000 heavy trucks (over 4500kg) operating in Canada
- the trucking fleet will grow at an annual rate of 3.1% over the next 5 years
- there are currently 170,000 federally-regulated trucks operating in Canada
- 30% of the ramp-up for the mandate will be completed in 2016, and 70% in 2017, due to the U.S. compliance deadline
- on average, the proposed regulation would cost \$1,193 per year for a small carrier, and \$46,685 for a large carrier
- entry-level ELDs range from \$300 to \$900 per unit
- it is likely that mobile ELD applications could push unit costs down further
- associated installation costs are \$220 per device and activation fees \$15 per unit
- driver time savings from maintaining paper log books is estimated to be from 4.5 to 23 minutes per day, and time spent forwarding logs by drivers to their employers will be reduced by 5 minutes, 25 time per year
- in total, drivers are expected to save about 20 hours per year on logbook maintenance
- there is consensus that fatigue is more likely responsible for about 15% to 20% of vehicle crashes

Check back for further developments in early 2017!

*James Manson*



### 3. Trucker requirement to wear protective headwear at Montreal Port survives religious challenge

A recent decision of the *Quebec Superior Court* considered the legality of the 2005 requirement of the respondent Montreal Port terminal that truckers on site must wear a hard hat while outside of their vehicles (\*1). The challenge was brought by three Sikh applicants who sought declaratory relief against the requirement on the basis that wearing a protective helmet covering their turbans ran contrary to their religious beliefs, and therefore violated their protected rights of freedom of religion.

Safety requirements at the respondent terminals at the Montreal Port were reinforced in 2004 following a serious accident involving a worker and also the amendment in the same year of the Criminal Code to include s. 217 (1), that provides, "Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task" (\*2).

In 2005, a new requirement was imposed that truckers picking up or dropping off containers at the port must wear a hard hat while outside of their vehicle. Between 2005 and 2008, in response to objections by Sikh truckers to the new requirements, an accommodation was provided to the affected drivers whereby they would not leave their vehicles during the loading and unloading processes, thereby obviating the need to wear a hard hat. This caused significant delays to operations and proved to be unsustainable. When this accommodation was discontinued and Sikh drivers were required to leave their vehicles and wear a hard hat that would cover their turban, the applicants brought the issue before the Quebec Superior Court.

#### *Federal Competence*

The court first had to determine whether the dispute was subject to the federal laws of

Canada by reason of the subject matter. Prévost J. for the court held that activities of the truckers, which consisted of loading, unloading and handling shipping containers, were directly related to the interprovincial and international shipping of goods by sea and hence federal law was applicable to this dispute. The court however quickly set aside the applicants' argument that the Canadian Charter of Rights and Freedoms ("Canadian Charter") (\*3) was of application given that neither the federal nor the provincial government was party to the proceedings, contrary to the scope of application set out at s.32 (1) of the Canadian Charter (\*3).

As a further preliminary measure, the court had to determine whether or not the applicants could assert rights under the Quebec Charter of Human Rights and Freedoms ("Quebec Charter") (\*4) given that the domain fell within the field of federal competence. Pursuant to a two stage analysis endorsed by the Supreme Court (\*5), Prévost J. held that the application of Quebec Charter provisions to the determination of the legality of the requirement to wear a hard hat would encroach into a field of federal competence; however, the encroachment was held to be minor such that federal law should not be applied solely to the exclusion of the Quebec Charter.

The court went on to conduct an analysis of whether the policies of the terminals violated either the Quebec Charter or the Canadian Human Rights Act.

#### *Legal Framework*

Section 5 of the *Canadian Human Rights Act* provides that "It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public **(a)** to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or **(b)** to differentiate adversely in relation to any individual, on a prohibited ground of discrimination".

Section 10 of the Quebec Charter states that “Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Although the requirement to wear a hard hat was at first blush discriminatory *vis à vis* Sikhs, the court found that the policy was justified as the prescribed behaviour was rationally related to the work performed by the applicants, that the standard was imposed in good faith and that it was reasonably necessary to protect safety of workers at the terminals. The restriction was also not economically prohibitive for the applicants.

#### *Breach of Applicants’ Religious Freedom*

Mr. Justice Prevoist went on to consider whether the freedom of religion of the applicants had been violated under the federal and/or provincial legislation. The applicants did sincerely adhere to the Sikh faith, and their observance of religious practices was hindered by the requirement to wear a hard hat over their turbans.

This being said, the outcome of the case hinged on whether the court determined that the interference with the applicants’ freedom of religion was justified. The court held that this was the case, applying the two step analysis set out in the case law. Firstly, the judge held that the safety of workers was a sufficiently meritorious objective and the prescription of a hard hat was within the range of reasonable measures to address the legitimate concern for worker safety. Secondly, the measure was proportionate to the legitimate objective being pursued. The respondents had initially made efforts to employ accommodation for the applicants; however, it became apparent that these were unsustainable and hence justifiably discontinued. By way of conclusion, the judge highlighted that the benefits of a uniform policy ensuring protection for workers at the port outweighed the prejudice suffered by the applicants either by deviating from their religious ideals momentarily by covering their turbans or by their not servicing the respondent terminals.

*Mark Glynn*

#### *Endnotes*

(\*1) *Singh c. Montréal Gateway Terminals Partnership (CP Ships Ltd./Navigation CP Itée)* 2016 QCCS 4521

(\*2) *Criminal Code* (R.S.C., 1985, c. C-46)

(\*3) *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, Part I: *Canadian Charter of Rights and Freedoms*

(\*4) *Charter of Human Rights and Freedoms*, CQLR c C-12

(\*5) *Québec (P.G.) c. COPA*, 2010 SCC 39



#### 4. New French Language Obligations regarding Commercial Signage for Companies that Carry on Business in Quebec Become Law

This serves as a brief update regarding the amendment of the *Regulation respecting the language of commerce and business* that was discussed in the Fernandes Hearn LLP newsletter in May 2016. The draft regulation published on May 4, 2016 came into force on November 24, 2016 with no changes. The purpose of the amendments is to ensure that there is a “sufficient presence of French” when a trade-mark in a language other than French is displayed on a building in Quebec.

Previously, there was an exemption in place that allowed a business to display a non-French trade-mark as long as it was registered under the Federal *Trade-Marks Act*. The amendment removes this exception by making it a requirement that those businesses include a French description along with their non-French trade-mark. There is no need to translate an existing trade-mark into French or to amend a trade-mark to add French words to the registration. However, the signage must have a French description added which can consist of:

- a generic term or a description of the products or services concerned;
- a slogan; or
- any other term or indication with respect to the products or services to the benefit of consumers or persons frequenting the site.

The French description must be permanently visible and designed, lighted and situated so as to make it easy to read, at the same time and at all times that the trade-mark is legible. However, the French wording does not need to be in the same place, number, material or size as the trade-mark.

Companies who carry on business in Quebec should be aware that they are required, by November 24 2019, to add a French description to any signs appearing on their premises that currently show only a non-French trade-mark. Any new signs or replacements to existing signs must comply with the amended regulations immediately upon their installation, unless they are already used elsewhere in Quebec as part of a franchise system or otherwise.

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## 5. CFIA: Administrative Monetary Penalties (AMPs) Policy Engagement

The Canadian Food Inspection Agency (the "CFIA") is requesting feedback by December 18, 2016 from Canadians with respect to its draft Administrative Monetary Penalties ("AMPs") Policy (the "Policy") that will cover the manner that CFIA will use AMPs to address non-compliance with food, plant and animal health, and meat inspection standards and regulations. It should be noted that the CFIA has advised that under the Safe food for Canadians Act, AMPs will be expanded across the food sector when the associated new regulations come into force. (\*1)

### *CFIA Enforcement Tools*

Currently, the CFIA may issue AMPs with respect to non-compliance with federal legislation respecting meat inspection, plant health and animal health. AMPs are one of the many enforcement tools available to the CFIA and are normally applied when the CFIA's letters of non-compliance are insufficient but prosecution is not yet warranted. AMPs may or may not include a financial penalty. (\*2)

The CFIA applies a risk-based approach to verify that domestically produced and imported products meet Canadian standards. Compliance and enforcement actions occur all along the supply chain. (\*3) Such activities can occur within the countries of Canada's trading partners, at/near the border, domestically in processing facilities, at points of retail sale/distribution or at food service locations. (\*4)

The CFIA has a number of tools that it can use to respond to non-compliance, including: refusing to let shipments into the country; issuing notices of violation with a warning or penalty; suspending/cancelling licenses, registrations, or permits for federally registered establishments; recommending to the Public Prosecution Service of Canada that violators be prosecuted; seizing and detaining shipments; and suspending or cancelling organic certifications. (\*5)

It is within the CFIA's discretion to select the appropriate response to non-compliance based on the gravity of the non-compliance. The CFIA considers the potential or actual harm to human or animal health, marketplace deception or product misrepresentation, the compliance history of the party and the intent of the party to commit a contravention. (\*6)

### *Administrative Monetary Penalties*

AMPs are intended to discourage non-compliance by creating "financial disincentives" that will result in behaviour changes and improved compliance. (\*7) AMPs can range anywhere between \$500 and \$15,000.

Some examples of provisions to which AMPs apply are:

(a) under the *Health of Animals Act* and regulations: failing to notify a veterinary inspector of the suspicion of a reportable disease or a toxic substance; exporting an animal without the prescribed certificate

(b) under the *Plant Protection Act* and regulations: failing to notify the Minister of the existence of a thing that the person suspects to be a pest or to provide a specimen of a suspected pest; failing to comply with the conditions of a Movement Certificate

(c) under the *Meat Inspection Act* and regulations: exporting or importing a meat product without meeting the legislative requirements

Currently, those issued a notice of violation with penalty have three options available to them: (1) pay the penalty; (2) request to enter into a compliance agreement with the CFIA; or (3) seek recourse by requesting a review of the facts of the violation before the Minister or the Canada Agricultural Review Tribunal. (\*8)

### *The Draft Policy*

The draft Policy aims to outline how the CFIA will use AMPs to address non-compliance

consistently and fairly across Canada by providing clear guidelines on their application. The following are the key elements of the Policy:

- (1) AMPs are to be applied objectively, consistently and on an evidence-driven basis.
- (2) AMPs should be proportionate with the non-compliance and not simply a “cost of doing business.” Consideration is to be given to the proportionality of the warning or penalty amount to the contravention and its likelihood to discourage non-compliance.
- (3) CFIA is to use a risk-based approach when determining which enforcement tool should be used. This includes consideration of health, environment, and economic risks.
- (4) AMPs and reviews of AMPs are to be processed according to established time standards.
- (5) Information regarding the issuance of AMPs is to be made available to the public in an effort to be transparent.
- (6) The provisions subject to AMPs are to be clear and unambiguous.
- (7) Classification levels of AMPs violations (minor, serious and very serious) are to be assigned based on the level of risk and severity of the consequences.
- (8) Regulated parties are to be made aware of the elements of the AMPs regime and the available recourse options.

The Policy is to be reviewed at least once every 5 years to evaluate its success in achieving its stated objectives. (\*9)

#### *How to Participate*

After reading the draft Policy, there are three ways to participate in the discussion:

1. Complete the CFIA’s online questionnaire which can be found here: <http://inspection.sondages-surveys.ca/surveys/CFIA-ACIA/amps-consult-2/?l=en>
2. Request an electronic copy of the questionnaire from the CFIA by emailing: [CFIA-Modernisation-ACIA@inspection.gc.ca](mailto:CFIA-Modernisation-ACIA@inspection.gc.ca) and then return the completed questionnaire to that email address.

3. Request an electronic copy of the questionnaire from the CFIA by emailing: [CFIA-Modernisation-ACIA@inspection.gc.ca](mailto:CFIA-Modernisation-ACIA@inspection.gc.ca) and then return a paper copy of the completed questionnaire by regular mail to:

Program Policy Integration Division  
Canadian Food Inspection Agency  
1400 Merivale Road  
Ottawa, ON K1A 0Y9

*Jaclyne Reive*

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Blog: <https://jaclynereive.wordpress.com>

#### *Endnotes*

- (\*1) “Questions and answers: Engagement on the Draft Administrative Monetary Penalties Policy” CFIA, online: <<http://www.inspection.gc.ca/about-the-cfia/accountability/consultations-and-engagement/amps/questions-and-answers/eng/1479269149328/1479269205355>>
- (\*2) “Administrative Monetary Penalties (AMPs) Policy Engagement” CFIA, online: <<http://www.inspection.gc.ca/about-the-cfia/accountability/consultations-and-engagement/amps/eng/1479265849671/1479265897031>>
- (\*3) “Compliance and Enforcement Activities” CFIA, online: <<http://www.inspection.gc.ca/about-the-cfia/accountability/compliance-and-enforcement/eng/1299846323019/1299846384123>>
- (\*4) Ibid.
- (\*5) Ibid.
- (\*6) “Compliance and Enforcement Operational Policy” CFIA, online: <<http://www.inspection.gc.ca/about-the-cfia/accountability/compliance-and-enforcement/operational-policy/eng/1326788174756/1326788306568>>
- (\*7) “Draft Administrative Monetary Penalties Policy” CFIA, online: <<http://www.inspection.gc.ca/about-the-cfia/accountability/consultations-and-engagement/amps/draft-amps-policy/eng/1479268385122/1479268424375>>
- (\*8) Ibid.
- (\*9) Ibid.

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### CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - January 19th 2017 in Toronto - for the first individual to email us the name of location depicted in photograph on page 5. Email your answer to [info@fernandeshearn.com](mailto:info@fernandeshearn.com) with a subject line "Newsletter contest". First response with the correct answer wins.