



Atlantic Canada Year in Review 2019

Top 15 Takeaways for Employers

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2019 saw numerous changes to Atlantic Canadian labour and employment. The following are the top 15 takeaways:

1. **Workplace violence and harassment legislation in all Atlantic provinces except Nova Scotia**

New Brunswick, Newfoundland and Labrador, and Prince Edward Island all adopted new workplace violence and harassment legislation.

The amendments to the New Brunswick *Occupational Health and Safety Act* introduced new definitions of violence and harassment and requires employers to establish and implement:

- a harassment code of practice;
- an assessment for violence; and,
- a violence code of practice (for employers with more than 20 employees or in prescribed occupations).

For a detailed review of this legislative change, please see our thought leadership piece [here](#).

The amendments to the Newfoundland and Labrador *Occupational Health and Safety Act and Regulations* that came into force on January 1, 2020, requires employers to:

- develop written harassment prevention plans;
- conduct risk assessments;
- protect workers from potential family violence in the workplace; and,
- provide harassment prevention training

For a detailed review of this legislative change, please see our thought leadership piece [here](#).

The amendments to the Prince Edward Island *Occupational Health and Safety Act, and Regulations* outlining the detailed obligations, which come into force on July 1, 2020, will require employers to implement a workplace harassment policy.

2. Human rights decisions

Accommodation of medical marijuana use

The Newfoundland and Labrador Supreme Court agreed that an employer had satisfied the duty to accommodate, after refusing to hire an individual using medical marijuana on a daily basis in a safety sensitive position, because there was no reliable way to measure impairment levels and ensure that the person would not be impaired at work. An employer is not required to accept a risk of potential impairment when such impairment cannot be properly measured.¹

Hiring practices

A professor's complaint alleging that he had been discriminated against in a professorship hiring process on the basis of his race, national origin, place of origin, skin colour and age was ultimately denied by the New Brunswick Court of Appeal on the basis that: requires employers to:

- Employers are not required to hire the most qualified candidate to stay on-side with human rights law. They are entitled to choose the person who, in their view, best meets the needs of their institutions, provided that the selection process and the selections made do not violate human rights.
- For discrimination to be established, a protected ground must be shown to be a factor in the decision that was detrimental to the complainant.²

3. Surreptitious recording of customers is just cause

An employee with over 34 years' service was terminated for taking a photograph and two videos of a female customer without her knowledge or consent using his work-provided tablet computer. The New Brunswick Queens Bench confirmed that customers of businesses have a reasonable expectation of privacy, including the expectation that they will not be the subject of unauthorized video recording or photographs.³

4. Importance of the "character of employment" as a factor when calculating reasonable notice has diminished

Consistent with other provincial courts, the Nova Scotia Supreme Court concluded that the significance of the "character of employment" factor in determining reasonable notice has diminished and that a party seeking to rely on the factor must present evidence on its importance.⁴

5. Employees should think twice before they reject a new position with their employer

The Nova Scotia Court of Appeal found that a transfer of a long service salesperson into a new sales position was not a constructive dismissal. The Court confirmed the following principles: employers to:

- The Court must undertake an objective analysis and consider whether the offending unilateral change to the contract was so serious or substantial as to demonstrate “an intention not to be bound by the employment contract”.
- A reduction in income – whether actual or anticipated – does not automatically remove the duty to mitigate by continuing in the position.⁵

For a detailed review of this decision, please see our thought leadership piece [here](#).

6. Preventing former employee solicitation without a written agreement is hard to do

The Newfoundland and Labrador Supreme Court was satisfied that a former employee hired by a newly formed competitor in a nearly identical position did not violate any legal obligations by soliciting his former employer’s clients and employees because: to:

- the employee was not bound by a written or oral confidentiality agreement (or non-solicitation) agreement;
- the employee was not in a fiduciary position;
- non-fiduciary employees are free to take from their employer what is in their memory about the organization’s clients as long as it is “unaided by the employer’s documentation”; and,
- there is nothing “inherently wrong” with approaching former co-workers for hiring purposes.⁶

7. Commission-based employees entitled to receive minimum wage in New Brunswick

The New Brunswick Court of Appeal confirmed that automobile sales people paid by commission are employees and are entitled to receive at least the minimum wage for their hours worked. The *Minimum Wage Regulation* (“Act”) applies to every employee and employer in New Brunswick, unless otherwise provided in the Act or any regulation made under the Act.⁷

8. Minimum wage reviews in Newfoundland and Labrador and Prince Edward Island

Both Newfoundland and Labrador and Prince Edward Island have made announcements regarding the review of their minimum wages:

- In Newfoundland and Labrador, an Independent Minimum Wage Review Committee was established. Submissions from the public were accepted until December 2, 2019, with the review expected to be completed by April 1, 2020.
- In Prince Edward Island, an amendment to the *Employment Standards Act* requires the Employment Standards Board to:
 - solicit and consider written and in-person submissions from the public when conducting its annual review of the *Minimum Wage Order*;
 - consider, when making a *Minimum Wage Order*, new criteria including “measures of poverty and the ability of an employee to maintain a suitable standard of living”; and,
 - issue a report of its consideration of the specified criteria and to make that report public upon publication of a *Minimum Wage Order* in the Royal Gazette.

9. Domestic violence leave introduced in Prince Edward Island and Nova Scotia

Prince Edward Island and Nova Scotia introduced new leave for employees affected by domestic violence:

- Prince Edward Island amended its *Employment Standards Act* to provide eligible employees with:
 - a three day leave of absence with pay; and
 - an additional seven day leave of absence without pay

during a 12 calendar-month period in respect of domestic, intimate partner, and sexual violence. Employees must be employed for a continuous period of three months to be eligible. This also applies to employees working under the terms of a collective agreement.
- Nova Scotia amended its *Labour Standards Code* 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. 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. The leave is intended to allow employees 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
- use the leave for another purpose prescribed by the regulations.

For a detailed review of this legislative change, please see our thought leadership piece [here](#).

10. Weekend and holiday unionization applications in the construction industry are no longer permitted

Effective April 24, 2019, the Nova Scotia *Trade Union Act General Regulations* do not allow the Labour Board to consider a Saturday, Sunday, or holiday as the date of application for purposes of unionization in the construction industry. This means that:

- the “Snapshot Rule” cannot be misused through applications being made when fewer employees are working; and,
- a more representative number of employees are included in the application and there is sufficient support in the workforce as a whole.

For more information on this legislative change, please see our thought leadership piece [here](#).

11. Successful “carve out” application in Prince Edward Island

The Prince Edward Island Labour Board (“Board”) made the extraordinary decision to allow Charlottetown firefighters to leave their existing “all employee” bargaining unit that included a diversity of positions because:

- The firefighters’ training and work performed was very different from the other workers in the bargaining unit.
- The firefighters had a strong “community of interest”.
- It was industry practice for firefighters to be represented by “stand-alone” bargaining units (comprised of firefighters only).
- The firefighters had different reporting and pay structures than the other groups in the existing bargaining unit.

Successful carve out applications like this one are rare. Labour boards regularly refuse such applications based on the principle that larger bargaining units promote industrial stability. The Board's decision on this application is very much the exception. It does, however, serve as a reminder that the presumption in favour of the appropriateness of the existing bargaining unit is one that can be rebutted on the right set of facts.⁸

For more information on this decision, please see our thought leadership piece [here](#).

12. Offshore oil & gas - time-based 'significant attachment' test confirmed for membership in offshore bargaining unit

The Newfoundland and Labrador Court of Appeal confirmed that the Labour Relations Board ("Board") is entitled to interpret "all employees employed on the platform" as meaning all employees with a "significant attachment" to the platform. The Court of Appeal reaffirmed the Board's approach whereby workers who work at least 24 days in a selected 90-day period were presumed to have a significant attachment as being a flexible first step in determining whether significant attachment exists.

Even where the worker does not meet the 24 in 90 threshold, significant attachment can still be established. Some factors the Board will look at are the nature, type and duration of employment on the platform, and the connection between the worker and the platform's core workforce, among others.⁹

13. New Brunswick's new definition of supervisor

New Brunswick's *Occupational Health and Safety Act* now defines "supervisor" and includes the duties of supervisors in the workplace. The new definition is broad and may catch those without the formal title of supervisor.

14. New Nova Scotia eligibility period for pregnancy and parental leave

Nova Scotia's *Labour Standards Code and Regulations* have been amended to provide 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.

For a detailed review of this legislative change, please see our thought leadership piece [here](#).

15. Prince Edward Island's presumptive coverage for post-traumatic stress disorder

The Prince Edward Island *Workers Compensation Act* now includes presumptive coverage for post-traumatic stress disorder for workers:

- who are exposed to a traumatic event in the workplace; and

- who are subsequently diagnosed with PTSD by a psychiatrist or psychologist.

The presence of the two is sufficient to trigger coverage, without the need to provide a professional opinion on the cause.

This update is intended for general information only. If you have questions about the above, please contact a member of our [Labour & Employment group](#).

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¹ [International Brotherhood of Electrical Workers, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.](#), 2019 NLSC 48

² [Ayangma v. Universite de Moncton, Campus de Moncton](#), 2019 NBCA 14

³ [Durant v. Aviation A Auto Inc.](#), 2019 NBQB 214

⁴ [Hallett v. R.A. Murray International Ltd.](#), 2019 NSSC 288

⁵ [Halifax Herald Limited v. Clarke](#), 2019 NSCA 31

⁶ [Safety First Contracting \(1995\) v Murphy](#), 2019 NLSC 47

⁷ [J. Clark & Son, Limited v. New Brunswick](#), 2019 NBCA 31

⁸ *Charlottetown Professional Firefighters Assn. and Charlottetown (City), Re*, (2019), 26 C.L.R.B.R. (3d) 1

⁹ [Unifor Local 2121 v Newfoundland and Labrador \(Labour Relations Board\)](#), 2019 NLCA 55

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