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Dorothy Tran

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CANADA UPDATE: IMPORTANT LEGAL NEWS AND HIGHLIGHTS OF SIGNIFICANT COURT CASES FROM SEPTEMBER 2011 THROUGH DECEMBER 2011

*Dorothy Tran**

THIS update of the Canada Reporter includes two parts. Part I will discuss important legal news, specifically the U.S.-Canada border agreements that were revealed to the public in December of 2011. It will summarize and explain the two U.S.-Canadian agreements as well as some of the concerns and criticisms that have since emerged. Part II will cover one significant court case: *Di Tomaso v. Crown Metal Packaging Canada LP*.

In February of 2011 the United States and Canada announced their intentions to work towards a partnership that will bring Americans and Canadians closer together, for the sake of security and economic welfare.¹ On December 7, 2011 the “Beyond the Border Action Plan” and the “Regulatory Cooperation Council Action Plan” debuted, outlining the goals of the arrangements struck between United States President Barack Obama and Canadian Prime Minister Stephen Harper.² The purpose of the deal is two-fold: 1) to enhance security and 2) to ease and improve trade and travel between the United States and Canada with the overall goal of expanding good relations between the two nations.³ Prime Minister Harper’s statement that “these agreements represent the most significant step forward in Canada-U.S. co-operation since the North American Free Trade Agreement”⁴ highlights the magnitude of the deal, which is set to start pilot programs as early as April of 2012.⁵

* Dorothy Tran is a 3L at Southern Methodist University. This is her second article as the Canadian Reporter.

1. Press Release, Office of the Press Sec’y, Fact Sheet: U.S.-Canada Beyond the Border and Regulatory Cooperation Council Initiatives (Dec. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/07/fact-sheet-us-canada-beyond-border-and-regulatory-cooperation-council-in> [hereinafter Fact Sheet].

2. *Id.*

3. *Id.*

4. Laura Payton, *Canada-U.S. Border Deal Marks ‘Significant Step’*, CBC NEWS (Dec. 7, 2011 10:16 PM), <http://www.cbc.ca/news/politics/story/2011/12/07/pol-canada-us-border-perimeter.html>.

5. *Id.*

The opinion in part II comes from the Ontario Court of Appeal. *Di Tomaso* is a significant case in the employment law arena. The opinion attempts to inform employers of what fair and proper notice consists of when terminating an employee. While increasing protection for employees, it also raises questions regarding how employers are supposed to calculate what fair notice is, and how they can avoid being sued.

I. IMPORTANT LEGAL NEWS

A. BEYOND THE BORDER: PROTECTING NORTH AMERICAN NATIONAL SECURITY

The Beyond the Border action plan outlines four areas of cooperation meant to enable the United States and Canada to enhance the security of its borders and “accelerate the legitimate flow of people, goods, and services.”⁶ The four areas that the plan focuses on are (1) addressing threats early, (2) trade facilitation, economic growth, and jobs, (3) integrated cross-border law enforcement, and (4) critical infrastructure and cyber security.⁷

Addressing threats and hazards early, both natural and man-made, has been identified as an area in need of greater cooperation.⁸ In order to do this, the United States and Canada have made promises to share intelligence more freely and conduct joint threat assessments so as to “develop a common understanding of the threat environment.”⁹ If and when the time comes, the two countries will be able to support and aid one another more effectively. The countries have also agreed to coordinate security systems when possible.¹⁰ This includes synchronizing “technical standards for the collection, transmission, and matching of biometrics,” which will allow the two countries to use the same standards in screening travelers trying to enter either country.¹¹ Synchronizing standards means the United States and Canada will also harmonize their visa waiver programs, so that those who do not need a visa to enter one country do not need a visa to enter the other, and those who are restricted from entering either nation will be denied prior to boarding any flight leading to Canada or the United States.¹² The United States and Canada have also decided to integrate their entry-exit systems, meaning travelers leaving Canada to travel south of its border will be tagged as entering the United States and

6. Press Release, Office of the Press Sec’y, Declaration by President Obama and Prime Minister Harper of Canada – Beyond the Border (Feb. 4, 2011), <http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord> [hereinafter Declaration].

7. Fact Sheet, *supra* note 1.

8. Declaration, *supra* note 6.

9. *Id.*; *United States—Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness Action Plan*, WHITEHOUSE.GOV 3 (Dec. 2011), http://www.whitehouse.gov/sites/default/files/us-canada_btb_action_plan3.pdf [hereinafter *Beyond the Border Action Plan*].

10. *Beyond the Border Action Plan*, *supra* note 9, at 3.

11. *Id.* at iii.

12. Fact Sheet, *supra* note 1; *see also* Payton, *supra* note 4.

vice versa.¹³

Promoting facilitation of trade, increased economic growth, and creation of jobs is the second area where cooperation has been agreed on. Actions to be taken at the land border include improving infrastructure for efficient passage of travelers and goods, such as increasing lanes at the busiest entry sites,¹⁴ combining U.S. and Canadian facilities to cut down on costs at other sites,¹⁵ and allowing for trusted traders to pass through customs more quickly.¹⁶ For example, programs will be implemented to allow “cargo [to be] cleared at its first port of entry, operating under the philosophy of ‘cleared once, accepted twice’ to reduce the time and expense of re-screening.”¹⁷

The third area of focus is an area in which the United States and Canada already cooperate successfully. For example, Integrated Border Enforcement Teams are multi-agency organizations that operate in fifteen regions along the U.S.-Canada border.¹⁸ The teams pull from various agencies to “target cross-border criminal activity.”¹⁹ The Beyond the Border deal intends to continue to improve upon cross-border law enforcement by creating similar programs to integrate “intelligence, criminal investigations, and intelligence-led uniformed presence between ports of entry.”²⁰

Finally, the United States and Canada have targeted critical infrastructure and cyber security as the fourth area of joint cooperation. The two countries will expand the infrastructure necessary for quick response in emergency situations, creating lines of communication, and putting in place combined emergency plans to counter any type of security threat.²¹ In terms of cyber security, the United States and Canada will enhance “already strong bilateral cyber security cooperation to better protect vital government and critical digital infrastructure.”²²

B. REGULATORY COOPERATION COUNCIL: IMPROVING OUR ECONOMIES THROUGH COOPERATIVE EFFORTS

At this point in time, the United States and Canada both have their own regulatory systems, and will continue to maintain their individual systems despite the Regulatory Cooperation Council Action Plan. The purpose of the Regulatory Cooperation Council is not to have across-the-

13. *Beyond the Border Action Plan*, *supra* note 9, at 10.

14. Evan Dyer, *Canada – U.S. Deal Could Close Small Border Crossings*, CBC NEWS (Dec. 15, 2011 10:16 AM), <http://www.cbc.ca/news/politics/story/2011/12/14/small-border-crossings-canada-us.html>.

15. Fact Sheet, *supra* note 1.

16. *Beyond the Border Action Plan*, *supra* note 9, at 11.

17. Payton, *supra* note 4.

18. *Integrated Border Enforcement Teams*, PUBLIC SAFETY CANADA (Feb. 6, 2009), <http://www.publicsafety.gc.ca/prg/le/bs/ibet-eng.aspx>.

19. *Id.*

20. *Beyond the Border Action Plan*, *supra* note 9, at 21.

21. *Id.* at 23-25; *see also* Fact Sheet, *supra* note 1.

22. *Beyond the Border Action Plan*, *supra* note 9, at 23.

board regulations, but to align the respective regulatory schemes of the United States and Canada within two years, in a way so as “to promote economic growth, job creation, and [furnish] benefits to consumers and businesses”²³ In aligning regulations, the two countries seek to increase and ease trade, as well as create more cross-border investment opportunities.²⁴ The four areas in which regulatory cooperation is sought are (1) agriculture and food, (2) transportation, (3) health and personal care products and workplace chemicals, and (4) environment.²⁵

The agriculture and food sectors contribute greatly to both U.S. and Canadian economies.²⁶ Within these sectors, coordinating regulations on food safety, agricultural production, and marketing²⁷ will lead to more economic benefits for both countries. In terms of food safety, the United States and Canada have two of the most rigorous safety regulation systems in the world.²⁸ By acknowledging the standards of the other, the two countries can cut down on costs by removing the need to reinspect produce.²⁹ Regulatory cooperation in the agricultural production sector will focus on harmonizing the regulations for veterinary drugs and pesticides.³⁰ The United States and Canada will also join efforts to combat invasive species and animal disease outbreaks.³¹ Doing so will allow producers more access to better tools which will have the effect of improving quality of the products. It will increase the amount of produce allowed to enter and leave the two countries, and will also prevent the disruption of trade.³² The third subarea for cooperation is marketing regulations. Harmonizing grading systems, especially for meat products, means less confusion and need for remarketing.³³

The second area of regulatory cooperation outlined in the Regulatory Cooperation Council Action Plan is transportation. The movement of cargo between the United States and Canada is facilitated by a combination of “roadways, rail lines, airways, and waterways.”³⁴ For trade between North America and other countries, the safety and security of these routes are critical. Thus, collaborating to maintain and operate these systems is of utmost significance.

23. Press Release, Office of the Press Sec’y, Joint Statement by President Obama and Prime Minister Harper of Canada on Regulatory Cooperation (Feb. 4, 2011), <http://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0> [hereinafter Joint Statement].

24. *Id.*; see also Fact Sheet, *supra* note 1.

25. Fact Sheet, *supra* note 1.

26. *United States – Canada Regulatory Cooperation Council Joint Action Plan*, WHITEHOUSE.GOV 7, (Dec. 2011), http://www.whitehouse.gov/sites/default/files/us-canada_rcc_joint_action_plan3.pdf [hereinafter *RCC Joint Action Plan*].

27. *Id.* at 7-9.

28. *Id.* at 7.

29. *Id.* at 1, 7.

30. *Id.* at 8.

31. *Id.* at 9.

32. *Id.*

33. *Id.* at 10.

34. *Id.* at 11.

There are many differences between the health and personal care products and workplace chemicals that are permitted in each country. Certain unnecessary differences “can hinder two-way trade . . .”, which severely impacts the drug and healthcare industries.³⁵ Harmonizing such regulations would allow for greater variety of products to be sold in the market, allow products to be released into the respective markets faster, and lessen the costs for manufacturers who sell to both nations.³⁶ In regard to chemicals in the workplace, synchronization enhances compliance and worker safety. The most likely effect of synchronization would be lessening the variety of chemicals used, and simplifying and streamlining safety procedures.

The fourth area the United States and Canada have committed to cooperate on is the environment.³⁷ While both countries are independently committed to reducing emissions within their own nations, the proximity of the United States and Canada to one another means that one country’s air pollution affects the other. In collaborating and uniting against greenhouse gas emissions, the United States and Canada can ensure that they are taking the most effective tactics to combat pollution and sharing in the collective benefits.³⁸

C. THE DEAL’S CONTROVERSIAL POINTS

While the combination of the Beyond the Border and Regulatory Cooperation Council deal is being hailed as one of the most momentous agreements since the North American Free Trade Agreement (NAFTA), some reservations have surfaced since the two initiatives were revealed to the public. In the Beyond the Border Action Plan as well as the Regulatory Cooperation Council Action Plan, the two governments have agreed that one of the guiding principles for the deal will be continued sovereignty for each nation.³⁹ Even so, some Canadians are suspicious of the United States, and dislike many aspects of the deal.⁴⁰

One of the issues of concern regarding the Beyond the Border deal is the sharing of security information with the United States.⁴¹ It seems as if Prime Minister Harper may have consented to sharing more information in return for relaxed border restrictions.⁴² At this point in time, we know that “biographical information on citizens, permanent residents and others” will be shared due to the newly-integrated entry-exit system being formed.⁴³ What is unclear is how much and what other types of infor-

35. *Id.* at 14.

36. *Id.* at 15.

37. Fact Sheet, *supra* note 1.

38. *RCC Joint Action Plan*, *supra* note 26, at 16.

39. Declaration, *supra* note 6; *see also* Joint Statement, *supra* note 23.

40. *The Border Two-Step*, *ECONOMIST* (Dec. 10, 2011), <http://www.economist.com/node/21541421>.

41. *Id.*

42. *Id.*

43. Payton, *supra* note 4.

mation will be shared, what safeguards will be put in place to ensure that information remains secure, and what happens if a mistake is made regarding security threats.⁴⁴ For example, Canada Privacy Commissioner Jennifer Stoddard said in a statement to CBC News, that errors in assessing threats have her worried about problems like “stranding travelers at airports or branding them as terrorists.”⁴⁵

Another controversy that has arisen since the unveiling of the Beyond the Border Action Plan is the rumors of changes to border crossing locations.⁴⁶ The action plan itself mentions the creation of a working group that will assess and suggest alignments and improvements,⁴⁷ but a leaked document from the “Small Port Working Group” shows that this group has already been created and may be well on its way to making some big decisions that will impact many communities and individuals.⁴⁸ There has been confirmation that the group indeed exists and has already met.⁴⁹ The leaked document has a chart of fifty-two different border posts and the options being considered for each one,⁵⁰ which include “sharing facilities, mirroring working hours, using a ‘remote-technology solution,’ or closing the posts altogether.”⁵¹ Of the four available options, closing border crossings and using a remote-technology solution are the most heavily-opposed.⁵² For example, there is heavy opposition to closing border crossings, because doing so proves detrimental to communities such as Morses Line, a farming town that lies on both sides of the U.S.-Canadian border and will be severed if the crossing is shut down.⁵³ Furthermore, using remote-technology instead of staffing certain border posts means that there will be little to no security along parts of the 5,521-mile border.⁵⁴

One Canadian government official, Public Safety Minister Vic Toews, has denied the rumors of border crossing closures.⁵⁵ He stated that he and his staff were not aware of the existence of the Small Port Working Group, and suggested that the document was created prior to the launch-

44. Peter McKenna, *Privacy Rights and a Thinning Canada – U.S. Border*, THE CHRONICLE HERALD, Dec. 29, 2010, available at <http://thechronicleherald.ca/opinion/47168-privacy-rights-and-thinning-canada-us-border>.

45. *Id.*

46. *Id.*

47. *Beyond the Border Action Plan*, *supra* note 9, at 17.

48. Dyer, *supra* note 14.

49. Aldo Santin, *Border Crossing Closures Report ‘Entirely False’: Toews Insists Talks Only Looking at Ways to Keep Them Open*, WINNIPEG FREE PRESS (Dec. 17, 2011), <http://www.winnipegfreepress.com/local/border-crossing-closures-report-entirely-false-135787413.html>.

50. *Small Port Working Group: Initial Results & Path Forward*, CBC.CA 6-7, <http://www.cbc.ca/news/pdf/small-port-working-group.pdf> (last visited Feb. 16, 2012).

51. Dyer, *supra* note 14.

52. *Id.*

53. *Id.*

54. *See The Significance of Canada’s Oil Sands: Hearing on U.S. Energy Security Before the H. Comm. on Energy and Commerce*, 112th Cong. 3 (2011) (prepared testimony of James Burkhard, Managing Director, HIS Cambridge Energy Research Assocs.).

55. Santin, *supra* note 49.

ing of the deal.⁵⁶ Upon closer examination of the leaked document, a timeline dated the first Small Port Working Group meeting in late January of 2011, which supports the contention that the group was established prior to President Obama's and Prime Minister Harper's February announcement of the initiatives.⁵⁷ However, the timeline also mentions the initiatives, making it more than likely that the group was created in expectation of the agreements.⁵⁸

The main criticism of aligning regulations is that the regulatory scheme in Canada is superior to that of the United States.⁵⁹ Some people, such as business lobbyists, are concerned that Canadian standards will be lowered because of the synchronization.⁶⁰

II. SIGNIFICANT COURT CASE

A. *ANTONIO DI TOMASO v. CROWN METAL PACKAGING CANADA LP: A MESSAGE TO EMPLOYERS FROM THE ONTARIO COURT OF APPEALS*

In *Antonio Di Tomaso v. Crown Metal Packaging Canada LP*, Antonio Di Tomaso, a man who was terminated from his job as a mechanic and press maintainer, won in court against his employer ("Crown Metal") who he believed had "failed to provide [him with] proper notice or termination pay in lieu thereof."⁶¹ The Court of Appeal first considered the language of the *Termination and Severance of Employment* regulation of the *Employment Standards Act* ("ESA"), agreeing with the lower court that Crown Metal had misinterpreted the regulation.⁶² The Court of Appeal also reviewed previous case law, finding that each situation should be assessed holistically on a case-by-case basis utilizing five factors, which were first expounded in *Bardal v. Globe & Mail Ltd.*, [1960], 24 D.L.R. 2d 140, 145 (Ont. H.C.J.).⁶³ The Court of Appeal affirmed the lower court's holding that Crown Metal failed to provide Di Tomaso with enough notice of his impending termination.⁶⁴ This opinion clarifies that no maximum exists as to the amount of notice required for employees.⁶⁵ This decision brings benefit to employees, but also raises uncertainty for employers.

56. *Id.*

57. *See Small Port Working Group: Initial Results & Path Forward*, *supra* note 50, at 3.

58. *See generally id.*

59. *The Border Two-Step*, *supra* note 40.

60. *Id.*

61. *Di Tomaso v. Crown Metal Packaging (Can.) LP* (2011), 337 D.L.R. 4th 679, para. 6 (Can. Ont. C.A.).

62. *See id.* paras. 8, 20.

63. *See id.* paras. 12, 26, 29.

64. *Id.* paras. 17, 24.

65. *Id.* para. 23; *see Bettina Burgess, Serial Extensions of Employment After Termination May Invalidate the Initial Notice*, GOWLINGS (July 5, 2011), http://www.gowlings.com/KnowledgeCentre/enewsletters/EmploymentAndLabourLaw/HtmFiles/V7N03_20110705.en.html.

1. *Background*

In 2009, Crown Metal, a metal packaging manufacturer made plans to close its facilities.⁶⁶ As a result, Di Tomaso, a sixty-two year old, long-time employee of Crown Metal was told that his last day of work would be on November 6, 2009.⁶⁷ Contrary to what he was originally told, Crown Metal extended Di Tomaso's employment for "temporary period[s]" on several occasions, finally letting him go on February 26, 2010, sixteen weeks after Di Tomaso's original termination date.⁶⁸ At the time Di Tomaso was let go, he was given a severance package including severance pay, vacation pay, and benefits until the end of March.⁶⁹ He was not given, however, any pay in lieu of notice.⁷⁰ Di Tomaso sued Crown Metal in the Superior Court of Justice, alleging that Crown Metal violated the ESA when it failed to provide him with the required amount of notice and did not compensate him for this failure, seeking common law damages amounting to twenty-four months of pay.⁷¹ Crown Metal filed a motion for summary judgment, arguing that the weeks between Di Tomaso's original termination date and his final termination counted as part of his statutorily-entitled notice, thus Crown Metal satisfied the "clear and unequivocal notice of termination" requirement mandated in the ESA.⁷² Crown Metal also argued that because Di Tomaso was an "unskilled worker in a non-managerial position" he could not be awarded more than twelve months' notice.⁷³ Justice Beth A. Allen, the motion judge, held that Crown Metal was wrong on both issues, and awarded Di Tomaso twenty-two months of notice.⁷⁴

2. *Analysis of the Ontario Court of Appeal*

The first issue on appeal was whether Crown Metal gave Di Tomaso clear and unequivocal notice of termination with its September 9, 2009 letter.⁷⁵ In order for termination to be clear and unequivocal, there must not be any uncertainty regarding when employment will end.⁷⁶ The *Termination and Severance of Employment* regulation states, in pertinent part:

(1) An employer who has given an employee notice of termination in accordance with the Act and the regulations may provide temporary work to the employee without providing a further notice of termina-

66. Di Tomaso, 337 D.L.R. 4th 679, para. 2.

67. *Id.* para. 5.

68. *Id.* paras. 3-5.

69. *Id.* para. 5.

70. *See id.* para. 7 (Crown Metal did not contest Di Tomaso's claim that he did not receive pay in lieu of notice).

71. *Id.* para. 6.

72. *Id.* paras. 7-9; *see* HOWARD A. LEVITT, *THE LAW OF DISMISSAL IN CANADA* 136 (2003).

73. Di Tomaso, 337 D.L.R. 4th 679, para. 12.

74. *Id.* para. 17.

75. *Id.* para. 18.

76. *See id.* para. 21; Burgess, *supra* note 65.

tion in respect of the day on which the employee's employment is finally terminated if that day occurs not later than 13 weeks after the termination date specified in the original notice.⁷⁷

This regulation seeks to avoid uncertainty regarding when employment will end in situations where work notice, extensions in employment after the initial notice of termination, are given by requiring that the final date of termination must be no later than thirteen weeks after the original date of termination.⁷⁸ Crown Metal interpreted the regulation to mean that each extension should last no longer than thirteen weeks in length.⁷⁹ If this were the case, a company could extend an individual's employment indefinitely, without any final termination in sight. This would go against the requirement of "clear and unequivocal" notice of termination, which makes a final notice of termination necessary,⁸⁰ and "be inconsistent with the *ESA's* status as [a] remedial, benefit-conferring legislation designed to protect the interests of employees."⁸¹

The second issue in front of the Court of Appeal was whether Di Tomaso's working notice under the common law was reasonable.⁸² As mentioned above, the Court looked to previous case law to figure out the standards for appropriate notice.⁸³ It considered the four *Bardal* factors, which consist of "the character of the employment, the employee's length of service, the employee's age, and the availability of comparable employment in the market."⁸⁴ The Court disagreed with Crown Metal's contention that character of employment should be considered more heavily than other factors, providing precedent from the Supreme Court of Canada supporting that each factor should be given equal consideration.⁸⁵ The rationale behind Crown Metal's stance is that low-level employees "have an easier time finding comparable alternative employment" than more skilled employees, lending more weight to the consideration of character of employment than the other factors, but the Court was able to draw from other jurisdictions that have stated that this is not necessarily the case.⁸⁶ The Court of Appeal also disagreed with Crown Metal's assertion that twelve months is the maximum amount of

77. Employment Standards Act, Termination and Severance of Employment, O. Reg. 288/01 (Can.).

78. *Id.*

79. Di Tomaso, 337 D.L.R. 4th 679, para. 9.

80. *Id.* paras. 20-21.

81. *Id.* para. 20.

82. *Id.* para. 18.

83. *See generally id.* paras. 23-29.

84. *Id.* para. 12.

85. *Id.* para. 26; *see also* Honda Inc. v. Keays, [2008] 2 S.C.R. 362, para. 31 (Can.).

86. Di Tomaso, 337 D.L.R. 4th 679, paras. 27-28. (citing *Medis Health and Pharm. Servs., Inc. v. Bramble* (1999), 175 D.L.R. 4th 385 (N.B.C.A.) and *Vibert v. Paulin* (2008), 291 D.L.R. 4th 302 (N.B.C.A.) to support the statement that character of employment is a factor of declining importance); *see also* Barry W. Kwasniewski, *Ontario Court of Appeal Rules: No Camp on Dismissal Damages for Clerical or Unskilled Workers*, CHARITY LAW BULLETIN (Aug. 18, 2011), <http://www.carters.ca/pub/bulletin/charity/2011/chylb255.htm>.

notice appropriate for “clerical and unskilled employees” under the common law, which Crown Metal argued was the holding in *Cronk v. Canadian General Insurance Co.*, a case from 1995.⁸⁷ The Court instead likened the case at bar to *Minott v. O’Shanter Development Company Ltd.*, a more recent case in which a thirteen month notice period was granted to an employee who was unskilled like Di Tomaso, but much younger and who had given less years of service to his employer.⁸⁸ The *Minott* case and other similar cases show that the *Bardal* factors can lead to a variation in notice periods and that there is no set cap for common law notice.⁸⁹ As such, the holding to grant Di Tomaso, a sixty-two year old man, who had been employed with Crown Metal for thirty-three years and had applied vigorously to other companies since receiving his initial termination letter, twenty-two months’ notice was upheld.⁹⁰

3. Conclusion

The *Di Tomaso* decision provides good cause for employers to consider tactics for limiting liability. In order to prevent invalidating an original notice of termination, employers should monitor extensions in order to ensure that extensions do not last longer than thirteen weeks.⁹¹ Employers should also require that employees sign an employment contract outlining “notice to which they will be entitled upon termination of employment, thereby avoiding the uncertain and often significant liability under the common law.”⁹² The Ontario Court of Appeal looked to other jurisdictions in its analysis, and effectively demonstrated that its decision falls in line with the trend of similar employment law cases.

87. Di Tomaso, 337 D.L.R. 4th 679, para. 13; *see also* Cronk v. Canadian General Insurance Co. (1995), 128 D.L.R. 4th 147, paras. 29-30 (Can. Ont. C.A.); What’s New in HR Law: *Certainty and Uncertainty*, FILION WAKELY THORUP ANGELETTI (Sept. 2011), <http://www.filion.on.ca/uploads/File/DiTomaso.pdf>.

88. Di Tomaso, 337 D.L.R. 4th 679, paras. 14-15 (reciting facts and holding of a similar case, *Minott v. O’Shanter Dev. Co.*, (1999) 168 D.L.R. 4th 270, para. 76 (Can. Ont. C.A.)).

89. Di Tomaso, 337 D.L.R. 4th 679, para. 24.

90. *Id.* at para. 29.

91. Burgess, *supra* note 65.

92. *Id.*