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CANADIAN EMPLOYMENT LAW

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What's New in this Update:

This release updates the case law and commentary in Chapter 33 (Prosecution) and Chapter 35 (Human Rights).

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Case Highlights

- **Chapter 35 — I. Introduction — § 35:1. The Legislation — and Job Descriptions and Fiduciary Status —** Although the Ontario *Human Rights Code* contains no express limitation restricting the tribunal's jurisdiction to matters within provincial competence, it remains a provincial statute and cannot confer authority over matters that fall within Parliament's exclusive jurisdiction. The constitutional doctrine of interjurisdictional immunity prevents one level of government from legislating in a way that impairs the core of the other's legislative powers: *Trudel v. Meta Platforms Inc.*, 2026 ONSC 789 (Ont. Div. Crt.) at para. 20.
- **Chapter 35 — VI. Discrimination on the Basis of Disability — § 35:52. Physical Disability —** In the course of finding that whether an element of a statutory human rights claim is made out is inherently a contextual fact-based inquiry and not a jurisdictional question, the Ontario Divisional Court emphasized that in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 (CanLII), [2000] 1 SCR 665 (Boisbriand), the Supreme Court of Canada rejected the exclusive application of the bio-medical model of disability in favour of a contextual analysis that considers the socio-political dimensions of discrimination: *Bokhari v. Top Medical Transportation Services*, 2026 ONSC 1073 (Ont. Div. Crt.) at paragraphs 26, 49 and 51.
- **Chapter 35 — VI. Discrimination on the Basis of Disability — § 35:57. Perceived Disability —** "At paragraph 54 of *Bokhari v. Top Medical Transportation Services*, 2026 ONSC 1073, the Ontario Divisional Court noted that while the Supreme Court in *Boisbriand* acknowledged that "normal ailments" like a cold "will generally not" constitute a disability because there is "normally not a negative bias" against these ailments, the court did not lay down a hard and fast rule that transitory injuries were necessarily excluded from the meaning of disability. In this regard, the Supreme Court of Canada was careful to emphasize that the multidimensional analysis of disability required under human rights legislation focuses on "obstacles to full participation in society rather than on the condition or state of the individual."
- **Chapter 35 — VI. Discrimination on the Basis of Disability — XII. Discrimination on the Basis of Sex — § 35:90. Sexual Harassment—Requirement of a Sexual Component —** The maker of offending comments need not have been motivated by the desire to engage in sexual relations with those to whom the comments are made for the comments to constitute sexual harassment. For example, distribution of pornography in the workplace, in and of itself, has been held to constitute sexual harassment: *Westjet v. T.H.*, 2026 FCA 20 at paragraph 24 referencing *Poliquin v. Devon Canada Corporation*, 2009 ABCA 216 at paragraphs 55 to 60. Lewd comments and demeaning comments based on gender or sexual orientation have been found to constitute sexual harassment in the absence of any sexual intent on the part of the maker. In the *Westjet* case the, Federal Court of Appeal found that an arbitrator's conclusion that the respondent's repeated comments and

questioning of co-workers about their sexual development and that of their female children, as well as his comments about a co-worker's breasts did not amount to sexual harassment, contradicted the well-established case law on sexual harassment. The Federal Court of Appeal noted that the comments and questions were sexual in nature, were made repeatedly, and the respondent knew or should have known that they were inappropriate and unwelcome. The Federal Court of Appeal held that the arbitrator's failure to follow established case law, or, at the very least to provide a rational analysis for the departure, rendered the decision unreasonable, at paragraph 29.

- **Chapter 35 — VI. Discrimination on the Basis of Disability — XV. Procedure — § 35:133. Other Avenues for Legal Redress for Breaches of Human Rights Legislation —** In *Weeks v Abbotsford (City)*, 2025 BCSC 2120, a class action claim by former female police officers who alleged that they were subjected to gender or sexual orientation-based discrimination, harassment, and bullying by officers and management of British Columbia's municipal police forces that arose during their employment, but unrelated to a dismissal, and that predated the collective agreement, was allowed to proceed. The issue of the negotiation of an article in a collective agreement can be distinct from its application or interpretation and thus, it can be a stand-alone issue or complaint over which a Human Rights Board of inquiry has jurisdiction: *University Of New Brunswick v. Canadian Union Of Public Employees, Local 3339*, 2025 NBKB 231 at paragraphs 39 and 45 referencing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39.

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