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ARBITRATION MAY BE THE ANSWER WHEN PARTIES WANT TO AVOID GOING TO COURT

This is not a comprehensive discussion of commercial arbitration. Rather, it is a look at the factors one should consider when designing an arbitration to fit a particular commercial context. It explores how one can go about achieving the potential benefits of arbitration by making specific decisions before the process begins.

By Stephen Antle, Borden Ladner Gervais, Vancouver, B.C.
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Arbitration can be an effective alternative to going to court to resolve a commercial dispute. But care must be taken in designing an arbitration so that the process does not turn out to be compressed litigation.

Potential Benefits

Why would a party consider using arbitration to resolve a commercial dispute? What are the potential benefits of arbitration? Because arbitration can be a much simpler version of litigation, it has the potential to resolve disputes relatively quickly. Arbitration also has the potential to be more cost effective than litigation. However, depending on the economics of the dispute, it is important to remember that, in arbitration, the parties must pay the fees of the arbitrator directly and the logistical costs of whatever space and reporting agency they require instead of having those costs paid by the taxpayers at large, as is the case in litigation.

Inside . . .

It's Your Business

Bank governor wants monetary reform 5

Canada ranks as place for business . . . 6

Report says patterns are shifting 6

More resolve in softwood dispute . . . 6

Progress of Legislation

B.C. introduces compassionate leave 7

Ontario combats underground economy 7

News From the U.S.

Multigenerational workforce may be solution 8

Business Briefing

Overview of business statistics . . . 12

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Generally speaking, rights of appeal from arbitral awards are much more limited than appeals from court decisions. This limited right provides an element of increased finality, which may be desirable.

Because it is generally possible for parties to choose, or at least influence the choice of, an arbitrator, they may be able to ensure the arbitrator possesses expertise they consider necessary to resolve their dispute fairly. That expertise may be legal or specific to their industry. This choice of arbitrator tends to result in arbitral awards that are more predictable, or at least more acceptable.

Unlike litigation, which is generally open to the public, arbitrations are generally private and confidential. The private nature of the process may be generally important to business parties. It may have particular importance where sensitive financial information, business strategies or trade secrets are involved.

In considering the possibility of arbitration, the parties should consider all potential benefits, whether those benefits are important to them and whether those benefits are worth using the arbitration process. If so, they should then consider how to design that arbitration to ensure the benefits are realized. These potential benefits may make arbitration more suitable than litigation to resolve many commercial disputes. Arbitration may be particularly well-suited to resolving disputes that must, for commercial reasons, be resolved quickly, disputes involving sensitive information that the parties wish to keep confidential, and disputes where the amount involved does not warrant the expense of litigation.

Two Preliminary Points

First, an agreement to arbitrate a dispute, whether an arbitration clause in an existing contract or a stand-alone submission to arbitration, is itself a contract. It is a separate contract from whatever contract may have given rise to the dispute itself. As a contract, it carries with it all the usual potential contractual issues of interpretation, performance and breach.

Second, unless the parties agree otherwise, an arbitration will likely be governed by the laws of the jurisdiction where the arbitration is held. If the parties do wish some other law to govern, they must agree on it.

Preconditions

The parties should first consider whether they want to insist that certain conditions are met before they begin arbitration. Specific conditions could be required before arbitration. But the parties should only insist on preconditions carefully, fully aware of the potential difficulties they may cause.

For example, it is common for arbitration agreements to require "tiered" dispute resolution procedures, beginning with negotiation, continuing through mediation and culminating in arbitration, if necessary. The benefits of such an approach – principally resolving disputes as consensually and with as little outside intervention as possible – are obvious.

However, there are drawbacks. Such a process can establish unintended conditions precedent to the jurisdiction of an arbitrator (and if an arbitrator exceeds his or her jurisdiction, the award may be set aside by the courts or rendered unenforceable). In other words, there can be unintended consequences. Such a process would require the parties to go through the procedures preceding arbitration in the structure before arbitrating. The language creating the tiered process might also refer to the parties acting in "good faith" or using their "best efforts" to resolve the dispute by negotiation or mediation.

Such preconditions can cause several problems. They can be superfluous. Generally speaking, if the parties want to settle, they will, whether or not they are required by some agreement to negotiate or mediate in good faith. If the parties do not wish to settle, there is no real benefit to requiring them to go through the motions of negotiation or mediation before being entitled to arbitrate.

Such preconditions can also give rise to delay and expense and make the whole arbitration process uncertain. One party might think or take the position that the preconditions had not been satisfied, for example, because the other party had not negotiated in good faith. It would then be able to object to the jurisdiction of the arbitration on that basis. Although the arbitrator could make a preliminary ruling concerning his or her jurisdiction, that ruling could be appealed to the courts. In any event, the issue might not be finally settled until it came time to enforce the arbitral award. There again, the issue would likely have to be resolved in court. There is considerable jurisprudence about negotiating in good faith and using best efforts. Resolving these sorts of issues would likely require considerable time and expense.

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In addition, it is common for a party to an arbitration to require some form of interim relief: an injunction, a preservation order, an order prohibiting the disclosure of confidential information or to enforce intellectual property rights. However, if there were a dispute about the jurisdiction of the arbitrator, the arbitrator would not likely be able to grant such interim relief. The arbitrator's jurisdiction would have to be clarified, again likely in court, before the party could entertain an application for interim relief. By then, the damage might have been done.

In addition, having to resolve any of these issues in court might well nullify one of the important potential advantages of arbitration: confidentiality.

Because of these potential drawbacks, if the parties do consider having preconditions for arbitration, they should do so very carefully. They should draft them in such a way as to avoid, as far as possible, these sorts of difficulties.

Scope of the Dispute

The next decision to be made involves defining the scope of the disputes to be submitted to arbitration. In the commercial context, this issue often arises in terms of whether such disputes are to be limited to claims of breach of a particular contract or to all claims, including things like tort claims, arising from a business relationship. When the parties define the scope of the issues to be arbitrated, they define the jurisdiction of the arbitrator. If they use narrow language, the arbitrator may not have jurisdiction to deal with important aspects of the parties' relationship. The parties may find themselves in the unenviable position of having to arbitrate and litigate different aspects of their situation at the same time. That would largely negate the potential economic advantages of arbitration. If the parties define the scope of issues to be arbitrated in uncertain language, they invite preliminary objections to the jurisdiction of the arbitrator, which may again have to be resolved in court. That would give rise to delays and expense, uncertainty and breach of confidentiality, in much the same way as described above.

To avoid these difficulties, the parties should consider carefully in advance the kinds of disputes that might arise from their relationship and make conscious decisions about which ones they wish to arbitrate. They should then use appropriate language to reflect that decision. There is customary language, tested in court, for this purpose. Some common examples are:

- Any controversy or claim arising out of, or relation to, this contract or the breach thereof.
- All disputes arising out of, or in connection with, this agreement, or in respect of any legal relationship associated therewith or derived therefrom.
- Any dispute, controversy or claim arising under, out of or relating to, this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims.

Generally, it is preferable to use more comprehensive, rather than more limiting, language. The risk and expense of having to both arbitrate and litigate a dispute should be avoided. If there is a good reason to limit the scope of disputes to be arbitrated, that limitation should be stated in the clearest possible language.

Number of Arbitrators

Arbitrations are usually adjudicated either by a single arbitrator or a panel of three. The applicable arbitration legislation will provide a default choice, likely a single arbitrator. Nevertheless, it is always preferable for the parties to state clearly the number of arbitrators they wish to use.

Different factors favour a single arbitrator and a panel of three. Arbitrators must be paid by the parties. Preferably they will be experienced, and therefore in demand. The more people involved in the arbitration, the more calendars must be coordinated to schedule hearings. All these factors increase the cost and time and decrease the efficiency of an arbitration by a panel of three and favour the appointment of a single arbitrator.

However, there is some logic to the proposition that three heads are better than one. With a panel of three arbitrators, the risk of a fundamentally ill-conceived award is reduced. Where there is a panel, generally each party will appoint one and those two, or some designated arbitral institution, will appoint the third as chair. Thus, each party will directly appoint one of the decision-makers. That appointment can reflect the view of that party about the background and experience which are desirable in an arbitrator. A panel of three arbitrators also permits a blend of experience: for example, a chair with legal and arbitral experience, and arbitrators having relevant technical or business background.

Qualifications

One of the potential advantages of arbitration over litigation is that the parties have at least some input into the choice of their decision-maker. To realize this potential advantage, the parties should consider what, if anything, ought to be said in their arbitration agreement about the qualifications of the arbitrator(s).

Generally, arbitrators are required to be "independent" and "impartial". Independence requires that arbitrators not have a financial, professional or personal connection with any of the parties. Impartiality requires that they have an open mind about the parties and the issues. Such requirements are likely to be found in the legislation governing the arbitration or the rules of the relevant arbitral institution. But, if not, the parties should ensure they adequately address these issues.

Arbitrators should have legal and arbitral training. Arbitration is an adversarial legal process. Except in extraordi-

nary circumstances, arbitrators are required to adjudicate arbitrations according to the applicable law. They are not to adjudicate based on their perceptions of fairness, or their own experience or expertise. Their awards must be based on the application of the law to the evidence presented to them. Arbitrating a dispute therefore requires knowledge and experience in receiving evidence and dealing with objections and other legal procedural matters. Again, if the parties do not agree on an arbitrator, the applicable arbitration legislation or the rules of the relevant arbitral institution will likely provide for the appointment of an arbitrator. The institutions involved in those processes normally recognize the importance of legal and arbitral experience. However, the parties should consider specifying such qualifications.

Parties often believe it is essential that arbitrators have specific commercial, technical or scientific background relevant to the subject matter of the arbitration. In my view, that belief is fundamentally misconceived. Arbitrators must normally decide arbitrations by applying the relevant law to the evidence introduced before them. No matter what expertise they have, they cannot decide the arbitration according to their own experience, knowledge or opinions. To do so would be to decide the arbitration based on "evidence" that was not before them and would make their award liable to be set aside. Rather than choosing an arbitrator with relevant business, technical or scientific experience, the parties should prove those sorts of facts through evidence provided by qualified experts. The parties should also bear in mind that many arbitration rules permit arbitrators to appoint independent experts to advise them, if necessary. This may be particularly useful in technology-related disputes.

Procedural Rules

The parties must choose a set of procedural rules to govern the arbitration. There are numerous sets of rules drafted by Canadian and international arbitral institutions. The parties are also free to modify any of those sets of rules by agreement, or to draft their own rules from scratch. Likely the best way to proceed is to adopt a tested set of procedural rules from an arbitral institution and to agree on any modifications required by the particular nature of the dispute.

It is in this area, designing the procedural rules for the arbitration, that many of the potential cost, time and efficiency benefits of arbitration can be realized. The parties should consider the following kinds of issues:

- Should they require documents like litigation "pleadings" to set out their legal positions, and if so, how minimal or how elaborate should they be?
- What should be the scope of any required disclosure of documents?
- Should there be any form of pre-hearing "examination for discovery"?
- What should be the time frames for the procedural steps leading to the hearing?
- Should the evidence of witnesses at the hearing be given by written statement or affidavit and cross-examination, rather than by testimony?
- Should the arbitrator be required to deliver the award within a specified time, say 60 days after the hearing?
- What limits should be placed on the parties' rights to seek judicial intervention in the arbitration, and to appeal the award?

It is obvious from this list that arbitral procedure can differ significantly from civil litigation procedure. That is precisely the point. In arbitration, the parties have the freedom to design a process that incorporates only what is essential to resolve their particular dispute fairly, and therefore to realize the potential benefits of arbitration discussed above.

It should also be obvious that realizing many of the potential benefits will depend on the willingness of the parties (and the arbitrator) to make themselves available to deal intensively with resolving the dispute and to focus on what is essential to do so.

Administered Versus Ad Hoc

Another choice the parties must make is whether their arbitration is to be administered by an arbitral institution or ad hoc. Arbitral institutions offer administrative services for a fee. Usually their procedural rules assume their administrative services will be used. Those services usually include: acting as a registry for the filing of "pleadings"; assisting in the appointment of arbitrators if necessary; giving preliminary consideration of challenges to the independence or impartiality of arbitrators; arranging for the deposit of money to secure the payment of the arbitrator's fees, receiving and formally issuing the arbitrator's award; and the like. Some require that all communications between the parties and the arbitrator flow through them. If the arbitration is to be administered, the arbitration agreement should identify the administering institution and clearly state that it will have that responsibility.

The parties will have to consider whether these services are worth the cost. For a factually or legally complex dispute, or one involving large amounts of money, they may well be. For simpler disputes, they may not. The economics of a dispute involving a relatively small amount of money may simply make these services unaffordable. However, the parties should also remember that if the arbitration is to be ad hoc, the arbitrator (whom they must pay) will have to do whatever administrative work is necessary themselves.

The parties must also remember that, even if their arbitration is to be ad hoc, they must still specify a set of procedural rules. There are sets of arbitration rules suitable to ad hoc arbitrations. Another option is to amend the

rules of an arbitral institution to dispense with references to the institution administering the arbitration.

Confidentiality

If preservation of the parties' confidentiality is an important potential benefit of the arbitration, the parties should carefully consider how to preserve it. The applicable arbitral legislation and rules may deal with confidentiality to some extent. The parties should consider whether their arbitration agreement should incorporate a confidentiality agreement to deal with the issue further.

Seat of Arbitration

In the commercial context choosing the place, or "seat", of arbitration is important. This is because, if it is necessary for the parties to seek recourse to the courts during the arbitration, then they will almost certainly have to do so in the courts of that place, and because the laws of that place will govern the arbitration. Issues like the circumstances under which the parties can go to court and the procedures for doing so will be governed by the law of that place. Depending on where the parties' counsel are authorized to practice, they may have to retain local counsel to exercise those rights.

Sample Arbitration Provision

It is possible to address all of these design considerations in relatively few carefully chosen words. Here is one example:

All disputes arising out of, or in connection with, this agreement, or in respect of any legal relationship associated with it or derived from it, shall be finally resolved by arbitration administered by the ADR Institute of Canada Inc. pursuant to its National Arbitration Rules. The place of arbitration shall be Vancouver, B.C., Canada. The language of the arbitration shall be English.

This clause deals with all the design issues set out above:

- Scope – broad language.
- Number of arbitrators – the ADR Institute of Canada's National Arbitration Rules provide for the default of a single arbitrator.
- Qualifications – the Rules require that arbitrators be independent and impartial. No further qualifications are required in this case.
- Procedural rules – the ADR Institute of Canada National Arbitration Rules are specified.
- Administered v. Ad Hoc – the arbitration will be administered by the ADR Institute of Canada.
- Confidentiality – the Rules require confidentiality.
- Seat of arbitration – Vancouver is specified.

Conclusion

The commercial dispute resolution experience has been that arbitration can indeed be an effective alternative to litigation, if proper care is taken to design and implement an arbitration process which is more than just compressed litigation.

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IT'S YOUR BUSINESS

Bank Governor Wants Monetary Reform

Bank of Canada Governor David Dodge wants the International Monetary Fund (IMF) reorganized and bolstered so that it can pursue reforms that he believes are critical to preventing a global financial crisis. Addressing a recent meeting of the New York Association for Business Economics, he said the reforms must include liberalized capital markets and floating exchange rates in Asia, more flexible European labour markets, a reduction in the huge U.S. budget deficit, and a general lowering of protectionist trade barriers. "It could and should be the umpire for the world economic order, unafraid to call out countries that aren't playing by the rules", Dodge said. "It could provide support for the market to work at peak efficiency, monitor risks, provide necessary early warnings and help correct vulnerabilities before they become crises."

The IMF was established by the United States, Britain and their allies toward the end of the Second World War in a bid to stabilize currencies and coordinate monetary policy. It now has 184 member states, but the core Economic Summit entities known as the G7 dominate its board of directors and account for 45% of the organization's votes. The IMF and the World Bank have been criticized for lending policies that effectively compel indebted Third World countries to adopt market reforms and slash government spending to qualify for additional support. Dodge expressed his impatience with the G7, saying that its finance ministers and central bankers meet twice annually to talk about reforms while not accomplishing much. The meetings were "almost irrelevant" because "we're not dealing with the hard issues".

Dodge delivered much the same message the following day to an audience at Princeton University in New Jersey, calling the Washington-based IMF secretive and ineffective. "Instead of making tough calls about the rules of the game, the IMF has sat in the umpire's chair and simply asked the players politely whether they thought

their shot was in or out", he said, accusing the IMF of being badly out of step with the current global economy. He reiterated that its lending policies had "impeded the very same market-based adjustments that the IMF should be encouraging" and said that it should "play only a supporting role" rather than being a major lender. That role, he added, should be left to the World Bank.

Canada Ranks as Place To Do Business

The international accounting and consulting firm, KPMG, has ranked Canada for the sixth year in a row as the most cost-effective G7 country in which to do business. KPMG's *2006 Competitive Alternatives* report is based on eight months of intensive reviews of not only the G7 economies, but also those of Singapore and the Netherlands. Canada ranked second overall after Singapore. The report compared after-tax costs of starting up and operating a business over 10 years, factoring in energy, infrastructure, labour and transportation as well as taxes. Canada is shown as having a 5.5% overall cost advantage over the United States, and when results are broken down by municipality, Canadian cities rank higher than many of their international counterparts, particularly in the United States. KPMG also identifies Canada as the lowest-cost G7 country in 12 of 17 key industrial sectors such as aerospace, chemicals, electronics, medical devices, pharmaceuticals, precision manufacturing, telecommunications, biotechnology and software design.

"In today's global marketplace, companies continue to seek out the best, most cost-competitive places in which to locate and invest", Trade Minister David Emerson said in acknowledging the report. "The KPMG study shows once again that Canada offers one of the most cost-effective business and investment climates in the world.... Canada's competitive business costs are complemented by one of the highest standards of living in the world, a highly-skilled workforce, access to abundant natural resources, and its position as a gateway to the North American market. The message to global investors is clear: Canada is a location of choice for international commerce and our doors are wide open."

Report Says Trade Patterns Are Shifting

A Statistics Canada review of the country's international trade flows over the past decade and a half indicates that while the United States remains Canada's dominant export market, there has been an "unprecedented" shift on the import side of the trade ledger. "The United States and Japan are not as dominant in imports as in the early 1990s, and China has made inroads into many of Canada's consumer and investment goods", the agency says in its latest Economic Observer (**www.statcan.gc.ca/english/ads/11010-XPB/features.htm**). "Some of the growth in China is illusory, reflecting its role in assembling parts manufactured in other Asian countries." As a consequence, Canada's overall merchandise trade deficit with Asia did not deteriorate as it did during the 1990s.

Approximately 40% of Canada's imports last year came from countries other than the United States and Japan, a rise of more than 10 percentage points from the 1990s. The main beneficiaries of this shift – other than China – were South Korea, Europe, Mexico and the member states in the Organization of the Petroleum Exporting Countries (OPEC). "U.S. share of imports to Canada dropped primarily because of machinery and equipment (M&E), the largest import group", the agency says. The U.S. share of the Canadian M&E market amounted to some 54% in 2005 compared with 68% in 1990, having been eroded by imports from China and Mexico.

Canada's imports of electrical and electronic products (EEP) from the United States have shrunk by $10 billion in just the last five years. EEP imports from countries other than China also have declined. Conversely, the value of EEP shipments from China rose by 300% or nearly $4 billion over that period, part of the growth at the expense of Japan and the rest of Asia, both of which saw their EEP shipments to Canada drop by a third. "Canada's deficit for electronic goods has levelled off since 2000", the agency says. "That is because Canada imported less directly from Japan and other countries that supply the inputs for China's computer industry, such as Hong Kong, Taiwan and Singapore. Canada now imports much cheaper computer products that have been assembled in China, often from parts made throughout Asia."

On the export side of the ledger, Canada's dependence on natural resources continued to grow, accounting for 75% last year, with energy exports to the United States topping the list. "Energy is also one of Canada's least diversified exports in terms of trading partners and it became even less diversified after 2000", the agency says. "Roughly 95% of our energy exports went to the United States in 2005 compared with 84% in 1990. In 2005, energy made up one quarter of Canada's shipments to the United States, double their proportion in the 1990s. Canada exports mainly oil and natural gas, each of which earned at least $30 billion in 2005."

Exports of finished products fell sharply after 2000, a drop led by automotive products, notably to the United States. That decline affected only North American manufacturers; Canadian plants owned offshore increased their exports significantly. Automotive exports to Mexico grew notably in 2005, accounting for fully half of Mexico's total imports from Canada, up 10 percentage points from 2004 and the highest proportion since 1991. Overall, however, trade with Mexico has been "generally lacklustre" despite the *North American Free Trade Agreement*, displaced by growing trade with China over the last 15 years.

More Resolve Evident in Softwood Dispute

Prime Minister Stephen Harper and President George W. Bush evidently have directed their staffs to step

up efforts to resolve the 30-year softwood lumber dispute between Canada and the United States. Having met bilaterally with Harper for an hour during their Cancun summit with Mexican President Vicente Fox, Bush said Harper has shown a "steely resolve to get something done" and that they had agreed "to negotiate in good faith and in a timely fashion". Harper said Canada would continue court action in the absence of a negotiated solution. "If we don't see a resolution, Canada is going to continue to pursue all its legal options as well as enhanced support for our industry."

The United States has collected an estimated $5.2 billion in softwood surcharges during the past five years alone, and now a World Trade Organization (WTO) panel has validated the U.S. Department of Commerce's calculations on whether Canadian lumber exports were being dumped into the American market at below production costs. Canada had argued that the anti-dumping rates had been inflated. "The United States did not act inconsistently with its obligations under the asserted WTO agreements", the panel concluded in its report, which is the latest WTO ruling in favour of the United States. The ruling is non-binding, and it contrasts with legally-binding rulings in Canada's favour by panels under the auspices of the *North American Free Trade Agreement*.

Border Documents Probably Inevitable

Despite resistance from the tourism industry on both sides of the border, U.S. President Bush is bowing to Congress on the issue of stricter identification policies, and Prime Minister Harper has essentially conceded the inevitability of the measure. Security-conscious forces in Congress succeeded in passing a bill requiring most entrants to the United States, including returning Americans, to provide a passport or equivalent documentation, effective next year. Ground travel is exempt until 2008. Bush has said he would not veto the measure, and after their meeting in Mexico, Harper warned that "if we don't move quickly and properly on this" it could limit trade in merchandise and services as well as affecting the movement of people. "You name it, that is not helpful to our economy or to our relationship", he said, explaining that he and Bush have instructed their responsible cabinet members to meet and make the issue a top priority.

"I understand this issue has caused some consternation and your Prime Minister has made it very clear to me that he's very worried that such an implementation of the law on the books will make it less likely that people will want to travel between our two countries", Bush told reporters. "I believe this can be done in such a way that it makes future such relationships stronger, not weaker." Harper said in an interview that he expects to meet Bush in Washington this spring, probably in June, and that he might get an update on the "passport problem" then.

PROGRESS OF LEGISLATION

B.C. Introduces Compassionate Leave Bill

British Columbia has introduced Bill 8, the *Employment Standards (Compassionate Care Leave) Amendment Act, 2006*, which will allow an employee to take up to eight weeks of unpaid leave to provide care or support to an immediate family member who is terminally ill.

British Columbia joins most Canadian jurisdictions that have already passed similar legislation to provide for care to elderly family members, including the federal government, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan, Nunavut, the Yukon, and most recently, Newfoundland and Labrador. Alberta and the Northwest Territories are the only jurisdictions that currently do not provide compassionate care leave or the equivalent. The federal government has compassionate care leave benefits in place under the Employment Insurance system, granting eligible employees six weeks of special Employment Insurance benefits.

Pursuant to Bill 8, leave can be taken provided the employer is supplied, as soon as practicable, with a certificate from a medical practitioner indicating that the family member is at significant risk of death within 26 weeks. The leave must be taken in units of one or more weeks. The employee may take a further leave if the family member does not die within the original leave period, after obtaining a new medical certificate.

Bill 8 received first reading on March 9, 2006, second reading on March 20 and third reading on March 21.

Ontario Combats Underground Economy

The Ontario government has introduced measures to combat what it calls the underground economy in construction. The underground economy allegedly represents an estimated one to two billion dollars per year in lost revenue to all levels of government, a significant amount of which is lost through unpaid taxes, premiums and other fees that legitimate businesses pay. The government claims that the underground economy, in which uncertified and unqualified workers are hired in the construction sector, affects the overall economy, the quality of construction, the competitiveness of legitimate players in construction, and the health and safety of all who work in the sector.

To strengthen the enforcement of training requirements for trades workers in Ontario, the government will now grant Ministry of Labour inspectors the power to issue on-the-spot tickets to uncertified trades workers who require compulsory certification. Ticketing these workers will help create safer workplaces by ensuring that only qualified workers undertake construction and that all workers, supervisors, and employers play by the rules. Ensuring that construction trades workers are properly

trained also helps protect the public and reduce workplace injuries.

The *Trades Qualification and Apprenticeship Act* (TQAA) sets out certification requirements for certain trades and apprenticeship training requirements, including hazard recognition and health and safety training. Ministry of Labour health and safety inspectors enforce the Act's certification requirements for the following trades: electricians, hoisting engineers, plumbers, refrigeration and air conditioning mechanics, sheet metal workers, and steamfitters. Upon request, employers and these trades workers are required to provide written proof of TQAA trades qualifications, such as a certificate of qualification or an apprenticeship contract, to ministry inspectors.

Until now, ministry inspectors have generally been issuing orders to comply if written proof could not be provided immediately. With amendments to Regulation 950 under the *Provincial Offences Act* (POA), Ministry of Labour inspectors will now be able to issue tickets to employers, supervisors and workers in specified trades if written proof of TQAA trades qualifications is not provided. An employer, supervisor or worker, issued a ticket, can pay it in person or by mail or appear in court to contest the ticket.

Other steps that the Ontario Government is undertaking to combat the underground economy in construction include the following:

- Expanding the number of inspectors by hiring and training 200 new people to visit more workplaces, to improve health and safety performance, and to help identify workers or employers involved in the underground economy.
- Signing formal agreements with the Workplace Safety and Insurance Board (WSIB), the Electrical Safety Authority, and the Ministries of Finance and Training, Colleges, and Universities to work together to identify underground economy activity and recover lost revenue.
- Collecting data, including WSIB registrations and tax information, for the organizations involved to follow up on.
- Educating consumers about the dangers they may face when using underground, unqualified contractors and workers.

Saskatchewan To Boost Hourly Wages

Saskatchewan raised its general minimum wage rate on March 1, 2006 from $7.05 per hour to $7.55 per hour. The rate will increase again next year, on March 1, 2007, to $7.95 per hour.

Similarly, the call-in pay for Saskatchewan workers increased on March 1, 2006 from $21.15 to $22.65. This rate will also increase again on March 1, 2007, to $23.85. Call-in pay refers to the minimum amount an employee must be paid whenever he or she is required to be on duty (other than for overtime), whether or not services are required.

NEWS FROM THE U.S.

This Newsletter regularly reports on American trends in Human Resources Management of interest to Canadians. The article below appeared in IDEAS AND TRENDS, *a newsletter by CCH, a Wolters Kluwer business, on March 22, 2006: "Multigenerational Workforce May Be the Solution" (#627-1). The article is reproduced with permission from CCH Incorporated, United States. If you wish to place an order or would like more information on U.S. products available, please contact our Customer Satisfaction Hotline at (416) 224-2248 or 1-800-268-4522.*

Multigenerational Workforce May Be the Solution

The 50 plus workforce is one of our greatest national assets, and as such, engaging these workers should be one of the nation's highest priorities. For many employers, workers over 50 represent a potentially attractive solution to near- and long-term staffing challenges. "Making use of this growing pool of talent, of the collective experience and knowledge of veteran workers, is smart business – a plus for employers and employees alike", said Emily Allen, director of the Workforce Initiative for the AARP, formerly known as the American Association of Retired Persons.

The AARP, in a report prepared by global professional firm Towers Perrin, assessed the strength of the business case for investing an employer's resources in the retention and attraction of workers over 50. The AARP report found that workers over 50 are a solid investment for employers. The analysis showed that the extra per-employee cost of retention and attraction of workers over 50 ranges from negligible to three per cent.

At the same time, Towers Perrin said that workers over 50 are productive and more highly engaged in their work than younger workers. In brief, it is a myth that workers over 50 "check out" as they get older. Similarly, it is a myth to think that workers over 50 are looking to retire. Instead, workers between the ages of 50 and 70 intend to work far into what has traditionally been viewed as "retirement years".

Now is the time to access this untapped resource. As labor shortages are being projected in many sectors of the economy, companies are beginning to realize that they cannot afford to have employees retire en masse. These companies are wise to carefully evaluate labor costs – and the "value" of workers – in planning for their future talent needs.

"Virtually all companies will face a more competitive U.S. market for talent in coming years, along with the chal-

lenge of managing an increasingly cross-generational workforce, especially if significant numbers of Boomers do, in fact, prolong their careers", stated Allen. "Continuing productivity gains, immigration, off-shoring and new labor-saving technologies may help mitigate the staffing crunch for some companies."

Current data and projections suggest that the U.S. workforce will grow at a considerably slower rate during the first half of this century than it did during the last 50 years. This slowdown in labor force growth will occur at a time when many major companies are shifting their focus from business strategies geared to cost-reduction toward growth models that emphasize innovation and excellence in customer service. Such strategies depend on having the right number of engaged, service-focused employees – and therein lies the opportunity, as demographics evolve, for companies to gain a competitive advantage by effectively deploying the skills and talents of all age groups.

Engaging the Workforce is Key

Employee "engagement" is increasingly viewed as a key factor in predicting the financial success of a company. Towers Perrin's research has demonstrated that firms with highly engaged workers outperform those with less highly engaged employees. The research also found a strong inverse relationship between employee engagement and turnover. "Employees who are more engaged are less inclined to leave their employers", noted Allen. "Given the high cost of turnover, the higher engagement levels among workers over 50 should be an important consideration for companies trying to maximize their workforce investment."

Preparing for Baby Boomer Retirement

The media has discussed, analyzed and warned employers of the impending mass exodus of Baby Boomers. Employers, in turn, are feeling the pressure to build their workforce and to prepare for the potentially ill effects that could result from the loss of great talent and experience. As stated, however, not all Boomers are looking to retire and employers should be quick to take advantage.

Retain Boomers with Rewards

To retain, attract and engage workers over 50, organizations will need to offer the right mix of rewards, including health care benefits, innovative growth and development opportunities, competitive retirement benefits and, perhaps most importantly, flexible work and part-time employment opportunities. Companies will also need to pay closer attention to the work environment and cultural factors that contribute to a positive working experience for a multigenerational workforce.

In most cases, the policies, strategies or benefits an employer puts into place to help attract or retain workers over 50 will also very much benefit workers of all ages. Things like flexible work options, benefits for part-time work, etc., help younger workers as much as workers over 50. It is age-specific benefits, such as phased retirement, that are definitely of interest to the Boomer population as they look to balance work and life issues.

Policies and Strategies

By industry, it is important to segment areas of focus for policies and strategies. AARP has developed the following recommendations for engaging workers over 50 in four key business areas:

- Benefits and Compensation – Are there benefits (both core and ancillary) that resonate with workers over 50 that could also benefit younger workers?
- Training and Re-skilling – Are training opportunities and funding readily available to workers who want to enter a particular industry after careers in other industries? Are continuing education opportunities available to those even in remote areas?
- Environment and Tools – Are workers given the tools they need to get the job done and lessen the physical impact of the job, which could enable them to remain in the job longer (e.g., in the health care industry, are automatic lift beds available such that a nurse does not have to lift a patient)?
- Worklife and Wellness – Are proper programs in place to address employee needs, such as caregiving, of workers over 50?

To assist employers and HR further in their quest to prepare the workforce adequately for the future labor shortages and potential retirement of Baby Boomers, the AARP has formed The Alliance for an Experienced Workforce (AEW). The AEW helps employers understand, plan for and create workplaces that successfully engage and utilize the skills of the workers over the age of 50, both now and in the future. The AEW increases the opportunities for both employers and employees by presenting a collaboration of strategies, helpful in preparing the workforce for what lies ahead.

The AEW is made up of associations representing various industries. Consequently, while there may be varying strategies put into place based on what types of workforce challenges a particular industry is facing at a given time, the AEW believes that attracting and retaining experienced and reliable workers must become a core business strategy for all employers.

"At the same time, however, it is vital to ensure that these 50 plus workers are prepared to meet the skills in demand of the 21st century workplace," advised Allen. "For the U.S. to maintain its competitive edge in the global economy, companies must put in place innovative, sustainable policies and practices that are mutually beneficial to employers and 50 plus workers, while planning for the

transfer of knowledge, skills, information, and workplace culture as these workers begin to fully or partially retire."

Cost of Worker Retention Will Vary

The cost to an organization of retaining retirement age workers varies by company size, industry, job requirements, etc. "Whether in the context of retaining a larger segment of the 50 plus workforce or targeting additional hiring of 50 plus workers, the comparative cost differences are balanced – if not outweighed – by other factors", said Allen.

In the case of retention, the offsetting factors are the turnover-related costs of replacing veteran employees with deep institutional knowledge and job-related know-how and the time it takes to select and train new workers to be fully productive. In the case of hiring, the age-based compensation cost differences are negligible relative to total labor cost and, thus, make a strong business case for recruiting at all ages to maximize business performance and the organization's return on the available talent.

"What about the productivity side of the equation?" asks Allen. "The impact of aging on worker productivity is highly dependent on the specific job and work performed. In most cases, employers can expect that a worker over 50 will be more productive than someone younger with less on-the-job experience." Academic studies of physical attributes like strength and manual dexterity have found that workers' abilities tend to decline with age. But, increasingly, due to the growth of the knowledge economy, the proportion of jobs requiring relatively little physical effort has increased considerably over the past few decades. Moreover, research on cognitive functioning and skills that are learned over time (e.g., verbal communication) shows that abilities in these areas improve with age.

Tips for Understanding an Aging Workforce

Not all organizations understand the priorities of the workforce over 50. This lack of knowledge could be what leads a worker over 50 to retire even though it would not have been his or her first choice. Organizations can hang on to this on-the-brink-of-retirement talent by considering what it is that the aging workers want out of their jobs. AARP research has shown that workers over 50 are interested in the following when it comes to work:

- An environment in which their opinions are valued, and in which they can gain new skills and experiences;
- The ability to choose their own hours, take time off to care for relatives and work from home;
- An organization that allows people over 50 to remain employed for as long as they want to continue working;
- The opportunity to have new experiences and learn new skills;
- Access to good health benefits; and
- The opportunity to work a reduced schedule prior to full retirement.

The AARP also suggests that employers:

- Inventory current talent and define future needs, based on an analysis of your organization's near- and long-term business plans.
- Model cost trends to understand the business case for investments needed to attract or retain workers over 50, focusing on total compensation costs for the various talent pools and taking into account one-time turnover costs.
- Pay equal attention to revenue and performance considerations, including the impact of employee engagement on company performance and turnover risk.
- Study the available labor pool and define talent strategies, keeping in mind the specific requirements (physical, mental and scheduling flexibility) of each job.
- Align reward programs to support business and talent objectives.
- Align workplace policies and culture, as all of the available research points to the work environment as a key consideration for workers over 50 in deciding whether to join or stay with an organization.

Source: Interview conducted by CCH, a Wolters Kluwer business, of Emily Allen, director, Workforce Initiative in the AARP's national office, Washington, D.C. Please visit **http://www.aarp.org** for more information.

EDITORIAL

Are You Healthy Enough To Work Here?

By: Kristin Taylor of Fraser Milner Casgrain LLP's Toronto office. © CCH Canadian Limited.

One of the more interesting developments south of the border has been the increase in the number of employers who are taking great interest in their employees' personal health. This interest has not been generated solely by employers' caring attitude toward their employees' level of wellness. Much – or perhaps all, in some cases – of this interest comes from the desire to restrain rising benefit costs and the costs associated with absenteeism due to illnesses and injuries. It raises the question of just how intrusive employers can be in their attempts to ensure the physical health and well-being of their employees. As with the answers to many human rights issues, the answer to this question seems to vary depending on whether the employer operates south or north of the Canada – U.S. border.

An editorial I wrote recently described the new policy of a Michigan, U.S. employer, Weyco Inc., to fire employees who smoked. In early January 2005, four employees had been dismissed after they refused to take a breathalyzer test to check for the presence of nicotine. Weyco Inc. received a great deal of media attention immediately fol-

lowing the implementation of its policy, including a "60 Minutes" segment with an interview of its founder and president, Howard Weyers. Speculation swirled that overweight workers who did not lose weight were Weyco Inc.'s next target. This ultimately turned out to be false and Weyco Inc. maintains that it never had any intention of adopting a policy by which an employee could be subject to discipline or termination due to weight. However, Weyco Inc. has announced further plans to encourage employees to take better care of themselves. In a December 2005 CNN interview, Weyers indicated that they would implement a $1,000 charge for employees who report that their spouses smoke. Other plans include a premium hike of $65 per month for employees who refuse to take mandated medical tests and physical examinations.

Interestingly, Weyco Inc. is in the business of helping companies improve their benefit plan management and their employees' health. It appears that Weyco Inc.'s corporate objective is to be creative and cutting-edge in terms of expanding employer influence over employees' private lives where it can be done in the name of benefit cost savings. Privacy issues and accommodation issues appear non-existent, at least insofar as Weyco Inc. is concerned.

If Weyers had his way, I expect that employees and their immediate families (in light of dependent insurance coverage) would complete a daily, itemized report card that might include the following items:

- Day of week;
- Morning weigh-in;
- Meals consumed: describe with nutritional value, calorie and carbohydrate count;
- Drinks consumed: describe with nutritional value, calorie and carbohydrate count, identifying any alcoholic beverages;
- Teeth brushed and flossed (# of times);
- Exercise – describe type of activity, cardio level, duration and calories expended.

Perhaps video surveillance or automatic reporting of weight and exercise (through black boxes in scales and fitness equipment, for example) could be employed. Those who meet the healthy threshold could remain employed and receive a reduction on benefit premiums. Those who did not would receive substantial hikes in benefit premiums immediately, but be accommodated for a period of time during which they would receive counselling, medical examinations, etc. (similar to the "Biggest Loser" television program). If, however, after accommodation, they did not improve their ways, their employment would be terminated or, as Weyers might say, they could choose to work elsewhere. Can you imagine?

While the boundaries between work and personal life in Canada are just as blurred in some respects as they are in the U.S., in others they are very different. Blackberries, pagers, cell phones, and Internet connections all enable employees to work away from the actual workplace during and outside working hours. For some employees, these devices allow them to better manage their personal and work commitments. Technology can create greater flexibility and improve employees' ability to complete work assignments without commuting to an employer's premises. For other employees, though, technology has meant unwanted intrusion into personal time because the same trade-off has not taken place. Technology has added to already onerous work commitments rather than alleviating those commitments. There has been little challenge to this blurring of work and personal time from an employment rights perspective outside of compliance with minimum employment standards obligations.

The issues raised by Weyco Inc. and employers who are following its lead, though, are very different. I cannot imagine a Canadian employer tossing around the idea of punishing an employee because his or her spouse smokes, to save on benefit costs. The concept of an employee's right to privacy in terms of his or her personal health is very different in Canada. Here, outside of Quebec and the rights created with respect to injuries or illnesses covered by workers' compensation, an employer has little right to intrude on an employee's health situation. Independent medical examinations are becoming increasingly difficult to compel without a statutory right. Employers are required to defer to the employee's treating physician, and only if the treating physician refuses or is unable to clarify reasonable questions arising from a medical report can a demand for an independent medical examination reasonably be required. The idea that an employer could levy what appears to be, in essence, a penalty because an employee is married to a smoker is outrageous by Canadian standards.

The provision of a paycheque and benefits should not entitle employers to intrude on personal relationships or off-duty conduct except to the extent that there is a direct impact on the employer, particularly when it comes to matters of an individual's lifestyle choices and health. Perhaps the new "right to choose" will relate to broader lifestyle choices. The 21st century is bound to be interesting. We shall wait and see how this trend develops.

This article originally appeared in the January 2006 issue of Focus on Canadian Employment and Equality Rights.

BUSINESS BRIEFING

Note: Unless otherwise stated, all information is from Statistics Canada. For more figures on the Consumer Price Index and the Bank of Canada rate, go to the CANADIAN BUSINESS MANAGEMENT MANUAL, "Facts & Figures" tab division, ¶523 *et seq.*

Unemployment down. Seasonally adjusted unemployment in February was 6.4%, compared with 6.6% in January and 7% in February 2005. Adjusted unemployment in the latest month was 1,109,800, compared with 1,152,500 and 1,208,500; employment was 16,345,700, compared with 16,321,000 and 16,084,000; and the overall labour force was 17,455,500, compared with 17,473,500 and 17,292,500, all respectively.

Unadjusted February unemployment was 6.7%, compared with 7.2% in the previous month and 7.5% a year-earlier. Unadjusted unemployment was 1,158,900, against 1,230,000 and 1,273,100; estimated employment was 16,041,700, against 15,949,100 and 15,679,200; and the labour force was 17,200,600, against 17,179,100 and 17,042,300, again respectively.

Gross Domestic Product up. Economic growth as measured by gross domestic product (GDP) evidently decelerated in January, rising by an estimated 0.2% after gains of 0.4% in December and 0.3% in November and October. Subject to revision, it left the overall value of GDP, seasonally adjusted at annual rates (SAAR), at $1,091.95 billion (1997 prices) or 3.3% above a year earlier, the same as in the previous month. The goods-producing sector was down 0.5% in the month, but up 2% in the year at $345.23 billion, while services-producing industries were up 0.5% in the month and 3.9% in the year at $747.66 billion.

Consumer Price Index down. The Consumer Price Index (CPI) in February was 128.6 (1992 = 100), down 0.2% from 128.8 in the previous month, but still 2.2% ahead of 125.8 in February 2005. The latest annual increase, a sharp deceleration from January's 2.8%, was mainly due to a drop in retail gasoline prices. The purchasing power of the dollar in February was 77.8 cents, compared with 77.6 cents in the previous month and 79.5 cents a year earlier. The latest CPI on a 1986 base was 164.6.

Manufacturing down. Shipments by 21 major manufacturing groups were down in value in January from the previous month's revised values, while inventories and unfilled orders were up and new orders were effectively unchanged. All were up from January 2005 except new orders.

Bankruptcies up. There were 6,858 bankruptcies in January, compared with the previous month's 6,466 and the year-earlier's 6,792. The latest total includes 6,234 consumer bankruptcies against 5,905 in the previous month and 6,194 a year earlier. January's corporate failures totalled 624 against 561 in the previous month and 598 a year earlier. Liabilities arising from the corporate bankruptcies in January totalled $237,677,107 against the previous month's $213,508,206 and the year-earlier $119,448,199.

(Office of the Superintendent of Bankruptcy, 365 Laurier Avenue West, Jean Edmonds Tower South, 8th Floor, Ottawa K1A 0C8; telephone (613) 941-1000, fax (613) 941-2862).

Retail sales up. Retail sales in January are estimated at $31,823 million, seasonally adjusted, up 1.4% from the previous month's $31,387 million (revised from $31,251 million) and 7% from the year-earlier $29,763 million.

Housing sales up. Sales of existing housing in Canada's 25 major markets rose 7.6% in February from a year earlier to 27,569 units, the Canadian Real Estate Association reports. Average values rose 12.3% to $283,579.

(Canadian Real Estate Association, 320 Queen Street, Suite 2100, Ottawa, Ontario K1R 5A3; telephone (613) 237-7111 or fax (613) 234-2567.)

Motor vehicles sales up. The 89,422 new motor vehicles sold in Canada in January represented a 9% increase from a year earlier; sales value rose 10.7% to $2,975,032,000.

Population on rise. The latest estimate of the country's population is 32,422,919 at the beginning of 2006, up 0.14% from 32,107,043 a year earlier.

Bank rate steady. The Bank of Canada lending rate is now 4% and its overnight target rate was increased on March 7, 2006 to 3.75%. The next rate announcement is scheduled for April 25.

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