

**Stikeman Elliott**

## Secondment agreements Q&A: Canada

By Lorna Cuthbert and Tamara Ticoll

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## Secondment agreements Q&A: Canada

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Canada specific information concerning the key legal and commercial issues to be considered when drafting secondment documents for use internationally.

This Q&A provides country-specific commentary on *Practice note, Secondment agreements: International*, and forms part of *Cross-border employment*.

See also *Standard document, Secondment agreement: International* and *Standard document: Letter of secondment: International*, with country specific drafting notes with country specific drafting notes.

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## Secondment agreements: Canada

**1. Where the secondment is to your jurisdiction, what mandatory local laws will apply? Can the secondees' contract of employment, which is stated as being under the laws of their home country, be enforced under your national laws? If so, in what circumstances can this be done?**

A secondment who is entering into a secondment arrangement with a Canadian host must assume that the secondees will be subject to Canadian statutory employment laws. These mandatory local laws include:

- **Employment standards legislation.** This regulates the essential terms and conditions of employment (including, without limitation, with respect to minimum wage rates, hours of work, overtime pay, daily and weekly rest periods, vacation time and vacation pay, public holiday pay, leaves of absence and termination of employment). Each Canadian province and territory has its own employment standards legislation. Federally regulated employers (for example, employers in the banking and aviation industries, among others) are governed by federal employment standards legislation.
- **Human rights legislation.** This provides protection from discrimination and harassment in all aspects of employment based on certain protected grounds (for example race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status and disability). Each Canadian province and territory has its own human rights legislation. Federally regulated employers are governed by federal human rights legislation.

- **Occupational health and safety laws (OHS laws).** These contain workers' rights such as the right to refuse work reasonably believed to be unsafe, as well as protections in relation to workplace violence and harassment. Each Canadian province and territory has its own OHS laws, and federally regulated employers are governed by federal OHS legislation.
- **Accessibility for Ontarians with Disabilities Act 2005 (AODA).** Employers in the province of Ontario are subject to the AODA which contains requirements aimed, in part, at protecting and supporting workers with disabilities.
- **Pay equity legislation.** Employers in Ontario and Québec are subject to pay equity legislation that provides minimum requirements for ensuring that an employer's compensation practices provide pay equity for all employees in female job classes and for maintaining pay equity on an on-going basis.

Canadian courts will not enforce a secondees' contract of employment which is stated as being under the laws of their home country if its provisions violate statutory laws. They may also refuse to enforce contractual provisions in breach of the common or civil law, or which are contrary to public policy. This assessment is highly contextual and will vary based on the circumstances of each case.

Assuming the contract does not breach statutory laws and is not contrary to public policy, then Canadian courts may enforce contractual terms governed by a foreign jurisdiction, usually a through court order.



### 2. Are there any relevant national laws that any party to a secondment agreement may need to be aware of before entering into such an arrangement?

See *Question 1* and *Question 3*.

## Immigration

### 3. Do foreign nationals require a residence/work permit to live and work in the jurisdiction? Does it take a long time to obtain these?

#### Residence/work permit

A secondee who is a foreign national must have a work permit to work in Canada. There are several different work permit options that may be available, including, for example:

- Work permits obtained in connection with intra-company transfers for senior managers, executives or employees with specialised knowledge, through a general trade agreement with a foreign jurisdiction, including through the North American Free Trade Agreement (NAFTA) (for US and Mexican citizens) (provided certain prescribed criteria are satisfied). Work permits issued under the intra-company transfer categories of NAFTA may initially be valid for up to three years and can be extended for up to five years (in total) where the transfer falls under the specialised knowledge category, and up to seven years (in total) where the transfer falls under the senior managerial and executive category.
- Work permits obtained by “NAFTA professionals”, that is qualified professionals in one of the 60 professions deemed eligible under NAFTA (including, for example, accountants, architects, engineers, and certain scientists) in occupations that match their qualifications, which are generally valid for an initial period of up to 36 months and can be renewed indefinitely.
- Work permits obtained through the Temporary Foreign Worker Program, in conjunction with reciprocal employment agreements, which allow foreign workers to work in Canada when Canadians have similar reciprocal opportunities abroad. These work permits can generally be issued for up to three years and may be renewed.
- Work permits obtained through the International Experience Canada programme, available to individuals between the ages of 18 and 35 who are citizens of countries that have youth mobility programmes with Canada. These work permits are available for 12 to 24 months, depending on the secondee’s country of citizenship and the category under which the person is applying.

If the above exemptions are not available, work permits can be obtained through the Temporary Foreign Worker Program, in conjunction with the conduct of a labour market impact assessment (LMIA). The Canadian host must demonstrate through the LMIA that no other Canadian could perform the job in question and that it has advertised the position over a four-week period in the three months prior to filing the application for the LMIA. LMIA-based work permits can be issued for up to three years.

#### Procedure

The difficulty and length of the work permit process depends on the type of work permit being sought and whether the secondee can make their application directly at a Port of Entry or through a Canadian visa office (which is dictated by the secondee’s citizenship). Processing for LMIA exempt work permits can take from two weeks (where a Port of Entry application can be made) up to several weeks. LMIA-based work permits involve a lengthy application and approval process taking several months

## Nature of the secondment agreement

### 4. In your jurisdiction, how should a secondment arrangement usually be recorded between:

- a) The seconder and secondee; and
- b) The seconder and the host.

Generally, a secondment arrangement in Canada is recorded by a written secondment agreement between the seconder and the host, and a secondment agreement between the seconder and the secondee. There are no particular formalities required in this regard (including if the secondee is being seconded to another company in the employer’s group).

### 5. What information needs to be included about the parties at the start of the secondment agreement?

Although there are no required formalities, the following information should be included at the start of the secondment agreement:

- Name of the seconder/employer of the secondee (and confirmation that the seconder will remain the employer of the secondee for the duration of the secondment).
- Name and address of the host.
- Term/duration of the secondment.
- Secondee’s hours of work and nature of the services to be provided.

- Wages and tax withholdings applicable to the secondee (including which party will be responsible for same).
- Secondee's vacation entitlements and the process for taking/obtaining approval for vacation.
- Secondee's entitlements to benefits (including which party will be responsible for the provision of same).
- Consequences of termination of the secondment, or termination of employment of the secondee by the seconder.

### Duration

#### 6. Are there any limitations or requirements in national law that the seconder needs to be aware of in relation to the length or format of the secondment to your jurisdiction?

The length of a secondment to Canada for a secondee who is a foreign national will depend on the type of work permit obtained (see [Question 3](#)).

### Who is the employer?

#### 7. Under your national labour laws, who will be the secondee's employer during the secondment? Other than by the express agreement of the parties, could there be any change to the employer during the secondment?

There is no specific legal requirement as to who must be the secondee's employer during a secondment to Canada. Secondment agreements can be structured in different ways, depending of the preferences of the parties.

Typically, the seconder remains the employer of the secondee so that the host does not become subject to employment-related obligations in relation to the secondee (including, the termination of employment related obligations described in [Question 8](#)). However, it is possible that a change in employer could occur during a secondment even where there is express agreement of the parties as to which party will be the employer. More specifically, where a host assumes a significant degree of management and control over a secondee, the secondee could be deemed to have acquired employment status with the host. In this situation, the seconder and the host could also be deemed be joint employers (see [Question 9](#)).

Whether an employer-employee relationship was formed between a secondee and the host as a result of a secondment would be a fact specific determination, taking into account factors such as:

- Whether the secondee was remunerated directly by the host or received remuneration, benefits, perquisites, or other privileges directly from the host.
- Whether the secondee was subject to performance management by the host.
- Whether the host had any impact on the termination of the secondee's employment.

### Acquired employment rights

#### 8. What statutory employment rights could the secondee to your jurisdiction acquire?

A secondee to Canada would be subject to the minimum entitlements under Canadian employment legislation (see [Question 1](#)).

If the secondee was terminated from employment while in Canada, statutory entitlements (at a minimum) would govern the termination. In Canada, the statutory notice requirements for an individual employee vary from one to eight weeks' notice, based on years of service. Employees working in Ontario with more than five years of service are also entitled to severance pay up to a maximum of 26 weeks where one or more employees have their employment terminated by an employer with a payroll in Ontario of CAD2.5 million or more.

Canadian employees may also have common law (or civil law, in Québec) entitlements to notice of termination in the event of termination of their employment without cause. These entitlements are not formulaic and they typically exceed the statutory notice and severance pay obligations. What constitutes reasonable notice depends on a variety of factors, including, among other things, the employee's age, position, compensation level and years of service. On average, an employee's common or civil law notice entitlements can range from three to six weeks of total compensation per year of employment, up to a rough upper limit of 24 months. A written contract can limit the notice entitlement on termination, provided that the statutory entitlement are, at a minimum, provided for in the agreement.

### Continuity of employment

**9. Are there any circumstances under national law where the secondee's continuity of employment may be broken as a result of the secondment? What would be the impact on the secondee if continuity is broken, if any?**

For information regarding the acquisition of employment status with the host by a secondee, see [Question 7](#). In the event that a secondee is deemed to have acquired employment status with the host, it is possible that the seconder and host could be deemed to be joint employers. The secondee's continuity of employment with the seconder will not be broken in these circumstances, provided the employment relationship between the secondee and the seconder is not formally transferred to the host or otherwise terminated. However, the secondee could make a claim for the severance entitlements in relation to their acquisition of employment rights with the host (see [Question 8](#)). The secondee could also have claims against the host to any unpaid wages or other amounts owing under applicable employment standards legislation in connection with the secondment, such as unpaid vacation pay, public holiday pay, overtime pay, and termination and/or severance pay.

### Terms of the employment contract

**10. Can the terms of the secondee's employment terms be changed by their employer as a result of the secondment? If so, how can this be done?**

The terms of the secondee's employment can be changed by a Canadian employer as a result of the secondment, provided that the employer abides by any relevant contractual provisions and the employee consents, to the extent required, to such changes. Consent will generally be required where a Canadian employer is seeking to introduce material (and in particular, materially detrimental) changes to terms and conditions of employment.

Changes to contractual terms and conditions of employment (for example, to the employee's place of work, remuneration, and their role and responsibilities), if any, can be formalised in a secondment agreement between the employer/seconder and employee/secondees. The employee/secondees' consent would then be contained within the secondment agreement.

Where a change to a term or condition of employment could be construed as materially detrimental to the

employee (for example, the introduction of a restrictive covenant), the employer must, in addition to obtaining the employee's consent, provide consideration for such change to be enforceable and to avoid or limit the risk of claims of constructive dismissal (see [Question 16](#)).

### Management during the secondment

**11. Can provision be made in the agreement for the seconder to conduct any performance and pay reviews of the secondee during the secondment (Standard document, Secondment agreement: International: clause 6)?**

Yes.

### Payments

**12. Can provision be made in the secondment agreement for the seconder to continue to pay the secondee's salary and wages during the secondment and for the host organisation to reimburse the seconder (see Standard document, Secondment agreement: International: clause 5)?**

The typical structure in Canada is for the seconder to continue to pay the secondee's salary and wages during the secondment and for the host organisation to reimburse the seconder.

### Benefits

**13. Can provision be made in the secondment agreement for the seconder to continue to provide all the benefits to the secondee during the secondment, together with any sick pay or other leave entitlements (see Standard document, Secondment agreement: International: clause 5)?**

The typical structure in Canada is for the seconder to continue to provide all the benefits to the secondee during the secondment, together with any sick pay or other leave entitlements. However, the secondee is entitled to certain statutory leave of absence entitlements, as provided in the applicable

employment standards legislation. The statutory leaves of absence differ slightly by province, but generally include pregnancy and parental leave, medical/personal emergency and bereavement leave, caregiver/family medical/compassionate care leave, organ donor leave, reservist leave, child death and crime-related child disappearance leave, domestic or sexual violence leave, and jury or witness duty leave.

### Overtime

**14. Are there any requirements that the secondee must receive paid overtime for work performed in your jurisdiction? Can this be paid by the host (see *Standard document, Secondment agreement: International: clause 5.2*)?**

Overtime eligible workers in Canada are entitled to overtime pay for all hours worked in excess of the applicable provincial or federal overtime threshold for example:

- 44 hours for Alberta, New Brunswick and Ontario.
- 40 hours for British Columbia, Manitoba, Newfoundland and Labrador, Québec and Saskatchewan and for federally regulated employers.
- 48 hours for Nova Scotia and Prince Edward Island.

Certain categories of employees are not eligible for overtime pay. However, a highly paid or salaried employee is not necessarily exempt from overtime pay in Canada. Although the overtime exempt categories vary by Canadian jurisdiction, they generally include:

- Employees who are professionals and practising in their profession (for example, practising lawyers, doctors, accountants and architects).
- Employees whose role is managerial or supervisory in nature.
- Information technology professionals and sales people who make their sales outside of the office and who are remunerated partly by way of commission payments.

The parties can arrange for any overtime pay to which a foreign secondee is entitled to be paid by the host. However, the more common practice is for the host to notify the seconder of any overtime worked, the seconder to provide overtime pay to the secondee and the host to provide reimbursement to the seconder for the same. This arrangement, if applicable, should be formalised in the secondment agreement.

### Tax

**15. Are any service taxes payable on any secondment fees paid by the host to the seconder, if applicable under the terms of the agreement (see *Standard document, Secondment agreement: International: clause 5*)?**

The applicable sales taxes that could be payable under a secondment arrangement depend on the specific terms and conditions of the arrangement and the status of the host and seconder. However, as a general statement, if the secondment fee paid by the host to the seconder is a reimbursement of expenses (with no profit mark up, on the basis that the seconder made the payment to the secondee as agent for the host), no sales taxes would generally be expected in respect of this payment.

**16. What potential tax, social security or other payments will the parties be liable to make in your jurisdiction as a result of the secondment:**

- Secondee?
- Seconder?
- Host?

### Secondee

Tax. A secondee who is resident in Canada is subject to tax on their worldwide income. Whether a secondee is resident in Canada is a question of fact to be determined on a case-by-case basis. Generally, a secondee is considered to be resident in the country in which they “ordinarily reside”, which is the place where they maintain a home to which they regularly return, or the place where they maintain significant social, economic or family ties.

For a secondee, it is expected that the secondee would only be in Canada for a temporary duration and would be unlikely to be or to become a resident of Canada for tax purposes. However, an individual may be deemed to be resident in Canada throughout the year if they “sojourn” (that is, are physically present) in Canada for an aggregate of 183 days or more during the calendar year. An applicable tax treaty may provide for a tie-breaker in certain circumstances and, as a consequence, exempt the secondee from Canadian tax.



An individual who is a non-resident of Canada is subject to Canadian tax on their income from employment performed in Canada. This will likely apply to a secondee. However, an applicable tax treaty may provide for an exemption from such tax depending on the terms of the applicable tax treaty.

**Social security.** Not applicable.

**Other.** Not applicable.

### Secunder

**Tax.** From a Canadian tax perspective, a secondment arrangement is typically entered into to minimise the risk that the seconder is considered to be “carrying on business in Canada”. In general, a seconder which is not a resident of Canada will be subject to Canadian income tax if it is carrying on business in Canada (to the extent of the income earned from that business) and subject to the application of an applicable tax treaty. A properly structured secondment arrangement should mitigate the risk that, solely as a result of such arrangement, the seconder would be considered to be carrying on business in Canada. In particular, the Canada Revenue Agency has issued guidance as found in an information circular as to what the secondment arrangement should entail (Information Circular 75-6).

**Social security.** If the seconder is the party that pays the employee (the payor), it will be responsible for employment insurance (EI) and Canada Pension Plan (CPP) premiums. Additional source deductions may be required in Québec.

**Other.** If the seconder is the payor, it will be responsible for statutory vacation pay, statutory public holiday pay and overtime pay (if applicable), as well as workplace safety and insurance premiums in many cases.

### Host

**Tax.** The tax considerations most relevant to the host will relate to the mechanics under which the secondee is compensated for the period while they are on secondment in Canada. In particular, it is not uncommon for the secondee to remain on the seconder’s payroll, subject to a reimbursement payment from the host.

Under such an arrangement, one of the interpretative issues is whether the host is required to withhold any income tax on the reimbursement payment to the seconder. In particular, Canada has a rule that requires every person paying a fee, commission or other amount to a non-resident person in respect of services rendered in Canada to deduct or withhold 15% of such payment. The Canadian taxing authority has provided that a reimbursement payment which satisfies the criteria as set-forth in its information circular should not be subject to this withholding (*Information Circular 75-6*). There are number of conditions outlined in this circular,

including that there should not be a mark-up (profit element) on the reimbursement payment.

There will likely be Canadian income and other source deductions and remittances that will need to be made and remitted to the Canadian taxing authority in respect of the salary and other remuneration which is paid in respect of the secondee’s employment performed in Canada. The payor of such remuneration will be responsible for making such withholdings and remittances. Under some alternative arrangements, a “shadow payroll” arrangement can be implemented, pursuant to which the Canadian source deductions and remittances are made by the host, but all other payments to the secondee are made by the seconder.

**Social security.** If the host is the payor, it will be responsible for the social security payments described above.

**Other.** If the host is the payor, it will be responsible for the other payments described above.

## Data protection

### 17. What data protection issues may arise under national law as a result of the secondment? How can the parties deal with these in the:

- **Secondment agreement between the seconder and the host (see *Standard document, Secondment agreement: International: clause 8*)?**
- **Letter from the seconder to the secondee (see *Standard document, Letter of secondment: International: clause 9*)?**

The following comments apply to both secondment agreements and letters from the seconder to the secondee.

Employees in certain Canadian provinces (Alberta, British Columbia and Québec) are protected by provincial privacy laws that govern the handling of personal data by private sector employers within those provinces. Federal privacy legislation also governs the handling of employee personal data in federally regulated industries (for example, airlines, banks, railroads and telecommunications carriers, among others).

A key principle underlying these privacy laws is that personal information should only be disclosed to third parties who have a reasonable and legitimate need to access or retain the personal information in question. Accordingly, in the context of secondment arrangements, seconders should carefully consider

which data elements respecting seconded employees are required by the host, based on legal requirements or reasonable business needs, to carry out the secondment arrangement, and limit any disclosure to the host of the personal information of seconded employees to those data elements. In most secondment arrangements, the seconder will continue to be accountable under privacy laws for employee personal information even when it is in the hands of the host.

Where secondments involve the storage or processing of personal information outside of Canada, Canadian private sector privacy laws generally permit such storage or processing, provided that consent has been obtained. In the context of a secondment outside of Canada, where employee personal information would be transferred to a host, the inclusion of a consent in the secondment letter to the transfer of seconded personal data from the seconder to the host is acceptable; the inclusion of a clause in the secondment agreement requiring that the seconder obtain the necessary consents from the secondee for the host's benefit is prudent, although not required by law.

Due to the recent recognition of a new Canadian tort of "intrusion upon seclusion" (similar to invasion of privacy), we recommend that seconders in all provinces take measures to avoid privacy related complaints by employees in connection with secondments outside of Canada. In particular, and to the extent applicable, we recommend informing employees that any employee records or personal data will be transferred to or stored in a foreign jurisdiction.

We also recommend that seconders in all provinces require foreign hosts to:

- Provide a comparable level of protection with respect to employee personal information that the employee personal information would receive in Canada by the seconder.
- Use employee personal information only for purposes connected to establishing, managing or terminating the employment or secondment relationship.
- Notify the seconder as soon as practicable in the event of any unauthorised access to, or disclosure of, seconded employee personal information

## Restrictive covenants

**18. Can additional restrictive covenants be introduced for agreement by the secondee at the start of the secondment? If so, are there any formalities that need to be addressed to ensure that the restrictive covenants are valid and enforceable**

**(see *Standard document, Secondment agreement: International: clause 10*)?**

### Types of restrictive covenants

Restrictive covenants can be introduced for agreement by the host prior to (but in connection with) the start of the secondment. Language preventing poaching of the secondee by the host, as contained in *Standard document, Secondment agreement: International: clause 10*, is enforceable in Canada, provided it is entered into in writing before the start of the secondment.

Restrictive covenants can also be introduced for agreement by the secondee before the start of the secondment, but the seconder/employer must provide consideration for this change to be enforceable and to avoid or limit the risk of claims of constructive dismissal.

### Formalities/procedure

To be valid and enforceable, a restrictive covenant must be formalised in writing and executed by both parties. Restrictive covenants in Canada are presumptively unenforceable and are therefore subject to considerable scrutiny by the courts. To be found valid, a restrictive covenant in Canada must be drafted narrowly and unambiguously, and be reasonable in terms of the prohibited activity and duration. In particular, non-competition clauses must be reasonable in terms of geographic scope. A restrictive covenant that is found to be void or unenforceable by a Canadian court will not be subject to "blue pencilling" and instead will be struck in its entirety (in other words, a Canadian court will not edit, revise or otherwise amend an unenforceable restrictive covenant to render it enforceable).

If a restrictive covenant is governed by the laws of a foreign seconder or host, the Canadian courts can give effect to the covenant, even where it would not be enforceable under Canadian law

## Intellectual property

**19. Other than where it is explicitly stated in the secondment agreement, who will own any intellectual property rights created by the secondee during the secondment under national laws (see *Standard document, Secondment agreement: International: clause 11*)?**

Under Canadian copyright law, copyrightable works that are "made in the course of employment" (as an



employee, but not as a contractor) are deemed to be owned by the employer. However, the secondee will have moral rights to such works, which can be waived by contract.

As the secondee will not generally be deemed to be an employee of the host, it is advisable that there be a written agreement specifying that the host or seconder retain the rights to any works created by the secondee during the secondment.

Rights in inventions (which are not copyright works) are owned by the secondee. The secondment agreement must, therefore, contain an assignment by the secondee of all rights in inventions to the host or seconder, as agreed between the parties.

## Termination

**20. If the secondee does not continue with the secondment for whatever reason or is unavailable for a prolonged period, can the seconder provide a substitute secondee to the host if such provision is made in the secondment agreement?**

The seconder can provide a substitute secondee if the original secondee does not continue with the secondment, to the extent contractually permitted. However, the replacement individual would need appropriate authorisation to work in Canada pursuant to Canadian immigration laws (see [Question 3](#)).

**21. Under national laws, can the secondment be terminated as set out in *Standard document, Secondment agreement: International: clause 12*? In what other circumstances can the secondment arrangement be terminated immediately, without notice (or a payment in lieu of notice) by:**

- Secondee?
- Seconder?
- Host?

## Termination under clause 12

The secondee, seconder and host may terminate the secondment relationship with or without notice for any reason or no reason at all, provided that this

is captured in the secondment agreement between the parties.

If a Canadian host terminates the secondment relationship and there has been a significant assumption of management/control of the secondee by the host, there is a risk that the secondee could claim to have acquired employment rights with the host, such that the host could be liable for the termination-related liabilities described in [Question 8](#).

## Without notice termination for other causes

See above, [Termination under clause 12](#).

**22. If the secondment is terminated without notice by a host based outside your jurisdiction, can the secondee's employment with the seconder based within your jurisdiction terminate simultaneously and if so, in what circumstances?**

The employment with the seconder can be terminated simultaneously, subject to the Canadian seconder abiding by the requirements of employment standards legislation, the common or civil law (for those in Québec) (unless there is valid contractual language providing for waiver of common or civil law) and contractual notice provisions contained in the secondee's employment agreement (if any).

## Return to the seconder

**23. Does the seconder based within your jurisdiction have any obligation under national law to return the secondee to their original job when the secondment ends? What does the seconder need to do if the secondee's job is no longer available.**

Unless the seconder and the secondee have agreed by contract to the contrary, a Canadian seconder must return the secondee to their original job when the secondment ends. To do otherwise could give rise to an employee claim for constructive dismissal (that is, a claim that the employer effectively terminated the employment relationship by making a unilateral, detrimental change to a material term of the secondee's employment). If the secondee's job is no longer available,

the secondor could attempt to place the secondee in an equivalent role and secure the secondee's express written consent to the transfer, or terminate their employment and pay the required severance.

### Liability

**24. Does your national law recognise the concept of one party indemnifying the other as set out in *Standard document, Secondment agreement: International: clause 14*? If not, what can be included to protect each party from the potential liabilities set out in this clause?**

Yes.

### Vicarious liability

**25. Does your national law stipulate whether the original employer (the secondor) or host will be responsible for the secondee's acts and behaviour, if they cause loss or damage to the host, its employees, customers or suppliers, during the secondment?**

The concept of vicarious liability is recognised in Canada, such that an employer can be liable for the acts of its employees which occur in the scope of their employment. The Canadian courts apply a flexible interpretation in deciding whether a wrongful act was in the scope of employment. If an employee is performing a clear employment duty, then they will be acting within the course of their employment and as such their employer will be liable for wrongful acts committed during such time. However, if the wrongful act is not related to the employee's job requirements, but rather can be construed as an independent act, the employer will not be held liable, because the wrongful act was committed outside of the scope of employment. If the wrongful act is closely connected to an employment duty or act authorised by the employer, then the wrongful act may be found to be within scope of employment, as it may be regarded as a mode of doing an authorised act.

### Original or host employer

Canadian case law on the issue of vicarious liability in the context of secondment arrangements is scarce. That said, while in general only an employer will be vicariously liable for the wrongful acts of its employees (including a secondee), it is theoretically possible that a host could be vicariously liable for such acts in the event that the host authorised those acts or the acts were closely connected to acts authorised by the host.

In determining which of the secondor or host is vicariously liable for the wrongful acts of a secondee, a court would consider which entity exercised control or authority over the secondee in connection with the wrongful acts. If the secondee was carrying out acts that were jointly authorised by the secondor and host (or closely connected to jointly authorised acts), or if a plaintiff was able to establish that the parties were "joint employers", it is possible that both parties could be vicariously liable. Alternatively, in the event that a secondee was deemed to have acquired employment status with the host, the host could be found to be vicariously liable for the wrongful acts of the secondee as their deemed employer. The above analysis would be highly fact specific and dependent on all of the surrounding circumstances.

### Discrimination

**26. Is the secondee protected against discrimination and/or harassment by the host and its employees during the secondment to your jurisdiction?**

Yes, secondees in Canada are protected from workplace discrimination and workplace harassment by the host and its employees on the basis of provincial and federal human rights and occupational health and safety legislation, as well as case law.

With regard to discrimination specifically, employees are protected from adverse treatment in employment (including in the course of a secondment) on the basis of any of the protected statuses set out in the human rights legislation for each Canadian jurisdiction (see [Question 7](#)).

### Governing law and jurisdiction

**27. Are there any mandatory national laws which dictate the governing law and jurisdiction that will apply to this secondment agreement or can this be agreed between the parties (see Standard document, Secondment agreement: International: clause 20)?**

The governing law and jurisdiction applicable to the secondment agreement can be agreed between the parties. However, the parties cannot contract out of employment standards legislation that applies to the employment relationship (see *Question 1*).

### Execution formalities

**28. How does the secondment agreement need to be executed to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?**

#### Execution formalities

There are no execution formalities specific to secondment agreements. Generally, a contract must be executed before the date on which it becomes enforceable. It must be dated and, ideally, witnessed.

Where a seconded party is a party to the secondment agreement, it is recommended that the secondment agreement confirm that the seconded party has consulted or had the opportunity to consult legal counsel in connection with their execution of the agreement.

#### Registration formalities

There are no registration formalities.

### Language

**29. Does the secondment agreement need to be in a language other than English in order for it to be valid and enforceable (see Standard document, Secondment agreement: International: clause 21)?**

In Québec only, contracts containing printed standard clauses, or clauses that are predetermined by one party, must be in French, unless the parties expressly request that they be in another language.

It is therefore common practice to include in any English language contract a clause to the effect that the parties have expressly requested or agreed that it be drawn up in English.

### General

**30. Are there any clauses that would not be legally enforceable or not standard practice in your jurisdiction in:**

- **The secondment agreement; or**
- **b) The letter of secondment.**

With regard to *Standard document, Secondment agreement: International*, we suggest the following:

- Removal of clause 8.1(b) and clause 8.1(d), as the provision of information concerning a seconded party's racial or ethnic origin or religious or similar beliefs would reveal information concerning protected grounds of discrimination under Canadian human rights laws and is not necessary for any legal purposes in Canada (including, without limitation, equal opportunities legislation).
- Amending clause 8.1(e) as follows: "[ANY OTHER SENSITIVE DATA TO BE PROCESSED]".
- Removing clause 8.3, as it does not appear necessary for any legal or business purposes in Canada.
- Amending clause 11.2 as follows: "The Seconded party hereby irrevocably waives all moral rights in [JURISDICTION] (and all similar rights in other jurisdictions) which he has or will have in any existing or future works referred to in Clause 11.1, to the extent permitted under the applicable legislation, and irrevocably assigns, and agrees to assign to the Secondmentor, the Seconded party's entire right, title and interest in and to the Inventions".
- Consider amending the execution page to include the Seconded party as a result of the inclusion of representations on the part of the Seconded party at clause 11.2.
- Amending clause 21 as follows: "For Québec only: The parties have agreed that this agreement is drafted in the English language. Les parties aux présentes ont expressément convenu que la présente entente soit rédigée en anglais. If this agreement is translated into any other language, the English language version shall prevail, unless prohibited under the applicable law."

We have no suggested changes to *Standard document, Letter of secondment: International*.

### 31. Are there any other clauses that would be usual to see and/or that are standard practice in your jurisdiction in:

- The secondment agreement; or
- The letter of secondment.

We suggest adding the following to *Standard document, Secondment agreement: International: clause 8*:

“8.3. The Host will take reasonable precautions to protect the Secondee’s personal data in its possession and to secure it against the risk of loss, misuse, unauthorized access, disclosure, alteration and destruction.

8.4 The Host will take reasonable precautions to ensure that the Secondee’s personal data is used only in ways that are compatible with the purposes of establishing, managing or terminating the secondment relationship established in this agreement.

8.5 The Host will notify the Seconder as soon as practicable in the event of any unauthorized access to, or disclosure of, seconded employee personal information.”

We suggest adding the following to *Standard document, Letter of secondment: International*:

- Immediately prior to the signature line on page 9, we suggest adding:

“For Québec only: The parties have agreed that this Agreement be drafted in the English language. Les parties aux présentes ont expressément convenu que la présente entente soit rédigée en anglais.”

- Following to the signature line on page 9, we suggest adding:

“I hereby agree to the above changes to the terms of my employment. I further acknowledge that I have had the opportunity to obtain independent legal advice before signing this letter, and I have either obtained such legal advice or deliberately chosen not to.”

We suggest adding the following clause to *Standard document, Secondment agreement International* and *Standard document, Letter of secondment: International*:

“For Ontario only: The Company is committed to complying with the Accessibility for Ontarians with Disabilities Act, 2005, and has policies in place to accommodate its employees with disabilities. Should you require accommodation or have a question regarding any of these policies, please contact [[NAME] AT [EMAIL AND TELEPHONE NUMBER]] OR [[COMPANY NAME] HUMAN RESOURCES DEPARTMENT].”

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## About Stikeman Elliott

Stikeman Elliott is a global leader in Canadian business law and the first call for businesses working in and with Canada. Our offices are located in Montréal, Toronto, Ottawa, Calgary, Vancouver, New York, London and Sydney. We provide clients with the highest quality counsel, strategic advice, and workable solutions. The firm has an exceptional track record in major U.S. and international locations on multijurisdictional matters and ranks as a top firm in our primary practice areas including mergers and acquisitions, securities, business litigation, banking and finance, competition and foreign investment, tax, restructuring, energy, mining, real estate, project development, employment and labour, and pensions.

For more information about Stikeman Elliott, please visit our website at [www.stikeman.com](http://www.stikeman.com).

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