Stikeman Elliott

Practical Law

International Secondments into and out from Canada

By Tamara Ticoll

Published and reproduced with kind permission by
Thomson Reuters Canada Limited.

THOMSON REUTERS | CANADA

International Secondments into and out from Canada

by ***Lorna Cuthbert*** and ***Tamara Ticoll***, Stikeman Elliott LLP

Practice notes | Published on 15-Dec-2022 | Canada

A Practice Note explaining the issues to consider when entering into an arrangement to second an employee into or out from Canada. This Note considers the legal principles and drafting issues.

An international secondment takes place when an employee (or group of employees) is temporarily assigned to work for a different part of their employer or employer's group in another jurisdiction or for a different organisation in another jurisdiction. It is imperative that the mandatory local laws of the jurisdiction where the secondment is taking place are considered from the outset so that when the secondment planning starts, the parties are aware of any potential issues that may or may not affect the decision to proceed with the secondment or the terms of the arrangements.

This Note looks at the issues regarding international secondments to Canada and international secondments going out from Canada. It does not cover domestic secondments within Canada.

This Note details the mandatory local laws of Canada that need to be considered when an individual is seconded into Canada. However, if contemplating a secondment out of Canada, in addition to the laws of Canada that may apply to that arrangement, the mandatory local laws of the relevant territory will also need to be considered, for example, whether a local employment contract is required.

There are a number of different terms that are used for the three parties involved in a secondment arrangement. In this Note it is assumed that when a secondment is made to another organisation:

- The original (or seconding) employer is referred to as the seconder.
- The seconded employee is referred to as the employee or secondee.
- The organisation to which the secondee is to provide their services is referred to as the host.
- Unless said otherwise, in the Note, secondment agreement means the commercial agreement between the seconder and the host; and letter of secondment is an employment agreement (or amendment to the employment agreement) between the seconder and the secondee.

Secondment Arrangement or Temporary Work Agency

The requirements applicable under the laws of Canada to a secondment arrangement should be distinguished from an assignment of an employee to a client by a temporary help agency.

Where the employer is in the business of employing employees for the purposes of assigning them to perform work for its clients (whether that is an employment agency based in Canada sending staff outside of Canada, or an employment agency based outside of Canada sending staff into Canada), specific obligations and prohibitions will apply to the employer and client, and the assignment employee (and in some cases the prospective assignment employee) may have specific rights. These obligations and rights are outside the scope of this Note.

International Secondments out of Canada

Before seconding an employee from Canada to another jurisdiction, the Canadian seconder and the proposed host will need to confirm the law that governs the secondment agreement between the seconder and host, and to understand the mandatory laws of the host country and the rights the secondee will acquire during the international secondment.

Irrespective of the law the employee and seconder agree applies to the secondeee's employment during the secondment, the mandatory minimum protections of the host country may still apply to the secondee (such as rights to minimum pay, paid annual leave, rest breaks, and minimum entitlements to notice of termination (or pay in lieu) in the event of termination without cause).

In addition, the parties will need to consider any immigration requirements and any regulatory restrictions (for example, certain roles in the host country may require specific qualifications or registrations).

International Secondments to Canada

Before initiating a secondment into Canada, it is fundamental to understand the mandatory local laws that will apply to the seconded employee, any immigration requirements to allow the employee to work in Canada, and any other restrictions on seconding employees from abroad into Canada.

Mandatory Local Laws

A foreign seconder who is entering into a secondment arrangement with a Canadian host must assume that the secondee will be subject to Canadian statutory employment laws from the outset of the secondment. 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. In regard to the termination rights a secondee may acquire see *Termination of Employment*.

- **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. Effective on 31 August 2021, federally regulated employers became subject to the federal Pay Equity Act.

Canadian courts will not enforce a secondee's contract of employment which is stated as being under the laws of their home country if its provisions violate the statutory laws of Canada. They can 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 of employment (as amended by the letter of secondment, where applicable) does not breach statutory laws and is not contrary to public policy, then Canadian courts can enforce contractual terms governed by a foreign jurisdiction, usually through a court order.

Immigration: 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 Canada – United States - Mexico Free Trade Agreement (CUSMA) which supersedes the North America 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 CUSMA are initially 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. There are also treaties between Canada and a number of other countries (for example, Peru, Australia, Europe) that will allow for the secondment of employees to Canada. Each has its own unique criteria.
- Work permits obtained by "CUSMA professionals", that is qualified professionals in one of the many professions deemed eligible under CUSMA (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 are generally issued for up to three years and can 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 before filing the application for the LMIA. LMIA-based work permits are generally issued for up to two years.

Procedure

The difficulty of obtaining the work permit, and the duration of the work permit, 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). If an individual is a citizen of a country that requires a Temporary Resident Visa in addition to the Work Permit, the application must be made outside of Canada. Processing for LMIA exempt work permits can take from two weeks (that is, where a port of entry application can be made) up to

several weeks. LMIA-based work permits involve a lengthy application and approval process which can take several months.

Duration of Secondment

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 *Immigration: Residence/Work Permit*). There are no other express limits on the duration of a secondment to or out from Canada (subject to the laws of the foreign host country, where applicable).

Secondment Agreement and Letter of Secondment

Generally, a secondment arrangement in Canada is recorded by a written secondment agreement between:

- The seconder and the secondee (that is, the letter of secondment), and
- The seconder and the host (that is, the secondment agreement).

There are no particular formalities required in either case (including if the secondee is being seconded to another company in the employer's group), however see *Documenting the Secondment* for more detail as to recommended inclusions.

Who Is the Employer?

There is no specific legal requirement as to who must be the secondee's employer during a secondment to or out from Canada. Secondment agreements can be structured in different ways, depending on 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 *Termination of Employment*).

However, from a laws of Canada perspective when an individual is seconded to Canada, 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 joint employers (see *Continuity of Employment*).

To mitigate this risk, provision can be made in the secondment agreement for the seconder to conduct performance and pay reviews of the secondee during the secondment (along with such other mechanisms as appropriate in the circumstances

to allow the seconder to maintain a degree of management and control in relation to the secondee).

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

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

Payments and Benefits

The typical structure when an individual is seconded to Canada (or outside Canada) is for the seconder to continue to pay the secondee's salary and wages and 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, and for the host organisation to reimburse the seconder.

However, the secondee seconded to Canada is entitled to certain statutory leave of absence entitlements, as provided in the applicable Canadian employment standards legislation. The statutory leaves of absence differ slightly by province, but generally include pregnancy and parental leave, sick/medical/personal emergency and bereavement leave, family responsibility/family caregiver/family medical/ compassionate care leave, organ donor leave, reservist leave, child death and crime-related child disappearance leave, domestic or sexual violence leave, declared emergency leave, infectious disease emergency leave, and jury or witness duty leave. It is likely that an individual seconded out from Canada retains the benefit of these rights, save when it is agreed that their employment is governed by the laws of the host country for the duration of the secondment.

Overtime

Overtime eligible workers in Canada (this includes secondees employed outside of Canada and seconded to a Canadian host) are entitled to overtime pay for all hours worked in excess of the applicable provincial or federal overtime threshold for example:

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

In addition, overtime eligible employees in the provinces of Alberta, British Columbia, Manitoba, and Saskatchewan and federally regulated employers are entitled to overtime pay for all hours worked in excess of the applicable provincial or federal daily overtime threshold of either eight or ten hours per day.

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 (see *Who Is the Employer?*). This arrangement, if applicable, should be formalised in the secondment agreement.

For an overtime eligible Canadian secondee employed by a Canadian seconder and working for a foreign host (that is, a secondee employed in Canada and seconded to a foreign host), overtime worked in the foreign host territory may be payable in accordance with Canadian requirements, unless the letter of secondment specifies that the laws of the foreign host (including as they relate to overtime) will apply during the course of the secondment and the employee agrees to the same. In that situation, whether overtime is payable and the amount of such payment may also depend on the laws of the foreign host. As above, either the Canadian seconder or foreign host could pay any overtime owed to the secondee and this arrangement can be formalised in the secondment agreement (with the more common arrangement being for the seconder to provide payment for overtime on notice from the host, and the host to provide reimbursement for the payment).

Vicarious Liability: Seconder or Host Company?

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.

Seconder 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 seconder or host is vicariously liable for the wrongful acts of a secondee, a court will 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 seconder 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.

Changes to Terms and Conditions of Employment

Terms of the Employment Contract

The terms of the Canadian 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 letter of secondment between the employer/seconder and employee/secondee. The employee/secondee's consent would then be contained within the letter of secondment.

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.

Continuity of Employment

For information regarding the acquisition of employment status with the host by a secondee, see *Who Is the Employer?*. Where a secondee is deemed to have acquired employment status with the Canadian 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 Canadian 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 Canadian host (see *Mandatory Local Laws*). The secondee could also have claims against the Canadian 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.

Confidentiality and Restrictive Covenants

Confidentiality

It is recommended to include in the secondment agreement obligations on the host entity to maintain the secrecy of any confidential information of the seconder it receives during the secondment period, not to disclose directly or indirectly any such confidential information, and to notify the seconder immediately in the event that it becomes aware of any unauthorised access to such confidential information. Equally, if not already expressly stated in the employment contract, the letter of secondment should explicitly state the secondee's obligations and expectations towards the seconder's confidential information.

Types of Restrictive Covenants

Restrictive covenants can be introduced for agreement by the host before (but in connection with) the start of the secondment. Language can be included in the secondment agreement preventing poaching of the secondee by the host, 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 under the laws of Canada the seconder/employer must provide consideration for this change to be enforceable and to avoid or limit the risk of claims of constructive dismissal.

From 25 October 2021, Ontario employers are prohibited from entering into employment contracts or other agreements with an employee (with the exception of certain executives) that include a post-employment non-compete agreement. This prohibition is broadly construed and would restrict a Canadian host or Canadian seconder from including a post-employment non-compete agreement in a letter of secondment, unless the secondee is an executive.

An "executive" is defined in the Ontario employment standards legislation to include a person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or any other chief executive position. There are also limited situations in which post-employment restrictive covenants can be entered into in connection with a sale of business. However, this exception is unlikely to apply in the context of a secondment arrangement.

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. The foregoing parameters apply to both restrictive covenants entered into between commercial parties (for example, a seconder and host) and with employees (for example, a seconder or host, and secondee) however the former scenario is afforded slightly more latitude by the Canadian courts.

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 out 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.

Discrimination and Harassment

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 *Mandatory Local Laws*).

Data Protection

Host and Seconder

The following comments apply to both secondment agreements and letters of secondment.

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), regardless of the province in which the workplace is located.

A key principle underlying these privacy laws (which apply to personal information collected in Canada) 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.

The provision of information concerning a secondee'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).

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, therefore, it is incumbent on the seconder to put in place contractual and other restrictions to ensure that the data is handled and protected appropriately and in line with the seconder's own privacy law obligations.

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 the consent of the employee 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 letter of secondment to the transfer of secondee 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 existence in several provinces of a statutory cause of action for invasion of privacy, as well as the trend in Canadian tort law to recognise an increasing number of privacy-related causes of action, it is recommended that Canadian seconders in all provinces – even those without privacy laws applicable to employer processing of employee personal information – take measures to avoid privacy related complaints by employees in connection with secondments outside of Canada. In particular, and to the extent applicable, it is recommended to inform employees that any employee records or personal data will be transferred to or stored in a foreign jurisdiction.

It is also recommended that Canadian seconders in all provinces require foreign hosts to (and include appropriate wording in the secondment agreement):

- 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.
- In addition to the above recommendations, it is advisable to include in the secondment agreement provisions concerning the foreign host's actions and dealings with personal data on the termination of the secondment. For example, subject to any applicable laws, the foreign host must return or irretrievably delete (and provide written confirmation of the same) all personal data relating to the secondee in the host's possession or control that was compiled or acquired by the host during the secondment.

Secondee

While less important in Europe, and in other jurisdictions whose privacy laws include grounds for processing other than consent (like "legitimate business interests" and "fulfilment of a contract"), consent (or at least notice/implied consent) is essentially the only lawful ground for processing of personal data under the laws of Canada. Accordingly, it is important to provide the secondee with a detailed disclosure of purposes, and so on, in the letter of secondment.

The enforceability of the secondee's consent depends heavily on an adequate statement of purposes and the recognition of principles of data minimisation.

Intellectual Property

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 are not assignable but can be waived by contract.

Canadian copyright law is likely to apply to any works made in Canada or where the employment agreement is governed by Canadian law or where ownership is being assessed by a Canadian court.

Potentially, an employer can be considered the first owner of an industrial design under section 12(1) of the Industrial Design Act. It states that the author of a design is the first proprietor of the design unless the author has executed the design for another person for "good and valuable consideration", in which case the other person is the first proprietor.

Although there is limited jurisprudence on this point, the case law suggests that an employee's salary may qualify as "good and valuable consideration" for the purposes of section 12(1) of the Industrial Design Act (for example, see *Renwal Manufacturing Co. v. Reliable Toy Co. (1949), 9 C.P.R. 67; Angelstone Limited v. Artistic Stone Limited, (1960), 33 C.P.R. 155*).

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 letter of secondment (or the existing employment contract) must, therefore, contain an assignment by the secondee of all rights in inventions to the host or seconder, as agreed between the parties.

Liability

Canadian law recognises the concept of the seconder and host indemnifying the other party, as applicable, for certain liabilities and exposures.

For example, subject to applicable law:

- The host indemnifying the seconder for any losses and exposures suffered by:
    - the secondee arising from the acts or omissions of the host, its employees, or agents; and
    - a third party arising from any act or omission of the secondee.

- The seconder indemnifying the host for any claim from the secondee arising from its employment by the seconder or its termination, save for any claim from the secondee relating to any act or omission of the host, its employees, or agents.

Tax and Social Security Considerations

Specific tax and social security advice should be sought before entering into an international secondment arrangement, the information contained in this note is not intended to be exhaustive.

Permanent Establishment Risk

Foreign Seconder and Canadian Host

For a foreign seconder that is considering seconding one of its employees to a Canadian host, a properly structured secondment arrangement may help the foreign seconder to avoid being found to have a permanent establishment in Canada, solely as a result of the secondment arrangement (See *Service Tax Issues*).

Canadian Seconder and Foreign Host

For a Canadian seconder that is considering seconding one of its employees to a foreign host, it is important for the Canadian seconder to consider the risk that sending a secondee overseas may create a permanent establishment tax risk for the Canadian seconder in the foreign host territory.

Service Tax Issues

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. Where a non-resident seconder (for the purposes of this note, a seconder that is not, and is not deemed to be, a resident of Canada under the *Excise Tax Act* (Canada) or the *Income Tax Act* (Canada) seconds an employee to Canada to perform services for a significant period, the tax authorities may consider that non-resident seconder to be carrying on business in Canada for sales tax purposes on account of the nature and significance of the secondment services. To the extent the secondment fees exceed a certain threshold, the non-resident seconder may be required to register for sales tax purposes and collect and remit sales taxes on the secondment fee payable by the Canadian host.

Despite the above, in general, if the secondee is deemed to be the employee of the Canadian host and the secondment fee paid by the host to the non-resident seconder is a reimbursement of expenses (with no profit or mark-up, on the basis that the seconder made the payment to the secondee as agent for the host), no sales taxes (and no registration requirements) will generally be expected in respect of this payment.

Also, where the secondee is seconded outside of Canada to a non-resident host, the services it performs wholly outside of Canada are generally deemed to be made outside of Canada from a sales tax standpoint. As such, to the extent the secondment fee only pertains to services performed wholly outside of Canada, no sales taxes are generally expected in respect of such fee.

Secondee Tax

An individual 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.

Foreign Seconder and Canadian Host

An individual who is a non-resident of Canada is subject to Canadian tax on their income from employment performed in Canada, if any.

This will likely apply to a secondee to Canada, since 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. An applicable tax treaty may provide for an exemption from such tax on their income from employment performed in Canada depending on the terms of the applicable tax treaty.

However, an individual can 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 calendar days or more during the calendar year. An applicable tax treaty can provide for a tie-breaker in certain circumstances and, as a consequence, exempt the secondee from Canadian tax.

Canadian Seconder and Foreign Host

For a Canadian employee that is seconded out of Canada, it is expected that the secondee would only be in the foreign jurisdiction for a temporary duration and would likely remain resident in Canada. The individual may be considered a non-resident of Canada if they have severed all significant residential ties to Canada (that is, significant social, economic or family ties). Subject to the laws of the foreign host jurisdiction, the individual may be liable to pay tax to the foreign host jurisdiction and may also be considered resident in the foreign host jurisdiction. An applicable tax treaty can provide for a tie-breaker in certain circumstances and, as a consequence, exempt the secondee from foreign host jurisdiction tax. In addition, a resident of Canada may be able to claim a tax credit on taxes paid to the foreign host jurisdiction.

Secondee Social Security

Foreign Seconder and Canadian Host

If the Canadian host is considered to be the employer of the secondee, the secondee will typically be required to make contributions to the Canada Pension Plan (CPP). However, under an applicable totalisation agreement between Canada and the foreign jurisdiction, the individual seconded into Canada may be exempt from making such contributions to the CPP. If the foreign seconder is considered the employer of the individual, an individual seconded into Canada will typically not be required to make contributions to the CPP as long as they are a non-resident of Canada and the foreign employer does not have an establishment in Canada.

An individual seconded into Canada will typically be required to pay Employment Insurance (EI) premiums unless both:

- The individual is a non-resident of Canada, and

- The unemployment insurance laws of the individual's home country require the payment of unemployment insurance premiums.

Additional considerations may apply for employees seconded to a host in Québec.

Canadian Seconder and Foreign Host

A Canadian individual seconded into a foreign jurisdiction will typically still be required to make contributions to the CPP if the individual is resident in Canada and is paid from or by an establishment in Canada of their employer (in Canada, in regard to an employer, 'establishment' means any place or premises in Canada that is owned, leased or licensed by the employer and where the employer or one or more of its employees works or reports for work or from or at which one or more of its employees are paid).

A Canadian individual seconded into a foreign jurisdiction will typically still be required to pay EI premiums if the individual is resident in Canada and the employer is resident or has a place of business in Canada, unless the employee is subject to foreign based unemployment insurance laws in the country of where the services are performed.

Additional considerations may apply for employees of a Québec based employer.

Seconder Tax

Foreign Seconder and Canadian Host

From a Canadian tax perspective, a secondment arrangement is typically entered into to minimise the risk that the foreign seconder is considered to be "carrying on business in Canada". In general, a foreign 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 secondment arrangement, the foreign 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*).

There will likely be Canadian tax withholdings that will need to made and remitted to the Canadian taxing authority in respect of the salary and other remuneration which is paid in respect of the foreign secondee's employment performed in Canada. If the foreign seconder remains as the payer of such remuneration, it will be responsible for making such withholdings and remittances. Under some alternative arrangements, a "shadow payroll" arrangement can be implemented, under which the Canadian withholding and remittances are made by the Canadian host, but all other payments to the foreign secondee are made by the foreign seconder.

Canadian Seconder and Foreign Host

For a Canadian seconder that is considering seconding one of its employees to a foreign host, it is important for the Canadian seconder to consider the risk that sending a secondee overseas may create a tax liability for the Canadian seconder under the laws of the foreign host territory.

Where the Canadian employee remains on the Canadian seconder's payroll and the individual remains resident in Canada, the Canadian seconder will still be required to make Canadian tax withholdings on all of the employee's earnings, even those related to services rendered outside of Canada. A waiver application can be filed with the Canada Revenue Agency to reduce the Canadian withholding requirement.

Seconder Social Security

Foreign Seconder and Canadian Host

If the foreign seconder is the party that pays the employee during the secondment in Canada (the payer), it will be responsible for paying the employer portions and withholding the employee portions of any EI premiums and CPP contributions required. Under some alternative arrangements, a "shadow payroll" arrangement can be implemented, under which the Canadian social security deductions and remittances are made by the Canadian host, but all other payments to the foreign secondee are made by the foreign seconder.

Additional source deductions can be required in Québec.

Canadian Seconder and Foreign Host

If the Canadian seconder remains as the party that pays the employee during the secondment in a foreign territory, it will remain responsible for paying the employer portions and withholding the employee portions of any EI premiums and CPP contributions required.

Additional source deductions can be required in Québec.

Host Tax

Foreign Seconder and Canadian Host

The tax considerations most relevant to the Canadian host 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 foreign 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 out in its information circular should not be subject to this withholding (Information Circular 75-6). There are a 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 tax withholdings that will need to made and remitted to the Canadian taxing authority in respect of the salary and other remuneration which is paid in respect of the foreign secondee's employment performed in Canada. If the Canadian host is the payer of such remuneration, they will be responsible for making such withholdings and remittances.

Canadian Seconder and Foreign Host

If the Canadian employee remains resident in Canada, there will likely be Canadian tax withholdings that will need to made and remitted on all of the employee's earnings, even those related to services rendered outside of Canada. If the foreign host is the payer of such remuneration, it 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 withholding and remittances are made by the Canadian seconder, but all other payments to the Canadian secondee are made by the foreign host.

Host Social Security

Foreign Seconder and Canadian Host

If the Canadian host is the payer, it will be responsible for the applicable Canadian social security payments described above (see *Secondee Social Security*).

Canadian Seconder and Foreign Host

If the foreign host is the payer, it will be responsible for the applicable Canadian social security payments described above (see *Secondee Social Security*).

Termination of Secondment

Termination of Secondment Agreement

The seconder and host can 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. See *Termination of Employment*.

If the foreign host terminates the secondment without notice, 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

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 Canadian seconder 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.

Substitute Secondee

Subject to the secondment agreement providing for the same, and in accordance with any such provision, the seconder can provide a substitute secondee if the original secondee does not continue with the secondment. However, in regard to a secondment to Canada the replacement individual would need appropriate authorisation to work in Canada pursuant to Canadian immigration laws (see *Immigration: Residence/Work Permit*).

Termination of Employment

Secondee

The secondee may want to include a provision entitling them to bring the secondment to an end, without also terminating their employment, and to return to work for the employer. Whether the employer and host are likely to agree to this will depend on:

- The length of the secondment and the services the secondee is to provide.
- Whether a substitute can be provided to take over the secondee's services.
- Whether they want to limit the circumstances in which the secondee can terminate the secondment.

Seconder or Host

As stated in *Mandatory Local Laws*, a secondee to Canada, employed by a foreign seconder, will be subject to the minimum entitlements under Canadian employment legislation.

If the secondee was terminated from employment while in Canada, Canadian statutory entitlements (at a minimum) will 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. It is also very likely (subject to the parties agreeing that the laws of the host country govern the employment during the secondment period) that Canadian statutory entitlements will also apply to a Canadian secondee employed by a Canadian seconder who is seconded to a foreign host as their employment would likely be viewed as a continuation of the Canadian employment.

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 is, at least, provided for in the agreement and, as described above in Who Is the Employer?, can be used to limit the risks of the seconder and host being found to be joint employers.

The common law (or civil law, in Québec) entitlements may also apply to a secondee to Canada who is employed by a foreign seconder, particularly if the seconder and host are deemed to be joint employers. Generally speaking, the question of whether common law (or civil law, in Québec) entitlements apply to a secondee to Canada would be highly contextual and dependent on the contractual arrangements between the parties (that is, the secondment agreement and the letter of secondment).

It is advisable for the secondment agreement and letter of secondment to be very clear as to termination entitlements.

Termination of Secondee by Seconder

During a secondment, a Canadian seconder (that continues to employ the secondee for the secondment period) may terminate the employment of a Canadian secondee provided such termination is not discriminatory, and the seconder complies with the statutory notice (or pay in lieu) requirements described immediately above and any applicable contractual requirements. In the event the employee is not subject

to an employment agreement that limits in an enforceable manner their common law (or civil law, in Québec) entitlements upon termination without cause, such entitlements should be taken into account by the seconder in the event it terminates the employment of a secondee without cause.

Documenting the Secondment

Language

Save for Québec, it is common for the secondment agreement and letter of secondment to be in English.

In Québec only, contracts that contain terms and conditions of employment or that are entered into in the context of an employment relationship can be drafted in a language other than French if the parties expressly consent, unless it qualifies as an adhesion contract. In the case of an adhesion contract, for the contract to have a binding effect, the parties must examine the French version of the contract before execution and expressly consent to be bound by the non-French version of the contract.

Section 1379 of the Civil Code of Quebec stipulates that "an adhesion contract is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable".

It is therefore common practice in Québec to include in any English language contract (including the secondment agreement and the letter of secondment) a clause to the effect that the parties have expressly requested or agreed that it be drawn up in English or, in the case of an adhesion contract, that the individual reviewed the French version of the contract and requested to be bound by the English version.

For example, where Québec law is applicable, the following should be added to the secondment agreement and letter of secondment:

For Quebec only, if the essential terms of the agreement were negotiable by the parties:

> The parties have agreed that this agreement is to be 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." *Dans l'éventualité où cette entente serait traduite dans une autre langue, la version anglaise prévaudra, à moins que la loi applicable en dispose autrement.*

For Québec only, if the essential terms of the agreement were not negotiable between the parties (that is, the agreement is an adhesion contract):

> The parties acknowledge that they have received and reviewed the French version of this agreement, and they expressly consent to be bound only by the English version of this agreement. *Les parties déclarent avoir reçu et avoir pris connaissance de la version française de cette entente et ils consentent expressément d'être liées seulement par la version anglaise de l'entente*. If this agreement is translated into any other language, the English language version shall prevail, unless prohibited under the applicable law. *Dans l'éventualité où cette entente serait traduite dans une autre langue, la version anglaise prévaudra, à moins* que *la loi applicable en dispose autrement.*

Equally, similar wording should be added to the letter of secondment immediately above the signature line:

For Quebec only; if the essential terms of the agreement were negotiable by the parties:

> I [the employee] acknowledge that I have expressly requested and am satisfied that this agreement be drawn up only in English. *Je reconnais avoir expressément requis et être satisfait(e) que la présente entente soit rédigée en anglais seulement.*]

For Québec only; if the essential terms of the agreement were not negotiable between the parties (that is, the agreement is an adhesion contract):

> I [the employee] acknowledge that I have received and reviewed the French version of this agreement, and I expressly consent to be bound only by the English version of this agreement. *Je déclare avoir reçu et avoir pris connaissance de la version française de cette entente, et je consens expressément d'être lié(e) seulement par la version anglaise de l'entente.*

Governing Law and Jurisdiction

The governing law and jurisdiction applicable to the secondment agreement can be agreed between the parties.

Equally, the seconder and secondee are free to agree to the governing law and jurisdiction that applies to the employment during the secondment period.

However, the parties cannot contract out of employment standards legislation that applies to the employment relationship (see *Mandatory Local Laws*).

Execution and Other Formalities

Secondment Agreement

Under the laws of Canada, there are no execution formalities specific to secondment agreements. Generally, a contract must be executed before the date on which it becomes enforceable and it must be dated.

Where a secondee is a party to the secondment agreement (between the seconder and host, a tri-partite agreement – such a scenario is less common than the classic secondment structure of a secondment agreement and a letter of secondment), it is recommended that the secondment agreement confirm that the secondee has consulted or had the opportunity to consult legal counsel in connection with their execution of the agreement. In addition, for Ontario only, wording confirming compliance with the *Accessibility for Ontarian's with Disabilities Act, 2005* should be included. For example wording see *Letter of Secondment*.

Further, there are no registration formalities.

Having said the above, although there are no required formalities, the following information should be included at the start of the secondment agreement and a letter of secondment:

- 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.

Letter of Secondment

In regard to individuals employed in Canada and seconded overseas, there are no execution formalities specific to letters of secondment. Generally, a contract must be executed before the date on which it becomes enforceable. It must be dated and, ideally, witnessed.

Further, there are no registration formalities.

Below the signature line in the letter of secondment (between a Canadian seconder and its employee) wording should be included stating the following:

> "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."

Further, if the secondee is employed in Ontario, the letter of secondment should include a provision stating the employer is committed to complying with the *Accessibility for Ontarian's with Disabilities Act, 2005*, and has adequate policies in place. In addition, the employee should be informed of a contact person if they have any concerns or queries concerning an accommodation or have a question regarding any of the policies. For example:

> "For Ontario only: The Company is committed to complying with the *Accessibility for Ontarian's 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]."

END OF DOCUMENT

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.

Contact us

Tamara Ticoll
tticoll@stikeman.com

Follow us

SE

Subscribe to updates on a variety of legal topics from Stikeman Elliott's Knowledge Hub at stikeman.com/kh

Stikeman Elliott LLP

Montréal Toronto Ottawa Calgary Vancouver New York London Sydney

Stikeman Elliott