



The Future of Work

November 18, 2021

Symposium

November 18, 2021 - Toronto

Dear Guests:

Welcome to the Fasken Toronto Mini-Symposium.

We are pleased to host this virtual complimentary half-day event to provide you with educational webinars for continuing professional development. By attending, you can achieve up to three hours of education that can be applied towards CPD requirements of the Law Society of Ontario.

Our speakers will present the latest developments in various areas of law which will permit you to select those most relevant to your practice and your continuing professional development. We recognize that your continued professional development enables you to provide counsel and assist in the ongoing operation of your business.

We would appreciate your completion and submission of the online surveys that can be found on each of the webinar landing pages. Your feedback will ensure that we continue to provide high-quality events and learning opportunities that are relevant to you.

As the Managing Partner of Fasken's Ontario Region, I thank you for joining us today. I trust our event will not only meet, but exceed, your expectations.

A handwritten signature in blue ink, appearing to read "Martin K. Denyes".

Martin K. Denyes

Managing Partner, Ontario
Fasken

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Fasken Toronto Mini-Symposium – November 18, 2021

Agenda

Time	Session & Speakers
8:50 am – 9:00 am	Registration
9:00 am – 10:00 am	SESSION 1 1a. Hot Topics in Cybersecurity Risk Fasken Speakers: Alex Cameron and Daanish Samadmoten Guest Speakers: Alireza Arasteh, MBA, MSc, BEng, CISSP, Managing Director, Mandiant Services and Gregory Eskins, Managing Director, Cyber Product Leader, US & CAN, Marsh <i>or</i> 1b. Putting the “Cure” back in ERP Procurement: A Re-Enactment of an ERP Procurement Gone Wrong Fasken Speaker: John P. Beardwood
10:00 am – 10:10 am	Break
10:10 am – 11:10 am	SESSION 2 2a. The Future of Work Fasken Speakers: Alix Herber, Christopher Steeves and Douglas Tsoi Guest Speaker: Deenah Patel, Senior Director, Solution Enablement & Marketing, Future of Work & Culture, RBC <i>or</i> 2b. Cases You Need to Know from the Past Year Fasken Speakers: Zohar Levy, Zohaib Maladwala, Nicholas Carmichael and Rachel Laurion
11:10 am – 11:20 am	Break
11:20 am – 12:20 pm	SESSION 3 PLENARY 3a. Journey Towards Truth and Reconciliation: Considerations For In-House Legal Counsel Fasken Speakers: Amy Carruthers and Sandeep Tatla Guest Speakers: Bindu Cudjoe, SVP, General Counsel & Corporate Secretary, Canadian Western Bank and Chastity Davis-Alphonse, Chastity Davis Consulting



The Future of Work

Alix Herber, Partner, Fasken

Christopher Steeves, Partner & Tax Group Leader, Fasken

Douglas Tsoi, Associate, Fasken

Guest speaker: Deenah Patel, Senior Director, Solution Enablement & Marketing, Future of Work & Culture, RBC

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Please note the following

- **Survey:** please click on the “Survey” tab underneath the video window to complete our survey.
- **Handout:** the materials can be downloaded via the “Handout” tab, also underneath the video window.
- **Questions:** please put any questions for the speakers into the “Questions” chat box.
- **Technical Support:** if you require support, please click the “Tech Support” button.

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Movement of People

Lets Talk Talent

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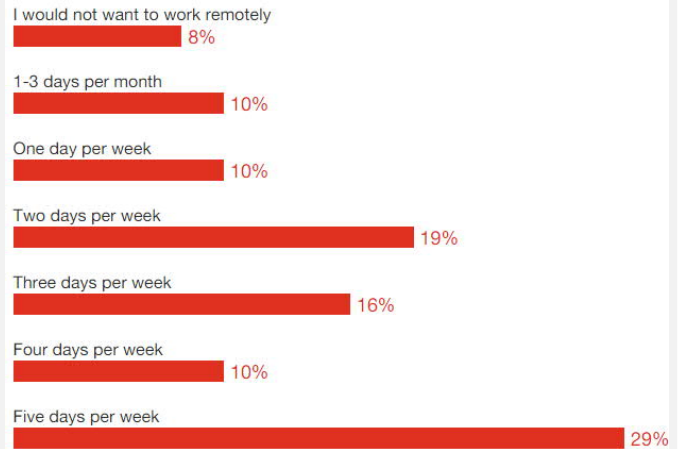
The Future is Now: the new world of work

- 20 months into the pandemic
- Workforce transformations are happening
- Employers are rapidly adapting their work environments to engage employees in new ways

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What Employees Want – Work that allows them to work from home (at least some of the time)

- ADP Study (September 2020)
 - 45% of Canadians would prefer to work remotely 3/5 days per week
 - 25% prefer flexible work hours
- RBC (December 2020):
 - 63% of Canadians want at least 50-50 in office/remote work
- PwC (January 2021):
 - 55% of workers would prefer to work remotely at least three days per week.



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Lets Talk Talent

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▼ Flexible Work Arrangements

- Post COVID
 - Hybrid Model vs Full Return to Work
 - For all employees or just “good performers”
 - Reserve the Employer’s right to return employees to the office or face constructive dismissal claims
 - Remote work as a reasonable accommodation

▼ Retaining Top Talent

- Retention Agreements
 - incentivize talent to remain with the Company for a specified period
- Secondment Agreement
 - Assign talent to affiliated companies for development opportunities, skill development
- Intercompany transfers

▼ Which ESA governs? It could be more than one

Ontario *Employment Standards Act* – Section 3

3 (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

- (a) the employee's work is to be performed in Ontario; or
- (b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario. 2000, c. 41, s. 3 (1).

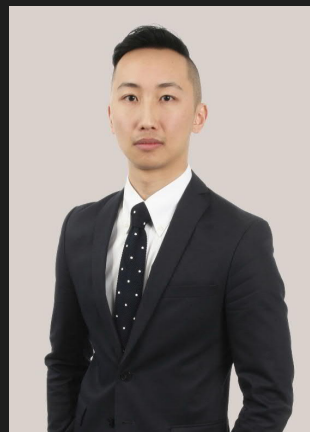
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Lets talk Immigration

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▼ Employer's obligation under s. 124 *Immigration and Refugee Protection Act* (IRPA)

Contravention of Act

124 (1) Every person commits an offence who

- (a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;
- (b) escapes or attempts to escape from lawful custody or detention under this Act; or
- (c) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.

Deemed knowledge

(2) For the purposes of paragraph (1)(c), a person who fails to exercise due diligence to determine whether employment is authorized under this Act is deemed to know that it is not authorized.

Due diligence defence

(3) A person referred to in subsection 148(1) shall not be found guilty of an offence under paragraph (1)(a) if it is established that they exercised all due diligence to prevent the commission of the offence.

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▼ Best practices that help an employer comply with s. 124 IRPA

- Establish a process to review immigration documents as part of onboarding process to ensure compliance with s. 124
- Track immigration expiry dates carefully and initiate extensions timely: some permits take months to renew, not too early to start six months in advance
- Obtain written declarations from employee with respect to particular issues, such as maintained status
- Consider standard language in employment agreements regarding maintaining immigration status as a condition of employment and who will be responsible for maintaining status, covering fees, etc.

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▼ Question:

An employee's work permit is expiring in a few days and she has provided proof that she applied to extend the work permit. Is this sufficient?

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▼ Answer:

- On its own, may not meet the due diligence test under s. 124.
- Employee may be able to keep working under maintained status (formerly known as implied status), ss. 186(u) of IRPR:

186 A foreign national may work in Canada without a work permit **(u)** until a decision is made on an application made by them under subsection 201(1), if they have remained in Canada after the expiry of their work permit and they have continued to comply with the conditions set out on the expired work permit, other than the expiry date;

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Increased immigration processing times are creating issues

- Global events requiring a shift in the way government employees carry out their functions have caused major increases in processing times
- Maintained status: how long can it last?
- Puts employers in a tricky situation, as maintained status is still valid employment authorization, but much more difficult to track than a work permit with an expiry date printed on it
- Risk that extension is refused but employee does not inform employer, or employee leaves country and returns without informing employer

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Definition of work under s. 2 *Immigration and Refugee Protection Regulations* (IRPR)

Interpretation

2 The definitions in this section apply in these Regulations.

work means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. (*travail*)

Examples of activities for which a person would not normally be remunerated or which would not compete directly with Canadian citizens or permanent residents in the Canadian labour market and which would normally be part-time or incidental to the reason that the person is in Canada include, but are not limited to:

- long distance (by telephone or Internet) work done by a temporary resident whose employer is outside Canada and who is remunerated from outside Canada;
- Even if no Canadian work permit required, working in Canada can trigger various employment and tax issues

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▼ Question:

It's getting cold and my employer is still allowing remote work. Can I go to Florida as a tourist and work from there? What do I tell the U.S. border officer?

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▼ Answer:

- Practitioners are divided on whether this is in violation of U.S. immigration law. Border officers have discretion. Many travellers are not informing border officers that they are working remotely, and instead are focussing on the tourism aspect of their trip
- Those who argue that it is allowed believe that there is no U.S. labour market entry and no competition with U.S. citizens or permanent residents, since the individual is not occupying a position in the U.S., will be paid outside the U.S., and the activities in the U.S. are incidental to work that will principally be performed outside the U.S.
- Those who argue that it is not allowed believe that B-2 visitor status is intended for those going to the U.S. for pleasure, and this status does not authorize work of any kind, regardless of where the wages are paid
- Other issues: personal taxation (IRS) and employer health benefits coverage

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▼ Keeping up with travel requirements


- Unclear how long vaccination and testing requirements will remain in place. Travel requirements will continue to evolve, even after COVID-19 is behind us
- Each jurisdiction is free to set and modify its entry requirements. Political considerations regarding reciprocity (vaccines, biometrics, etc.) can influence requirements
- Rules for travel into Canada do not always mirror rules for travel into United States, even with respect to the shared land border (e.g., before November 8, vaccinated Americans could drive into Canada for tourism but vaccinated Canadians had to fly into the United States for tourism)

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▼ AI and immigration decision making

- Immigration, Refugees and Citizenship Canada has begun using algorithms to decide certain immigration applications, and this is to be expanded further in the years to come
- Concerns regarding procedural fairness and ability to challenge refusals
- Judicial review at Federal Court is the main way to challenge a refusal but it is a very lengthy process and therefore rarely used. It is usually faster and easier to submit a new application
- Current system makes it very difficult to overturn a negative decision

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Lets talk Tax


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Tax considerations - Canadian employers with employees working in another country

- Canadian employer may be subject to payroll taxes, withholding obligations and reporting in foreign country
- If jurisdiction has a tax treaty with Canada, specific tax relief can be provided for Canadian resident employee but tax requirements for employer may remain
- Tax treaty relief would not apply for employee if they cease to be resident in Canada for tax purposes
- Local tax advice should be obtained

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▼ Tax considerations - Canadian employers with employees working in another country

- Canadian employer may itself be subject to tax in foreign jurisdiction
 - For example, do the activities of the employee constitute carrying on business in that jurisdiction?
- If jurisdiction has a tax treaty with Canada, there may be exemptions available to the Canadian employer provided it does not have, and is not deemed to have, a permanent establishment in that jurisdiction
- May be subject to local tax compliance including requirement to file a tax return (even if exempt from tax)
- Local tax advice should be obtained

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▼ Tax considerations - non-resident employers with employees working in Canada

- Non-resident employer is required to withhold and remit Canadian income taxes, unless they obtain a waiver from CRA
- If employee is resident in a jurisdiction that has a tax treaty with Canada, specific tax relief can apply to them
 - e.g. a U.S. resident employee is exempt from Canadian income tax if present in Canada for no more than 183 days in any 12 month period and the U.S. employer has no permanent establishment in Canada
- Exemption for employee does not release the employer from its Canadian tax obligations to withhold, remit and report – must obtain waiver or enter a non-resident employer certification program with CRA
 - Processing of waiver requests and entry into certification program substantially delayed by pandemic

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▼ Tax considerations - non-resident employers with employees working in Canada

- Non-resident employer may itself be subject to Canadian tax
 - For example, do the activities of the employee constitute carrying on business in Canada?
- If employer is a resident of a jurisdiction that has a tax treaty with Canada, there may be exemptions available to it provided it does not have, and is not deemed to have, a permanent establishment in Canada
- Even if the employer is exempt from Canadian income tax, it will be required to file a Canadian tax return if it “carries on business in Canada” – extended statutory definition and common law tests

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▼ Tax considerations - non-resident employers with employees working in Canada

- **Regulation 105**
- Every person paying a non-resident person a fee, commission or other amount in respect of services rendered in Canada, of any nature whatever, shall deduct or withhold 15% of such payment
 - Does not apply to payments of remuneration, payments made to certain registered non-resident insurers
 - payments made to certain authorized foreign banks in respect of their Canadian banking business
- Withholding is on account of Canadian income taxes of non-resident recipient
- If the amount of the withholding exceeds the income taxes owing by the recipient, due to a treaty exemption or otherwise, the recipient can file a Canadian tax return and claim a tax refund

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▼ Tax considerations - non-resident employers with employees working in Canada

- **Regulation 105 (cont.)**
- Where a non-resident employer charges its customer (wherever in the world they may be) for services provided by an employee who is working in Canada that customer is liable to withhold 15% of such charges and remit them to the Canada Revenue Agency
- Failure to remit such amounts will result in the customer itself having liability for the amounts plus penalties and interest
- Directors of a corporate customer/payer may also have personal liability for these amounts (subject to a due diligence defence)
- Reg 105 waivers may be obtained but usually are only available in “one-off” situations where the non-resident service provider is clearly exempt from Canadian tax

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Q&A

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Biographies



Deenah Patel

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Deenah currently leads RBC's Solution Enablement and Marketing within the Future of Work and Culture department in Human Resources. She works on global HR initiatives, along with managing Employer Brand, Talent Acquisition marketing, the Career site, and external People and Culture communications. Prior to this, she created RBC's Employee Experience Centre of Expertise; working with researchers, designers and marketers to create memorable moments that matter across Career Experience Journeys. She started at RBC as the Senior Director, Recruitment Marketing and Channel Strategy focused on acquisition and retention of best talent.

Before joining RBC, she spent 15 years at IBM in Canada and the USA, spanning several marketing positions, including leading worldwide Software's Digital and SaaS marketing, was in Sales for 5 1/2 years and also managed IBM's Diversity and Inclusion office. Deenah also worked at Digital Security Controls, a Canadian manufacturer of security solutions, and started her marketing career at a boutique security consulting firm -Strongbar Industries.

Deenah is a Laurier MBA alumna and lives in Sandbanks Provincial Park with her husband and daughter. She takes an integrated approach to healthcare and is often found advocating for mental health and physical fitness. If she's not out for a trail run, you'll also find her in the kitchen trying different gluten-free vegan baking recipes. For fun, she's learning Spanish because she dreams of living on the beach in Spain.



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Areas of Expertise

Labour Relations and Collective Bargaining | Labour, Employment & Human Rights | Employment Advice and Litigation | Labour Mergers, Acquisitions and Sales of Business | Human Rights & Discrimination | Cannabis Law

Education

1999, LLB, University of Victoria

1995, MA, University of Western Ontario

1994, BA (Honours), University of Western Ontario

Jurisdiction

Ontario, 2001

Language

English

Alix Herber is a senior partner in the Labour, Employment & Human Rights group. She prides herself on providing high quality strategic advice to her clients in all areas of labour, employment and human rights matters. With over 20 years of experience, Alix is a strategic partner to her clients and provides practical solution oriented advice, all the while mitigating potential liability. Alix also has particular expertise in advising clients in the federal sector.

In addition to providing clients with quality legal advice, Alix uses her considerable experience to passionately represent her clients in arbitration hearings, labour board hearings, human rights tribunals, and court actions relating to all aspects of the employment relationship; always keeping her clients interests in mind, be that achieving an excellent settlement or pursuing a successful litigation strategy.

Previously working as In-House-Counsel for one of North America's largest grocery retail and distribution companies, Alix was involved in operational labour relations, arbitrations, and the administration of approximately 50 collective agreements, leading negotiations in many of them. After returning to private practice, Alix regularly acts as chief negotiator for clients in collective bargaining.

Alix also regularly delivers personalized training sessions on harassment and discrimination, workplace violence, disability management, union organizing and certification and many other topics. Alix regularly advises on or acts as the external investigator in sexual harassment and other workplace investigations.

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Chair of the firm's Ontario Women's Network, Alix strongly advocates for women in the legal profession. Recently Alix was awarded Lexpert's "Zenith Award" for her ongoing contribution to promoting women in law. Finally, Alix is currently a Board of Director and Chair of the Governance Committee for Camp Kirk.





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Areas of Expertise

Tax Law | Cross-Border & International Tax | Investment Management | Executive Compensation & Benefits | Tax Litigation and Dispute Resolution | Entertainment and Media | Private Equity & Venture Capital | Life Sciences | Mining | Energy | Financial Services | Power | Renewable Energy

Education

1992, LLB, Queen's University

1989, BA, Queen's University

Jurisdiction

Ontario, 1994

Language

English

Christopher Steeves is the Leader of the firm's Tax group and is a member of the firm's Partnership Board. Frequently advising Canadian businesses in corporate restructurings and acquisitions, Christopher also assists with income tax aspects of complex domestic and cross-border financings, and financial instruments including derivatives, securities lending and collective investment funds.

With expertise in transfer pricing and the resolution of disputes with Canadian tax authorities, Christopher has worked with clients and advisors outside Canada to develop innovative, tax-efficient means of accomplishing cross-border business objectives.

Regularly speaking at industry conferences and seminars, Christopher has been an instructor for the Canadian Bar Association's course *Tax Law for Lawyers*, "Cross-Border Tax Issues" since 2006, and taught a course on "Transfer Pricing" for the Institute of Chartered Accountants of Ontario. He taught at the University of Windsor, Faculty of Law, from 1999-2003. Christopher's expertise has been recognized by *Chambers Canada*, the *Canadian Legal Lexpert Directory*, *Best Lawyers in Canada*, *Who's Who Legal* and the *International Tax Review*.



Areas of Expertise

Immigration | Canada | United States

Education

2012, LLB, Université de Montréal

Jurisdictions

New York, 2017 | Ontario, 2016

Languages


French | English | Chinese (Cantonese) | Spanish | Portuguese

Douglas Tsoi is an associate in our Immigration Group at the Montréal and Toronto offices. He advises clients on a broad range of complex immigration law matters.

A member of the Law Society of Ontario and the New York Bar, Doug speaks several languages and has experience with applications for temporary resident visas, work permits, labour market impact assessments, temporary resident permits, rehabilitation, permanent residence, and citizenship.

He is also a member of the Canadian Bar Association's Immigration Law Section and the American Immigration Lawyers Association.

Before joining Fasken, Doug practised immigration law at international firms in Canada and the US.



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