

**Employment
Handbook
For
First
Nations
Schools**

Revised June 2007



FNSEA

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Introduction

This Employment Handbook has been produced upon a recommendation of the First Nations Schools Association Board of Directors in 1997. The Handbook was originally published in 1997, and has been revised to reflect changes in the law as of December 15, 2006.

Please keep in mind that all of the information included in this Handbook is intended to convey only general information and does not constitute legal advice. Readers are encouraged to obtain advice to understand how the general issues apply to their particular situation.

The Handbook is intended to provide ideas and suggestions for First Nations schools in British Columbia regarding their personnel policies and practices. While most of the concepts presented within it have widespread application, some information may be provincially specific. It is also important to note that this Handbook does not consider situations in which employees are represented by a labour union. In those cases, the collective bargaining agreement and obligations under relevant labour legislation must be considered.

The Handbook includes a general discussion of a variety of topics and issues, as well as sample policies, forms and letters. In all cases, the samples are intended to provide ideas and suggestions, and they can be adapted and changed to reflect the unique circumstances of each school. When possible, more than one sample is included, with the hope that applicable aspects of each will be combined to result in a policy or form that is appropriate for each school. Schools are encouraged to obtain advice regarding their policies.

Several individuals were helpful in the preparation of this Handbook, particularly the schools/organizations that shared sample policies and evaluation materials for inclusion in this Handbook, including Bella Bella Community School, Chehalis Community School, and the First Nations Education Steering Committee. Thanks also to the FNSA Board of Directors, Christa Williams and Barb Kavanagh of the First Nations Educations Steering Committee, Wes Nap of the BC Teachers' Federation, and Nancy Lagana of the BC School Trustees' Association.

Part One: Employment Policies and Practices

1. Introduction and Background Information

1.1 Why Establish Personnel and Employment Policies?

This section outlines:

- The purpose and usefulness of employment policies;
- How employment policies and practices can be developed; and
- The usefulness of a personnel committee.

Personnel and employment policies are objectives and rules which provide a foundation for a school's employment practices. They are tools which can help an organization manage its day-to-day operations. Personnel and employment policies can help to ensure that employees and prospective employees are treated consistently and fairly, adding to an efficient workplace. They also can establish an organization's and employee's rights, and can provide guidance for resolving any disputes, which might arise. Policies can also be developed to reflect and reinforce the long-term objectives and goals of a school and community. Generally, employment policies can:

- Set out clear organizational standards;
- Support good employee relations; and
- Reduce or avoid litigation.

Personnel policies can range from a broad set of principles to a detailed set of instructions outlining the steps to be taken in each stage of the hiring and employment process. Employers should bear in mind that the more detailed the policy is, the less flexibility the employer may have. Once an employer establishes a personnel policy, the employer needs to comply with the policy and apply it consistently in order to be able to rely on it.

In many cases, detailed employment policies are quite useful. Detailed policies will ensure consistency in the way in which staff and potential staff are treated. In addition, with a detailed policy in place, the group of people responsible for the governance of a school can delegate a greater level of responsibility for its day-to-day operations. Ideally, the people responsible for governing a school will only have to be involved with the recruitment, hiring, supervision and evaluation of senior staff members. Those senior staff members can then be responsible for hiring and supervising the other staff members.

A note of caution about personnel policies:

If your personnel policies are included as terms and conditions of employment, it may be difficult to change them without employees' consent and without providing some consideration (such as money) to the employees in exchange for accepting the changed terms. Instead, it may be preferable to have employees enter into a written contract of employment at the time of hiring, with one of the terms being that the employees agree to abide by the policies of the employer, *as amended from time to time*. See also Section 3.16 for more information about written employment agreements.

1.2 Who Should Develop Personnel and Employment Policies?

Fundamentally, the group of people responsible for governing the school is responsible for designing personnel and employment policies and for ensuring that they are implemented. That group can be the Chief and Council, the School Board, the Education Authority, or any other governing body as is appropriate. It is important that this group of people “buy into” the personnel policies, and ensure that the employer's concerns are included in the policies.

Ideally, however, personnel and employment policies will be developed more collaboratively. Ultimately, school staff will be responsible for enforcing and will be affected by the policies. Therefore, involving staff in the development of policies will increase the likelihood of their effectiveness.

It may also be useful to seek technical advice from people experienced in designing personnel and employment policies. Doing so may involve contacting other schools and communities that have effective policies in place.

A *Personnel Committee* may be established to facilitate the design of personnel policies, including people with a range of responsibilities and perspectives. The size of the Committee will vary depending upon the size of the school, the number of staff people, and the range of viewpoints and issues to be considered.

While a Personnel Committee may draft the policies, the governing body should ultimately review and approve the policies produced. Then the Personnel Committee can be instrumental in implementing the policies created; the schools' governing body may consider delegating the Personnel Committee the authority to carry out most personnel related activities.

It is clearly very important to select members of a Personnel Committee carefully; if the Committee is not able to implement the policies consistently and clearly, your employment policies will be ineffective and possibly unenforceable.

1.3 What Considerations Are Important When Developing Personnel and Employment Policies?

The personnel and employment policies of a school cannot be considered in isolation. The policies will exist within a context of federal and provincial laws relating to employees and work place obligations. Some of the key pieces of legislation related to employment issues affecting First Nations schools are included in Part Two of this Handbook.

In Canada, both the federal and provincial governments have the power to make laws dealing with employment practices. The key federal legislation related to employment issues is the *Canada Labour Code*, which is described in Part Two of this Handbook. The main provincial legislation in British Columbia is the *Employment Standards Act*. Excerpts from it are included in Part Two of this Handbook, along with references to other legislation which may be of interest to employers.

First Nations schools are likely subject to federal legislation, but different laws will apply depending upon whether the employer is subject to federal or provincial jurisdiction. This Handbook has been prepared on the assumption that employers consulting it will be subject to federal jurisdiction over labour matters. However, each employer should seek its own legal advice on that point. Part Two, Section I of this Handbook includes further reference to this issue.

The *Canadian Human Rights Act* also has some implications for employers. For federally regulated employers, the *Canadian Human Rights Act* protects against discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted. For provincially-regulated employers, the *BC Human Rights Code* prohibits discrimination because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, or age of a person, or because a person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of that person. In the *BC Human Rights Code*, “age” means 19 years or more and less than 65 years. References will be made to the *Canadian Human Rights Act* when appropriate throughout this Handbook.

It is imperative that employment policies are designed such that they are not in conflict nor inconsistent with applicable federal and provincial legislation.

In addition, several suggestions are important to consider when developing and implementing personnel policies. These suggestions include:

- make the policies reasonable, be aware of the legal context, and consider the school’s existing policies, practices, and needs;
- include what makes sense for your school;
- only include policies you thoroughly understand so that you can consistently and properly administer them;

- make sure that employees know about the existence and content of any employment policies;
- refer to the policies in offers of employment, such as indicating that the policies will be an aspect of each employee's conditions of employment, as amended from time to time;
- include a reference to employment policies in each new employee's orientation;
- consistently follow the policies you create; and
- have a plan for reviewing and revising your employment policies. Reviews can take place on a regular, scheduled basis, or they can be done if it becomes clear that an aspect or aspects of the policies are not working.

Finally, all employees should have full access to the policy manual. It is usually best to give a copy to each employee, and to have the employee sign a form acknowledging receipt of the manual. This form will serve as documentation should an employee ever deny being aware of a policy.

2. Non-discrimination in Employment

The first issue that is crucial for employment practices and policies relates to non-discrimination. As discussed above, according to Canadian human rights legislation, discrimination on certain grounds is prohibited. Employment policies must be consistent with this legislation. The non-discrimination requirements of the Canadian Human Rights Act apply, as stipulated by Julie in paragraph 2 of her comment below.

Importantly, section 7 of the Act provides that where a private sector employer is engaged primarily in promoting or serving the interests of Aboriginal peoples, the employer may give preference in employment to Aboriginal peoples or employ only Aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the *Canadian Human Rights Act*. So the non-discrimination requirements of the *Canadian Human Rights Act* are really the main concern

In human rights law, harassment is a form of discrimination. The *Canada Labour Code* requires that federally-regulated employers have a sexual harassment policy. Because harassment based on any of the prohibited grounds is discrimination, it is a good idea to have a harassment policy that covers all of them. You should seek advice about whether to cover harassment generally. Quebec has been the first jurisdiction to address psychological harassment specifically in its human rights laws. So far neither BC nor Canada has followed suit.

Further information regarding the *Canadian Human Rights Act* is outlined on the following pages.

Further Information About the *Canadian Human Rights Act*...

Section 3 of the *Canadian Human Rights Act* says that prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted. Both mental and physical disabilities are covered. Alcoholism and addiction to illegal substances have been found to be disabilities for human rights purposes. Discrimination based on pregnancy or child-birth is deemed to be discrimination based on sex. Harassment based on any of the prohibited grounds, including sex, is also considered to be discrimination.

Where an employee suffers discrimination on the basis of a prohibited ground, the employer may have a duty to accommodate the employee to the point of undue hardship. Just what is undue hardship depends on the circumstances. It may be a defence for the employer if the requirement which has a discriminatory effect is a bona fide occupational requirement. To establish such a requirement as a defence, the employer must show (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; (2) that the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship upon the employer. Examples include certain physical strength requirements for police officers or fire fighters. The employee also has a duty to facilitate the accommodation.¹ The scope of the employee's duty may vary depending on relevant factors, including whether the employee is in denial or unaware of the addiction or disability.²

Under section 7 of the *Act*, it is a discriminatory practice to refuse to employ or continue to employ an individual, or in the course of employment to differentiate adversely in relation to an employee on a prohibited ground of discrimination. It is also a discriminatory practice to use or circulate any form of application for employment, or in connection with employment or prospective employment to publish any advertisement or to make any written or oral inquiry that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.

An exception is made for special programs under section 16 of the *Act*. Section 16 of the *Canadian Human Rights Act* provides in part:

16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the

¹ This point that was recently confirmed by the British Columbia Court of Appeal in *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, 2006 BCCA 57.

² See *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58.

prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

To take advantage of the exemption in section 16 of the *Canadian Human Rights Act*, it is advisable to have a written policy clarifying that one of the school's purposes is to prevent, eliminate or reduce disadvantages suffered by First Nations people. The policy could go on to state that because increasing employment opportunities for First Nations people is one way of accomplishing that objective, the school has a special program of giving preference in employment to First Nations people. Where applicants for a position are equally suitable (for example, based on skills, education, experience and other qualifications) preference could be given to First Nations people.

In March 2003, the Canadian Human Rights Commission adopted a revised Aboriginal Employment Preferences Policy. According to that policy, it is the Commission's view that it would be inappropriate to apply its Special Programs Policy (regarding the application of exemptions in section 16 of the *Canadian Human Rights Act*) to Aboriginal employment preferences. The policy provides that employers can require job applicants to have knowledge and/or experience with the language, culture, history and customs of a particular First Nation, band or tribe when such requirements are directly related to the job requirements. Note, however, that the policy does not allow for preference to be given to members of a particular First Nation, band or tribe. Adequate measures must also be taken to ensure that non-Aboriginal employees or candidates for employment are treated fairly and reasonably.

According to the Aboriginal Employment Preferences Policy, measures that can be implemented by employers to ensure fair treatment of non-Aboriginal employees or candidates for employment include:

- having clear written policies regarding the employer's application of Aboriginal employment preferences;
- indicating in all job postings and advertisements whether Aboriginal people will be given preference;
- making all employees aware of and required to acknowledge as part of their terms and conditions of employment that Aboriginal people will be given preference in accordance with the relevant policy;
- where non-Aboriginal employees have accepted, as a term of their employment, that they may be displaced in preference to an Aboriginal candidate, the employer must still treat the non-Aboriginal employee in a fair and reasonable manner, e.g., by giving adequate notice of termination.

3. Employee Recruitment

In this section, a number of issues which are crucial to employee recruitment will be discussed, including:

- Responsibility for hiring;
- Internal recruitment, including issues associated with hiring friends and relatives and potential conflict of interest situations;
- Preparing a job description, with samples;
- Advertising a new position;
- Screening and short-listing, with samples;
- Interviewing, with sample questions;
- and Applications with samples.

Filling a job opening is a very important aspect of employment practices and policies. The cost of hiring the wrong person for a job can be quite high, both in the short and long term. Therefore, recruiting and choosing an individual for employment should be approached with care.

Establishing and following a clear procedure for recruiting employees will also result in a process which is seen to be consistent and fair to all potential employees. Your personnel policy manual should therefore outline the process used by your school to recruit and hire employees.

Recruiting the best individual often takes a considerable time. If a position must be filled immediately, it may be best to consider hiring a person on a temporary basis. You can then take the time to complete a more thorough process.

The person who is hired on a temporary basis may be encouraged to apply for a permanent position. Even if that is the case, however, you may want to advertise the position more widely, to ensure that you choose correctly from among a number of potential candidates, and to ensure that everyone is allowed a fair chance to apply.

3.1 Determining Responsibility for Hiring

The first step necessary in the hiring process is a determination of who will be responsible for recruitment and hiring. It may be useful to have the school's governing body responsible for filling only the most senior positions. Responsibility for hiring other staff can be delegated to either a senior administrator, or to a personnel committee.

Hiring Responsibility Policy Sample 1:

Job Postings:

Prior to any recruitment and hiring, the Principal will develop a job description: outlining the level of responsibility; defining the salary range; and identifying the knowledge, skill requirements, and personal suitability required for the position

Procedure:

The Executive Director will: determine the need for the position; define the term of the position (permanent, term, or casual); establish the functions required for the position; identify the level of responsibility; identify the qualification requirements; define the salary range; identify and secure the budget; and post the positions available

Hiring:

All permanent positions will be filled by a personnel committee appointed by the Board and reporting to the Board. The number of members of the committee and criteria for selection will be determined by the Executive Director. This committee will recruit and hire the best qualified individual available for the position.

3.2 Internal Recruitment

It is useful to have a clear policy regarding internal recruitment and hiring. In many cases, an individual already working in a school or organization can be promoted or moved to fill a new or vacant position.

There are many benefits to internal recruiting and hiring. It is often a cost-effective way to fill a position, and an individual chosen in this way will already have a good understanding of the employment situation and the school. It will also be relatively easy to assess the candidate's strengths, weaknesses, and ability to fulfill the job requirements. Allowing individuals to move up may increase the morale of employees and provide motivation for those employees who are ambitious. It can help to retain good employees and to create team spirit. In addition, if training can be provided for individuals who are promoted, allowing employees to take on new responsibilities can help to build the capacity of those individuals and the community in general.

There are, however, some difficulties associated with internal recruitment. Most importantly, perhaps, it may lead to resentment if individuals are not promoted as often and as quickly as they wish, and if some employees are promoted while others are not. Therefore, it is important to establish a clear process if internal candidates are to be able to apply for new positions, and it may be best to advertise the position both internally and externally and assess all of the candidates according to standard criteria. Another option is to post the position internally first, and if a suitable candidate is not found within a set period of time, then to post externally. A sample policy regarding internal applicants is:

Internal Applicants Policy Sample 1:

This school believes that our staff should have the first opportunity to fill vacant positions for which they are qualified. It will therefore be the practice to inform staff of vacant positions. Anyone interested can submit an application to the personnel committee. That applicant will then be considered along with and according to the same criteria as all others received.

It may be useful to have policies related to internal applicants. For example, employees applying for a different position may be required to:

- Have completed their probationary period;
- Have been in their current position for a specified period of time (such as six months or a year); and
- Have had no disciplinary notes in their files for at least six months, a year, or some other specified length of time

Internal Applicants Policy Sample 2:

This school believes that the best candidates to fill our job openings may well be some of our present employees. Therefore, prior to any outside recruitment, we will announce all new positions within the school for five working days. All applicants must have completed at least one full year in their current position prior to applying for another position.

You may also wish to consider in your policy problems which may arise if the applicant turns out to be unable to perform the job to which he or she has been promoted. Whether or not this issue is addressed in the personnel policy, it should be addressed specifically in the offer of the new position to the employee. Will the employee be able to return to the previous position for a certain length of time? If so, that time period should be specified – and should be taken into account when you are replacing the employee in the previous position. This should be decided and clearly related to the employee as part of the offer, as should any new probation period requirement, salary, benefits, and related matters. Will the employee be provided training for the new position? If these sorts of questions are not addressed at the time the new position is offered, it will be much more difficult to change things after the employee has accepted the new position.

In addition, please keep in mind that the *Canada Labour Code* (section 209) provides that every employee who intends to or is required to take a leave of absence due to pregnancy, maternity leave, parental leave, or compassionate care leave is entitled, upon making a written request, to be informed in writing of every employment, promotion, or training opportunity that arises during the period of leave and for which the employee is qualified. Upon receiving such a request, the employer is obligated to so inform the employee. Apart from the *Canada Labour Code* requirements, it is good employee relations practice to keep employees informed of opportunities so that they can consider them themselves or possibly refer other people to the employer.

3.3 Avoiding Conflicts of Interest

It also may be useful to have clear policies about potential conflicts of interest. While it is important to be aware of conflict of interest concerns, it may be preferable to have a very generally worded policy indicating that the school's policy is to avoid conflicts of interest whenever possible, in particular in matters relating to hiring, employment, supervision, and promotion. Conflicts may arise not only from loyalties to relatives and friends but also from loyalties to business or political associates. There should also be a term in the employee's contract of employment requiring the employee to avoid any conflict of interest and to report such a conflict if one arises.

It is important when dealing with conflict of interest policies to be sure that the policy does not result in discrimination based on marital status or family status, grounds that are protected under the *Canadian Human Rights Act*.

Hiring Policy Sample 1:

Subject: Hiring

Policy:

All permanent positions shall be filled by a personnel committee appointed by and responsible to the Board. The number of members of the committee and the criteria for selection shall be determined by the Executive Director.

Procedure:

1. The qualification requirements for a position, together with a detailed job description (which will be written and kept on file), shall be posted and filed in the workplace when a position is advertised.
2. The Executive Director will first consider promotion from within the organization to determine if the position can be filled by an existing employee.
3. If no internal promotion is possible, the position will be advertised throughout BC.
4. The personnel committee will go through the process of short listing and interviewing.
5. The final hiring decision is the responsibility of the Executive Director.
6. All employees are required to read and abide by the “Code of Ethics.”
7. Depending upon the position, it may be a condition of employment that the individual provide a satisfactory criminal record check.

Reason for the Policy:

To recruit and hire the best qualified Aboriginal individual available for employment in the organization. **Note: if an Aboriginal employment preference policy is in place, you may wish to say “the best qualified Aboriginal individual available for employment.”**

3.4 Code of Conduct

It is good practice to have a code of conduct, which may cover matters like conflicts of interest, duties of confidentiality and privacy. A template Code of Conduct for a Treaty Society Board of Directors is provided at Appendix 3. Another sample policy is outlined below:

Employee Conduct and Confidentiality Sample 1:

All employees of this organization shall work to promote the objectives of the organization and to keep information confidential with regards to the organization and clients. Employees must adhere to the “Code of Ethics.” Failure to do so may result in suspension or dismissal.

Procedures:

All personnel working on behalf of the organization will protect the confidentiality of any information acquired from a client during the conduct of their duties.

Confidential information may be disclosed only when the client has authorized such disclosure, or in accordance with applicable laws.

In any event, disclosure for legal reasons shall not occur before consultation with the Executive Director of the organization. [Any possibility of legal disclosure must be known to clients.] Violation may result in suspension or dismissal.

[Note: It would be better to address privacy and confidentiality in a policy that is provided to parents. If a client situation applies, then privacy and confidentiality should be addressed in a standard form that all clients are required to sign.]

Please note:

Policies referring to confidential information should indicate as clearly as possible what information is considered confidential. The policies should also specify that the duty to keep information confidential continues even after employment ends. In addition, any policies dealing with privacy and personal information need to be reviewed in light of the *Personal Information and Protection of Electronic Documents Act* (Canada) and the *Personal Information Protection Act* (BC). Please refer to Part Two, Section 6 for more information about these Acts, or refer to the Acts themselves.

Code of Ethics Sample 1:

Code of Ethics

This organization is dedicated to serving our clients. It is important that all employees be aware of their responsibilities to the clients, the organization, fellow employees, and to the Board. Therefore, the following guidelines pertaining to conduct and ethics shall be respected by all employees.

1. During work hours, employees must: devote themselves to their duties of employment; be prompt, courteous, and temperate in their performance; and adhere to the policies and procedures of the organization.
2. Employees shall carry out the duties of their positions conscientiously, loyally, and honestly, remembering that the primary work task is to serve our clients and meet the goals of the organization.
3. Employees shall respect the integrity and dignity of the organization, its programs, staff, and all other affiliated agencies.
4. Employees shall conduct themselves, while on duty and in public, in a manner that will bring credit to themselves and the organization.
5. Employees shall work continually towards self-improvement through self-evaluation and training.
6. Employees shall use information obtained on the job for the intended purpose only, and not for their own personal interests or those of other persons.
7. Employees shall be on the job punctually each day unless there is a valid reason for absence or lateness, in which case the employee will contact his/her immediate supervisor at the start of the working day and give an indication of when s/he expects to return to work.
8. Employees shall use their own initiative to find ways of doing their work more efficiently and economically.
9. Employees shall follow instructions attentively and cooperate with their supervisor.
10. Employees shall maintain a satisfactory standard of dress and general appearance appropriate to their duties.
11. Employees shall use equipment, property or supplies which are owned, leased or rented by the organization for authorized purposes only.

Code of Ethics Sample 1 continued:

12. Employees shall protect and care for all property entrusted to them and report to their relevant supervisor any faulty equipment which requires repair.
13. Employees shall not engage in public criticism of other employees or the approved policies of the organization.
14. Employees may recommend to their supervisor, within their sphere of responsibility, changes of policy which s/he believes appropriate.
15. Employees shall not be under the influence of alcohol or non-prescriptive or medicinal drugs while on duty.
16. Employees shall respect the confidentiality of all records, materials, and communication concerning clients and disclose official information only when publication has been authorized by their supervisor.
17. Employees shall refuse any fees, gifts, or other tangibles offered to them in a reward for duties performed by virtue of their appointment, with the exception of cultural offerings.
18. Employees shall serve clients with loyalty, determination and the maximum application of professional skill and competence

3.5 Outlining the Position – Preparing a Job Description

When a job needs to be filled, it is usually helpful to begin by clearly outlining what is required. For example, the sample worksheet included on the following page might be used to prepare a job description.

Generally, job descriptions are a valuable asset to all organizations, and they should be updated regularly to ensure that they are reasonable and current. Screening, hiring and evaluation criteria should be based upon the job description to avoid any human rights complaints.

Job descriptions generally include job qualifications, assigned duties, responsibilities, knowledge required, reporting requirements, and physical working conditions. Analyzing and reviewing job descriptions on an ongoing basis may uncover overlapping responsibilities, and may identify some duties that could be better assigned to another employee.

When preparing a job description, it is best to ensure that any qualifications listed relate to the job criteria. It may also be useful to develop a clear policy to address a situation in which an employee or applicant loses any necessary credentials. For example, if the job requires a valid driver's license, it may be important to outline what will happen if an employee in that position loses his or her license. Sample job description forms are included on pages 22-3.

Job descriptions can also be used to help an employee understand what his or her job entails, and what the school expects of him or her. It can also be an important tool in employee evaluations (an issue discussed later in this Handbook). For that reason, it is important to carefully review job descriptions with employees, and in many cases it is useful to involve an employee in revising or clarifying his or her job description.

Job Description Sample 1:

Job Description and Requirements Worksheet

Position: _____

When the job will begin: _____

Who the employee will report to: _____

Describe the essential activities involved in this job:

1. _____
2. _____
3. _____
4. _____
5. _____

Describe any necessary skills and experience:

1. _____
2. _____
3. _____
4. _____
5. _____

List any specific education requirements (i.e. grade twelve, post-secondary...)

List any specific skills required (for example: computer literacy, driver's licence, first aid, specific knowledge of machine operations...)

Wages to be paid: _____

Hours: _____

Job Description Sample 2:

Position:

Counsellor

Position Description:

The Counsellor is directly responsible to the Principal, and has the primary function of providing support services to students with the stated aim of supporting the student in the school environment.

The major emphasis of this position is at the grade 9 and 10 level, and 80% of the Counsellor's time will be spent working at that level.

Duties and Responsibilities:

1. Provide direct counselling services to children.
2. Work with the Principal in providing teachers with support and assistance in managing classroom problems.
3. Work with parents, guardians and other agencies involved with the welfare of children.
4. Help organize and attend all meetings concerning counselling support for children in the school.
5. Develop educational and support programs which assist children with counselling needs.
6. Provide reports on a regular basis regarding programs and activities to the school Principal.
7. Perform other duties as may be assigned by the Principal.

3.6 Advertising

Once it has been written, a job description can be used as the basis for preparing a job posting or advertisement.

Deciding how to advertise for candidates involves considering a number of factors. One or more options may be pursued as appropriate and necessary. If it seems likely that an appropriate person may be found locally, a job posting may be adequate. This is generally the most cost and time-effective method of recruitment.

If specific or extensive skills are required, it may be necessary to advertise more widely to attract an adequate number of qualified applicants. Advertisements in major newspapers are somewhat expensive, and often can only include limited information. However, they will be read by a wide range of potential candidates.

It may also be useful to advertise a position by contacting college and university employment offices. This method may be most successful in the spring, when students are graduating and/or looking for summer employment. Contact information for some B.C. colleges and universities is included below.

College and University General Information Lines

(Ask for the number of the employment offices).

Malaspina College	(250) 753-3245
Simon Fraser University	(604) 291-3224
University College of the Cariboo	(250) 828-5000
University of British Columbia	(604) 822-2844
University of Northern British Columbia	(250) 960-5555
University of Victoria	(250) 721-7211

However you choose to advertise, list the essential job functions and requirements in the advertisements. Advertisements should also prompt any interested candidates to take some action. Indicate whether people should call for more information or send in a resume and cover letter by fax, mail or e-mail, and whether they should submit references. Finally, include a closing date, after which time no more applications will be accepted. Sometimes handwritten resumes and cover letters are requested. Handwritten information may demonstrate a person's ability to communicate neatly and effectively.

As mentioned above, the *Canadian Human Rights Act* prohibits discrimination in employment based on race, national or ethnic origin, colour, religion, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted. It is also a discriminatory practice for employers to use or circulate any form of application for employment or to publish any advertisement that expresses or implies any limitation, specification, or preference based on a prohibited ground of discrimination. *However, you can indicate in your advertisement that the successful candidate must have experience working with First Nations*

people, or that an excellent understanding of a particular First Nation's language, culture, history and customs is required. If included, that criterion must then be used consistently throughout the hiring process and must be directly related to the job requirements. You may also give preference in hiring to First Nations people, as discussed above in relation to the Aboriginal Employment Preferences Policy. But apart from job requirements related to a particular First Nation's language, culture, history and customs, the *Canadian Human Rights Act* does not permit preference to be given to members of a particular First Nation, band or tribe as opposed to First Nations people generally.

3.7 Screening or Short-listing

The individual or committee responsible for hiring can use a screening or short-listing process to review the applications and/or resumes and select the appropriate candidates for an interview. This process involves matching the experience and skills demonstrated in the application and/or resume with the requirements of the job. It is useful to consider the overall neatness, presentation, and care demonstrated by the resume and covering letter. The number of applicants selected for interviews may vary, but generally it is useful to interview between three and five people.

It is important to screen applicants objectively according to a set of criteria applied in a consistent way. A checklist can make the process easier and faster, and can be helpful if a candidate who is not chosen for the position inquires about the reason for that decision, and/or requests suggestions for improving his or her resume. A sample checklist and a sample selection grid are included below.

Remember – when screening resumes, it is important not to focus too heavily on one aspect. Instead, look for a relevant mix of education, experience and skills. Also remember that the human rights considerations referred to in Section 3.6 also apply to screening and shortlisting. Make sure the criteria used in screening do not relate to the prohibited grounds of discrimination.

Application Screening Checklist Sample 1:

Screening Checklist

Candidate's Name _____

The scale consists of 1 (excellent/very relevant) – 5 (poor/not relevant)

	1	2	3	4	5	General comments
Previous Experience						
Education						
Specific Training						
Demonstrated Skills						
Resume Presentation						
Knowledge of First Nations Language/Culture						
Other.....						

Application Screening Grid Sample 1:

Applicant Screening Grid

Scoring based on a scale of 1 (excellent/very relevant) – 5 (poor/not relevant)

Applicant	S. Smith	J. Jones	T. Thom	*	*	*
Experience	2	5	4			
Education	3	4	4			
Training	3	3	3			
Skills	4	5	4			
Resume	3	5	4			
Knowledge of Culture	4	4	1			
Other...						
Other...						
Other...						
Total	19	26	20			

3.8 Interviewing

The interview process will allow you to choose the most qualified and appropriate person from among the candidates you have short listed. Generally, in the interview you are looking for an individual with:

- job related skills, ability and experience;
- intelligence and aptitude;
- relevant education and training;
- positive social, personal and behavioural qualities; and
- dependability, enthusiasm and motivation.

It may be useful to have the individuals who come for an interview fill out a standard application form. This will ensure that you obtain any necessary information which may not be on all of the resumes. The application form may also include information related to and an authorization for reference checks. More information about privacy concerns is contained in Part Two of this Handbook. A sample application form is included after this section.

There may be a two step interview process that would have the employer interview 5-10 applicants in order to create the shortlist for the second interview.

The following is a list of interview stages. It is good to try to include all of these steps in each interview.

1. Opening: this stage should include putting the applicant at ease, establishing the objectives of the interview, explaining how the interview will proceed, and exchanging enough information to determine if the interview should continue. The opening stage includes:

- **Putting the Applicant At Ease:** before you begin the interview, it is helpful to make the applicant feel welcome and at ease by offering a chair, taking the applicant's coat, offering a coffee, introducing yourself, and beginning with a few brief informal comments.
- **Explaining the Objectives of the Interview:** in this stage, you may want to outline the aim of and what will take place during the interview. If any tests will be conducted, it is good practice to explain the tests and their purpose.
- **Outlining the Position:** it is important to provide a brief overview of the position early in the interview. In doing so, you will have an opportunity to ensure that the applicant's expectations are consistent with the available position, and that the applicant understands the situation before a significant amount of information is exchanged.

2. Data Exchange: this is the main stage of the interview, involving the gathering of information you will need to make your selection. The way in which you gather information is crucial, and you need to ask appropriate questions and constantly evaluate the applicant's responses.

Don't be afraid to ask a question in a different way if the first response is unsatisfactory. For example, you may want to say, "That answer didn't really address the issue I was aiming at. Perhaps you could tell me..." Also don't be afraid to allow for pauses and silences, as the applicant thinks about an answer, don't rush the applicant, and don't move on without an adequate answer.

During the data exchange you need to gather information about the work history, educational background, and professional goals of the applicant. Some of the things you might want to explore include:

- specific duties and responsibilities in prior positions;
- accomplishments at previous jobs;
- progress in terms of promotions, new positions, and employment moves;
- the applicant's likes and dislikes in terms of employment;
- the applicant's ability to work independently/take direction from a number of different people;
- the applicant's ability to make decisions;
- any failures of the past and how they were dealt with;
- the educational background of the applicant;
- reasons for leaving his or her last job/reasons for seeking this position;
- if the applicant has future plans for education, and is interested in further training and schooling; and
- the applicant's long-term employment goals.

Be sure to give the applicant an opportunity to ask you questions about the position and the organization. The kinds of questions asked may also be helpful in your evaluation of the applicant.

3. Closing: after you have gathered all of the information you need to make a hiring choice, you should close the interview. This may involve reviewing your notes and clarifying any points which are still not clear, allowing the applicant an opportunity to ask any questions he or she might have, and establishing a system for follow-up, such as indicating how and when you will notify the applicant of your decision.

Application Form Sample 1:

Application form

Name _____

Address _____ Phone Number _____

Job Applied For _____

Are you seeking (check one)?: full time part time temporary permanent employ

Are you over 16 years of age?: Yes No

Have you completed: some high school grade 12
 some college/university college/university degree

Please list the following information about your previous two jobs:

Name of Employer _____

Employed from _____ to _____

Primary Duties _____

Supervisor _____ Phone Number _____

Name of Employer _____

Employed from _____ to _____

Primary Duties _____

Supervisor _____ Phone Number _____

Special Skills: Valid BC Driver's Licence Class 4 Drivers Licence
 First Aid Certificate Computer Literacy

Please list the names and phone numbers of three references:

1. _____
2. _____
3. _____

Application Form Sample 1 continued:

As part of the hiring process, we may contact those persons whom you have identified as potential references. We may also contact those persons identified as previous supervisors. When we contact a reference, we may ask about your background, work experience, or education.

I have read the foregoing, and I hereby consent to allow the school/ organization, or any of its employees or delegates to check my references, and to ask any questions considered to be relevant to their hiring decision. I further hereby consent to my former employers listed above disclosing personal information about me that is related to my previous employment to employees or representatives of **[name of school]** for the purpose of checking my references.

Signature: _____ Date: _____

The following steps can help to ensure a successful interview:

- Prepare carefully for the interview. The individual or small committee conducting the interview must fully understand the position, and should be able to answer questions about the school/organization and the job itself. The individual or committee should also understand the skills and personal characteristics necessary for the position.
- Choose an appropriate environment – one which is quiet and free from distractions;
- Use open-ended questions and encourage the applicant to talk;
- Ask questions in a logical sequence, and don't jump around from one issue to another;
- Avoid using leading questions (that is, questions that can be answered yes or no);
- Follow-up on interesting and unusual responses, and use probing questions to learn more about the applicant;
- Demonstrate enthusiasm for the school/organization;
- Emphasize what is needed and the key aspects of the job;
- Take notes;
- Allow adequate time for the interview;
- Stay open minded, don't make up your mind too early, and don't let one factor make your decision; and
- At the end of the interview, tell the applicant what to expect next, such as when you will call or if the applicant should phone you.

There are several questions which are inappropriate and possibly illegal to ask during an interview. For example, you should **not** ask an applicant about his or her age, height, weight, marital status, spouse's name or occupation, religion, national or ethnic origin, number and/or age of children, potential disabilities, sexual orientation, affiliation with unions, child care arrangements, or future plans to become pregnant or have children. For example, the following illustrates an appropriate and inappropriate way to phrase a question during an interview:

An inappropriate question:

Do you have any young children who might interfere with your work?

A *more appropriate* question:

In this job, you may be required to work varying hours, such as an occasional Saturday or evening. Will that be a problem for you?

A list of sample questions is included on the following pages.

Again... remember the *Canadian Human Rights Act* grounds for discrimination referred to above. Interviewers should not make any written comments based on prohibited grounds of discrimination – not even rough notes on interview comment sheets. Personal identifiers (such as noting the person’s gender, race, approximate age...) may be useful for remembering the applicants after they have left, but records of that nature increase the risk of a human rights complaint.

Interview Questions Sample 1:

Possible Interview Questions

Educational Background

1. What level of education have you achieved?
2. What was your major course of study? Why did you choose that major?
3. What were your favourite/least favourite courses? Why?
4. What extracurricular activities were you involved in?
5. How did you spend your summers while in college?
6. What training do you have that might be relevant for this position?
7. What are your future educational plans?

Personal Traits/Characteristics

1. What do you consider to be your strengths/weaknesses?
2. How do you normally deal with stressful situations? Tell me about a situation in which you had to deal with stress and explain how you coped?
3. Have you ever experienced difficulty with a co-worker? If so, how did you handle that situation?
4. Give me an example of a situation in which you had to make a quick decision. How successfully did you deal with that situation?
5. Can you give me an example of how you have motivated other co-workers?
6. Have you ever had to implement a policy with which you did not agree? If so, how did you handle that situation?
7. What are your long-term career goals?
8. How do you like to spend your leisure time?

Interview Questions Sample 1 continued:

Prior Work Experience

1. What were your responsibilities at your last place of employment?
2. What did you like/dislike about that position? What did you enjoy/not enjoy?
3. What were some of your major accomplishments?
4. How have you benefited from that employment?
5. How did that position prepare you for greater responsibility?
6. Why did you decide to seek other employment?
7. What kind of position are you now looking for?
8. What was the most difficult situation you ever faced in that job, and how did you solve or deal with that situation?

Interest in this Position

1. What first interested you in this position?
2. What qualifications do you have that you think are relevant to this job?
3. What are your expectations of this position?
4. What do you feel would be the most challenging aspects of this job?
5. What further training/development do you think you might need for this position?

Experience Working with First Nations

1. Have you had previous experience working with First Nations organizations?
2. What did you like/dislike about that experience?
3. What did you learn from that experience?
4. Do you think that there are any special skills/understanding which are needed when working with a First Nations organization?
5. Have you ever worked in a small community before? If so, what did you like/dislike about that experience?

Interview Questions Sample 2:

Can You Ask the Following Questions?	Yes	No
1. Have you ever worked under a different name? <i>(You may only ask about this after the selection process, if necessary to check references.)</i>		√
2. How many children do you have?		√
3. Are you planning to start a family soon?		√
4. Would you be able to work Saturdays when necessary? <i>(You can ask this if it is a job requirement.)</i>	√	
5. Can we see your birth certificate before we hire you? <i>(You cannot ask this question until after a person is hired.)</i>		√
6. Do you have any disabilities?		√
7. This job requires heavy lifting. Is that o.k. for you? <i>(You can ask this if it is a job related requirement.)</i>	√	
8. Were you born in this country?		√
9. If you're hired will you provide a photo for your file?	√	
10. Will you provide a photo to attach to your applications? <i>(You cannot request this until after a person is hired.)</i>		√
11. Have your wages ever been garnished?		√
12. Who referred you for a position here?	√	
13. Are you single, married or divorced?		√
14. Do you plan to move any time soon?		√
15. Do you own or rent your home?		√
16. Do you speak any languages fluently? <i>(You can ask this if it is a job related requirement.)</i>	√	
17. Do you attend Church? Which one?		√
18. What is your ancestry?		√
19. What schools have you attended?	√	
20. Have you ever been arrested? <i>(You can ask about convictions, but only if it is job related.)</i>		√
21. Who should we notify in case of an emergency?	√	
22. Have you ever had trouble getting credit?		√
23. Have you ever worked with a First Nations organization? <i>(You can ask this if it is a job related requirement.)</i>	√	

Interview Appraisal Form Sample 1:

Applicant Interview Appraisal Form

Do not fill this form out in the presence of the applicant.

Review the job description, and rate the candidate in the following areas.

The applicant...	Excellent (4)	Good (3)	Average (2)	Poor (1)
Can fulfill the job functions				
Comments				
Has relevant experience				
Comments				
Has the necessary training				
Comments				
Has demonstrated relevant skills				
Comments				
Has the necessary education				
Comments				
Demonstrates enthusiasm				
Comments				
Demonstrates maturity				
Comments				
Understands First Nations language and culture				
Comments				

Interview Appraisal Form Sample 2:

Interview Summary Form

Position for which the applicant is being considered: _____

Name of the individual being interviewed: _____

Name of person conducting the interview: _____

Instructions: circle the appropriate response for each category.

Appearance	Sloppy, untidy	Neat & Tidy	Very careful about appearance
Conversational Ability	Disorganized, confused, irrelevant	Logical & Clear	Fluent, articulate
Alertness	Slow to respond	Comprehends quickly, responds readily	Sharp, perceptive
Personality	Cold, unfriendly	Pleasant, amiable	Easy to get along with, warm personality
Enthusiasm	Uninterested, unmotivated	Excited about job	Very motivated, goal oriented
Initiative	Didn't volunteer information	Full responses	Organized, asked good questions
Education	Weak, irrelevant	Some related courses	Relevant, exceptional qualifications
Experience	Lacking, not related	Basically qualified	Well qualified, excellent experience
Others...			

Based on your interview, do you recommend this person for the position? Yes No

Signature of person conducting the interview: _____

Date: _____

3.9 Following the Interview

This section outlines considerations to follow the interview process, such as:

- testing of applicants; and
- checking references and conducting criminal record and licensing and membership checks. **[Note: if matters such as a satisfactory criminal record check and licensing and membership checks are conditions of employment, the applicant should be informed of those requirements either prior to or during the interview.]**

Following each interview, take time to consider the applicant. Review the notes you took, make any necessary additions, and complete an applicant appraisal form right away. You may also want to develop your own form if appropriate.

Whatever form is used, it should be used to assist with the selection process. If a committee is conducting the interview, each committee member can complete a form individually and then compare scores when the interviews are completed. The final decision, however, should reflect a number of factors, some of which may not be included on the forms. ***Remember not to focus too heavily on one or two criteria.***

3.10 Testing of Applicants

A variety of tests can also be used to assess the skills of applicants, such as tests to assess the applicant's typing ability, computer skills, math skills, and his or her ability to write business letters, fill out business forms, and write reports. Such tests can help to distinguish between similarly qualified candidates, and are a consistent measure if all of the tests are performed under the same conditions. However, it is important not to rely too heavily on tests. They should be viewed as one among many factors to be considered. ***Remember – some people do not respond well to tests, but perform very well in other circumstances.***

If you ask applicants to take a test as an aspect of the interview process, make sure the tests are done using a standard format, in a consistent environment, and in a neutral way. In addition to tests, you may ask applicants to submit examples of past reports, writing samples, or an essay. These can be useful indicators of a person's writing and presentation abilities.

The *Canadian Human Rights Act* does apply to testing. For example, an applicant with a disability may need to be accommodated in performing tests.

3.11 Checking References

It is important to always check an applicant's references before he or she is hired. Often, references will provide information that will be an important factor in your decision-making. As in all of the other steps of the hiring process, it is important that you be well prepared for the reference checks, it is useful to have a form prepared before you make your calls, and to ask consistent questions. Samples of such forms are included on the next three pages. Privacy issues are addressed in more detail in Part Two of this Handbook.

3.12 Criminal Record Checks

In the *Criminal Records Review Act* (BC), “work with children” means working with children directly or having or potentially having unsupervised access to children in the ordinary course of employment or in the practice of an occupation. Because many if not all of the employees in a school setting will be working with children, you may want to require that every employee undergoes a criminal record check.

“Employer” is defined in the Act as including a board as defined in the *School Act* and an authority as defined in the *Independent School Act*. An employer is required to ensure that every individual who is hired for employment involving work with children and every employee who works with children undergoes a criminal record check (section 8(1)). An employer must not require an applicant for employment to authorize a criminal record check unless the employer has offered employment to the applicant and that offer could be subject to a satisfactory criminal records check (section 8(2)). The employer is also required to inform individuals of the requirements of the Act if those individuals are employed by or are applicants for employment with the employer in a job that involves working with children (section 8(3)).

Whether or not each First Nation school and the First Nations Education Authority fall within these definitions, it may be wise to require satisfactory criminal record checks of all employees working in a school as a condition of employment. This is an area where federal human rights legislation may be more helpful in that the *Canadian Human Rights Act* only prohibits discrimination based on a criminal conviction for which a pardon has been granted. The BC *Human Rights Code*, on the other hand, prohibits discrimination because someone has been convicted of an offence that is unrelated to the employment or intended employment, which is a less certain test to meet.

Criminal record checks are intended to help protect children from abuse. Already more than 280,000 British Columbians are subject to having such a check in order to access a range of employment opportunities, including anyone who works with children. This issue is discussed in more detail in Part Two of this Handbook, in the section outlining the *Criminal Records Review Act Implementation Guide*. Further information related to criminal record checks is outlined on the following page, and also included in Appendix 4.

Employers should be aware, however, that simply meeting the requirements of the *Criminal Records Review Act* may not be enough to protect them from a claim of negligence if an employee who works with children abuses them in the course of that employment. Also see the section on the *Criminal Code* in Part Two of this Handbook.

3.13 Licensing and Membership Checks

Finally, if a job applicant is required to be a registered member of an organization or to be licensed, those requirements should be specified, preferably in writing, at the time the employer offers the employment. For example, an offer to a teacher could state that the offer is conditional upon the applicant being a member in good standing of the BC College of Teachers (or holding other specified qualifications) and providing satisfactory evidence of that status (or the other qualifications). Licensing requirements should also be indicated in the job advertisement. If it is a condition of employment that membership in good standing in a professional association or other body be maintained, that should also be specified in the employment contract.

Criminal Record Checks

As mentioned above, the human rights provisions regarding criminal convictions are different in the *BC Human Rights Code* and in the *Canadian Human Rights Act*. Although the *Canadian Human Rights Act* only prohibits discrimination based on convictions for which a pardon has been granted, the *BC Human Rights Code* prohibits discrimination based on a person's conviction of a criminal or summary conviction offence which is unrelated to the employment or intended employment of that person. As described above, this Handbook has been written based upon assumption that the federal law will apply.

Section 8 of the *Criminal Records Review Act* says that an employer must ensure that every individual who is hired for employment involving work with children and every employee who works with children undergoes a criminal record check. As indicated above, the *Act* defines "work with children" as working with children directly or having or potentially having unsupervised access to children in the ordinary course of employment or in the practice of an occupation. For purposes of this *Act*, "employees" include independent contractors. An employer must not require an applicant for employment to authorize a criminal record check unless the employer has offered employment to the applicant. The employer must also inform individuals of the requirements of the *Criminal Records Review Act* if those individuals are employed by or are applicants for employment with the employer in a job that involves working with children.

According to the *Act*, when an individual is offered employment that involves working with children, the individual must provide a criminal record check authorization to the employer. Although the *Act* only says that an employer must not employ an applicant in a job working with children if the applicant has not provided an authorization, employers should not employ applicants until after the satisfactory criminal record check has been obtained (and not simply the authorization). (There could be a delay between the applicant providing the authorization and the employer receiving the results of the criminal record check.) Offers of employment should, therefore, not only be subject to the individual providing a criminal record check authorization, but they should also be conditional upon the employer receiving a satisfactory criminal record check. The authorization must (a) be in the form provided by the registrar under the *Act*; (b) be signed by the individual; and (c) include the individual's authorization to submit his or her fingerprints if necessary to verify the results of the criminal record check.

It should also be a term or condition of employment that employees promptly report to the employer if they have been charged or convicted of one of the offences listed in Schedule I to the *Act* and provide to the employer an authorization for a further criminal record check. An employer who becomes aware that an employee who works with children has an outstanding charge for, or has been convicted of, one of the listed offences must require the employee to provide an authorization for a further criminal record check. If an employee is also a registered member of the College of Teachers, the employer must take reasonable steps to notify the College of Teachers that the employer is obtaining a further criminal record check.

Reference Check Form Sample 1:

Reference Check Form

Name of Applicant: _____

Name of Reference Contact _____

Date Contacted _____

Always identify yourself. Advise the person you are calling that (candidate's name) is applying for a position with your school, and has authorized you to contact his or her references. They may want you to fax them a copy of a signed consent from the applicant authorizing them to disclose information about the applicant. Then ask the following questions:

1. When did the (applicant work) for you?

From: _____ to _____

2. What was (the applicant's) position?

At the start of employment: _____

At the time of leaving: _____

3. Did (the applicant) have supervisory responsibilities? Yes No

Comments:

4. How well did (the applicant) work with others?

5. How was (the applicant's) attendance record?

Reference Check Form Sample 1 continued:

6. How would you describe (the applicant's) work ability?

7. What were (the applicant's) strengths?

8. What were (the applicant's) areas for improvement?

You may want to add additional questions which are specific for each job. Be sure to ask the same questions to all references of each candidate.

Final Question:

Would you recommend this person for a job, or would you rehire (the applicant)?

Yes No

If no, why not?

Reference Check Form Sample 2:

Reference Check Form

Applicant: _____

Person Contacted: _____

1. Was the applicant employed by your company? Yes No

2. If yes, what was the date of that employment?

From: _____ to: _____

3. What was his or her job title? _____

4. What was the nature of the work performed?

5. The applicant has stated that he/she was earning \$ _____ when leaving. Is that amount correct? Yes No

6. Did the applicant follow instructions satisfactorily? Yes No

Comments:

7. Was the applicant able to work independently? Yes No

Comments:

8. Was the applicant reliable? Yes No

Comments:

Reference Check Form Sample 2 continued:

9. Did the applicant arrive to work on time? Yes No

Comments:

10. How would you rate the applicant's performance?

Excellent Good Average Below average Poor

Comments:

11. Would you rehire the applicant? Yes No

12. Any additional comments?

3.14 Making an Offer

This section outlines factors to consider when making an offer of employment, including:

- signing contracts; and
- establishing a probationary period and conducting reviews during the probationary period, including sample statements for offers and contracts.

Once a decision has been made, the successful applicant can be made an offer of employment. An applicant may be told in person or in a telephone conversation that he or she has been selected for the position, but if a verbal offer of employment is made, the person making the verbal offer should clearly state that the terms of the offer will be provided in writing. The conversation should be to the effect that the employer will be making an offer in writing, and that the conversation itself is not the offer. The terms and conditions of employment must be specified at the time the offer is made. As indicated above, any conditions (such as a criminal record check or teaching qualifications) should be spelled out in the written offer. The written offer should also indicate that the employee will be bound by the school's employment policies, as amended from time to time. It is also important that employees know at the time the job offer is made whether there is a probationary period and the possibility that it may be extended.

A letter sent with the offer can also contain other details, such as the term of employment, with a start date, hours, the starting salary and benefits. A full job description can also be included with the offer as an attachment. Policies or documents referred to in the written agreement should be available for the person to review before accepting the employment. *Employees should have a clear understanding of their job responsibilities prior to accepting employment.*

The offer may be subject to the signing of a contract, or to the signing of the offer by both the employer and employee. **A contract which an employee is required to sign after employment has been commenced, or even after the offer has been accepted, may be unenforceable.**

More details about written employment agreements is provided in Section 3.16.

Ideally, you will also write to the other applicants thanking them for their interest in the position and informing them that it has been filled. You may want to suggest to them that you will keep their resumes on file for future consideration for a set period of time, but if you do so, you should be sure to consider their resumes for all relevant positions which become available during that time.

Rejection Letter Sample 1:

Sample Letter for Applicants Not Interviewed

Dear (Applicant),

Thank you for your recent application. We certainly appreciate your interest in our school.

I regret to inform you that we have offered the position advertised to another applicant whom we think best meets our needs for the position.

Again, we thank you for your interest in our school, and the time you spent in submitting an application. We wish you continued success in your job search.

Sincerely,

Rejection Letter Sample 2:

Sample Letter for Applicants Who Were Interviewed

Dear (Applicant),

Thank you for your recent application and interview for (the position). We certainly appreciate your interest in our school.

I want to inform you that we have offered the position to another applicant whom we think best meets the needs for the position. It was a difficult decision because a number of applicants were strong candidates. We will keep your application on file for a period of 60 days in the event that another position for which you are qualified becomes available.

Again, we thank you for your interest in our school, and for attending the interview. We wish you continued success in your job search.

Sincerely,

3.15 Probationary Period

It is common for new employees to be subject to a probationary period. That period is intended to allow for a mutual assessment as to whether the employee and job are suitable for one another. If there is to be a probationary period, it must be mentioned as a condition in the offer of employment, and the implications of dismissal during the probationary period must also be made clear. Usually the length of the probationary period is noted in the letter of offer. **If an employee has accepted a position without having been told about the probationary period, the employee will have a strong argument that probation was not a term of the contract.**

The length of the probationary period is usually three months, although it is sometimes extended—particularly for managers, whose period is sometimes six months or longer. The time period should be chosen to allow the new employee to become familiar with the job and the work environment, and to demonstrate his or her ability to fulfill the job requirements.

Employment agreements can indicate expressly that employment may be terminated for any reason without notice or compensation, except as required by statute, if performance during the probationary period is not satisfactory. In the absence of a written agreement to that effect, the employment of a probationary employee may only be terminated without notice or cause if the employer determines during the probationary period that the person is not suitable for the position and the termination of employment occurs before the end of the probationary period.

It is important to distinguish between a probationary period for new employees, and a trial period for existing employees moving into a new position. While these are sometimes referred to as similar, they are not the same thing. If an existing employee is offered a new position within the school, consider whether a new probationary period will apply. In those circumstances, the letter offering the new position should clearly state whether any new probationary period is a condition of the offer and what will happen if the employee fails to complete the probationary period successfully. For example, will he or she be able to return to the position previously held?

Before the probationary period has expired, it is important to review the employee's performance and either continue their employment or let them go. Unjust dismissal provisions now in place make it much more difficult to terminate employment after employees have more than one year's service. Therefore, all new employees should have their performance evaluated prior to the completion of their probationary period, and again about one month before their first anniversary of employment.

It is a good practice for employers to evaluate new employees two or three weeks before the end of their probationary period. At that time, the employee should also have an opportunity to express any concerns or difficulties to the employer to ensure that employment continues to be successful. Employers should be careful about "extending" probationary periods. It is generally preferable to evaluate the employee well in advance of the end of the probationary period and ensure that the probationary period is long enough to allow for that evaluation. Sample probationary period policies are included below:

Probationary Period Policy Sample:

All new employees, as well as those promoted and demoted, will serve a three month probationary period. After the completion of this period, employees rated with a satisfactory (or better) “Employee Performance Review” shall be retained on a contract of such term as deemed appropriate by the Executive Director.

Procedure:

The employee is requested to carry out a “self-assessment” based on mutually agreeable work plans. The employee’s supervisor carries out the same review. A meeting between the employee and the supervisor is called to compare the two reviews. If the employee is rated with a satisfactory performance, they are no longer on probation; if the employee is rated with an unsatisfactory assessment then the probationary period may be extended, the employee demoted back to their former position, or the employee may be dismissed.

A sample Probation Employee Review form is included on the following page.

Probationary Evaluation Form Sample 1:

Probationary Period Employee Review Form

Name: _____ Position: _____

Start Date: _____

Overall Assessment: Satisfactory Unsatisfactory

This probationary review has been discussed with the employee, who has been recommended for:

 retention dismissal extended probation**

(** extended probation should only be used in exceptional circumstances and the employee should have been aware of the possibility of extended probation at the time the original offer of employment was made)

Reasons: (if extended probation, state action necessary before next review)

Additional Comments:

Employee's Comments:

Signature of Employee: _____

Date: _____

Signature of Supervisor: _____

Date: _____

Probationary Evaluation Form Sample 2:

Probationary Period Appraisal Form

Date _____

Employee _____ Position _____

Probation Period _____ to _____

In accordance with the British Columbia *School Act*, and following the standards and quality indicators listed below, it is my opinion that the performance of the employee is:

_____ Satisfactory _____ Unsatisfactory

The probation period will be completed/extended effective _____

Category	Satisfactory	Unsatisfactory
A. Instructional Skills		
1. Uses a variety of techniques & models	_____	_____
2. Plans instruction to meet objectives	_____	_____
3. Adapts lessons to meet student needs	_____	_____
B. Focus On Students		
1. Establishes a healthy, supportive environment	_____	_____
2. Generates excitement & interest in learning	_____	_____
3. Shows sensitivity to student needs/feelings	_____	_____
C. Knowledge of Content & Use of Materials		
1. Demonstrates knowledge of relevant material	_____	_____
2. Uses multi-sensory approaches in lessons	_____	_____
3. Integrates community resources in lessons	_____	_____
D. Classroom Environment		
1. Organizes physical setting for effective learning	_____	_____
2. Exercises classroom control effectively	_____	_____
3. Provides a positive classroom conducive to learning	_____	_____
E. Communications Skills		
1. Communicates clearly in oral and written form	_____	_____
2. Encourages two way communication with parents	_____	_____
3. Communicates student progress effectively	_____	_____
F. Interpersonal Skills		
1. Displays consistency and fairness	_____	_____
2. Interacts positively with colleagues	_____	_____
3. Accepts extra curricular responsibility	_____	_____

Probationary Evaluation Form Sample 2 continued:

Category	Satisfactory	Unsatisfactory
G. Professionalism		
1. Sets high standards for personal performance	_____	_____
2. Actively participates in professional activities	_____	_____
3. Meets basic work expectations (e.g. promptness)	_____	_____
H. Attitude		
1. Exhibits enthusiasm, energy, and optimism	_____	_____
2. Exhibits positive attitude and sense of humour	_____	_____
3. Reflects self confidence	_____	_____
I. Adaptability		
1. Adjusts teaching approaches as needed	_____	_____
2. Handles change, interruption effectively	_____	_____
3. Responds to frustration/adversity with patience	_____	_____
Comments:		
*Principle/Administrator		
*Staff Member		
I have reviewed the material provided within this report. I am satisfied with the evaluation of the probation period.		
Staff Member: _____		Date: _____
Principal/Administrator: _____		Date: _____

3.16 Information About Written Agreements

Advantages of Written Employment Agreements

The most important term which is generally implied in unwritten contracts is that the employee will be given reasonable notice of termination in the absence of cause for dismissal.

Because of the wide variety of potential terms and conditions of employment that may be implied by the common law or imposed by statute, many employers and employees have preferred to set out clearly the terms of their agreement. A written agreement can help to clarify the relationship between an employee and an employer and ensure that their interests and concerns are expressly covered, giving both parties more certainty.

Common Provisions

There is no particular written employment agreement that will cover all situations – written employment agreements must be drafted to cover the specific concerns of the parties involved. Although it is not possible to provide an exhaustive list of the provisions that should be in an employment agreement, a comprehensive written employment agreement should cover at least the following points.

1. Parties

The written employment contract should start by identifying the parties to the contract. The correct legal name of both parties should be used.

2. Definitions

The written employment contract should contain a section defining important terms used in the agreement. For example, instead of repeating the full name of the school throughout the agreement, you may want to define “Employer” as representing the name of the school. You can then refer to the Employer throughout the agreement.

3. Employment

The written employment agreement should contain a provision briefly describing the nature of the employment, stating, for example, that the Employer offers and the Teacher accepts the employment in accordance with the terms and conditions set out in the contract.

4. Term of the Agreement

For how long does the agreement apply? Is the agreement for a definite or indefinite term? Can the agreement be renewed? If so, how and on what terms? Is a satisfactory performance evaluation a prerequisite to renewal? What about a probationary period? If the agreement is for a definite term, is there automatic renewal or termination in the absence of notice? Is the

employment conditional upon a certain number of students enrolling for the next school year? Is continued employment dependent upon funding?

5. Probationary Period

If there is a probationary period, then the agreement should define exactly what this means. For example, the agreement may state that the teacher will be on probation for a period of three months. The agreement should also clarify if the intention is that, during this probationary period, the teacher can be dismissed at any time for any reason by giving the teachers a specified number of days' written notice or pay in lieu of notice or a combination of the two.

The agreement should also be clear about what happens after the probationary period has been successfully completed. It should not state that the employment will become permanent or that the employee will have tenure. For example, the agreement could indicate expressly that employment may be terminated without notice or compensation, except as required by statute, if performance during the probationary period is not satisfactory. Can the probationary period be extended?

Because of the unjust dismissal provisions of the *Canada Labour Code* (which make it much more difficult to terminate employment after employees have more than one year's service), it is strongly recommended that all new employees have their performance evaluated prior to the completion of the probationary period, and again about one month before the first anniversary of employment.

A Word of Caution About Tenure

In drafting a written employment agreement, it is important to choose your words carefully. For example it is recommended that you do not use the term tenure. The court considered the use of the word in the case of *Greenwood v. Chilliwack Christian School Society*, (1994) B.C.J. No. 2852. In that case, Greenwood, a teacher, had an employment contract which contained the following provision:

Employment With Tenure:

After the designated probationary period, you are employed with tenure as long as you perform your duties satisfactorily and in accordance with the terms outlined herein.

Termination by the Board:

The school board shall notify you by February 1 if your status is in jeopardy, for the following school year, due to unsatisfactory performance. Both your deficiencies and the expected improvements shall be stated in writing.

The school board will give you written notice, prior to April 1, stating the reasons, if your employment will not be extended beyond the end of the current school year.

Your employment may be terminated for cause at any time.

In *Greenwood*, the teacher knew that the employer was unhappy with her performance. However, as of February 1, 1992, she had not received a letter indicating that her status was in jeopardy due to poor performance, as required by the contract.

On March 30, 1992, she received a letter of dismissal which informed her that her employment contract would not be extended beyond the end of the current school year.

On April 6, 1992, she received a letter telling her that her employment would be terminated forthwith, rather than at the end of the school year, but that she would continue to be paid until the end of August.

The Society argued that all that was required to terminate the contract was written notice prior to April 1, 1992, regardless of whether notice of unsatisfactory performance had been given on February 1 or not. The court disagreed, concluding that the term in the Letter of Appointment requiring notice on February 1 was a clear precondition to termination on April 1.

In calculating the damages to which the plaintiff was entitled, the court considered the effect of the use of the word “tenure,” stating at para. 45:

Given the nature of a teacher’s employment, which falls in increments of one year, the plaintiff was justified in expecting, after February 1 had passed, that she would be employed for the following year, even without the guarantee of “tenure.” In the private school context, **the guarantee of tenure changes the nature of the contract from a year-to-year position to long-term employment and provides additional security and expectations.** The plaintiff is entitled to have the unique nature of this contract recognized in an assessment of damages, but the realities of the teaching profession and the fact that jobs become available on a yearly basis must also be taken into account. In my view the plaintiff is entitled to damages in the amount of one and one half year’s salary. The amount paid to her from termination to the end of her 1992 contract should not be deducted from this amount. (emphasis added)

Thus the use of the word “tenure” resulted in a finding that a longer notice period was required than would have been if that word was not used. The notice period was quite significant – she was terminated on April 6, 1992 and was paid until August. On top of that, she was held to be entitled to an additional amount equivalent to 1.5 years’ salary.

6. Teacher Qualification

(a) Certified Teacher

Certification of teachers in British Columbia is generally covered by the *Teaching Profession Act*, the *School Act* and the *Independent School Act*. For First Nations schools, certification requirements may also depend on the terms of funding agreements and other agreements entered into as part of the transfer of jurisdiction to the First Nations Education Authority.

Depending upon the certification requirements applicable to the particular school, the written employment agreement should include a provision stating that the teacher shall have and maintain, for example, a certificate of qualification under the *Teaching Profession Act*, or a certificate of qualification issued by the inspector under the *Independent School Act*, or a letter of permission which has been issued to an authority by the inspector pursuant to the *Independent School Act* or certification by the First Nations Education Authority

(b) Criminal Record Checks

Pursuant to the *Criminal Records Review Act*, all persons hired to work with children must undergo a criminal record check. The written agreement should, therefore, include a provision indicating that the agreement is offered subject to a satisfactory criminal record check being completed. Although the *Criminal Records Review Act* does not purport to prevent a person from commencing employment where the record check has not been provided, it is more prudent for a school not to allow a person to begin working with children until a satisfactory criminal record check has been provided.

The requirement of a satisfactory criminal record check should be mentioned in any posting or advertisement for positions where it applies.

7. Duties of the Teacher

The written employment agreement should contain a provision which sets out at least a general statement of duties. The duties set out in section 4 of the *School Regulation*, made pursuant to the British Columbia *School Act*, could serve as a guideline. That section includes the following duties:

- (a) providing teaching and other educational services, including advice and instructional assistance, to the students assigned to the teacher, as required or assigned by the board or the minister;
- (b) providing such assistance as the board or principal considers necessary for the supervision of students on school premises and at school functions, whenever and wherever held;
- (c) ensuring that students understand and comply with the codes of conduct governing their behaviour and with the rules and policies governing the operation of the school;
- (d) assisting to provide programs to promote students' intellectual development, human and social development and career development;
- (e) maintaining the records required by the minister, the board, and the school principal;

- (f) encouraging the regular attendance of students assigned to the teacher;
- (g) evaluating educational programs for students as required by the minister or the board;
 - (g.1) evaluating each student's intellectual development, human and social development, and career development, including, as required by the minister, administering and grading Required Graduation Program Examinations;
 - (g.2) ensuring the security of Provincial examinations, including retaining completed Provincial examinations for any period of time set by the minister;
- (h) providing the information in respect to students assigned to the teacher as required by the board or, subject to approval of the board, by a parent;
- (i) when required to do so by the minister, verifying the accuracy of the information provided to the minister under paragraph (h);
- (j) regularly providing the parents or guardians of a student with reports in respect of a student's school progress;
- (k) attending all meetings or conferences called by the principal or superintendent of schools for the district to discuss matters the principal or superintendent of schools considers necessary unless excused from attending the meeting or conference by the principal or superintendent of schools; and
- (l) admitting to his or her classroom, to observe tuition and practise teaching, student teachers enrolled in a university established under the *University Act* or in an institution for training teachers established under any other Act, and rendering the assistance to the student teachers, and submitting the reports on their teaching ability or on other matters relating to them or to their work, considered necessary for the training of teachers by the university or institution.

In First Nations schools, the written agreement could also mention specifically that the teachers' duties include promoting the culture of the Nation and incorporating customs and traditions of the Nation into the curriculum. If the objectives of the school are to advance particular interests such as rebuilding community (in addition to education of the students), then those objectives can be included in the written employment agreement in order to clarify the responsibilities for the principal, teachers and staff for meeting those objectives.

The statement of duties can be as general or specific as the parties feel is necessary, but it should specifically mention any duties that are requirements of a funding agreement, for example.

It is always wise to state who will provide directions to the employee or the person to whom the employee reports.

There is a risk of being too specific. The employer needs flexibility so that it can adapt its

operations to meet changing conditions. If the duties are too specifically described, and a unilateral change to these duties is made by the employer, then the employee may be able to claim that he or she was constructively dismissed (described in more detail in Section 5 of this Handbook on Termination).

8. Confidential Information

You may wish to clarify what information is considered confidential. It should be a term of the contract of employment that confidential information is not to be disclosed except as required in the course of one's duties, and that the duty to keep information confidential continues even after employment ends.

9. Compensation

Again, the provisions on compensation can be general or specific. What are the forms of compensation? Amount of salary? Frequency of payments? Is there a procedure or formula for increases? Are the hours of work defined? Will the employee receive overtime? Is authorization from the principal required before overtime can be worked?

10. Benefits

Is the employee entitled to benefits? Are health, dental, life and disability insurance provided generally to employees? Is there a pension plan? What happens upon termination? If applicable, the agreement should specify that the only obligation of the employer is to pay premium contributions and not to provide the benefit itself. It should also state that benefits will be provided in accordance with the terms of the insurance policies.

11. Vacations

How many days does the employee get for vacation? Can an employee carry over unused vacation into future years? (This should be consistent with the term of the contract. For example, if it is a one-year contract that may or may not be renewed, then it should not contemplate vacation being carried forward). Are there restrictions on when vacation can be taken? Generally, the employer has authority to determine when vacation will be scheduled.

12. Sick Leave

How many paid sick leave days are available? Is money paid for accumulated sick days at the time of termination of employment? Does the number of paid sick days relate to a waiting period for short-term disability benefits? Is a doctor's certificate needed for an illness that lasts longer than a certain number of days?

13. Medical Fitness

The employer may want a provision that would allow it to require the teacher to undergo an examination by a doctor and to submit a medical certificate setting out the doctor's conclusions regarding the physical, mental, or emotional health of the employee and whether there is any problem or condition that may endanger the health of the students or staff of the school. Such a provision should provide that if there is such a danger, the employee can be suspended from duties without compensation until the employee delivers to the employer a satisfactory medical certificate. Employees should not be subject to unpaid suspensions without clear contractual terms allowing them.

Issues of medical fitness and disability also raise privacy and human rights concerns. Additional considerations relating to disabled employees are addressed in Part Two below.

14. Suspension from Duties

The employer may want a provision that would allow it to suspend a teacher in certain circumstances. For example, a paid suspension may be in order to investigate an allegation of assault. After the investigation is completed, if the employer is satisfied that the teacher committed a serious act such as an assault, the next step could be an unpaid suspension or dismissal.

In *Cabiakman v. Industrial Alliance Life Insurance Company*, [2004] 3 S.C.R. 195, the Supreme Court of Canada held that unless unpaid suspensions are part of the employment contract, an employee who is suspended because of an investigation or pending criminal charge to protect the employer's interests must be paid for the time during which the employee is expected to be available to the employer even if the employee is not reporting to work. Although the case dealt with Quebec law, it is relevant to considering suspensions in British Columbia.

15. Termination*

The method by which employment can be terminated is often the most important aspect of the contract and the most poorly defined. A provision dealing with termination should include a requirement that on termination or expiry of the agreement, the employee shall return to the school all property, records, keys, and so forth belonging to the school, along with any copies.

A provision dealing with termination should cover both termination for cause and termination without cause.

* This issue is covered in more detail in Section 5 of this Handbook.

(a) Termination for Cause

Pursuant to the common law, where the written contract says nothing about termination, it is an implied term of the employment contract that an employee can be terminated for cause without notice or pay in lieu of notice. Case law helps explain what constitutes “cause.” The employer may want to rely on this common law notion of cause, or it may want to define cause. Both parties should be aware that if such a provision is included, they may be giving up rights that they would have at common law.

(b) Termination Without Cause

Similarly, where the written contract says nothing about termination, it is an implied term of the employment contract that an employer can terminate an employee without cause if the employer provides reasonable notice or pay in lieu of notice. Again, the common law has developed a body of case law that sets out what will constitute reasonable notice in certain circumstances. However, determining what constitutes reasonable notice is not a scientific matter – it depends on a large number of factors.

It may be preferable, therefore, to specify in the written employment agreement exactly how a contract can be terminated when no cause exists. This can resolve a great deal of uncertainty. Another reason for including such a provision is to ensure that you can easily terminate the contracts of those teachers who have poor job performance. Without such a provision, it may be difficult to terminate such teachers as it is quite difficult to prove cause on the ground of poor work performance.

The provision should set out how much notice or pay in lieu of notice is required to terminate the contract without cause. It may also be preferable to include a provision indicating that the employer can give notice or pay in lieu of notice, or a combination of the two.

Careful wording is required, but an employer and employee generally can reach a binding agreement in advance regarding the length of notice or compensation required to terminate without cause.

For such an agreement to be valid and enforced by the courts, it must not violate the minimum standards of the *Canada Labour Code*. The employee must have fully understood the effect and term and must not have been pressured, however subtly, to agree to such a term. It is also helpful if the employee is given the opportunity to obtain legal advice before accepting the terms of the agreement.

(c) Notice

It may be preferable to set out clearly how notice of termination of the agreement can be given. Can it be mailed or does it have to be hand delivered? If mailed, when will it be deemed to have been received?

16. Entire Agreement and Modification

The written employment agreement should contain a provision clarifying the scope of the agreement. For example, it may state that the agreement represents the full agreement between the parties and that it supersedes any prior agreements. If you want your personnel policy to be part of the employment contract, and it has not been specifically referred to, then you may not wish to have this type of provision.

The agreement should also contain a provision indicating the manner in which the agreement can be modified. In this regard, it is important to consider the effect of your written policies. If these policies may change from time to time it is important to have a reference in the employment agreement to the employee accepting these changes. Otherwise, the employer may not be able to rely on the changed policies or, worse, a substantial change to the policies may be considered as termination without cause.

17. Waiver

The written employment agreement should contain a provision stating that a waiver of a breach or failure to assert a claim shall not constitute a waiver of any subsequent or continuing breach of such terms.

18. Severability

The written employment agreement should contain a provision stating that if any part of the agreement is deemed to be invalid, the remaining portions are to remain in force and effect.

19. Acknowledgement of Agreement

The written employment contract should contain a provision whereby the employee acknowledges having read and understood all terms of the agreement.

20. Additional Points

A written agreement should also provide that if it provides for a lesser benefit than that to which the employee would be entitled under applicable legislation, then the legislation will apply instead of the applicable term of the agreement.

It is possible to customize policies, organizational charts, and employment agreements so that they reflect some of the unique aspects of First Nations culture. For example, the statutory definition of immediate family may be broadened for purposes of bereavement leave.

N.B. This represents only general information and does not constitute legal advice. Readers are encouraged to obtain advice to understand how the general issues noted above apply to their particular circumstances.

4. After Completing the Hiring Process

After the hiring process has been completed, there are a number of considerations which are important, including:

- the need for employee orientations and full introductions to the new workplace;
- employee record keeping, and complying with relevant legislation;
- employee evaluations;
- training and upgrading policies and practices;
- employee safety considerations; and
- promotions, compensation and discipline.

4.1 Orientations

When a new employee begins work, it is important to give the person a full orientation. The orientation may involve a tour of the school, as well as any other relevant facilities and offices. Information about parking and times for access to the school should be provided. It is useful to introduce the new employee to as many other staff members as possible, and to make him or her feel comfortable in the working environment. The orientation may also involve an opportunity for the employee to sit with his or her supervisor and/or co-workers to discuss any concerns or important information.

You may also want to have an orientation package prepared for all new employees. The package may include a brief history of the school, its mandate, vision, objectives, and a brief profile of the staff and students (being sensitive to privacy concerns, addressed in more detail in Part Two). Having previously provided a job description or list of duties in the offer of employment, it is useful to provide another copy of the job description in order to clarify again the job expectations for both the employee and the school. Any relevant regulatory requirements (such as health and safety manuals) should also be included in the orientation package. The package should include a policy manual, and/or an outline of policies and practices related to issues such as vacation, sick days, maternity leave, parental leave, compassionate care leave, bereavement leave, the possibility of pay increases or salary scale, smoking, overtime, general dress, reporting, evaluations and discipline. If the harassment policy and privacy policy are not in the policy manual, then they should also be provided. A description of any benefits and training/employment opportunities would also be useful, as would an indication of any support groups or employee assistance programs which may exist. Ideally, someone will review the orientation package with the new employee and answer any questions the employee may have.

The school may well have other policies and procedures that are not directly related to the individual's employment but that the employee will be required to comply with and/or enforce. For example, the school should have Internet use policies governing use of the Internet, e-mail and instant messaging by staff and students. In addition to harassment policies aimed at

employees, schools should also have policies to cover teacher interaction with students and matters such as bullying or harassment of students by each other. The British Columbia Court of Appeal found in the *Jubran* case³ that the School District had not done enough to inform its teachers about harassment issues and how to deal with them. Part of the orientation process should involve providing copies of such policies to new employees and explaining their application. Because most new employees in a school setting will begin employment at the beginning of the school year, many of these matters can be conveniently dealt with as part of a general orientation or in-service days for all staff prior to the start of classes in September. If, for example, the school will have a general orientation for staff at the end of August of each year, then the start date for the employment contract should take that into account.

Sample employee orientation checklists are provided on the following pages. You may want to adapt those lists to reflect your priorities and needs. A sample policy for inclusion in a manual is also included on the following page.

Orientation Policy Sample 1:

All new employees will be provided with an orientation within their first week of employment, which is intended to establish good communications, reduce the anxiety related to working in a new environment with new responsibilities, provide information about the school and its goals, and assist with the adaptation to a new job.

³ 2005 BCCA 201.

Orientation Checklist Sample 1:

New Employee Information Checklist

Employee's Name: _____

Date: _____

Supervisor: _____

Please check off the following topics as they are discussed with the new employee.

Rate of Pay	_____	Pay Schedule	_____
Probation Period	_____	Performance Reviews	_____
Benefits	_____	Working Hours/Shifts	_____
Safety Procedures	_____	Smoking Policies	_____
Sick Days	_____	Vacations	_____
Discipline	_____	Termination	_____

Please also ensure that the following steps are taken:

Introduce co-workers _____

Show washrooms _____

Show lunchroom _____

Signature of Employee _____

Signature of Supervisor _____

4.2 Record Keeping

It is important to keep a confidential file with complete information for each employee. That file should include the employees' application, any relevant authorization forms, the orientation checklist, evaluation forms, and disciplinary notes.

The *Canada Labour Standards Regulations* (made under the *Canada Labour Code*) require that employers keep certain records. Section 24(1) of the Regulations requires each employer to make and keep a record showing the date of commencement and the date of termination of employment for each employee. These records must be kept for at least 36 months after the date of termination of employment.

In addition, section 24(2) of the Regulations requires every employer to keep the following records for at least three years after work is performed by an employee:

- (a) the full name, address, Social Insurance Number, occupational classification and sex of the employee, and where the employee is under the age of 17 years, the age of the employee;
- (b) the rate of wages, clearly indicating whether it is on an hourly, weekly, monthly or other basis and the date and particulars of any change in the rate;
- (c) where the rate of wages is on a basis other than time or on a combined basis of time and some other basis, a clear indication of the method of computation of that basis;
- (d) the hours worked each day;
- (e) the actual earnings, indicating the amounts paid each day, with a recording of amounts paid for overtime, vacation pay, general holiday pay, bereavement leave pay, termination pay and severance pay;
- (f) the payments made each pay day after deductions, with clear details of the deductions made;
- (g) the dates of commencement and termination of annual vacations, and the year of employment in respect of which each such vacation is given;
- (h) any written agreement between the employer and the employee to postpone or waive the employee's entitlement to annual vacation;
- (i) the dates of commencement and termination of any pregnancy leave, maternity leave, parental leave, or compassionate care leave granted to the employee, a copy of any notice concerning the leave, and any medical certificate submitted by the employee in respect of that leave;

- (j) the dates of commencement and termination of any job modification or reassignment of the employee related to pregnancy or maternity and a copy of any notice provided by the employer concerning the job modification or reassignment;
- (k) any general holiday or other holiday with pay granted to the employee pursuant to Division V of the *Canada Labour Code*, any notice of substitution of a general holiday required to be posted, and, if applicable, proof of agreement for the substitution of a general holiday by at least 70 percent of affected employees;
- (l) where hours of work are averaged, any notice concerning the averaging of hours of work, details of any reductions in the standard and maximum hours of work, and the number of hours for which the employee was entitled to be paid at the overtime rate of wages;
- (m) the employer's pay periods;
- (n) a copy of any medical certificate provided in respect of sick leave and any request made for the certificate by the employer, and any notice of termination of employment or intention to terminate employment;
- (o) the dates of any bereavement leave granted to an employee;
- (p) any notice of a work schedule that is required to be posted under the Code, and proof of agreement to the work schedule by at least 70 percent of the affected employees.

Employers should also keep records of the employee's date of birth and telephone number, and of all benefits paid to the employee by the employer.

If, for purposes of determining annual vacations, an employer has determined a "year of employment" to be something other than a calendar year or the period of 12 consecutive months beginning with the date the employment began or any subsequent anniversary (s. 183 of the Code), then the employer is also required to keep a record of any notice provided to employees. Section 12 of the Regulations requires that the employer give employees notice 30 days in advance.

Where an employee has been absent from work due to a work-related illness or injury, the employer is required, where reasonably practicable, to return the employee to work after the absence (s. 239.1(3) of the Code). For at least three years after the employer's obligation to return the employee to work expires, the employer is required to keep the following information:

- (a) detailed reasons for the employee's absence;
- (b) a copy of any certificate of a qualified medical practitioner indicating that the employee is fit to return to work; and

- (c) the date the employee returned to work, or a copy of any notification from the employer to the employee that return to work was not reasonably practicable and the reasons why it was not.

The Regulations also require an employer to preserve the confidentiality of any certificate of a qualified medical practitioner provided to the employer concerning the employee. This obligation and the other record keeping obligations mentioned above should be considered together with the requirements of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, which is addressed in Part Two.

4.3 Employee Evaluations

Employee evaluations should be performed regularly. The purpose of the evaluations is to promote and reinforce good instruction, and to maintain excellence in quality education. Evaluations can be used for career planning, and for motivational purposes. They can also provide necessary documentation and input for merit increases, and they can identify training needs. Evaluations can identify problems and improve poor performance, and can be used to support a decision and fulfill legal requirements if it is necessary to dismiss an employee. Accurate and full documentation will assist a school if a dispute about employment arises.

To be effective, a school should have a formal review system which is recognized by all staff and supported by all employees. Reviews should be performed on a scheduled basis – usually annually. The evaluation system should be clear to each employee, and standard procedures and forms should be used to ensure consistency and fairness for all employees.

Evaluations will ideally include matters relating to both past and future work. They should provide feedback on past performance, as well as expectations for the future. Evaluations can allow for a discussion of employees' strengths and weaknesses, their abilities and skills, as well as any need for additional training. It can also provide an opportunity to discuss employees' long-term goals and employment expectations. It is sometimes useful to keep performance reviews separate from salary increase reviews. This ensures that adequate attention is paid to both matters. Note, however, that employees who receive unsatisfactory reviews should probably not be getting salary increases. Appendix 5 includes Evaluation of Teachers and Reporting Writing information used by the Bella Bella Community School Society. That information is based upon School District #62 documents. In addition, some sample evaluation policies and forms are included on the following two pages.

Evaluation Policy Sample 1:

Teacher Evaluation Policy

An evaluation may be conducted at any time, but will take place not less than every three years, or when the teacher and personnel committee agree. All teachers will be evaluated during their first year of appointment at the school.

In evaluating the teacher's performance, the following criteria will be considered:

The teacher's:

1. knowledge of the pupils;
2. planning ability;
3. attempts to involve students in effective ways to allow them to develop skills and stimulate thought;
4. ability to account for individual differences;
5. provision of opportunities for questions and originality;
6. classroom management;
7. relationship with students;
8. knowledge of current information; and
9. understanding of the First Nation's culture and language.

In the course of the evaluation:

- the teacher will receive a copy of the policy and criteria at least 4 weeks in advance;
- a minimum of 2 classroom visits and not more than 5 classroom visits will take place;
- the teacher will be notified 4 weeks in advance that the evaluation will take place;
- each classroom visit will include...;
- the evaluation process may include one or more unscheduled visits;
- following the classroom visits, the teacher will be given a copy of the report;
- the teacher will be given a copy of a final evaluation report; and
- the teacher will be given an opportunity to respond to that report.

Evaluation Policy Sample 2:

Staff Evaluation Policy

After the successful completion of the probationary period, the employee's immediate supervisor will review the employee's performance against the mutually agreed upon work plan on a formal basis, as well as an informal performance assessment annually.

Procedure:

The Supervisor will:

1. request that the employee carry out a self-assessment for the period of the review within a mutually agreed upon time frame;
2. conduct a review of the employee's performance against the work plan and the "Employee's Performance Review";
3. call a meeting to review the respective assessments; and
4. finalize the review by completing the evaluation form, taking into consideration the previous meeting's discussion.

Once the evaluation is complete, both the Supervisor and the employee will sign it, signifying agreement with the assessment.

If the employee does not agree with the Performance Review, s/he may ask to be reviewed by the Chair/President.

The findings of the Chair/President will be final.

Evaluation Form Sample 1:

Teacher Supervision Report

Name of Teacher: _____

Dates Observed: _____

Years of Teaching Experience: This School: _____

Other Districts: _____

Certificate: B.C. Degree Held: _____
 Other

Lesson Observed: _____

Report Completed By: _____

Position: _____

Explanation of Rating Scale

- 5 – Excellent - Consistently outstanding quality
- 4 – Superior - Consistent professional performance
- 3 – Satisfactory - Basic requirements are fulfilled
- 2 – Fair - Minimum requirements are fulfilled
- 1 – Poor - Minimum requirements are not fulfilled
- Improvement is required
- N/A - Not applicable to the lesson observed
- Unable to determine at time of observation.

(This report is confidential and is intended for the use of the School and the teacher listed within.)

Teaching Plans and Materials

A. PLANS INSTRUCTION TO ACHIEVE SELECTED OBJECTIVES

The lesson plan/unit:

- 1. Specifies or selects learner objectives for lessons. _____
- 2. Specifies teaching strategies that are appropriate for the lesson objectives. _____
- 3. Specifies or selects content, materials and media for lessons. _____
- 4. Specifies or selects materials and procedures for assessing learner progress on the objectives. _____
- 5. Provides for instruction at a variety of levels. _____

Evaluation Form Sample 1 continued:

B. ORGANIZES INSTRUCTION TO TAKE INTO ACCOUNT INDIVIDUAL DIFFERENCES AMONG LEARNERS.

- 6. Instruction takes into account differences among learners' capabilities. _____
- 7. Instruction takes into account differences among student learning styles. _____
- 8. Instruction takes into account differences among learners' rates of learning. _____

C. OBTAINS AND USES INFORMATION ABOUT THE NEEDS AND PROGRESS OF INDIVIDUAL LEARNERS.

- 9. The teacher uses teacher-made or teacher-selected evaluation materials or procedures to obtain information about learner progress. _____
- 10. Communicates with individual learners about their needs and progress, and with parents and guardians about the program and needs of their child. _____

D. REFERS LEARNERS WITH SPECIAL PROBLEMS TO SPECIALISTS

- 11. Obtains and uses information about learners from school records. _____
- 12. Identifies learners who require the assistance of specialists, e.g. LAC and Guidance personnel, speech therapists, etc. _____
- 13. Obtains and uses information from co-workers and parents to assist with specific learner problems. _____

E. OBTAINS AND USES INFORMATION ABOUT THE EFFECTIVENESS OF INSTRUCTION TO REVISE IT WHEN NECESSARY.

- 14. Obtains information on the effectiveness of instruction e.g. self-evaluation, participates in formative feedback strategies, invites feedback through the supervisory process. _____
- 15. revises instruction as needed using supervisory feedback and observation data. _____

Classroom Procedures

F. USES INSTRUCTION TECHNIQUES, METHODS, AND MEDIA RELATED TO THE OBJECTIVES.

- 1. Uses teaching methods appropriate for objectives, learners and environment. _____
- 2. Uses instructional equipment and other instructional aids. _____
- 3. Uses instructional materials that provide learners with appropriate practice on objectives. _____

Evaluation Form Sample 1 continued:

G. COMMUNICATES WITH LEARNERS.

- 4. Gives directions and explanations related to lesson content. _____
- 5. Clarifies directions and explanations when learners misunderstand lesson content. _____
- 6. Uses responses and questions from learners in teaching. _____
- 7. Provides feedback to learners throughout the lesson. _____
- 8. Uses acceptable written and oral expression with learners. _____

H. DEMONSTRATES A REPERTOIRE OF TEACHING METHODS.

- 9. Implements learning activities in a logical sequence. _____
- 10. Demonstrates ability to conduct lessons using a variety of teaching methods. _____
- 11. Demonstrates ability to work with individuals, small groups, and large groups. _____

I. REINFORCES AND ENCOURAGES LEARNER INVOLVEMENT IN INSTRUCTION.

- 12. Uses procedures which get learners initially involved in lessons. _____
- 13. Provides learners with opportunities for participating. _____
- 14. Maintains learners involvement in lessons. _____
- 15. Reinforces and encourages the efforts of learners to maintain involvement. _____

J. DEMONSTRATES AN UNDERSTANDING OF THE SCHOOL SUBJECT BEING TAUGHT AND DEMONSTRATES ITS RELEVANCE.

- 16. Helps learners recognize the purpose and importance of topics or activities. _____
- 17. Demonstrates knowledge in the subject area. _____

K. ORGANIZES TIME, SPACE, MATERIALS AND EQUIPMENT FOR INSTRUCTION.

- 18. Attends to routine tasks _____
- 19. Uses instructional time effectively. _____
- 20. Provides a learning environment that is attractive and orderly. _____

Interpersonal Skills

L. DEMONSTRATES ENTHUSIASM FOR TEACHING AND LEARNING AND THE SUBJECT BEING TAUGHT.

- 1. Communicates personal enthusiasm. _____

Evaluation Form Sample 1 continued:

- 2. Stimulates learner interest. _____
- 3. Conveys the impression of knowing what to do and how to do it. _____

M. HELPS LEARNERS DEVELOP POSITIVE SELF-CONCEPTS.

- 4. Demonstrates warmth and friendliness. _____
- 5. Demonstrates sensitivity to the needs and feelings of learners. _____
- 6. Demonstrates patience, empathy and understanding. _____

N. MANAGES CLASSROOM INTERACTION.

- 7. Provides feedback to learners about their behaviour. _____
- 8. Promotes comfortable interpersonal relationships. _____
- 9. Maintains appropriate classroom behaviour. _____
- 10. Manages disruptive behaviour among learners. _____

Professional Standards

O. MEETS PROFESSIONAL RESPONSIBILITIES.

- 1. Works co-operatively with colleagues, administrators, and community members. _____
- 2. Follows the policies and procedures of the school and Authority. _____
- 3. Demonstrates ethical behaviour. _____
- 4. Performs extra-curricular duties. _____

P. ENGAGES IN PROFESSIONAL SELF-DEVELOPMENT.

- 5. Participates in professional growth activities. _____

Other Supervisory Comments:

Evaluation Form Sample 1 continued:

Teacher Comments:

Signature of Supervisor: _____ Date: _____

I have read and previously discussed this appraisal with the reporting supervisor.

Signature of Teacher: _____ Date: _____

IN KEEPING WITH THE SCHOOL ACT REGULATIONS OF BRITISH COLUMBIA IT IS MY OPINION THAT THE LEARNING SITUATION IS:

_____ Satisfactory _____ Initials

_____ Unsatisfactory _____ Initials

Principal: _____

Teacher: _____

Evaluation Form Sample 2:

Evaluation: Resource Centre Staff

Name: _____

Position: _____

Date: _____

Evaluator: _____

Signature: _____

Performance Rating: S – meets standards; F – fails to meet standards**

**comments must be made if an F is assigned.

1. Management of the Resource Centre

The employee demonstrates an ability to manage the resource center programs.

Comments:

2. Selection of Learning Materials

The employee selects resources which support the school's programs.

Comments:

3. Organization and Circulation of Learning Materials

The employee facilitates efficient acquisition, organization and circulation of learning materials.

Comments:

4. Program Planning

The employee works well with the teachers to plan programs.

Comments:

5. Student Interaction

The employee works with students to identify their needs and guide them to develop attitudes and skills.

Comments:

Evaluation Form Sample 3:

Employee Review Form

Employee: _____

Position Held: _____

Years of Experience: _____ This School: _____
Other: _____

Post Secondary Training: _____

(attach a separate sheet if necessary)

Date of Report: _____ Completed By: _____
(name and position)

- The staff member has received, or is in possession of, the job description relating to their position. Yes No
- The staff member is aware of the relevant policy section relating to their position. Yes No

Explanation of Rating Scale

- 5 – Excellent - Consistently outstanding quality
- 4 – Superior - Consistent professional performance
- 3 – Satisfactory - Basic requirements are fulfilled
- 2 – Fair - Minimum requirements are fulfilled
- 1 – Poor - Minimum requirements are not fulfilled
- N/A - Improvement is required
- Not applicable to the lesson observed
- Unable to determine at time of observation.

A. Professional/Interpersonal Standards

- 1. Maintains professional appearance _____
- 2. Demonstrates ethical behaviour _____
- 3. Follows policies/procedures of the school _____
- 4. Works co-operatively with staff/community _____
- 5. Fosters an attitude of cooperation and positive public relations with school patrons _____

Evaluation Form Sample 3 continued:

- 6. Demonstrates initiative in the workplace _____
- 7. Communicates personal enthusiasm _____
- 8. Maintains high standards of confidentiality _____
- 9. Is knowledgeable regarding legalities of student and staff files and school procedures _____
- 10. Utilizes strong time management practices _____
- 11. Promotes positive interpersonal relationships _____
- 12. Maintains appropriate behaviour among students when acting in a supervisory role _____

B. Office Procedures

- 1. Organizes and maintains student attendance records _____
- 2. Organizes, maintains and updates student files _____
- 3. Maintains inventory of school materials/supplies _____
- 5. Prepares school correspondence, notices, bulletins, newsletters, and reports as directed _____
- 6. Provides for, and acquires, substitute staff as required _____
- 7. Monitors and maintains school bus requests _____
- 9. Organizes and communicates extra-curricular travel as required _____
- 10. Handles problems effectively and in a timely manner in the Principal's absence within delegated areas of responsibility _____
- 11. Acts as a liaison between Principal and staff and community members _____
- 12. Prepares, compiles, and distributes all materials for the opening and closing of the school term _____
- 13. Receive, screen, and prioritize all calls and correspondence for the Principal and staff _____
- 14. Demonstrates a willingness to assist staff _____
- 15. Demonstrates a high level of computer literacy _____
- 16. Receives instruction well and utilizes a variety of methods and materials to carry out duties _____
- 17. Requests clarification when unsure of requests _____

C. Professional Growth

- 1. Accepts direction willingly _____
- 2. Strives to better oneself professionally through self directed learning and/or in-service _____
- 3. Displays a willingness to learn new programs _____
- 4. Shares and seeks professional materials & ideas _____

Evaluation Form Sample 3 continued:

D. Overall Review

1. Employee performance within job description _____

E. Proposed Areas of Growth:

- *
- *
- *

F. Comments – completed by individual making the report

G. Comments – staff member

I have met with the member completing this report and have viewed the completed report.

(staff member)

(supervisor)

cc File

4.4 Training and Upgrading

A comprehensive training and development program can prove to be both useful and motivational. To be most successful, such a program will be designed to meet the needs of individuals and of the school. It is important that all employees are provided equal opportunities for training, both as a matter of good employee relations and in order to avoid perceptions of favouritism or discrimination. An employee who feels that he or she has been dismissed as a result of inadequate training for a position, for example, may be more likely to harbour ill will and bring a complaint against an employer. Therefore, you may want to develop a clear policy regarding training programs and the development of necessary skills and abilities. You may also want to consider “train the trainer” programs, in which supervisors or management personnel are trained by a professional in how to deliver the course content to their employees.

Training programs, it should be remembered, do not necessarily involve formalized classroom courses or workshops. Training and skills development may involve on-the-job-training, special projects, job rotation, job shadowing, apprenticeships, correspondence or reading programs, self study or group work.

Educational Leave Policy Sample 1:

Employees may be granted up to one year of educational leave without pay, for purposes of professional development/education or skills upgrading.

Procedure:

An employee must submit in writing to his or her supervisor a request for educational leave, outlining all the details of the leave including the training institute, courses, etc.

The Supervisor, in consultation with the Executive Director, approves the leave by signing the request.

If the request is granted, the Executive Director and the Supervisor will decide if the employee’s position will be held open or filled with a term appointment.

Professional Development Policy Sample 1:

Employees are encouraged to take advantage of courses, workshops, training programs and professional development available that directly relates to their employment.

Whenever possible, Supervisors will attempt to create in-service opportunities for employees to develop and upgrade their skills for the positions they occupy.

If an employee wishes to take short courses or workshops during regular working hours, s/he must apply in writing to his/her supervisor.

The Supervisor, in consultation with the Executive Director, shall grant such requests, if at all possible, within fiscal and organizational restraints.

Where development or training cannot reasonable be undertaken within working hours, the employee may apply for educational leave.

Training/professional development not provided by the organization will normally be at the employee’s time and expense.

Business Seminars and Conferences Policy Sample 1:

Employees are to receive prior approval from their immediate Supervisor in order to attend business seminars and conferences.

Procedure:

An employee must seek prior approval for attending a seminar or conference.

The employee is expected to give a written report to his/her supervisor within five working days following the seminar/conference.

4.5 Safety

Employers should have policies relating to safety included in their employment policies or in an employee handbook. Section 135 of the *Canada Labour Code* requires that every employer shall, for each workplace controlled by the employer at which 20 or more employees are normally employed, establish a safety and health committee.

The *Canada Occupational Health and Safety Regulations* were amended effective November 28, 2005 to add provisions requiring employers to have hazard prevention programs. The employer now has to analyze the work environment to identify what could cause an unsafe condition and implement measures to prevent an accident or injury from occurring. Section 19.6 requires the employer to provide health and safety education to each employee, including education about the employer's hazard prevention program. This is an ongoing obligation. The employee education program must be reviewed and if necessary revised at least every three years, whenever there is a change in conditions in respect of the hazards, and whenever new information in respect of a hazard in the workplace becomes available to the employer. Section 19.6(4) provides that each time education is provided to employees, the employees must acknowledge in writing that they received it and the employer must acknowledge in writing that it was provided. The employer must keep records of the education provided to each employee for a period of two years after the employee ceases to be exposed to a hazard.

For more information, employers should consult Part 2 of the *Canada Labour Code* regarding occupational safety and health, as well as the *Canada Occupational Safety and Health Regulations*. For employers whose labour relations are within federal jurisdiction, Part 2 of the *Canada Labour Code* and the federal regulations will be of greater concern than the *Workers Compensation Act* and the *Industrial Health and Safety Regulations*.

Sample safety policies are outlined below.

Safety Policy Sample 1:

Safety is the responsibility of all employees in the school and will be the responsibility of a Health and Safety Committee. The school will also strive to:

- *Provide a healthy and safe work and study environment;*
- *Provide health and safety training for employees;*
- *Set up a system for monitoring health and safety standards, for the filing of serious accident reports with the Workers' Compensation Board, and for investigating serious accidents;*

- *Properly care for and maintain schools, school property and equipment;*
- *Take action to correct unsafe working conditions; and*
- *Provide emergency first aid equipment.*

A good safety policy will make it clear that all injuries and work-related conditions must be reported to the employer immediately. A copy of a form available in all provincial schools for the reporting of serious accidents is included on the following page. Also included is a sample violence report form.

Health and safety legislation also provides for three basic principles for workers:

- The right to know about health and safety risks and hazardous materials, and the right to know about health and safety procedures;
- The right to participate in health and safety policy development and decisions, such as through health and safety committees; and
- The right to refuse dangerous work.

Another sample policy relating to safety in the workplace is:

Safety Policy Sample 2:

The Industrial Health and Safety Regulations issued by the Workers' Compensation Board provide that employees have a right to work in an environment free from intimidation and violence. Acts or threats of violence toward an employee by non-employees, including students, shall not be tolerated.

The School will ensure that the Industrial Health and Safety Regulations relating to protection of workers from violence in the workplace are adhered to. In particular, the school will ensure that:

- *risk assessments are performed;*
- *risks are eliminated or minimized;*
- *procedures are in place for reporting, investigating and documenting incidents of violence;*
- *employees who may be exposed to violence are informed of any risk;*
- *and employees who are at risk are provided proper training in how to recognize and respond to risk.*

Every employee is expected to notify his or her supervisor of a potentially violent situation.

You may be required to establish a health and safety committee and to have employee representatives on that committee. That committee can then help to establish health and safety policies. Schools should also ensure that they have all of the necessary insurance in place.

Violence Report Form Sample 1:

Violence Report Form	
Date of Incident: _____	Time: _____
Exact Location of Incident: _____	
Full name of Employee Involved: _____	
Employee's Position: _____	
Type of Incident: (check appropriate boxes):	
Assault	Threat Physical Verbal
Weapon Involved	Intimidation
Person Committing Assault/Threat:	
Full Name: _____	Parent Student
Address: _____	Other: _____
Action Taken:	
Principal Notified	Safety Committee Notified
Parent Guardian Notified	Police Notified
Description of Injury (if any) _____	
Was a physician involved?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Was work time lost?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Describe the Incident: (include what happened, under what conditions, what contributed to the incident, and what people involved said and did)	

Description of Person Who Committed Assault: (If their identity is unknown and court action may result)	
Male Female	Weight: _____ Height: _____
Hair Colour and Length: _____	
Any Identifying Marks: _____	
Witnesses (if there are any) _____	
Employee Statement:	<input type="checkbox"/> Yes <input type="checkbox"/> No (if yes, attach; if no, why) _____
Completed By: _____	

4.6 Promotions

Issues associated with policies regarding promotions are similar to those outlined above in the section addressing internal applications for new positions. As discussed in that section, there are benefits to promoting from within, but care must be exercised in doing so. If a school has a policy of promoting from within, it must be sure to do that whenever possible if it is to maintain credibility.

A job posting system will assist the process of promotions, as will a clear process to address a situation in which an employee is not suited to a new position. A trial period can be used to monitor the success of an employee in a new position and to identify any further training requirements to help the person handle new responsibilities. It may also be useful, if possible, to leave the employee's old position vacant for a few months to allow the possibility of returning the employee to that job if he or she is not successful in completing the new job requirements. This avoids having to dismiss an employee who is not suitable for a new position.

4.7 Compensation

Compensation usually includes salary, payroll procedures, and all forms of wages and benefits.

A school should decide on a clear salary policy and should communicate that policy to its employees and prospective employees. You may want to use salary ranges for positions at various levels, such as a secretarial range, an office administrator range, a range for custodians, etc. You may also want to outline clear salary increase policies, which can be based on cost of living factors, length of service, performance (merit), or a combination of factors. Policies regarding the effects of demotions or poor performance on salaries are also important considerations.

Salary reviews are most effective when a clear job description is available as a measurement of performance.

Overtime compensation should be paid according to the provisions of the relevant provincial and federal legislation. Overtime policies often vary between management and non-management positions. It is also common for organizations to indicate that overtime is not desirable, and that it should only occur when absolutely necessary and with the approval of a supervisor or manager.

Payroll policies should also be developed according to the relevant legislation and should indicate the pay periods, method of payment, calculation of earnings, and necessary deductions.

Any employee benefits you offer should be clearly outlined for all employees. Some of the considerations in this regard include insurance benefits, sick leave, leaves of absence, vacation, paid holidays, travel policies, employee discounts, pension plans, and employee assistance programs. Benefits may also include reimbursement for education, such as paying some or all of the costs associated with college, university, correspondence or other training courses. Although

the appendices are not exhaustive, they provide more detailed information about some of the minimum requirements set out in the *Canada Labour Code* in relation to these matters.

4.8 Performance Management

Performance management is a matter which should be clearly addressed. Termination is a particularly serious issue, and can lead to legal consequences if it is not dealt with clearly and properly.

The performance management process may involve warnings, appeals and dispute resolution. Serious misconduct may result in dismissal. The appropriate action will depend upon the circumstances. In some cases, conduct may justify immediate dismissal without notice (for example, dishonesty). For less serious offences, however a system of progressive discipline (verbal warning, written warning, suspension,⁴ dismissal) or performance management may be appropriate. Not only the conduct meriting discipline, but also the employee's work record and circumstances should all be considered in determining the appropriate action to be taken. Before any disciplinary action is taken, the employer must be sure to have investigated the problem fairly and given the employee a reasonable chance to respond to any accusations or complaints. The employee's privacy should also be respected as much as possible in the performance management process.

Depending on the nature of the problem, a verbal correction or warning to the employee may be the appropriate first step. In other cases, for example if one or two verbal warnings have been ineffective or if the problem is more serious, it will be appropriate to give a written warning. It is also important to have documentation if an employee is being informed that his or her performance is not satisfactory. It is a good practice to have employees read and sign an acknowledgement that they have read the warning or performance evaluation. Some of the issues that may warrant warnings include, among others: consistent lateness; rudeness to fellow employees, parents or students; inappropriate or rude language; excessive personal telephone calls or personal visits; too many absences; and below standard or unsatisfactory work.

Disciplinary action taken against an employee **may** be accompanied by an appeal process. An appeal process allows employees to challenge a disciplinary action but that is not required. An appeal process sometimes involves an impartial third party reviewing the situation, but that is also not required. One consideration is who will pay for the third party. In unionized workplaces, the grievance procedure and arbitration are provided for in the collective agreement. In the event of arbitration, the employer and the union share the cost of the arbitration. That option is less realistic in a non-union workplace. Regardless of whether employment policies include a right of appeal, the relevant policy and the forms of dispute resolution available should be clear and understandable. For example, the policy may state that a written request is required for a review of a disciplinary decision within a particular time, and it should clearly outline who will hear the appeal, such as the School Board or Education Committee. Note that if a policy does provide for an appeal process or other form of dispute resolution, the employer may be

⁴ Caution should be exercised in imposing unpaid suspensions. See the section on suspensions from duties in Section 3.16 above.

required to follow that process in all cases in order to avoid unjust dismissal complaints under the *Canada Labour Code*.

Dismissal usually occurs only after an employee has been given one or more warnings about problematic behaviour or work. If termination is necessary, it is useful to be very clear about the reasons for the dismissal, and to avoid any unnecessary personal criticisms or attacks.

Discipline Policy Sample 1:

An employee may be disciplined when it is determined by his/her immediate Supervisor that the employee is not carrying out his/her job in compliance with the “Code of Ethics” and organizational policies.

Preferred Procedure

On the first occasion that a problem develops, the employee may receive a verbal warning.

In the event that the problem recurs, the employee may receive a written reprimand that will be placed in the employee’s Personnel File.

Should the problem occur a third time, the employee may be placed on probation or suspended without pay.

Any occurrence thereafter will result in immediate termination.

That preferred procedure should not be taken to prevent the employer from terminating an employee immediately for cause.

4.9 Other Issues for Consideration

Other issues that can be included in employment policies include the following:

- hours of work;
- leaves;
- breaks;
- attendance;
- lateness;
- absenteeism;
- conflict of interest;
- outside employment;
- confidentiality and release of information;
- security and anti-theft measures;
- personal appearance;
- employee conduct;
- working at home and flexible work arrangements;
- telephone use and visitors at work; and
- general and miscellaneous workplace rules.

Any of these issues may be included in an employee handbook or policy manual. This list is not exhaustive.

Hours of Work Policy Sample 1:

All employees are required to work thirty-five (35) hours per week, normally from 8.30am to 4.30pm., Monday to Friday, with one (1) hour for lunch.

From time to time, employees may be required to maintain flexible schedules to meet operational requirements. Employees must seek prior approval from their Supervisor for establishing a flexible schedule.

Dress Code Policy Sample 1:

All employees are required to dress appropriately for their respective positions. The dress code does not instruct employees to dress in a specific manner, it only limits the types of clothing which are not acceptable for in-office work: ball caps or similar caps; non-dress shorts; sweat pants; t-shirts with inappropriate slogans or designs; worn out sneakers or runners; worn out or ragged style jeans; worn out t-shirts.

Annual Leave Policy Sample 1:

All permanent employees are entitled to annual leave. Annual leave will be negotiated and written into their employment contract. For holidays that exceed three consecutive working days, the employee must submit a 'Request for Leave' form to their supervisor, preferably one week prior to leave. For any leave less than three days in length, the form is to be submitted as soon as possible prior to the time off. An employee may take one week of their entitled vacation time after successfully completing six months of employment at the organization. Annual leave will be based on the fiscal year and cannot be carried over into the next year.

Sick Leave Policy Sample 1:

All permanent employees are entitled to 1.25 days per month of sick leave with pay. An employee must contact his/her supervisor no later than thirty minutes after the start of the working day if the employee is going to be absent due to illness. An employee must produce a Doctor's certificate after three consecutive days absence due to illness. The organization reserves the right at all times to demand proof of illness.

****Other issues to consider in a sick leave policy include whether an employee will be paid for unused sick days at the time of termination of employment and whether the number of paid sick days relates to a waiting period for short-term disability benefits.**

Compassionate/Bereavement Leave Sample 1:

In the event that a life-threatening illness or death occurs in an employee's immediate family, the employee is entitled to three days of leave with pay, with an additional two days leave without pay if required.*

**immediate family is defined as mother, father, spouse of father or mother, including common-law spouse, sister, brother, child, grandmother, grandfather, aunt, uncle, niece, nephew, stepmother, stepfather, mother-in-law, father-in-law, spouse of father-in-law or mother-in-law, including common law spouse, sister/brother-in-law, foster parent, spouse (including common law), child of spouse (including common law), and any employee who*

resides permanently in the employee's household or with whom the employee permanently resides.

Cultural Leave Sample 1:

Employees may be granted up to six weeks of leave to enrich their spirituality and identity through cultural activities in their communities. An employee must submit a written letter of request to the Executive Director to request cultural leave. The Executive Director will negotiate with the employee the terms and conditions of cultural leave.

5. Termination

Upon termination of employment, employers generally have both contractual and statutory obligations to employees. The statutory obligations are set out in the *Canada Labour Code*, discussed in more detail below. The contractual obligations of an employer will depend on the terms of a written agreement and will also be determined by terms the court will imply.

If a contract of employment is silent on the issue of termination of employment, then the courts will find that it is an implied term of the contract that an employee is entitled to reasonable notice of termination. The court will determine the amount of notice which is reasonable based on several factors such as the employee's age, qualifications, length of service, position held, and how difficult it will be for the employee to replace the employment. Generally, the older the employee and the more senior the position, the longer the notice is. Until several years ago, the upper limit for notice in British Columbia was 24 months, which would only apply for older and quite senior executives. However, there has been a tendency to award increased notice periods if the employer has acted in a way that demonstrates bad faith, or if the employee has been induced to leave secure employment to take the position and is subsequently terminated. The employee has a duty to try to find other employment, and income from other employment earned by the employee during the notice period will be deducted from damages.

If a court decides that the appropriate amount of notice was not given, then the court will award damages to put the employee in the same position as if the appropriate amount of notice had been given. As a result, the obligation during the notice period extends not only to providing wages, but may also include benefits. Because of possible liability for benefit coverage which the employee was unable to replace or which the employee did not realize he or she should have taken steps to replace, it is imperative that the employer notify each employee in writing at the time of termination of precisely what benefits will cease and on what dates. The termination letter should also indicate the possibility of conversion from group to individual coverage where that is an option.

The best way for an employer to limit its contractual liability to a terminated employee is by having an express written employment contract which sets out the obligations of the employer at termination (with and without cause), as long as it does not violate the statutory requirements.

1. Written Employment Agreements

If a written employment agreement exists, it should be examined to see if it contains a provision dealing with termination. If it does, then that provision should be followed when an employee is terminated. If, for example, the contract provides that termination without cause can be effected by giving three months' notice by March 31 of each year, then the employer should comply with that provision. If notice is given on April 1, the employer will be in breach of the contract.

2. Statutory Obligations

Employees with more than one year's service tend to have greater protection under the *Canada Labour Code* than they do at common law. It is important to note, however, that common law obligations will not always meet the employer's obligations to an employee whose employment is being terminated.

(a) Individual Terminations of Employment

Under the *Code*, where an employer terminates the employment of an employee who has completed three consecutive months of continuous employment, the employer must, except where the dismissal is for just cause, give the employee either:

- (i) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate employment on that date; or
- (ii) two weeks' wages at the regular rate of wages for regular hours of work, in lieu of the notice.

For the purpose of the *Code's* notice of individual termination requirement, an employer is deemed to have terminated employment when the employer lays off an employee.

After notice of termination has been given, the employer cannot reduce the employee's wage rate or alter any other term or condition of employment except with the written consent of the employee.

If an employee to whom notice has been given continues to be employed by the employer for more than two weeks after the date specified in the notice, the employment must not, except with the written consent of the employee, be terminated except by way of dismissal for just cause, unless the employer gives a new notice or pay in lieu of notice.

(b) Severance Pay

Except where the dismissal is for just cause, an employee who has completed 12 consecutive months of continuous employment and whose employment is being terminated by the employer is entitled to be paid the greater of:

- (i) two days' wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment with the employer; and
- (ii) five days' wages at the employee's regular rate of wages for regular hours of work.

For the purposes of determining entitlement to severance pay, an employer is deemed to have terminated the employment of an employee when the employer lays off that employee. An employer is deemed not to have terminated the employment of an employee where, either immediately on ceasing to be employed by the employer or before that time, the employee is entitled to a pension under a pension plan contributed to by the employer that is registered

pursuant to the *Pension Benefits Standards Act*, to a pension plan under the *Old Age Security Act*, or to a retirement pension under the *Canada Pension Plan*.

For the purpose of regulations of the *Canada Labour Code* regarding termination, individual termination, and severance pay, the regulations provide that a layoff of an employee shall not be deemed to be a termination of the employment where, among other things,

- (a) the term of the layoff is three months or less;
- (b) the term of the layoff is more than three months and the employer: (i) notifies the employee in writing at or before the time of the layoff that he or she will be recalled to work on a fixed date or within a fixed period neither of which shall be more than six months from the date of the layoff, and (ii) recalls the employee to employment in accordance with subparagraph (i); or
- (c) the term of the layoff is more than three months and (i) the employee continues during the term of the layoff to receive payments from his employer in an amount agreed on by the employer and the employee (ii) the employer continues to make payments for the benefit of the employee to a pension plan that is registered pursuant to the *Pension Benefits Standards Act* or under a group or employee insurance plan, (iii) the employee receives supplementary unemployment benefits, or (iv) the employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the *Employment Insurance Act*.

In determining the term of layoff for purposes of (a) and (b) above, any period of re-employment of less than two weeks duration shall not be included. An employer's ability to fund severance pay will have no bearing on its liability.

(c) Unjust Dismissal

Pursuant to section 240 of the *Code*, any person who has completed 12 consecutive months of continuous employment and who is not a member of a group of employees subject to a collective agreement may make a complaint to an inspector under the *Code* if the employee has been dismissed and considers the dismissal unjust. An unjust dismissal may be one which a court would find to be dismissal for cause. Unjust dismissal is therefore a higher standard than that required by the common law.

Section 167(3) of the *Code* provides that Division XIV of the *Code* (the unjust dismissal provisions) does not apply to or in respect of employees who are managers.

Where an employer dismisses a person to whom section 240 applies, that person or an inspector may make a written request to the employer to provide a written statement giving the reasons for the dismissal. An employer must respond to such a request within 15 days. If the matter is not settled, the complaint will be referred to an adjudicator

Section 242(3.1) of the *Code* says no complaint shall be considered by an adjudicator in respect of a person where:

- (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
- (b) a procedure for redress has been provided elsewhere in the *Code* or under any other Act of Parliament.

Where an adjudicator decides that a person has been unjustly dismissed, the adjudicator require the employer to:

- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- (b) reinstate the person; and
- (c) do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

A “just” dismissal is one which is based on an objective, real and substantial cause, independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business. It is difficult to justify dismissal under the *Code*.

Being laid off is something different from being dismissed for purposes of Division XIV of the *Code*. A lay off means the employer’s temporary or permanent termination of the employee’s employment because of the employer’s economic concern of lack of work or, with the same concerns expressed through management restructuring choices, the discontinuance of a function. A person will not likely be considered to have been “laid off because of lack of work” unless that was the real, essential, operative and dominant reason for the termination of employment. It would be problematic if another employee was hired to do the work of the laid off employee or if the employee’s work was contracted out to someone else.

With respect to “discontinuance of a function”, a “function” must be the “office” that contains the bundle of responsibilities, duties and activities that are carried out by a particular employee or group of employees. The employer must be acting in good faith. Where a set of duties is handed over entirely to another person, or if the activity or duty is simply given a new and different title to fit another job description, there would likely not be a “discontinuance of a function.” However, there is authority that if the activities that form part of the bundle are divided among other people, there would be a “discontinuance of a function.”

(d) Group Termination

Additional provisions apply when an employer terminates the employment of a group of 50 or more employees. Under section 212 of the *Code*, an employer who terminates the employment of 50 or more employees either simultaneously or within any period not exceeding four weeks shall, in addition to the notice of individual termination required by section 230, give notice to the Minister of Labour at least 16 weeks before the date of termination of employment for the first employee affected.

(e) Retirement

As indicated above, the severance pay provisions of the *Canada Labour Code* contemplate retirement as an appropriate reason for employment coming to an end by providing that the employer is deemed not to have terminated employment where certain pension entitlements apply.

Under the *Canadian Human Rights Act*, a policy of mandatory retirement is not unlawful discrimination based on age if employment is terminated because the individual has reached the “normal age of retirement for employees working in positions similar to the position of that individual.” It is helpful if the employees are entitled to retirement benefits or pension of some sort at age 65.

3. Common Law (Contractual) Obligations

It is important to remember that the amount of notice set out in the *Canada Labour Code* is the minimum notice or severance pay required. In the absence of an employment contract stating otherwise, the employee is also entitled to notice pursuant to the common law.

(a) Termination For Cause

At common law, an employee who is dismissed for cause is not entitled to any notice of termination, essentially because cause for dismissal means that the employee has fundamentally breached the contract of employment. What amounts to cause is strictly construed by the courts. Generally speaking, only the most serious misconduct such as theft or rank insubordination will justify immediate dismissal. Other matters which, if proved, may be considered cause for dismissal include dishonesty, disobedience, insolence, absenteeism, breach of trust, conflict of interest, or incompetence.

A key consideration in deciding whether to terminate for cause is how strong the employer’s evidence will be should the matter proceed to a trial or other hearing. It is impossible to know the strength of your case without conducting an investigation. That means gathering and reviewing any relevant documents and speaking with any witnesses (including other employees). You may need to suspend the employee with pay while the investigation is being conducted. Until the employment has been terminated, benefits should be continued.

Before terminating for cause, you should also consider the employee’s length of service and past work record, as well as the message being sent to other employees or to students by allowing conduct to continue without any consequences. Another important question to explore before terminating for cause is whether the employee has a physical or mental disability which is contributing to the problematic conduct. If that is the case, then you may have a duty to accommodate the disability by referring the employee to an employee assistance program, if you have one, or to another treatment program, before terminating.

Lack of work or the employer’s financial difficulties are not cause for dismissal.

(b) Termination Without Cause

If an employer dismisses an employee without cause, then assuming a written agreement does

not address termination, it will be an implied term of the contract of employment that the employee is entitled to reasonable notice of termination. Failure to provide sufficient notice or pay in lieu of notice may lead to a wrongful dismissal claim by the employee. Damages are assessed by the court as the amount necessary to put the employee in the same position as if he or she had been given reasonable notice of termination.

Damages are not limited to base salary during the notice period but may also include expected commissions, bonuses, profit sharing, salary increase and increased benefits during the term of reasonable notice and the value of benefits such as expense accounts, company car, medical and dental plans and insurance pension plans.

(c) What Constitutes Reasonable Notice?

In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) atp 145:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

These factors are not exhaustive. The courts have considered other factors, for example, whether the employee was induced to leave previous secure employment. In those circumstances, the amount of notice to which the employee is entitled will be increased.

Another factor which may increase the length of notice to which an employee is entitled is the manner of termination. In October of 1997, the Supreme Court of Canada held in *Wallace v. United Grain Growers Ltd.*, (1997) 3 S.C.R. 701, that the length of notice to which an employee is entitled may be increased if the manner of dismissal affects the employee's future prospects for employment or if the employee suffers humiliation, embarrassment and damage to his or her self-worth and self-esteem, even if the prospects for future employment were not affected.

Mr. Wallace was hired by the employer in 1972. He was 45 years old the time he joined the employer and he asked for assurance regarding fair treatment and remuneration. The employer gave such assurances stating that if he performed as expected, he could continue to work for the employer until his retirement. Wallace was very successful, and was the top salesman each year, until he was summarily dismissed in 1986. The employer argued that they had cause to dismiss, namely, Wallace's inability to perform his duties satisfactorily. The employer did not withdraw the allegation of cause until the start of the trial. The employer admitted that it had maintained the allegation for so long in an attempt to play "hardball" with the employee. The termination of employment resulted in emotional difficulties for Wallace, who was forced to seek psychiatric help and was unable to find similar employment.

The Supreme Court of Canada found that the tactic of maintaining an unfounded allegation of cause until the start of the trial constituted bad faith conduct in the manner of dismissal.

As a result, Wallace was entitled to an increase in the notice period. Mr. Justice Iacobucci said for the majority at para. 95:

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damages and dislocation (both economic and personal) that result from dismissal. In *Machtinger, supra*, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when the termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

In determining what constitutes bad faith conduct, Iacobucci J, said at para. 98:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

The Supreme Court of Canada described a number of examples which constitute bad faith. For example, an employer who maintains a wrongful accusation of theft and communicates this accusation to other potential employers of the dismissed employee will be acting in bad faith. Another example involves a case where an employee's position was eliminated and he was told by the employer that another position would be found for him, and that this new assignment would necessitate a transfer. However, at the same time that the employee was being reassured about his future, a senior representative of the company was contemplating his termination. When a position could not be found, the decision was made to terminate the employee. This decision was not communicated to the plaintiff for over a month despite the fact that his employers knew he was in the process of selling his home in anticipation of the transfer. News of his termination was communicated to the plaintiff abruptly following the sale of his home. This behaviour amounted to bad faith.

As a result of this decision, it is vital that employers terminate employees in a careful and considered way. Before an employer raises an allegation of cause, the employer should think long and hard about whether it can substantiate such an allegation.

One factor that is particularly relevant in determining the amount of notice a teacher is entitled to is the timing of the termination. For teachers, there are certain times of the year when it will be easier or harder for them to find a job. Employers should try to dismiss them at a time which allows them to apply for the jobs available during the next school year.

(d) Mitigation

Upon dismissal the employee has a duty to mitigate his or her damages by seeking new employment. The damage award will be reduced to the extent that new employment is obtained during the period of reasonable notice or if the necessary steps to mitigate are not taken.

(e) Outplacement Consulting

As indicated above, the sooner the employee finds a new job, the better it is for the employer in terms of its liability. Therefore, the employer may want to consider the use of outplacement counsellors who could help the employee find a new job sooner or choose a new career direction.

There are also other important but less quantitative benefits that can be realized in the morale of the remaining employees and in the recruitment of further employees by using outplacement counsellors. An employer is more likely to establish a reputation for dealing with terminations in a sensitive and successful manner for both the employer and the employee.

(f) Benefits

In assessing damages, it is important to remember that the purpose of damages is to put the employee in the same position he or she would have been in if reasonable notice had been given. If the employee had worked through the period of notice, then the employee would have been entitled to benefits. The loss of benefits which would have been provided during that period can create large liabilities for the employer if handled incorrectly.

If the employee is not able to or does not replace some of these benefits, the employer may be liable not just for the cost of purchasing the benefit but for the loss of the benefit itself. This is perhaps the most dangerous area to be considered.

A typical example is long-term disability coverage. It is very difficult to obtain personal long-term disability insurance. And the employer may not be able to continue long-term disability coverage for employees who are not “actively” at work. The availability of benefits will depend not only on the terms of agreement between the employer and the employee, but also on the terms of the insurance if coverage is provided by a third party. The practical problem is that an employee whose employment has been terminated could have a claim for long-term disability benefits within the period of reasonable notice.

Life insurance benefits can lead to similar problems. Sometimes employees can replace these benefits, but it is either too expensive or they are unwilling to do so. In some cases, the employee may not be able to replace the benefit due to poor health or because the benefit is not available outside a group plan.

If the employee is disabled or dies during the notice period, the employer may be found liable, not for the lost premiums, but for the actual benefit. In the worst case, an employer may have to provide the equivalent of disability benefits until the coverage would have run out, usually until the employee attains age 65.

Therefore, it is wise to continue, when possible, some of the employee’s benefits, particularly those that create large liabilities (such as life insurance, extended health, dental or long-term

disability) during the notice period or at least until a settlement can be reached with the employee.

It is also important to advise the employee in writing which benefits have ceased and give sufficient warning to the employee that it is his or her responsibility to replace coverage. It is often a term of group plans that the group life insurance coverage can be converted to an individual plan without the need for medical examination if the conversion option is exercised within 30 days of termination of employment. By notifying the employee of his or her responsibility and of the options available, the employer can at least argue that the employee had notice of the termination of the benefits and had an opportunity to mitigate losses by obtaining the benefits personally. The employer may want to offer to pay the cost of the employee replacing the benefit through an individual plan, or seek the approval of the insurer to continue the terminated employee on the group plan for the duration of the notice period. Insurers seem more willing to agree to continue long-term disability coverage for employees if the employee's salary is being continued.

4. Constructive Dismissal

A dismissal might take place without actually using the words "you're fired." A unilateral change to a fundamental term of the employment contract can amount to constructive dismissal, which gives the employee the same rights, and subjects the employer to the same liabilities, as if employment had been terminated without cause. For example, a demotion or a significant reduction in compensation can amount to a constructive dismissal.

Constructive dismissal can often be difficult to identify and the appropriate course of action for both the employer and employee may be difficult to determine. The employer should avoid making changes to the terms and conditions of employment before being satisfied that they will not amount to a constructive dismissal. Similarly, the employee should be satisfied that a constructive dismissal has taken place before raising the allegation and leaving his or her job.

5. Releases

It is generally preferable not to make any payment in respect of damages for termination of employment without a formal release from the employee. Always get a release or, at a minimum, have clear language stating the severance package is in full satisfaction of any claims the employee may have relating to his or her employment. Note that a release will not be effective if the only payment to the employee is the amount required by statute. There must be some other consideration to the employee.

6. Records of Employment

When filling out the Record of Employment of the employee (for Employment Insurance), it is essential that it be filled out frankly. Some employers try to help the employee by saying something that will help the employee get Employment Insurance benefits. For example, the employer will indicate that the employee was laid off rather than, for example, terminated for cause. The reason for termination given in the Record of Employment should reflect the circumstances – it may become evidence in a later proceeding.

Part Two: The Context for Personnel and Employment Policies – Relevant Legislation

Contents:

1. Applicability of the *Canada Labour Code*
2. What is the *Employment Standards Act*?
3. How Does the *Child, Family and Community Service Act* Apply to Employees of First Nations Schools?
4. What Should You Know About the *Criminal Records Review Act*?
5. What If the *Independent School Act* Applies to You?
6. Privacy Legislation
 - *Personal Information Protection and Electronic Documents Act* (Canada)
 - *Personal Information Protection Act* (BC)
7. The *Criminal Code*
8. References

1. Applicability of the Canada Labour Code

A. INTRODUCTION

In dealing with employment issues for First Nations schools, it is important to keep in mind which structure is being used. Generally, First Nations schools are based on one of three models:

- 1) local, band-operated schools (generally under the administration of a local school board or education authority pursuant to education agreements and/or treaty rights);
- 2) federal schools controlled by the Department of Indian Affairs (DIAND) pursuant to the *Indian Act* and/or individual treaties; or
- 3) provincial public or private schools.

Whether or not employees in First Nations schools are subject to federal, provincial or First Nations jurisdiction over labour relations is the first question that needs to be addressed. The inquiry is very fact-specific and depends on a number of factors such as which model is used, the location of the school, the curriculum, and the terms of any funding agreements.

For purposes of this Handbook, it is assumed that most First Nation schools are subject to federal laws regarding labour relations. Depending on the aspirations of the First Nation (for example, to exercise jurisdiction over labour relations on the reserve), language regarding jurisdiction over labour matters should be included in written agreements whenever possible. As First Nations move forward in legislating to deal with labour matters, those additional provisions will need to be taken into account.

Assuming then that federal laws apply and that there are presently no treaty provisions or by-laws affecting labour matters, the key statutes are the *Canada Labour Code* and the *Canadian Human Rights Act*. Those statutes set the minimum standards that employers must meet. In order for employees to enforce their rights under those statutes, they must use the mechanisms created in the statutes. Under the *Canada Labour Code*, that means a complaint may be filed with Labour Canada. Similarly, under the *Canadian Human Rights Act*, a complaint may be made to the Canadian Human Rights Commission.

The report of Professor Harry Arthurs on revisions to federal workplace standards (Part III of the *Canada Labour Code*) was delivered October 30, 2006. It remains to be seen what changes will be made to the federal labour standards as a result of this report, but the changes could be extensive. Information about the review of federal labour standards is available at <http://www.fl-s-ntf.gc.ca/en/index.asp>.

The contract of employment between the employer and employee can be oral, in writing, or partly oral and partly in writing. Even if there is nothing on paper saying this is your employment contract, after an employer has offered a job (with the terms being specified sufficiently) and a person has accepted that offer, a contract has probably been created. The fewer the terms that are specified in writing, the more a court will have to imply terms if a dispute arises. But the court will not imply terms that are inconsistent with the statutes. And if a

written contract contains a term which is less favourable to the employee than the statutory requirements, that term of the contract will be void; a court will not enforce it.

If the employees are represented by a union, then the collective agreement negotiated between the union, on behalf of the employees, and the employer is the contract of employment. Because few First Nation schools' employees in British Columbia are represented by unions, the focus here is on non-union contracts of employment. In either case, however, the statutory provisions cannot be ignored.

B. CANADA LABOUR CODE

The *Canada Labour Code* consists of three parts. Part I deals with industrial relations, including the way in which unions become certified to represent employees and how collective agreements are negotiated. Part II deals with occupational health and safety, and Part III deals with standard hours, wages, vacations and holidays. Part III is the focus here. It is divided into 18 divisions including hours of work, minimum wages, equal wages, annual vacations, general holidays, multi-employer employment, reassignment, maternity leave and parental leave, compassionate care leave, bereavement leave, group termination of employment, individual termination of employment, severance pay, garnishment, sick leave, work-related illness and injury, unjust dismissal, payment of wages, and sexual harassment.

The relevant sections in the *Code* cannot be read alone. Important provisions are also contained in the *Canada Labour Standards Regulations*.

What Provisions of the *Canada Labour Code* Apply to Teachers?

Unlike the British Columbia *Employment Standards Act*, the *Canada Labour Code* does not contain any exemptions for teachers. This distinction between the federal and provincial legislation highlights the risk of relying solely on advice from the B.C. Employment Standards Branch.

Section 34 of the B.C. *Employment Standards Regulation* states that Part 4 of the *Employment Standards Act* does not apply to teachers:

34. (1) Part 4 of the Act [regarding hours of work and overtime] does not apply to any of the following:
- ...
 - (c) a teacher;
 - (d) a person employed as a noon hour supervisor, teacher's aide or supervision aide by
 - (i) a board as defined in the *School Act*, or
 - (ii) an authority as defined in the *Independent School Act*[.]

As a result of the exemption in the *Regulation*, teachers are not entitled to overtime under that Act. In contrast, overtime and other provisions under the *Canada Labour Code* do apply to teachers.

Requirements of the *Canada Labour Code* Cannot be Waived

Section 168 of the *Canada Labour Code* provides that employees are entitled to their rights under the *Code*, unless an amount provided by contract is more favourable to the employee:

168.(1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

(1.1) Divisions II, IV, V and VIII do not apply to an employer and employees who are parties to a collective agreement that confers on employees rights and benefits at least as favourable as those conferred by those respective Divisions in respect of length of leave, rates of pay and qualifying periods for benefits, and, in respect of employees to whom the third party settlement provisions of such a collective agreement apply, the settlement of disagreements relating to those matters is governed exclusively by the collective agreement.

Hours of Work

Division I of Part III of the *Code* governs hours of work. Under section 167 of the *Code*, Division I does not apply to or in respect of employees who are managers or superintendents or exercise management functions. Under the *Code* “manager” is given a relatively narrow interpretation and, according to one adjudicator, is someone who has the power to act “independently, autonomously, using one’s discretion.” The term “manager” does not include all persons who exercise some management functions.

Section 169 of the *Code* provides that, except as otherwise provided, an employee’s standard hours of work shall not exceed eight in a day and 40 in a week, and no employer shall cause or permit an employee to work longer than those hours (not including general holidays provided under Part V of the *Code*). Generally, the total hours that may be worked by an employee in a week must not exceed 48 hours.

Hours of work are to be scheduled and actually worked so that each employee has at least one full day of rest each week, and, wherever practicable, Sunday shall be the normal day of rest in the week.

Section 11.1 of the *Regulations* requires an employer to pay an employee who reports for work at the call of the employer wages for not less than three hours of work at the employee’s regular rate of wages, whether or not the employee is required to perform work after reporting for work.

Overtime

Section 174 of the *Code* provides that when an employee is required or permitted to work in excess of the standard hours of work, the employee shall be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages (subject to the *Regulations*). “Wages” include every form of remuneration for work performed but do not include tips and other gratuities. Requiring an employee to attend at a conference or workshop on a regular day of rest without paying overtime likely violates the overtime provisions in the *Code*.

The overtime requirement does not apply in circumstances where there is an established work practice that

- (a) requires or permits an employee to work in excess of standard hours for the purpose of changing shifts;
- (b) permits an employee to exercise seniority rights to work in excess of standard hours pursuant to a collective agreement; or
- (c) permits an employee to work in excess of standard hours as the result of his exchanging a shift with another employee (see section 7 of the *Regulations*).

Because the *Code* does not provide for banking overtime, employers who allow employees to do so may be exposed to a claim for unpaid wages.

Statutory Holidays

In section 166 of the *Code*, “general holiday” means New Year’s Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day, and includes any day substituted for any such holiday pursuant to section 195 of the *Code*. Under the British Columbia *Employment Standards Act*, in addition to the general holidays provided under the *Code*, British Columbia Day is listed as a statutory holiday. (But the *Employment Standards Act* does not include Boxing Day.)

Generally, when a statutory holiday falls on a day that is a non-working day for an employee, the employee is entitled to a holiday with pay at some other time. Under section 193 of the *Code*, the holiday may be by way of addition to the employee’s annual vacation or at a time convenient to both the employee and the employer. Section 193(2), however, provides that when New Year’s Day, Canada Day, Remembrance Day, Christmas Day or Boxing Day falls on a Sunday or Saturday that is a non-working day, an employee is entitled to a holiday with pay on the working day immediately preceding or following the holiday.

With respect to holiday pay, section 197 of the *Code* provides that an employee who is required to work on a day on which the employee is entitled to a statutory holiday with pay is entitled to, in addition to his regular rate of wages for that day, wages at a rate of at least one and one-half times his regular rate of wages for the time worked on the holiday. A manager who is required to work on a statutory holiday must be given a holiday with pay at some other time. An employee who does not work on a statutory holiday is not entitled to holiday pay if, during the 30 days immediately preceding the holiday, the employee is not entitled to wages for at least 15 days.

This exception does not apply with respect to an employee whose terms and conditions of employment with respect to hours of work (for example, a part-time employee) are such that the employee is unable to establish entitlement to wages on at least 15 days during the 30 calendar days immediately preceding a general holiday. Such an employee is not entitled to pay for a general holiday on which the employee does not work but is entitled to be paid 1/20th of the wages he has earned during the 30 calendar days immediately preceding that general holiday.

Section 202 of the *Code* provides that an employee is not entitled to pay for a general holiday that occurs in his first 30 days of employment if the employee does not work on the holiday. But if the employee is required to work on the holiday, the employee must be paid at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on the holiday. For the purpose of section 202, a person is deemed to be employed when he or she is available at the call of the employer, whether or not the person is called on to perform any work.

Some other exceptions apply in the case of employees who are on an unusual work schedule. The *Code* and the *Regulations* also have specific provisions dealing with the calculation of an employee's "regular rate of wages" for purpose of calculating holiday pay where the employee receives irregular wages.

If a school provides holidays in addition to those required by statute, it should clarify whether the non-statutory holidays will have the same consequences as holidays required by the *Code* and the *Regulations* (e.g., holiday pay).

Deductions from Wages

Section 254.1 of the *Code* deals with deductions from wages. The only deductions permitted under section 254.1 are:

- (a) those required by a federal or provincial Act or regulations;
- (b) those authorized by a court order or a collective agreement or other document signed by a trade union on behalf of an employee;
- (c) amounts authorized in writing by the employee;
- (d) overpayments of wages by the employer; and
- (e) other amounts prescribed by regulation.

The section also provides that no employer shall make a deduction pursuant to (c) above in respect of damage to property, or loss of money or property, if any person other than the employee had access to the property or money in question.

A clear written authorization should be obtained from employees before any deductions are made. The effect of section 89 of the *Indian Act* should also be taken into account.

No Limitation Period

In light of the absence of a limitation period in the *Canada Labour Code* and a recent decision of the Federal Court upholding an award of overtime wages in the amount of \$192,000 covering a 13-year period,⁵ First Nations schools should take steps to minimize possible liability for unpaid wage claims. A written acknowledgement that no overtime, vacation pay, etc. is outstanding, signed by the employee, would be helpful. [Note: those schools that will be undergoing a transition to come under the First Nations Education Authority could incorporate terms addressing this matter as part of their transition (e.g., in new written employment contracts with

⁵ *Delaware Nation v. Logan*, [2005] F.C.J. No. 2154, 2005 FC 1702.

each employee). Schools that are not going to participate in the jurisdiction initiative should assess the risk and take steps to confirm the possibility of outstanding liability

Leaves

(a) Maternity and Parental Leave

Reassignment and Job Modification

Under section 204 of the *Code*, an employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the 24th week following the birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or that of the baby. An employee's request for job modification or reassignment must be accompanied by a certificate of a qualified medical practitioner of the employee's choice indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk.

Where a request has been made, the employer must examine the request in consultation with the employee and, where reasonably practicable, shall modify the employee's job functions or reassign her. An employee who has made such a request is entitled to continue her current job while the employer examines her request, but if the risk posed by continuing any of her job functions so requires, she is entitled to a paid leave of absence until the employer either modifies the job, reassigns her, or informs her in writing that it is not reasonably practicable to modify her job functions or reassign her. An employee whose job functions are modified or who is reassigned shall be deemed to continue to hold the job that she held at the time of making the request, and shall continue to receive the wages and benefits that are attached to that job. If modification or reassignment is not reasonably practicable, the employee is entitled to a leave of absence without pay for the duration of the risk as indicated in the medical certificate.

An employee who is pregnant or nursing is entitled to a leave of absence during the period from the beginning of the pregnancy to the end of the 24th week following the birth, if she provides the employer with a certificate of a qualified medical practitioner of her choice indicating that she is unable to work by reason of the pregnancy or nursing and indicating the duration of that inability.

An employee whose job functions have been modified, who has been reassigned, or who is on a leave of absence must give the employer at least two weeks' notice in writing of any change in the duration of the risk or in the inability as indicated in the medical certificate, unless there is a valid reason why that notice cannot be given. The notice must be accompanied by a new medical certificate.

Section 132 of the *Canada Labour Code* is an occupational health and safety provision relating to pregnancy and nursing. Under section 132, an employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the baby. On being

informed of the cessation, the employer, with the employee's consent, must notify the workplace committee or the health and safety representative.

The employee must consult with a qualified medical practitioner of her choice as soon as possible to establish whether continuing any of her current job functions poses a risk to her health or that of the baby. Once the medical practitioner has established whether there is a risk, the employee may no longer cease to perform her job. For the period during which she does not perform her job, the employer may, in consultation with the employee, reassign her to another job that would not pose a risk to her health or to that of the baby. Whether or not she has been reassigned to another job, the employee is deemed to continue to hold the job that she held at the time she ceased to perform her job functions and shall continue to receive the wages and benefits that are attached to that job for the period during which she does not perform the job.

Section 208 of the *Code* provides that an employer cannot require an employee who is pregnant to take a leave of absence simply because she is pregnant. However, an employer may require a pregnant employee to take a leave of absence if she is unable to perform an essential function of her job and no appropriate alternative job is available for that employee. The required leave can only be for such time as the employee is unable to perform the essential function. The school would have to be able to prove that the employee is unable to perform an essential function of the job.

Maternity Leave

Every employee who has completed six consecutive months of continuous employment with an employer and provides her employer with a certificate of a qualified medical practitioner certifying that she is pregnant is entitled to an unpaid leave of absence of up to 17 weeks. The leave may begin not earlier than 11 weeks prior to the estimated date of her confinement and end not later than 17 weeks following the actual date of her confinement.

Parental Leave

Every employee who has completed six consecutive months of continuous employment with an employer is entitled to and shall be granted a leave of absence from employment of up to 37 weeks to care for a new-born child of the employee or a child who is in the care of the employee for the purpose of adoption in the province in which the employee resides.

The leave of absence may only be taken during the 52-week period beginning on the day on which the child is born or comes into the care of the employee.

The total amount of parental leave that may be taken by two employees in respect of the same birth or adoption shall not exceed 37 weeks.

The total amount of maternity and parental leave that may be taken by one or two employees in respect of the same birth cannot exceed 52 weeks.

General

Every employee who intends to take a maternity leave or parental leave must give at least four weeks' notice in writing to the employer unless there is a valid reason why that notice cannot be given and must inform the employer in writing of the length of leave intended to be taken.

Every employee who intends to take or who is on a maternity leave or parental leave must give the employer at least four weeks' notice in writing of any change in the length of leave intended to be taken, unless there is a valid reason why that notice cannot be given.

Every employee who intends or is required to take a leave of absence related to maternity, parental or compassionate care leave is entitled, on making a written request to the employer, to be informed in writing of every employment, promotion or training opportunity that arises during the period when the employee is on leave of absence and for which the employee is qualified. (Compassionate care leave is addressed in more detail below.)

Every employee who takes or is required to take a leave of absence related to maternity, parental or compassionate care leave is entitled to be reinstated in the position that the employee occupied when the leave of absence commenced. Where for any valid reason the employer cannot reinstate the employee in the same position, the employer shall reinstate the employee in a comparable position with the same wages and benefits and in the same location. Where an employee takes a leave of absence of the type referred to above, and during the period of the leave the wages and benefits of the group of employees of which that employee is a member are changed as part of a plan to reorganize the industrial establishment in which that group is employed, that employee is entitled, on being reinstated in employment, to receive the wages and benefits that the employee would have been entitled to receive had the employee been working when the reorganization took place. The employer shall notify the employee in writing of the change in wages and benefits as soon as possible.

The pension, health and disability benefits and the seniority of an employee who takes or is required to take a maternity, parental or compassionate care leave shall accumulate during the entire period of the leave. Where contributions are required from an employee in order for the employee to be entitled to a pension, health or disability benefit, the employee is responsible for and must, within a reasonable time, pay those contributions for the period of any leave unless, before taking the leave or within a reasonable time thereafter, the employee notifies the employer of his or her intention to discontinue contributions during the leave period. An employer who pays contributions for pension, health and disability benefits must continue to pay those contributions during an employee's leave of absence at least in the same proportion as if the employee were not on leave. The employer may cease paying its share of benefit contributions if the employee does not pay his or her contributions within a reasonable time. Employees should receive written warning before the employer ceases paying its share of any contributions. Where pension, health and disability benefit contributions have not been paid during the leave of absence, the benefits shall not accumulate during the leave of absence. On the employee's return to work, employment shall be deemed to be continuous with employment before the employee's absence. For benefits other than pension, health and disability benefits, on the employee's return to work, employment shall be deemed to be continuous with employment before the employee's absence.

An employee who takes a maternity, parental or compassionate care leave of absence of the type described above is entitled to benefits under any income-replacement scheme or insurance plan in force at the workplace on the same terms as any employee who is absent from work for health-related reasons and is entitled to benefits under the scheme or plan.

No employer shall dismiss, suspend, lay off, demote or discipline an employee because the employee is pregnant or has applied for or been required to take maternity, parental or compassionate care leave. Similarly, the employer may not take into account the pregnancy of an employee or the intention of an employee to take maternity, parental or compassionate care leave in any decision to promote or train the employee.

(b) Compassionate Care Leave

Under the *Canada Labour Code*, employees are entitled to up to 8 weeks of unpaid compassionate care leave to provide care and support to a gravely ill family member. A certificate is required from a qualified medical practitioner stating that the family member has a serious medical condition with a significant risk of death within 26 weeks. Some employees may be entitled to benefits under the *Employment Insurance Act*.

Each employee is not entitled to 8 weeks of compassionate care leave to care for the same person. However, the 8-week entitlement may be shared by two or more employees. The total amount that may be taken by two or more employees in regard to the same family member is 8 weeks in the 26-week period. Note that this is the statutory minimum and that you may wish to leave some flexibility to allow for additional time being granted in particular cases.

If the family member is still gravely ill at the end of 26 weeks, an employee is entitled to a further period of up to 8 weeks of compassionate care leave. A qualified medical practitioner would be required to issue another certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks.

As with pregnancy, maternity and parental leave, the employee must be reinstated in his or her former position at the end of the leave or be given a comparable position in the same location and with the same wages and benefits.

For purposes of the *Canada Labour Code* compassionate care leave provisions, a “family member” includes the following classes of persons:⁶

- (a) a child of the individual’s parent or a child of the spouse or common-law partner of the individual’s parent;

⁶ Subsection 206.3(1) of the *Canada Labour Code* defines “family member” for purposes of federal compassionate care leave. Paragraph (d) in that definition refers to any other person prescribed in the definition of “family member” in subsection 23.1(1) of the *Employment Insurance Act*. The definition in subsection 23.1 of the *Employment Insurance Act* tracks the language in subsection 206.3(1) of the *Canada Labour Code*. The *Employment Insurance Regulations* were amended in June 2006 (SOR/2006-135) to provide the more comprehensive definition of “family member” set out here.

- (b) a grandparent of the individual or of the individual's spouse or common-law partner or the spouse or common-law partner of the individual's grandparent;
- (c) a grandchild of the individual or of the individual's spouse or common-law partner or the spouse or common-law partner of the individual's grandchild;
- (d) the spouse or common-law partner of the individual's child or of the child of the individual's spouse or common-law partner;
- (e) a parent, or the spouse or common-law partner of a parent, of the individual's spouse or common-law partner;
- (f) the spouse or common-law partner of a child of the individual's parent or of a child of the spouse or common-law partner of the individual's parent;
- (g) a child of a parent of the individual's spouse or common-law partner or a child of the spouse or common-law partner of the parent of the individual's spouse or common-law partner;
- (h) an aunt or uncle of the individual or of the individual's spouse or common-law partner or the spouse or common-law partner of the individual's aunt or uncle;
- (i) a niece or nephew of the individual or of the individual's spouse or common-law partner or the spouse or common-law partner of the individual's niece or nephew;
- (j) a current or former foster parent of the individual or of the individual's spouse or common-law partner;
- (k) a current or former foster child of the individual or the spouse or common-law partner of a current or former foster child of the individual;
- (l) a current or former ward of the individual or of the individual's spouse or common-law partner;
- (m) a current or former guardian of the individual or the spouse or common-law partner of that guardian;
- (n) in the case of an individual who has the serious medical condition, a person whether or not related to the individual by blood, adoption, marriage or common-law partnership, whom the individual considers to be like a close relative;⁷ and

⁷ This means that the person who has the serious medical condition may designate any individual who is not included in the definition of "family member" but who is considered to be like a close relative.

- (o) in the case of an individual who is the claimant, a person, whether or not related to the individual by blood, adoption, marriage or common-law partnership, who considers the individual to be like a close relative.⁸

A common-law partner means a person who has been cohabiting with the individual in a conjugal relationship for at least one year.

The *Employment Standards Act* was amended in April 2006 to provide for compassionate care leave. The *Compassionate Care Leave Regulation* (in force October 20, 2006) establishes the following classes of individuals as “family members” for purposes of the provincial compassionate care leave:

- (a) in relation to an employee:

- (i) a step-sibling;
- (ii) an aunt or uncle;
- (iii) a niece or nephew;
- (iv) a current or former foster parent;
- (v) a current or former foster child;
- (vi) a current or former ward;
- (vii) a current or former guardian;
- (viii) the spouse of
 - (A) a sibling or step-sibling;
 - (B) a child or stepchild;
 - (C) a grandparent;
 - (D) a grandchild;
 - (E) an aunt or uncle;
 - (F) a niece or nephew;
 - (G) a current or former foster child; or
 - (H) a current or former guardian;

- (b) in relation to the employee’s spouse:

- (i) a parent or stepparent;
- (ii) a sibling or step-sibling;
- (iii) a child;
- (iv) a grandparent;
- (v) a grandchild;
- (vi) an aunt or uncle;
- (vii) a niece or nephew;
- (viii) a current or former foster parent, or
- (ix) a current or former ward.

⁸ This means that any individual who is not listed in the definition of “family member”, but who considers the person who has the serious medical condition to be like a close relative, may claim compassionate care benefits.

For purposes of compassionate care leave, “family member” also includes a person, whether or not related to an employee by blood, adoption, marriage or common-law partnership, with a serious medical condition with a significant risk of death within 26 weeks who considers the employee to be, or whom the employee considers to be, like a close relative.

(c) Family Responsibility Leave

Although the *Canada Labour Code* does not provide for family responsibility leave, federally-regulated employers in British Columbia may wish to provide family responsibility leave in order to be consistent with provincially-regulated employers in B.C. The *Employment Standards Act* provides that employees are entitled to up to 5 days of unpaid leave in each employment year to meet responsibilities related to (a) the care, health or education of a child in the employee’s care, or (b) the care or health of any other member of the employee’s immediate family.

(d) Leaves of Absence

Leaves of absence, with or without pay, should not be granted in a way that is contrary to the *Canadian Human Rights Act* (i.e., based on prohibited grounds of discrimination).

Consider whether or not an employee who takes an unpaid personal leave of absence loses any seniority. If that is a condition of being given the leave, the employee should be told that in writing before taking it. Section 29 of the *Canada Labour Standards Regulations* provides that for the purposes of certain Divisions of the *Code* dealing with labour standards, the absence of an employee from employment shall be deemed not to have interrupted continuity of employment where (a) the employee is absent as a result of a layoff that is not a termination, or (b) the employer permits or condones the employee’s absence from employment.

(e) Sick Leave

Employees should understand clearly when they are required to report an absence and to whom they should report it. It is arguably not sufficient to have employees leave the message with a co-worker. You will, however, need to be flexible in the case of an extremely ill or hospitalized employee.

Absent employees should indicate the anticipated length of the absence. Depending upon the individual, you may require daily follow up calls or perhaps over some longer period.

Section 239 of the *Code* provides that no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if

- (a) the employee has completed three consecutive months of continuous employment prior to the absence;
- (b) the period of absence does not exceed 12 weeks; and
- (c) the employee, if requested in writing by the employer within 15 days after his return to work, provided the employer with a certificate of a qualified medical practitioner

certifying that the employee was incapable of working due to illness or injury for a specified period of time, and that period of time coincides with the employee's absence from work.

If these conditions are met, then the pension, health and disability benefits and the seniority of an employee who is absent due to illness or injury shall accumulate during the entire period of the absence. Where contributions are required from the employee, the employee is responsible for and must, within a reasonable time, pay those contributions for the period of absence unless, at the commencement of the absence or within a reasonable time thereafter, the employee notifies the employer of the employee's intention to discontinue contributions during that period. An employer who pays contributions for pension, health and disability must continue to pay the contributions in at least the same proportion as if the employee were not absent, unless the employee does not pay his or her contributions, if any, within a reasonable time.

If contributions are not paid as set out above, the benefits shall not accumulate during the absence. On the employee's return to work, employment will be deemed to be continuous with employment before the absence.

An employer may assign to a different position, with different terms and conditions of employment, any employee who, after an absence due to illness or injury, is unable to perform the work performed by the employee prior to the absence.

Work-related Illness and Injury

Section 239.1 of the *Code* contains an even broader prohibition for an employee who has been absent from work due to work-related illness or injury. An employer cannot dismiss, suspend, lay off, demote or discipline an employee because of absence from work due to work-related illness or injury.

Employers are required to subscribe to a plan that provides an employee who is absent from work due to work-related illness or injury with wage replacement, payable at an equivalent rate to that provided for under applicable workers' compensation legislation in the employee's province of permanent residence.

Where reasonably practicable, the employer shall return an employee to work after the employee's absence. An employer may assign the employee to a different position, with different terms and conditions of employment, if the employee is unable to perform the work performed by the employee prior to the absence. Pursuant to section 34 of the *Regulations*, the obligation to return an employee to work begins on the date that, according to a certificate from the qualified medical practitioner authorized by the plan the employer subscribes to in accordance with section 239.1(2) of the *Code*, the employee is fit to return to work with or without qualifications, and ends 18 months after that date.

Where, within nine months after an employee's return to work, an employer lays off or terminates the employment of that employee or discontinues a function of that employee, the employer must demonstrate to an inspector that the layoff, termination of employment or

discontinuance of function was not because of the absence of the employee from work due to work-related illness or injury.

Where an employer cannot return an employee to work within 21 days after the date of receipt of the certificate of the qualified medical practitioner referred to above, the employer must, within those 21 days, notify the employee in writing whether return to work is reasonably practicable and if not, the reasons.

The pension, health and disability benefits and the seniority of the absent employee shall accumulate during the entire period of the absence. Where contributions are required from the employee, the employee is responsible for and must, within a reasonable time, pay those contributions for the period of absence unless, at the commencement of the absence or within a reasonable time thereafter, the employee notifies the employer of the employee's intention to discontinue contributions during that period. An employer who pays contributions for pension, health and disability benefits must continue to pay the contributions in at least the same proportion as if the employee were not absent, unless the employee does not pay his or her contributions, if any, within a reasonable time.

If contributions are not paid as set out above, the benefits shall not accumulate during the absence. On the employee's return to work, employment will be deemed to be continuous with employment before the absence.

The Disabled Employee

It is a good idea to have a sick leave policy indicating when employees will be required to provide a medical certificate to the employer. Mental and physical disabilities raise a host of legal issues, with two of the main ones being privacy and human rights.

Human Rights Commissions take the view that the employer has no need to know precisely what ails an employee. All the employer needs to know is that the individual is disabled from working for some medical reason. You should not ask for the diagnosis.

Where an employee has been absent for medical reasons, the employer may want to require the employee to have his or her physician complete a doctor's report that contains information about the individual's diagnosis, treatment, and ability to return to work assuming complete or modified duties. You may wish to send the doctor a job description and ask if the employee can perform that particular job. Relevant information about the physical or mental requirements of the job should be specified. On the doctor's form, the employee should sign an authorization allowing the physician to release information to the employer. The employer should not try to obtain any more information than is reasonably necessary, such as information relevant to the employee's eligibility for benefits, workplace accommodations necessary to support a return to work, and/or the individual's prognosis. Employees who will be receiving such information about other employees should be required to sign a confidentiality agreement that recognizes the sensitivity of the medical information they handle. Requests for additional information should be made of the employee directly and not of the employee's physician unless the employer has a valid signed consent form permitting the employer to speak directly to the physician. (See

PIPEDA Case Summaries #284 and #287, decisions of the federal Assistant Privacy Commissioner.)

The safest course in dealing with an employee who is off on stress leave or some other disability, particularly where there are performance issues, is to wait until the employee is healthy and able to return to work before addressing the performance problems or terminating the employment. Before such an employee returns to work, you may wish to require a medical certificate indicating that the employee is well and able to resume his or her job duties.

After the employee has returned to work, the more time you can put between the disability leave and the termination or criticism of job performance, the better. A termination or critical performance review immediately upon the employee's return to work could leave you exposed to a possible human rights complaint alleging that the action with respect to employment was taken because of the disability. Termination of a disabled employee also carries a risk of the employee being awarded an increased notice period because of the manner of dismissal.

(f) Bereavement Leave

Section 210 of the *Code* provides that, in the event of the death of a member of the employee's immediate family (as defined in the *Regulations*), every employee is entitled to bereavement leave on any of his or her normal working days that occur during the three days immediately following the day of the death. If an employee has completed three consecutive months of continuous employment, the employee is entitled to the bereavement leave with pay at the employee's regular rate of wages for normal hours of work.

For purposes of the bereavement leave provision in the *Code*, "immediate family" means, in respect of an employee:

- (a) the employee's spouse or common-law partner;
- (b) the employee's father and mother and the spouse or common-law partner of the father or mother;
- (c) the employee's children and the children of the employee's spouse or common-law partner;
- (d) the employee's grandchildren;
- (e) the employee's brothers and sisters;
- (f) the employee's grandmother and grandfather;
- (g) the father and mother of the spouse or common-law partner of the employee and the spouse or common law partner of the father or mother; and
- (h) any relative of the employee who resides permanently in the employee's household or with whom the employee permanently resides.

This definition appears in section 33 of the *Regulations*. "Common-law partner" means a person who has been cohabiting with an individual in a conjugal relationship for at least one year, or who had been so cohabiting for at least one year immediately before the individual's death. Employers are free to provide bereavement leave for additional family members, but are not required by the *Code* to pay for the leave.

(g) Court Leave

The *Code* does not require that jury duty be paid. The *Employment Standards Act* specifically provides that employers must not terminate an employee or change a term or condition of employment without the employee's consent because the employee has performed jury duty. Under the *Employment Standards Act*, employees who attend court as jurors are entitled to be returned to the same position or a comparable position when the leave ends.

Sexual Harassment Policy

In the *Code*, "sexual harassment" means any conduct, comment, gesture or contact of a sexual nature (a) that is likely to cause offence or humiliation to any employee, or (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or any opportunity for training or promotion. Every employee is entitled to employment free of sexual harassment. Employers are required to make every reasonable effort to ensure that no employee is subjected to sexual harassment.

Section 247.4 of the *Code* requires employers, after consulting with the employees or their representatives, "to issue a policy statement concerning sexual harassment." The employer is required to make each person under the employer's direction aware of the policy. The *Code* specifies some of the things that must be included in a sexual harassment policy:

- (a) a definition of sexual harassment that is substantially the same as the definition above;
- (b) a statement to the effect that every employee is entitled to employment free of sexual harassment;
- (c) a statement to the effect that the employer will make every reasonable effort to ensure that no employee is subjected to sexual harassment;
- (d) a statement to the effect that the employer will take such disciplinary measures as the employer deems appropriate against any person under the employer's direction who subjects any employee to sexual harassment;
- (e) a statement explaining how complaints of sexual harassment may be brought to the attention of the employer;
- (f) a statement to the effect that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purposes of investigating the complaint or taking disciplinary measures in relation to the complaint; and

- (g) a statement informing employees of the discriminatory practice provisions of the *Canadian Human Rights Act* that pertain to the rights of persons to seek redress under that Act in respect of sexual harassment.

Although the *Code* deals only with sexual harassment, it is prudent to have a harassment policy which covers all the grounds of discrimination covered by the *Canadian Human Rights Act*. Section 25 of the *Regulations* requires an employer to post copies of the harassment policy.

A harassment policy is a much more useful defence in the event of a complaint if the employees have been educated about what constitutes harassment, the existence of the policy, and how it works. Training should be mandatory for all employees and executives in the organization (e.g., Council members), and the policy should apply to all work-related activities.

Vacations

In section 183 of the *Code*, “vacation pay” means four per cent or, after six consecutive years of employment by one employer, six per cent of the wages of an employee during the year in respect of which the employee is entitled to the vacation. Generally, every employee is entitled to and must be granted a vacation of at least two weeks with vacation pay, and, after six consecutive years of employment, at least three weeks with vacation pay, in respect of every year of employment by that employer. The vacation must begin not later than ten months immediately following the completion of the year of employment for which the employee became entitled to vacation (i.e., no later than ten months after the employee’s anniversary date).

Section 187 of the *Code* provides that where one or more general holidays occur during a vacation granted to an employee pursuant to Division IV, the vacation may be extended by one day for each such holiday.

Where there is no agreement between the employer and the employee concerning when the vacation may be taken, the employer must give the employee at least two weeks’ notice of the commencement of the employee’s vacation. The employer must also pay vacation pay to the employee within 14 days before the beginning of the vacation, or on the regular payday during or immediately following the vacation where that is an established practice.

Section 14 of the *Regulations* provides that an employee may, by written agreement with the employer, postpone or waive his or her entitlement to annual vacation for a specified year of employment. In that case, the employer must pay the vacation pay to the employee within 10 months after the end of the specified year of employment. Your policies should not allow employees to carry forward vacation entitlement to a greater extent than is permitted by the legislation.

Generally it is up to the employer to determine when vacation will be scheduled, and the employer has a responsibility to schedule vacations. Not surprisingly, teachers’ vacations are typically scheduled during the summer months.

Termination

The *Canada Labour Code* also contains provisions governing the termination of employment and severance pay. These provisions are discussed in greater detail in Part One of the Handbook in the section entitled “Termination”.

2. What is the *Employment Standards Act*?

For those situations in which the BC Employment Standards Act would apply, please refer to the entire Act for more information.

The *Employment Standards Act* and *Regulations* set minimum standards for wages and conditions of employment in British Columbia.

The provincial *Employment Standards Act* is intended to:

- ensure that employees in British Columbia receive at least basic standards for compensation and conditions of employment;
- promote the fair treatment of employees and employers;
- encourage open communication between employers and employees;
- provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act;
- foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia; and
- contribute in assisting employees to meet work and family responsibilities.

Please note that according to the *Employment Standards Regulations*, the Act does not apply to the following:

- (a) a student who is employed by a board as defined in the *School Act* or by an authority as defined in the *Independent School Act*, to work at the secondary school where he or she is enrolled;
- (b) a student enrolled at a secondary school under the supervision of a board as defined in the *School Act* or an authority as defined in the *Independent School Act* in a work study, work experience or occupational study class; and
- (c) a person receiving benefits under the *Unemployment Insurance Act* (Canada) as a result of working on a job creation project under section 25 of that Act.

For further information, please refer to the entire Act, or call the toll free inquiry service:

1-800-663-3316

Publication relating to the *Employment Standards Act and Regulations* can be obtained at www.labour.gov.bc.ca/esb/intro.htm through the Internet.

Otherwise, please contact your nearest Employment Standards Branch office listed in the blue pages of your phone book.

3. How Does the *Child, Family & Community Service Act* Apply to Employees of First Nations Schools?

The *Child, Family and Community Service Act* deals with child protection matters. The Act says that a child needs protection in the following circumstances:

- if the child has been, or is likely to be, physically harmed by the child's parent;
- if the child has been, or is likely to be, sexually abused or exploited by the child's parent;
- if the child has been, or is likely to be, physically harmed, sexually abused, sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;
- if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;
- if the child is emotionally harmed by the parent's conduct;
- if the child is deprived of necessary health care;
- if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;
- if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;
- if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;
- if the child's parent is dead or adequate provision has not been made for the child's care;
- if the child has been abandoned and adequate provision has not been made for the child's care; and
- if the child is in the care of a Director of Child, Family and Community Services or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

In addition, for the purpose of the Act, a child has been or is likely to be sexually abused or sexually exploited if the child has been, or is likely to be:

- (a) encouraged or helped to engage in prostitution; or
- (b) coerced or inveigled into engaging in prostitution.

A child is emotionally harmed if the child demonstrates severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour.

A person who has reason to believe that a child needs protection as set out above must promptly report the matter to a director or a person designated by a director. The duty to report applies even if the information on which the information is based (a) is privileged, except as a result of a solicitor-client relationship, or (b) is confidential and its disclosure is prohibited under another Act.

If a person does have reason to believe that a child needs protection, failing to make a report as required means committing an offence punishable by law. A person who

knowingly reports false information that a child needs protection also commits an offence. A person who commits either of these offences is liable to a fine of up to \$10,000.00 or to imprisonment of up to 6 months, or both.

No action for damages may be brought against a person for making such a report unless the person knowingly reported false information.

4. What Should You Know About the *Criminal Records Review Act*?

The *Criminal Records Review Act* was developed with the intention of protecting children from physical and sexual abuse. The legislation applies to all current employees or applicants for employment in organizations that are operated, licensed or receive operating funds from the provincial government. The *Act* makes a criminal record check mandatory for anyone who works with children. In the *Act*, “work with children” means: *working with children directly or having or potentially having unsupervised access to children in the ordinary course of employment or in the practice of an occupation.*

That legislation covers more than 280,000 British Columbians, including teachers and non-teaching staff in schools, doctors, nurses and hospital staff, dentists, denturists, health care professionals and licensed child care providers. According to the Criminal Records Review policy, it is the responsibility of each employer or program to determine which of its positions are ones in which the individual “works with children” as defined in the *Act*. Organizations must review the positions and create *defensible criteria* for determining which positions “work with children.”

The applicability of the *Criminal Records Review Act* to First Nations School is discussed in this Handbook in Part One.

A *Criminal Records Review Act Implementation Guide* is available from:
Criminal Records Review: Security Programs Division
Ministry of Attorney General 2881 Nanaimo Street, Victoria, B.C. V8V 1X4
Phone: (250) 356-5486 Fax: (250) 356-1889

Questions about how to interpret the *Act* and its applicability can be directed to the phone number listed above. Employers should be aware that meeting the requirements of the *Act* will not necessarily address all of the potential concerns that may arise when dealing with this topic.

5. What if the *Independent School Act* Applies to You?

Sections of the *Independent School Act* apply to employment issues, and independent schools must be aware of these provisions.

For example, the *Act* provides that:

- 7(1) If an authority dismisses, suspends or otherwise disciplines a person holding a certificate of qualification issued under the *Teaching Profession Act*, it must without delay report the dismissal, suspension or disciplinary action to the council of the College of Teachers, giving reasons, and must send a copy of the report to the person holding the certificate.
- (2) If a person holding a certificate of qualification issued under the *Teaching Profession Act* resigns from employment with an authority, the authority must without delay report the circumstances of the resignation to the council of the College of Teachers, if the authority considers that it is in the public interest to do so, and must send a copy of the report to the person holding the certificate.
- (3) An authority that has made a report to the College of Teachers under this section in respect of a person holding a certificate of qualification issued under the *Teaching Profession Act* must, without delay after being requested to do so by the College of Teachers, (a) provide the College of Teachers with all of the records available to the authority that touch on the matter in respect of which the report was made, and (b) send a copy of the records referred in paragraph (a) to the person holding the certificate.

6. Privacy Legislation

There are several different statutes – both federal and provincial – that may apply when privacy issues are being considered. In addition, exceptions to privacy requirements may appear in other statutes, such as the *Child, Family and Community Service Act*. Privacy legislation is aimed at protecting the privacy of personal information by imposing restrictions on how such information is collected, used, and disclosed as well as giving individuals access to information about themselves. The purpose is to recognize both the rights of individuals to protect their personal information and the need of organizations to **collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances**. That test is really the key. Personal information may be contained in any format, for example, paper, electronic, audio, photographic or video. Privacy legislation does not affect solicitor-client privilege.

The *Privacy Act* (Canada) is intended to protect the privacy of individuals with respect to personal information about them held by a government institution and provide individuals with a right of access to that information. The purpose of the *Access to Information Act* (Canada) is to provide a right of access to information in records under the control of a government institution and is aimed more at access to government information. The main piece of federal legislation for private organizations is the *Personal Information Protection and Electronic Documents Act*.

Similarly, the purposes of the *Freedom of Information and Protection of Privacy Act* (BC) are to make public bodies more accountable to the public and to protect personal privacy by giving the public a right of access to records, giving individuals a right of access to and a right to request correction of personal information about themselves, specifying limited exceptions to the right of access, preventing the unauthorized collection, use or disclosure of personal information by public bodies, and providing for an independent review of decisions made under the Act. The Act applies to public bodies, which include educational authorities. Educational authorities are defined to include a board as defined in the *School Act* (i.e., a board of school trustees constituted or continued under the *School Act*). The main piece of provincial legislation for private bodies is the *Personal Information Protection Act*.

A brief summary of some key features of the most relevant privacy legislation for private bodies is provided below.

Personal Information Protection and Electronic Documents Act (Canada)

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) came into force on January 1, 2001. The organizations that are bound by PIPEDA include those that carry on activities in connection with the “operation of a federal work, undertaking or business.” “Federal work, undertaking or business” is defined to mean “any work, undertaking or business that is within the legislative authority of Parliament.” This is similar to the language used in the *Canada Labour Code*. All federally-regulated employers are subject to the requirements of PIPEDA. PIPEDA applies in respect of personal information that:

- (a) is about an employee of the organization and that the organization collects, uses, or discloses in connection with the organization's operation; or
- (b) the organization collects, uses or discloses in the course of commercial activities.

“Personal information” means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization. “Commercial activity” means any particular transaction, act or conduct that is of a commercial character, as well as a regular course of conduct that is of a commercial character. In other words, even where an organization's activities are largely non-commercial, i.e., not for profit, any one act or activities that might be found to have a primarily commercial purpose, and which involves the collection, use, or disclosure of personal information, may be subject to *PIPEDA*.

What are *PIPEDA*'s Main Requirements?

Schedule 1 to *PIPEDA* sets out the obligations with which every organization is required to comply. A copy of Schedule 1 is included at the end of this section **Schedule 1 can be reviewed on the following website <http://laws.justice.gc.ca/en/P-8.6/258076.html>. These obligations and recommendations are based on ten privacy principles: accountability; identifying purposes; consent; limiting collection; limiting use, disclosure and retention; accuracy; safeguards; openness; individual access; and challenging compliance. As noted above, the key obligation is to collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.**

Consent

Except in limited circumstances, an organization may not collect, use or disclose personal information about an employee without his or her prior knowledge and consent. Similarly, organizations may not collect, use or disclose personal information of a person other than an employee in the course of commercial activity without obtaining the prior knowledge and consent of that individual. These requirements apply to any new personal information acquired and any personal information already in possession of the organization.

The consent obtained must be meaningful. That means that individuals must be advised of the purposes for which their personal information will be used or disclosed. All purposes for which the personal information being collected is used must be identified at the time of collection. An organization may only collect information for purposes a reasonable person would consider appropriate in the circumstances.

PIPEDA does provide certain exceptions to the need to obtain consent. These include situations such as where obtaining consent would interfere with the investigation of a violation of the law, emergencies, where the personal information is necessary to deal with threats of life, health or security of an individual, or where disclosure to a third party is required by law.

PIPEDA provides for the possibility of obtaining implied consent, such as by notifying individuals that their consent will be assumed unless they take certain steps by a certain time. However, where the personal information is considered to be sensitive, *PIPEDA* suggests that

express consent will be required. *PIPEDA* also requires that organizations destroy personal information once it is no longer required to fulfill the purpose for which it was collected.

Policies

Under *PIPEDA*, an organization must have in place policies and practices regarding the management of personal information and must make information about those policies and practices readily available. One of the obligations is for the organization to train staff and communicate to staff information about the organization's policies and practices. Organizations must also have a mechanism by which an individual can obtain access to his or her personal information, including the right to request details regarding its use and disclosure.

Privacy Officer

Every organization bound by *PIPEDA* must have an individual designated to be responsible for the organization's compliance with *PIPEDA*.

Security

PIPEDA requires that personal information be protected by security safeguards appropriate to the sensitivity of the information. This might mean physical measures, such as locked filing cabinets and/or the use of computer passwords.

More information about *PIPEDA* can be found at www.privcom.gc.ca.

Personal Information Protection Act (BC)

The *Personal Information Protection Act (PIPA)* came into force on January 1, 2004. *PIPA* applies to "organizations, which are defined as including persons, unincorporated associations, trade unions and not for profit organizations. It does not apply to individuals acting in a personal or domestic capacity or acting as an employee. Nor does it apply to public bodies or the Nisga'a Government. The *Freedom of Information and Protection of Privacy Act (BC)*, which is similar to the *Freedom of Information Act (Canada)*, applies to public bodies, including school boards under the *School Act* and the Nisga'a Government.

If *PIPEDA* or the *Freedom of Information and Protection of Privacy Act (BC)* applies, then *PIPA* does not apply. As mentioned above, *PIPEDA* applies to First Nations schools in the employment context, i.e., information about employees. *PIPEDA* will also apply to commercial activity by a First Nations school. However, information about students or parents would likely be subject to *PIPA*.

In order to comply with *PIPA*, an organization must designate one or more individuals to be responsible for ensuring that the organization complies. The name or title of the designated individual and contact information for the individual must be made available to the public. An organization must:

- (a) develop and follow policies and practices that are necessary for the organization to meet its obligations under the Act;
- (b) develop a process to respond to complaints that may arise respecting the application of the Act;
- (c) make information available on request about
 - (i) the policies and practices under the Act, and
 - (ii) its complaint process.

An organization must not collect, use or disclose personal information about an individual unless the individual consents, the Act authorizes it without the individual's consent, or the individual is deemed to consent under the Act. On or before collecting personal information about an individual from the individual, an organization must disclose to the individual verbally or in writing (writing is better) (a) the purposes for the collection of the information, and (b) on request by the individual, the position name or title and the contact information for an officer or employee of the organization who is able to answer the individual's questions about the collection.

On or before collecting personal information about an individual from another organization without the consent of the individual, an organization must provide the other organization with sufficient information regarding the purpose of the collection to allow the other organization to determine whether the disclosure would be in accordance with the Act.

An organization whose employment is governed by *PIPA* is required to notify an individual that it will be disclosing employee personal information about the individual and the purposes of the disclosure before the organization may disclose employee personal information without the consent of the individual. If, for example, a First Nations school is checking references on an applicant who was previously employed by a provincially-regulated employer, that former employer will be subject to *PIPA*. The First Nations school will need to obtain from an applicant the consent to disclosure required under *PIPA* in order to obtain personal information about the applicant.

In contrast to *PIPEDA*, *PIPA* contains a definition of "employee personal information", which is personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information that is not about an individual's employment. Employment includes volunteer work under *PIPA*. "Personal information" means information about an identifiable individual and includes employee personal information but does not include contact information or work product information.

PIPA also applies to access to personal information. On the request of an individual, an organization must provide the individual with:

- (a) the individual's personal information under the control of the organization (control being broader than information in the custody of the organization);
- (b) information about the ways in which the personal information has been and is being used by the organization; and
- (c) the names of the individuals and organizations to whom the personal information has been disclosed.

The *Personal Information Protection Act Regulations* provide that the guardian of a minor may exercise the rights of a minor to make a request if the minor is incapable of exercising his or her rights. The guardian may also request that information be corrected and may give or refuse consent to the collection, use and disclosure of personal information of the minor if the minor is incapable of exercising that right.

An organization must not disclose personal information and other information if:

- (a) the disclosure could reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request;
- (b) the disclosure can reasonably be expected to cause immediate or grave harm to the safety or physical or mental health of the individual who made the request;
- (c) the disclosure would reveal personal information about another individual;
- (d) the disclosure would reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to the disclosure of his or her identity.

Certain information, such as information subject to solicitor-client privilege or information being used in an investigation, is not required to be disclosed. However, if the information that is not required to be disclosed can be removed, then the organization is required to remove it and disclose the rest of the information.

Unless an extension is appropriate for reasons provided in the Act, an organization has 30 days to respond to a written request for information.

If an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it. Otherwise, an organization must destroy its documents containing personal information or remove the means by which the personal information can be associated with particular individuals as soon as it is reasonable to assume that the purpose for which that personal information was collected is no longer being served by retention of the personal information, and retention is no longer necessary for legal or business purposes.

7. The *Criminal Code*

Effective March 31, 2004, the *Criminal Code* was amended to:

- expand the circumstances under which corporations and other organizations may be held criminally responsible for the acts of their representatives;
- establish a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public;
- set out factors for courts to consider when sentencing an organization; and
- provide optional conditions of probation that a court may impose on an organization.

Criminal liability of an organization for the actions of its employees could arise in the area of health and safety. Sections 219-221 of the *Criminal Code* deal with criminal negligence causing death or bodily harm. The new section 217.1 of the *Criminal Code* provides:

Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

If that duty is breached, and a person is injured or killed as a result, both the person who violated the duty and that person's employer may be charged with the offence of criminal negligence causing death or bodily harm. The person's conduct must have constituted a "marked departure" from the norms with respect to ensuring workplace safety. An organization may also be held criminally negligent for the actions of its representatives and senior officers taken as a whole.

The organization's due diligence in establishing training, safety and enforcement systems to prevent injury to employees or students will be its best defence in the event of criminal charges arising from an accident causing injury or death. Although the provisions regarding criminal liability are aimed at industrial accidents such as the Westray mine disaster, it is not difficult to think of examples of accidents causing injury or death that could happen in a school setting.

In addition to the provisions establishing liability for organizations, the *Criminal Code* was amended effective September 15, 2004 to protect "whistleblowers": employees who report unlawful activity. Section 425.1 provides:

425.1(1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

- (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

- (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.
- (2) Any one who contravenes (1) is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
 - (b) an offence punishable on summary conviction.

The Supreme Court of Canada's decision in *Merk v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, suggests that generally the employee's duty of loyalty and the public's interest in whistle-blowing is best reconciled with an "up the ladder" approach. In other words, the employee is generally required first to bring unlawful activity within the organization to the attention of those who can correct such wrongdoing. Public criticism or reporting to outside authorities will likely be justified where reasonable attempts to resolve the matter internally are unsuccessful. Although it makes labour relations sense to require employees to report matters internally as a first step, section 425.1 of the *Criminal Code* is narrower and does not contain that requirement.

8. References

In addition to the sources included in the appendices, as well as the Acts listed above, the following materials were used in developing this Handbook:

Grensing, L. 1991. *A Small Business Guide to Employee Selection. Finding, Interviewing and Hiring the Right People.* North Vancouver: Self-Counsel Press

Holzschu, M.A. 1996. *Complete Employment Handbook.* Wakefield: Moyer Bell.