INTRODUCTION

This issue of our Newsletter covers a number of different topics that are important for trade unions and their members.

As always, please feel free to contact us with any questions you may have in relation to any of the topics covered in this Newsletter.

INSIDE THIS ISSUE:

CaleyWray
Lawyers
Suite 1600
65 Queen Street West
Toronto ON M5H 2M5

T: 416-366-3763
F: 416-366-3293

www.caleywray.com

A. BILL 148, FAIR WORKPLACES, BETTER JOBS ACT, 2017

Brooke Auld

Ontario's provincial government has introduced *Bill 148, Fair Workplaces, Better Jobs Act, 2017*, which proposes amendments to the *Employment Standards Act* and the *Labour Relations Act*. This will be the first time in over a decade that both have been significantly revised. Over the last two years the government has participated in the Changing Workplaces Review which comprised of consultations with the public and various stakeholders. The government also examined various academic studies and inter-jurisdictional research. This process culminated in The Changing Workplaces Review Final Report, which contains 173 recommendations. Below we will review some of the most significant changes proposed in the Bill to the *Employment Standards Act* followed by the *Labour Relations Act.*

Proposed Changes to the *Employment Standards Act*

Minimum Wage

The most widely talked about proposed change is to Ontario's minimum wage. Instead of calculating minimum wage based on the rate of inflation, which is the current practice, if Bill 148 becomes law, Ontario's general minimum wage would rise to $14 on January 1, 2018 and $15 on January 1, 2019.

Equal Pay

Part-time, temporary, seasonal, and casual workers would receive the same pay as full-time employees when they perform the same job for the same employer. However, if a collective agreement conflicts with any of these provisions, the collective agreement prevails.

Temporary Help Agencies

Temporary Help Agency employees would be entitled to equal pay for the same work done by permanent employees. Temporary Help Agencies would be required to give advance notice to workers whose three month or longer assignment will be terminated early.

Scheduling

Bill 148 would allow employees to request schedule or location changes after three months of employment. Additionally, employees would be paid for three hours of work if a scheduled shift is canceled within 48 hours of its start. This provision will not apply

if the reason for the cancelation is out of the employer's control, which includes weather related reasons for certain weather dependent jobs. If an employee is provided less than four days' notice by an employer that he or she is scheduled to work, then that employee can refuse the shift without consequences. If a collective agreement conflicts with this provision, the collective agreement prevails if the provision has taken effect on January 1, 2019 and ceases to apply either upon the expiry of that agreement or on January 1, 2020 whichever is earlier.

Vacation

After working for 5 years for the same employer, employees would be entitled to three weeks of paid vacation. This would apply after each vacation entitlement year that ends on or after December 31, 2017. This does not include additional vacation days in respect of vacation entitlement years that ended before that time.

Personal Emergency Leave:

Workplaces of all sizes, not only those with more than 50 employees would be required to provide personal emergency leave. Employees would be entitled to 10 personal emergency days per year, two of which would be paid. Significantly, employers would no longer be permitted to request a sick note from an employee taking personal emergency leave. Bill 148 would also create new leaves: child death leave as well as a separate leave for crime-related child disappearance. Family Medical Leave would increase from 8 weeks in a 26-week period to up to 27 weeks in a 52-week period.

Domestic or Sexual Violence Leave:

Bill 148 would create a new, standalone leave for Domestic or Sexual violence. In order to utilize this leave, an employee would have to have been employed by their employer for 13 consecutive weeks. This leave covers the employee or a child of an employee, who has experienced domestic or sexual violence or the threat of either. Bill 148 sets out specific events that the leave can be taken for: to seek medical attention; obtain services from a victim service organization; to seek legal or law enforcement assistance and others.

Proposed *Labour Relations Act* Changes

Card Based Certification

Bill 148 would establish card-based certification for the temporary help agency industry, building services sector and home care and community services.

Fine increases

Currently the maximum fine under the *Labour Relations Act* for organizations, who are non-compliant with the Act is $25,000. Bill 148 would increase this amount to $100,000. The current maximum fine for individuals who are non-compliant is $2,000. Bill 148 would increase this amount to $5,000.

Remedial Certification

Under the proposed change contained in Bill 148, if the OLRB finds that an employer's contravention of the *Labour Relations Act* has compromised the ability to ascertain whether representation reflects the wishes of the employees, the OLRB would be required to certify the union as the bargaining agent.

Contact Information

If the union can demonstrate that it has achieved 20% of the employees involved in the collective bargaining process, then the OLRB will allow that union to access employee lists and certain contact information. It is important to note that this proposed amendment would not apply in the construction industry and that there are a number of provisions included in the Bill for the protection of employees' private information.

Voting

If passed, Bill 148 would allow the OLRB to conduct votes electronically and by phone.

Structure of Bargaining Units

If the OLRB certifies a union or council of unions as the bargaining agent of the employees in a bargaining unit, the OLRB may review the structure of the bargaining units if each of the following conditions are met:

1. The employer, trade union or council of trade unions make(s) an application to the Board requesting the review at the time the application for certification is made, or within three months after the date of certification.

2. A collective agreement has not yet been entered into in respect of the bargaining unit.

3. The same trade union or council of trade unions that is certified as the bargaining agent of the employees in the bargaining unit already represent(s) employees of the employer in another bargaining unit at the same or a different location.

Where the Board reviews a bargaining unit, the Board must allow for the parties to come to an agreement. If the parties are unable to reach an agreement, then the Board would have the authority to make orders that it sees fit in the circumstances.

In an earlier version of Bill 148, there was an amendment that sought to allow the Board to review the structure of bargaining units, where the units no longer were appropriate. This provision has since been removed.

Discipline

Another proposed change under Bill 148 would protect employees from being disciplined or discharged without just cause by their employer in the period between certification and the earlier of the following dates: (1) the date on which a first collective agreement is entered into; and (2) the date on which the trade union no longer represents the employees in the bargaining unit.

Successor Rights

Bill 148 would extend successor rights to the retendering of building services contracts. If passed, Bill 148 would also provide the government the ability, through regulation, to expand successor rights to the retendering of other publicly funded contracted services.

First Collective Agreement Mediation Time Limits

Bill 148 proposes to increase the following time limits from 20 days to 45 days:

- No employee shall strike and no person or trade union shall call or authorize or threaten to call or authorize a strike by any employee during the period beginning at the time the Minister makes an appointment of a mediator and ending on the day that is 45 days later.
- The Board shall not deal or continue to deal with a decertification application or displacement application until 45 days after the Minister makes an appointment.
- At any time on or after the day that is 45 days after the Minister makes an appointment if the parties have not entered into a collective agreement, either party may apply to the Board to direct the settlement of a first collective agreement by mediation-arbitration.

After First Reading at the beginning of the 2017 summer, Bill 148 was referred to the Standing Committee on Finance and Economic Affairs. The Committee conducted public hearings across Ontario. As a result of these public hearings, the Committee adopted several amendments, which are reflected above. Bill 148 has now passed Second Reading in the legislature. It will be sent back to the Standing Committee on Finance and Economic Affairs for further public hearings. Following this, it will return to the

legislature for Third Reading debates. The final step will be a vote by all parties in the legislature and Royal Assent.

B. BILL 114 (ANTI-RACISM ACT, 2017)

Ngozi Okidegbe

On June 1, 2017, Ontario passed *Bill 114 (Anti-Racism Act, 2017)*, which requires Ontario to maintain an anti-racism strategy that aims to eliminate systematic racism and advance racial equity. Under Bill 114, Ontario is required to create mechanisms to monitor and redress racial disparities.

Background to Bill 114

Bill 114 is part of a broader strategy to target systemic racism through the implementation of racial equity policies and programs. For instance, in February 2016, the Anti-Racism Directorate was established. Prior to the implementation of this strategy, the primary avenue for redressing racial discrimination was through Ontario's *Human Rights Code*, which allows individuals discriminated against due to race or to other personal characteristics to seek a personal remedy. In contrast, Bill 114 seeks to combat systematic discrimination that adversely impacts marginalized groups such as members of Indigenous, racialized, Muslim, and Jewish communities.

Relevant provisions of Bill 114

Bill 114 allows Ontario to establish data collection to identify, monitor, and redress racial disparities. If established, public sector organizations may be required to collect and disclose information, including personal information, in relation to anti-racism programs and services, unless the organization is a health information custodian. Public sector organizations are defined as including:

- Ministries of the Government of Ontario;
- Municipalities,
- Universities;
- Local boards; and
- District social service administration boards.

Where personal information is collected directly from the individual, the public sector organization is required to inform the affected individual of:

- the type of personal information being collected;
- the purpose of collection, which is to eliminate systemic racism and advance racial equity;
- the fact that no program, service, or benefit may be withheld if the individual refuses to provide the personal information; and
- the title and contact information of an employee, who can answer the individual's questions about collection.

Where personal information is indirectly collected, the public sector organization is required to publish a notice on its website with the above information.

Bill 114 also contains rules regarding the protection and retention of personal information collected.

Conclusion

Given that Bill 114 provides Ontario with additional tools to address systematic racism, Unions representing members working at public sector organizations should be aware of it. At CaleyWray, we are happy to answer any questions that Unions might have concerning Bill 114 in particular or human rights issues in general. Please contact us for further information.

C. INDEPENDENT MEDICAL EXAMINATIONS

Douglas Wray

A question that arises quite frequently is when can an employer require that an employee undergo an "independent" medical examination ("IME") with a physician selected by the employer.

There are many situations where an employee's fitness to work can arise; for example, calling in sick, applying for short or long term disability benefits, applying for WSIB benefits, accommodating a disability under a collective agreement or the *Human Rights Code,* etc. In all these situations, an employee will be expected to provide medical information from their own physician(s). The more contentious issue is whether – and/or in what circumstances – an employer can require that an employee undergo an IME.

There is a traditional line of cases that stand for the proposition that an employer can only require an IME if it has a contractual or statutory right to do so. Most insurance plans (for short and long term disability benefits) have express provisions dealing with IMEs. There are also rules that apply when individuals are applying for WSIB benefits. Most collective agreements, however, are silent on the general issue of requiring employees to undergo an IME.

Sometimes, of course, employers, unions and employees may agree on an IME (even on a without prejudice basis) as a means of attempting to resolve a dispute concerning an employee's fitness to work.

The difficult question is whether, and/or in what circumstances, an employer can require an employee to undergo an IME in the absence of any contractual provision giving the employer such a right. The issue involves considerations of privacy, and indeed freedom from assault (in the form of unwanted touching by the physician).

The Ontario Divisional Court recently dealt with this issue in the context of a *Human Rights Code* complaint by a management employee.

Mr. Bottiglia was a School Superintendent in Ottawa employed by the Ottawa Catholic School Board (the "OCSB"). He was absent from work for an extended period and was under the care of a psychiatrist for depression and anxiety. Mr. Bottiglia then sought to return to work, subject to various conditions recommended by his psychiatrist. The OCSB, relying on its internal management Guide to Workplace Accommodation for Employees, requested that Mr. Bottiglia undergo an IME to assess his current health status, his ability to perform his duties, and any relevant accommodation that might be necessary. Mr. Bottiglia refused to attend the IME. He filed a complaint with the Human Rights Tribunal. He later resigned.

The Tribunal, in a decision dated September 4, 2015, dismissed the application.

The Tribunal held that the employer had acted reasonably in requiring Mr. Bottiglia to undergo an IME as part of the accommodation process. (The Tribunal also held that Mr. Bottiglia had terminated the accommodation process by failing to attend the IME.)

On judicial review, the Divisional Court held that OCSB did not have the right to require the IME based on its internal Management Guide.

The Court further held that an employer such as the OCSB does not have a freestanding unrestricted right to require an employee to undergo an IME as part of the statutory duty to accommodate under the *Human Rights Code*.

However, the Court held that the OCSB acted reasonably in the particular factual circumstances in requiring Mr. Bottiglia to undergo an IME. The circumstances included the length Mr. Bottiglia had been absent from work (almost two years) and that there was significant and unexpected changes in Mr. Bottiglia's stated ability to return to work. Specifically, Mr. Bottiglia's psychiatrist had held the position, for almost two years, that Mr. Bottiglia was unable to return to work. His opinion then changed and he then stated that Mr. Bottiglia could return to work, subject to various conditions. The Court stated this "about-face" "provided a reasonable and *bona fide* basis for the OCSB to question the adequacy and reasonableness" of the physician's opinion.

In summary, the case emphasizes that there are no hard and fast rules that apply to IME requests. The propriety of such requests will, in most cases, depend very much on the particular facts of each individual case.

Bottiglia v. Ottawa Catholic School Board, 2017 ONSC 2517

D. THE "DAY OF APPLICATION" TEST COMES UNDER FIRE IN RECENT BOARD DECISIONS

Maeve Biggar

For certification applications in the construction industry, the Ontario Labour Relations Board has a clear benchmark to determine which employees are in the bargaining unit: those who performed bargaining unit work for the majority of the day on the application filing date. The "day of application" test, as it is commonly referred to, has been consistently applied by the Board to resolve status disputes in the construction industry for the last sixty years. The test has long been heralded as the only functional way to define a bargaining unit in the construction industry, where employees often move fluidly among employers. However, a series of recent cases have called into question the legitimacy of the "day of application" test as it pertains to workers' rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

There is no question that the "day of application" test is a blunt tool that often leads to the exclusion of certain employees from the unionization process. If only two out of fifty employees are at work on a particular day, a union can file an application for certification with merely two membership cards and receive automatic certification. However, the Board has consistently defended the test on the grounds that it provides a bright line rule that balances expediency with fairness. A more nuanced alternative, it has been said, would inevitably result in lengthy delays in the certification process.

In two ongoing cases at the Board, *Govan Brown & Associations Ltd.* (OLRB No. 0838-16-R) and *Graham Bros. Construction Limited* (OLRB No. 0030-16-R) the "day of application" test has been challenged on the basis that it violates employees' section 2(d) rights under the *Charter*, which protects freedom of expression. The gist of the case against the "day of application" test is that it precludes certain employees (i.e. those that are not performing bargaining unit work on the application date) from participating in the unionization process, which they are entitled to do under the *Charter*. The Board has not issued its final determination on the *Charter* issue in either case to date.

A recent decision from the Board, *Labourers' International Union of North America, Ontario Provincial District Council v.Looby Construction Limited* (2017 CanLII 1592) suggests that the Board will likely not entertain the *Charter* challenges to the "day of application" test in the *Govan Brown* and *Graham Bros.* cases. The *Looby* case dealt with a number of applications being heard together, including two displacement applications. The complicating factor was that the employer was not engaged in any construction work during the open period and therefore, according to the "day of application" test, there were no employees in the bargaining unit when the displacement applications were filed. The applicant unions argued that the "day of application" test robbed the workers of their chance to terminate their current union's bargaining rights or choose a different union to represent them.

In rejecting the applicants' argument, Vice-Chair McKee concluded that the *Charter* jurisprudence to date confirms that employees are only entitled to a "degree of choice" with respect to trade union representation, and that a statutory scheme need not provide each individual employee a voice to meet this standard. He concluded that the "day of application" test on the whole provided employees with a sufficient degree of choice, even though it may exclude certain employees from the process. Vice-Chair McKee also aptly pointed out that allowing exemptions to the "day of application" test on a case-by-case basis would invite such an argument in each and every certification and termination case that goes before the Board. Given the length of time that these proceedings currently take under the current status quo, this is certainly not an insignificant consideration.

It appears that the "day of application" test is likely safe for now, or at least until an alternative is proposed that can strike a better balance between fairness and expediency.

E. THE SUPREME COURT OF CANADA'S DECISION *ELK VALLEY* PLACES HIGHER EXPECTATIONS ON EMPLOYEES WITH SUBSTANCE ABUSE ISSUES

Robert M. Church

On June 15, 2017, in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, the Supreme Court of Canada upheld a decision of the Alberta Human Rights Tribunal, which concluded that an employee, who had a cocaine addiction and was involved in an accident at work, was not dismissed or discriminated against because of his addiction – since he was dismissed for breaching his employer's Alcohol, Illegal Drugs & Medical Policy by failing to disclose his off-duty drug use.

This decision seems to emphasize the responsibilities on your members to be proactive in disclosing alcohol or drug use issues where an employer policy so requires (despite the associated difficulties and stigma). The decision also indicates the importance of your members being aware of employer policies on alcohol and drug use, and the necessity of obtaining medical evidence for the purposes of defending members that fail to disclose these issues, whether to the union or to the employer.

The Facts

Elk Valley Coal Corporation operates a mine in Alberta. It implemented a drug and alcohol policy requiring employees to disclose any dependence or addiction issues before they were involved in any drug-related incidents. If an employee disclosed his or her addiction, then that employee would be offered treatment. If not, and if the employee was involved in an incident and tested positive for drugs, that employee would be terminated.

The employee in question drove a loader in the mine. He used cocaine on his days off, but did not disclose his drug use to his employer. The employee was involved in an accident in his loader, was tested for drug use in accordance with the policy, and tested positive for cocaine. After the positive test, he indicated to his employer he thought he was addicted to cocaine.

Under the policy, his employment was terminated. The employee filed a complaint with the Alberta Human Rights Tribunal alleging that his employer discriminated against him by terminating his employment because of his disability.

The Alberta Human Rights Tribunal Decision

The Tribunal dismissed the complaint. It found that the reason for the termination was *not* the disability, but the failure to disclose the disability (addiction), in breach of the employer policy. The Tribunal found that no *prima facie* discrimination was established by the employee – in practical terms, the Tribunal found that his drug use did not make his failure to disclose his addiction non-culpable.

The decision was affirmed by the Alberta Court of Queen's Bench and by the Alberta Court of Appeal.

The Supreme Court of Canada Decision

The employee appealed the decision of the Alberta Court of Appeal to the Supreme Court. The Supreme Court upheld the Tribunal's decision that the employee's termination was not discriminatory because the reason for the employee's termination of employment was not the disability *per se,* but breach of the disclosure requirement of the employer policy.

The justices upheld the case but split on the issues. The majority, led by Chief Justice McLachlin, found the Tribunal had been reasonable in concluding that there was no discrimination. The minority found that there was discrimination, but that this discrimination was justified because the employer could not accommodate the addicted employee without incurring undue hardship. One justice wrote a minority judgment finding that there was discrimination and the Tribunal's decision was unreasonable.

The Court found that the evidence before the Tribunal clearly established that the employee had the capacity to comply with the terms of the policy, but failed to do so. (In our view, medical evidence is needed to establish that a failure to comply with the policy was a direct result of the employee's disability).

The decision in *Elk Valley* does not change the legal framework for assessing whether there has been discrimination under Canadian law:

(1) A complainant must still show that they have a characteristic (in this case, disability) that is protected under the relevant human rights legislation;

(2) That they experienced an adverse impact; and,

(3) That the protected characteristic was a factor in this adverse treatment.

Consequently, the Court concluded that the Tribunal's decision was reasonable. The Supreme Court did not address the issue of whether the employee was reasonably accommodated because a *prima facie* case of discrimination was not made out.

Implications for Unions and Your Members

As this decision is relatively recent, having been decided in June 2017, the question of how arbitrators will apply *Elk Valley* is not yet clear. The interpretation of human rights protections in Canada as they apply to drug and alcohol dependency remains an area of significant debate and dispute. However, some conclusions can be drawn:

- This case has negative implications for employees with drug or alcohol addictions. It is common for an employee with addiction issues to be unaware that they have a disability, or to minimize its impact. Many employees may not disclose to employers for this reason. However, by helping your members to obtain the necessary medical evidence to establish that a failure to disclose was a direct symptom of the disability, we believe this problem can hopefully be mitigated.

- Both the majority and the concurring reasons make clear that the safety of the workplace and other employees is a valid objective for employers and will be given considerable deference by adjudicators when reviewing the actions of employers.

- The policy relied upon by the employer was clear and made well-known to employees. The employees were trained on the policy and signed acknowledgements of their awareness of its terms. Knowledge of the policy will be hard to disprove in this scenario.

F. MEDICAL MARIJUANA

Brooke Auld

Medical marijuana has been legal in Canada, since before the new millennium. With the number of registered users on the rise, many employers wonder about the impact medical marijuana has on their workplace's safety. Distinct from the legalization of recreational marijuana and the use of both legal and illegal substances in the workplace, medical marijuana in the workplace raises complex issues that require a

discussion involving a host of issues including alcohol and drug policies and the specific details in each scenario.

There are few, if any reported decisions of medical marijuana causing accidents or incidents on safety sensitive job sites in Canada. However, many employers' first reaction to learning that an employee has been prescribed marijuana is "he or she can no longer work here safely." There is much more to it than that and several important questions to consider. Ontario's *Occupational Health and Safety Act* states that employers have a duty to take "every precaution reasonable in the circumstances for the protection of the worker." This is coupled with the requirement in Ontario's *Human Rights Code* that employers have a duty to accommodate employees with disabilities, unless it would cause undue hardship. Each province has similar language in their legislation that demonstrates this balance that must be considered when dealing with medical marijuana in the workplace.

In *Calgary (City) v. Canadian Union of Public Employees (CUPE 37)*, 261 L.A.C. (4th) 1 a city employee who in a safety sensitive position was prescribed medical marijuana by his doctor. The employee notified two supervisors of his prescription and continued to operate heavy machinery in this safety sensitive workplace. The employee was later removed from his duties pending investigation and assessment, despite explaining that he only took the prescription before bed to relieve his pain. The arbitrator performed a human rights analysis under the collective agreement. The arbitrator looked at the employee's safety record, his disclosure of marijuana use and the steps the employer took before reassignment of the employee's duties. It was found that there was a failure of the employer to make a proper assessment of the employee, his duties and the impact of his marijuana use prior to him being removed from his duties.

In *Construction Employer's Association Inc. and IBEW, Local 1620*, 270 L.A.C. (4th) 171 the Grievor worked for a contractor on the Lower Churchill Project in Newfoundland and Labrador. The Grievor was a structural assembler of a transmission line. The work site was safety sensitive and required workers to stay at a campsite nearby due to its remote location. When the Grievor applied to work on the project, he was required to fill out a medical questionnaire, which asked if he took any medications that may have side effects. The Grievor did not disclose that he had a prescription for medical marijuana. The Grievor also refrained from taking his medical marijuana prescription leading up to a drug rest required for the application. The Grievor brought his prescription with him to the worksite, but only used it on the side of the highway and not on the worksite. The project's safety advisor discovered the Grievor's marijuana use and terminated him for violating the project's drug and alcohol policy. The Arbitrator found that there was no use of the marijuana on the worksite. However, the Arbitrator found that the Grievor had violated the drug and alcohol policy by not disclosing his medical marijuana use prior to commencing work on the project and by possessing marijuana on the worksite. On judicial review, 2016 NLTD(G) 192, the Court found that

the Arbitrator's decision met the standard of reasonableness with regards to the findings on misconduct and breach of the employer's policies. However, the Court found that the Arbitrator failed to properly consider whether the termination was justified in the circumstances and thus the matter was sent back to the Arbitrator.

These cases help to establish the complex considerations involved when examining medical marijuana in safety sensitive workplaces. They also help to demonstrate that employers should inquire as to whether the employee will be able to perform the essential duties of their job and the types of accommodations needed. Employers should not make stereotypical assumptions about the abilities of an employee prescribed medical marijuana or jump to conclusions without thoughtful deliberation of the issues in a particular situation. If employers do not do this, then failure to accommodate issues can arise relating to unfair discipline, lost time, lost wages and benefits, discharge and loss of employment. Each of these results raise the potential for human rights litigation.

The state of the law in this area is in its earliest stages and is constantly evolving. Each case will be decided based on its individual set of facts.

CaleyWray is recognized as one of Ontario's and Canada's leading labour law firms representing trade unions and their members, with a record of providing quality service for over 40 years.

We are a "full service" labour firm, providing experienced and effective representation to our clients in all areas of law that impact on trade unions and their members, including WSIB, Human Rights and Pay Equity.

This includes acting on behalf of Boards of Trustees of pension plans, health and wellness plans, apprentice plans, etc.

We pride ourselves on providing the highest quality legal representation at reasonable rates.

Our goal is to obtain the best results possible for our clients in a cost-efficient manner.

CaleyWray
Lawyers

Suite 1600
65 Queen Street West
Toronto ON M5H 2M5

T: 416-366-3763
F: 416-366-3293

www.caleywray.com