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.

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A. BILL 47
MAKING ONTARIO OPEN FOR BUSINESS ACT, 2018

The Ontario Provincial Government introduced Bill 47 on October 23, 2018 and it is currently proceeding through the legislature. The Bill significantly amends the *Employment Standards Act* and the Ontario *Labour Relations Act*. We sent out a Newsflash on October 25, 2018. Please contact us if you wish to receive a copy or visit our website where there is a link to the Newsflash under "News".

B. PERSONAL EMERGENCY LEAVE ("PEL") – TWO PAID DAYS

Michael Church and Brooke Auld

Personal emergency leave ensures that employees have job protected leave when an emergency arises. This has been long recognized by the *Employment Standards Act, 2000* (the "*ESA*"). This leave recognizes that the health of others may depend on employees who are ill remaining away from the workplace, and also recognizes that many families rely on a parent, spouse or other relative to care for sick family members on shorn notice or when a person is faced with an urgent matter.

Until January 2018, PEL days under the *ESA* were unpaid. Bill 148 made two (2) of the ten (10) PEL days paid. Allowing for two (2) paid days and eight (8) unpaid days ensures that employees are not penalized for missing work due to unexpected or sudden named occurrences and recognizes that life events can happen without warning.

When the *ESA* was changed to make two (2) PEL days paid, many unionized employers took the position that collective agreements provide a greater right or benefit than the paid PEL days under the *ESA*, and that therefore they refuse to pay for two (2) PEL days.

A number of grievances filed by Unions on this issue have proceeded to arbitration. Fortunately, most of these union grievances have been successful or partially successful. The level of success depends on the specific wording of each collective agreement with respect to any possible comparator, or similar of benefit, in the "greater right or benefit" analysis.

A recent decision was issued by Arbitrator Nyman in the matter of a dispute between the *Steelworkers and St. Mary's Cement* (2018 CanLII 84794) in respect to the claimed entitlement of workers for two (2) paid days of PEL. In this case, the employer argued that the employees were entitled to ten (10) unpaid days of PEL under the *ESA*. The

employer argued that it was not obliged to provide paid PEL days on the basis that the collective agreement provided a greater right or benefit, relying on other entitlements under the collective agreement such as bereavement leave, weekly indemnity and long term disability leaves.

Arbitrator Nyman provided an interesting analysis of the purposes of PEL days and the case law. He concluded that the proper analysis in such cases, required a comparison of the total benefits under the *ESA* vis-à-vis the total benefits of the same subject matter under the collective agreement, if applicable. He ultimately found the benefits under the collective agreement that the employer wished to include in the comparison served different purposes than the PEL paid day benefits as envisioned under the *ESA* . As a result, he found that the other collective agreement benefits were not properly part of the weighing process for determining whether the collective agreement provides a greater right or benefit than the *ESA* for PEL-related absences.

The above decision provides a fresh, novel and helpful argument to any trade union which seeks to enforce paid PEL days under the *ESA* for its members.

In another recent decision, *SEIU Local 1 and Extendicare Canada Inc.* (2018 CanLII 100280), Arbitrator Gedalof considered both the Full-Time and Part-Time Collective Agreements between the parties. Arbitrator Gedalof determined that under both agreements, probationary employees were entitled to the two paid PEL days under the *ESA*, but that with respect to all other classes of employees, the Collective Agreements provided a greater right or benefit.

As many trade unions are well aware, the current Government of Premier Ford has introduced Bill 47, which would repeal many of the helpful provisions of Bill 148, including two (2) paid PEL days.

C. BENEFITS FOR WORKERS AGED 65 AND OVER: WHAT HAPPENS WHEN THE HUMAN RIGHTS TRIBUNAL OF ONTARIO FINDS THE HUMAN RIGHTS CODE UNCONSTITUTIONAL?

Robert M. Church

On May 18, 2018, in an interim decision in *Talos v. Grand Erie District School Board*, 2018 HRTO 680, the Human Rights Tribunal of Ontario (the "HRTO") issued a surprising decision declaring that a portion of its own statute, the Ontario *Human Rights Code* (the

"*Code*"), was discriminatory and unconstitutional under Canada's *Charter of Rights and Freedoms* (the "*Charter*").

Background

In *Talos*, a school teacher brought an application to the HRTO to argue that a section of the *Code* which allows providers to terminate benefits for workers over age 65 infringed his equality rights and was unconstitutional. The present *Code* explicitly states, at section 25(2.1), that it is not a violation of an employee's human rights for an insurance plan to terminate health and welfare benefits, short-term disability ("STD"), long-term disability ("LTD"), and life insurance for employees who are age 65 and over. The *Code*, on its face, permits this specific type of age discrimination:

> Section 25(2.1)
>
> "The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder."

Given the broad definition of "group insurance" plan under the *Code*, it is likely that this section also applies to union-sponsored health and welfare trust funds, in addition to employer-sponsored plans.

Through this exception, employers, unions and health and welfare trust funds could choose benefit plans that terminated or significantly reduced benefits for employees who turn age 65 and over, even if they are still working full-time. The claimed reasoning for this exception was the additional cost of benefits for older workers. As a result, many collective agreements across Ontario contain few or no benefits for workers age 65 and over, as unions bargained and trust funds implemented this issue in the face of the s. 25(2.1) exception. The cessation of benefits at age 65 was a lawful standard practice in Ontario.

The Recent *Talos* Decision

In *Talos,* the HRTO overrode a decade of its own jurisprudence and found that subsection 25(2.1) of the *Code*, as well as related provisions in the *Employment Standards Act, 2000* and its regulations, amounted to age discrimination and violated section 15 of the *Charter* by infringing on Mr. Talos' right to equal protection and equal benefit of the law. He had

been cut off from his group health, dental and life insurance plans (the case does not specifically address LTD benefits).

The HRTO found that Mr. Talos experienced disadvantage on the basis of age and that his rights under the *Charter* had been infringed as a result of the impact of the exception in the *Code*. Specifically, after considering the extensive evidence presented (including actuarial, economic and sociological evidence), the HRTO concluded that the *Code's* limit of age 65 for protection from discrimination in the provision of benefit and insurance plans appeared unacceptable "given the cogent evidence to the contrary that there is no close link to costs and age" (para. 283).

This decision comes as a surprise to unions, trust funds and employers, particularly since the HRTO and labour arbitrators have ruled in the past that the termination of benefits for workers over the age of 65 did not violate the *Code* (see for example Arbitrator Brian Etherington's decision in *Chatham-Kent (Municipality) v. Ontario (Attorney General)* (2010), 202 L.A.C. (4th) 1, upholding the constitutionality of s. 25(2.1)).

As a result of the HRTO's decision, plan providers across Ontario may be required to alter group health, dental and life insurance benefit plans if they offer fewer or no benefits to employees age 65 and older compared to younger employees. This could be the case whether those benefits are set out under a collective agreement or under non-union contracts of employment. We anticipate that trade unions may be expected to file grievances for their members on this issue, even if the union was involved in negotiating the benefits in question or if the trust fund established by the union administers the plan.

Going Forward

It is likely that one of the Responding Parties will file an application for judicial review to attempt to have the decision in *Talos* overturned by the courts; to date, they have not done so. As well, this case was only an interim decision; it did not deal with the merits of Mr. Talos' discrimination claim.

According to the Supreme Court of Canada, administrative tribunals like the HRTO may decide Charter issues, but their decisions on those issues are not binding on future decision makers, within or outside the tribunal[1]. In other words, the HRTO can rule on the constitutionality of section 25(2.1), but it takes a Superior Court (or higher) decision to strike section 25(2.1) as invalid across the province.

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[1] *Nova Scotia (Workers' Compensation Board) v. Laseur,* 2003 SCC 54

As a result, for now, until the Ontario courts rule on this issue, the exception at s. 25(2.1) remains a part of the *Code*, and the *Talos* decision is not binding on other HRTO panels or labour arbitrator – although it may be quite persuasive.

D. MARIJUANA IN SAFETY-SENSITIVE WORKPLACES: *INTERNATIONAL BROTHERHOOD LOWER CHURCHILL TRANSMISSION CONSTRUCTION EMPLOYERS' ASSN. INC.*

Denis Ellickson

With recreational marijuana now legal throughout Canada, there has been a renewed focus on and amendment to employer policies as they relate to drug and alcohol use. At least one recent arbitration award has caused some concern amongst trade unions and employees regarding the ability of an employer to dictate off duty conduct and the use of marijuana.

In *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc.,*[2] the Union had referred the Grievor to work in a safety-sensitive position with the Employer. The Grievor was required to submit to a pre-employment drug test which revealed the presence of THC. The employer then learned that the Grievor had been prescribed medical marijuana by his physician. The only restriction suggested by the physician was that the Grievor not drive a motor vehicle for four hours after use. Ultimately, the employer refused to employ the Grievor and a grievance was filed.

This case is significant because the Arbitrator concluded, based on expert medical evidence, that an individual who consumes marijuana can still be impaired for up to 24 hours afterwards (based partly on a Health Canada report from 2013 which related to chronic users). Further, the arbitrator concluded that there was a "lack of reasonable ability to measure impairment in persons using cannabis – blood and urine tests do not measure current impairment plus the lack of specifically trained individuals who can observe and measure impairment in one's judgment, motor skills, and mental capacity – presents a risk of harm that cannot be readily mitigated."[3]

On this basis, the arbitrator concluded that "the inability to measure and manage that risk [impairment]... constitutes undue hardship for the Employer."[4]

For several reasons we are of the opinion that the Arbitrator's conclusion is wrong.

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[2] 2018 CarswellNfld 198 (Roil)("*Lower Churchill*").
[3] *Ibid*, para 178
[4] *Ibid*, para 201

First and most importantly, the Arbitrator has shifted the burden of proof from the employer onto the employee. According to the Arbitrator the employer is not responsible for proving impairment, the employee is responsible for moving non-impairment. That is a stunning reversal of the law in our view.

Second, employers – just like law enforcement officers once marijuana becomes legal – have tools to assess impairment. Apart from any form of saliva, urine or blood testing, these tools include observation and interviews of employees.

Third, drug testing – along with making inquiries of the employee – remains a viable option for employers. If an employee is suspected of being impaired or is involved in a significant incident where reasonable cause exists, it is open to most employers to request the employee submit to a drug test. While a blood test remains the only reliable test to measure present impairment – contrary to what the arbitrator concluded in *Lower Churchill* – both saliva and urine test an employee's past use. A sufficiently high reading will likely raise suspicion and result in further investigation.

Finally, with respect to the decision in *Lower Churchill*, the Arbitrator's conclusion that the Grievor could not be accommodated would likely not be the same conclusion reached by an arbitrator appointed under a different collective agreement. Most employers have some non safety sensitive and non safety critical positions and accommodation in one of those positions is likely feasible for an employee with a medical marijuana prescription.

The issue with marijuana for many employers and some adjudicators is that, unlike alcohol, the only truly reliable test of impairment is blood testing. Again unlike alcohol, an employee may believe they are not impaired or suffering any effects, but still have THC - the principal psychotic constituent in cannabis - present in their system. Mere presence of THC in urine or saliva is not, in and of itself, evidence of impairment. The only truly conclusive test for impairment by marijuana is a blood test and blood testing, being of its highly intrusive nature and cost, has generally not been adopted by employers in Canada or sanctioned by adjudicators. Saliva or urine testing remain generally reliable tests for past use but not useful in detecting present impairment (this, in fact, is a reversal of the long accepted and conventional view that a saliva test was a reliable indicator of impairment by marijuana and certain opioids).

The unreliability of current testing methods to establish impairment – bolstered by the decision in *Lower Churchill* – is likely what is compelling various employers to implement a zero tolerance policy as it relates to marijuana use by employees in safety critical positions.

E. *ST. MICHAEL'S HOSPITAL AND THE ONTARIO HOSPITAL ASSOCIATION V ONTARIO NURSES ASSOCIATION*[5]: VACCINATION - A SECOND FAILED KICK AT THE CAN

Robert Whillans

St. Michael's Hospital is the second recent decision to address "Vaccinate or Mask" ("VOM") policies. Arbitrator Kaplan determines in this decision that the enactment of the VOM policy by St. Michael's Hospital was an unreasonable exercise of management rights, and that the VOM policy violated nurses' collective agreement right to refuse an unwanted vaccination. However, unlike an earlier award, Arbitrator Kaplan would not go so far as to say the VOM policy was simply a mechanism of coercion.

The St. Michael's Hospital VOM policy required Health Care Workers who had not received a flu vaccine to wear a mask in areas where patients are present. This meant that Health Care Workers who exhibited no signs whatsoever of infection would be required to wear masks – those who were symptomatic were not to attend work.

The Ontario Nurses' Association ("ONA") not only grieved St. Michael's VOM policy, but also every other VOM policy introduced at hospitals across the Province. ONA and the Ontario Hospital Association ("OHA") determined that a "lead case" should be litigated rather than each individual grievance concurrently. The Sault Area Hospital VOM policy grievance was designated as the lead case and the arbitration of that grievance was held before Arbitrator Hayes in 2014 and 2015 (*Sault Area Hospital and the Ontario Hospital Association v Ontario Nurses' Association*, [2015] OLAA No 339).

In this previous decision, Arbitrator Hayes agreed with ONA that there was insufficient scientific evidence to support the implementation of the VOM policy. This absence of objective justification for the policy was all the more notable given that the policy could require ONA members to wear masks for up to six months a year. Arbitrator Hayes then went further and found that the purpose of the VOM policy was to coerce influenza immunization. This was because the minutes of a hospital meeting referred to required mask-wearing (at the nurses' own expense) as a potential punitive tool to be used to encourage vaccination.

The VOM policy at issue in both the matter heard before Arbitrator Hayes and that before Arbitrator Kaplan were essentially identical. But, despite the conclusion of Arbitrator Hayes' award, St. Michael's Hospital did not discontinue its VOM policy. As such, the OHA and ONA agreed that the award relating to St. Michael's Hospital would be the final word on the matter, binding on all other OHA hospitals with the same VOM policies.

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[5] 2018 CanLII 82519 (Kaplan)("*St. Michael's Hospital*").

The length and extent of the litigation of the St. Michael's case is noteworthy: it took several days of hearing over three calendar years and involved over 150 exhibits. Endless scientific articles, studies, literature reviews, and expert reports were involved.

In the end, Arbitrator Kaplan found that this extensive scientific evidence more or less tread the same ground as the hearing before Arbitrator Hayes. So, unsurprisingly, Arbitrator Kaplan found – as had Arbitrator Hayes – that there was no real scientific rationale for the VOM policy. He reached that conclusion based on the following facts:

- The Report which recommended the enactment of VOM policies itself states that there was no "direct" evidence that mask-wearing protects patients from influenza, only "indirect" evidence.

- The Report was based on observations made in a wholly different environment (a Long Term Care facility) and made exaggerated extrapolations from limited studies to general application of masking in a hospital setting.

- There was no evidence that asymptomatic Health Care Workers posed a risk to patients of transmitting the flu. The likelihood of transmission is much higher when an infected individual is coughing or sneezing.

- There was no evidence that mask-wearing reduced the risk of flu transmission. The Hospital did not call its own expert on masking. ONA's masking expert and the masks introduced into evidence demonstrated that the way masks are made and the way they sit on the face make them ineffective in reducing flu transmission. Essentially, masking may be effective when the mask is worn by a patient who is infected, but not as a means to control transmission from the mask-wearer.

- Even after the VOM policy was introduced, there were still several outbreaks of flu at St. Michael's Hospital.

Arbitrator Kaplan did not however find that the VOM policy was coercive. As opposed to the Sault Area Hospital case, there was no evidence that St. Michael's Hospital implemented its VOM policy in order to increase vaccination rates. That is, St. Michael's Hospital was not found to be using the VOM policy as a threat. The existence of a "hard choice" between vaccination and masking was not itself inherently coercive.

This decision hopefully marks the end of this debate in the labour relations context. Absent further compelling scientific evidence, two prominent arbitrators have devoted significant resources and attention to thorough reviews of the science. Even where a hospital has the best of intentions (i.e. St. Michael's as opposed to Sault Area), there is simply no real reason to conclude these policies will do anything to assist patient care.

F. REVIEW OF THE LAW OF QUALIFIED IMMUNITY FOR UNION STEWARDS

Meg Atkinson

Arbitrators have long recognized the unique and critical role union stewards play in unionized workplaces. On the one hand, stewards are employees who owe a duty of fidelity to their employers just like any employee, but on the other hand, they are agents of the trade union whose job it is to represent its members, often regarding the most contentious and important workplace issues. In certain circumstances, the roles of the faithful employee and zealous union representative can be incompatible. For this reason, union stewards, when acting in a representative capacity, enjoy a qualified measure of immunity from discipline.

The Dissanayake Panel characterized the steward's role well in a 1996 *Bell Canada*[6] decision as follows:

> In our view, the question of whether a union official is entitled to immunity from discipline must depend on the facts of each case. The starting point must be that there must be a recognition that once an employee is elected to union office his status in the workplace changes substantially. He has a dual role. As an employee, he must conform to the same rules and policies as his co-workers. However, when acting in his union capacity he is an integral part of the collective bargaining regime that governs the workplace on a day-to-day basis. He is then on an equal footing with members of management when carrying out his union duties. He must be free to police the collective agreement for compliance, and enforce it with vigour. In so doing, it is unavoidable that he will be required to take a higher profile than his fellow workers. Inevitably from time to time he will encounter areas of conflict with members of management. Regardless of the individual's degree of tact and diplomacy, it comes with the territory that on occasion he will be bordering the line between vigorously representing his fellow workers and engaging in insubordination towards members of management. Given this difficult role undertaken, the right of a union official to properly carry out his duties must be strictly protected except in the most extreme cases.[7]

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[6] *Bell Canada*, (1996), 57 L.A.C. (4th) 289 (Dissanayake).
[7] *Ibid.*, at para. 29.

In order for union stewards to be protected by qualified immunity, arbitrators have generally looked to four (4) factors or questions (see, for example, *Canada Post Corp. and C.U.P.W. (Condon)*, [2013] C.L.A.D. No. 278 (QL)(Ponak)).

First and foremost, the conduct must take place in a moment in which the union steward was acting in a representative capacity and had good reason to be so doing. This includes discipline or grievance meeting, collective bargaining and joint committee meetings. Clearly, the mere fact of being a union steward is *not* in and of itself sufficient to attract any immunity.

Second, there are limits to how far the immunity extends. Union stewards may be protected if they raise their voice or speak frankly about an issue, but they will not be immune from discipline if their conduct is malicious or includes making statements that are knowingly or recklessly false. Clearly, a measure of proportionality is expected.

Third, arbitrators have not granted immunity to stewards who engage in an intimidating or physically threatening manner. Indeed, that conduct violates the *Occupational Health and Safety Act* (Ontario) or the *Canada Labour Code* (Canada) and does not have a place in any workplace. This includes conduct in which union stewards have threatened or interfered with employees they perceive to be "helping" the employer with respect to an issue.

Finally, arbitrators will consider the overall conduct of the steward to determine whether it was reasonable in the circumstances. If the conduct went "too far" or seems to have really crossed a line of appropriate conduct in all of the circumstances, then arbitrators will decline to find the conduct to be immune from discipline.

Where the presence of union steward immunity is the subject of an arbitration hearing, these four (4) factors are typically considered at the initial stage of determining whether the employer had just cause for discipline at all. If the factors point to immunity, then that should be the end of the exercise and the grievance should be allowed. However, if the factors do not point to immunity, then the justness of discipline will then be analyzed on the basis of the usual considerations. Depending on the facts of the case, the employee's role as a union steward and the employee's genuine belief that they were acting in a representative capacity may function as a mitigating factor in favour of a lesser penalty. However the opposite can be true, as union stewards are also seen by employers and arbitrators to be leaders in the workplace, to whom members look for a role model for behaviour. In that sense, insubordinate behaviour engaged by a union steward outside

a representative capacity may indeed be an aggravating factor, weighting against the union in arbitration.

Effective union stewards are critical to the success of the trade unions they represent. Unions rely on their ability to strike an appropriate balance between zealous advocacy and tact at the critical moments while representing members. Stewards' qualified immunity from discipline when so doing is a valuable and time-honoured tool in the trade union toolkit, which allows critical interventions often at the most important moments in the workplace. As with any powerful tool, its limits must be known and respected by all who seek to utilize it, and the boundaries established by the four factors set out above must not be violated.

Note: *The information contained in this Newsletter is not intended to constitute legal advice. If you have any questions concerning any particular fact situation, we invite you to contact one of our lawyers.*

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