INTRODUCTION

This issue of our Newsletter, like the last two issues, will continue to provide updates on the continuing legal developments related to the pandemic. It will highlight some of the continuing issues related to vaccination policies.

The issue will also provide updates regarding a range of other subjects, including human rights issues, legislative updates, interest arbitration awards.

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.

We are also excited to announce that, after a three-year absence due to Covid-19 restrictions, we will once again be hosting our annual Client Holiday party on December 14, 2022. Invitations will be sent out with the full details.

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A. ONTARIO GOVERNMENT INTRODUCES THE *KEEPING STUDENTS IN CLASS ACT*

Samir Silvestri

On October 31, 2022, the Ontario government tabled the *Keeping Students in Class Act*. The Act will unilaterally impose a four-year collective agreement on Ontario's 55,000 education workers, prohibit any strike action and create significant penalties for any strike action taken. Notably, the Act will operate notwithstanding sections 2, 7, and 15 of the *Canadian Charter of Rights and Freedoms* and despite the *Human Rights Code*, meaning that the provincial government has immunized itself from *Charter* review for the second time since it was elected in 2018. In the forty years that the *Charter* has been a part of the Canadian Constitution, no provincial government has ever taken such extreme steps in order to avoid its obligation to bargain with its employees.

In an attempt to push through this cruel legislation as soon as possible, Ford's conservatives opened the legislature for an emergency session beginning at 5:00am on November 1, 2022, the day after the Act was first introduced.

This unprecedented and draconian legislation "criminalizes" the exercise of *Charter* protected fundamental freedoms, including the right to collective bargaining and the right to strike, and undermines the hard-fought rights of workers across the province. The Act will unilaterally impose a concessionary contract on Ontario's education workers, who are the lowest paid workers in the education system and who have already endured the unacceptable limit of 1% wage increases mandated by Bill 124 for the last 3 years.

Rather than returning to the bargaining table and providing essential education workers with the decent pay they deserve, Stephen Lecce (who himself received a 10% raise in 2020) has decided to ignore the *Charter* and impose below-inflation wage increases on 55,000 workers.

This legislation sets a dangerous precedent that threatens to undermine the constitutional rights of every worker in this province. Such anti-democratic actions must be strenuously opposed and cannot be allowed to become the norm in Canadian collective bargaining.

B. HUMAN RIGHTS TRIBUNAL OF ONTARIO HAS CONCURRENT JURISDICTION WITH LABOUR ARBITRATORS TO DECIDE HUMAN RIGHTS CLAIMS IN UNIONIZED WORKPLACES

Erin Carr

On October 4, 2022, the Human Rights Tribunal of Ontario released its decision in *Weilgosh v. London District Catholic School Board* ("*Weilgosh*"), ruling that the Tribunal has concurrent jurisdiction over employment-related human rights matters in unionized workplaces.

The decision was highly anticipated because it settles a significant question of law that arose after last year's ruling by the Supreme Court of Canada in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 ("*Horrocks*"). The Supreme Court in *Horrocks* concluded that unionized employees in Manitoba may not file human rights complaints with the Manitoba Human Rights Commission. Instead, they must go through the labour arbitration process, because labour arbitrators have exclusive jurisdiction over matters arising out of the collective agreement, including alleged human rights breaches.

The employers in *Weilgosh* requested an order dismissing the complaints the basis that the Tribunal did not have jurisdiction to hear them. The employers argued that, as ruled in *Horrocks*, the alleged human rights breaches fell within the exclusive jurisdiction of a labour arbitration under the collective bargaining agreement.

Tribunal answered the employers' question by adopting the Supreme Court's two-step analysis in *Horrocks* (paras 39 and 40):

> First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters (*Morin*, at para. 15). Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary.
>
> If at the first step it is determined that the legislation grants the labour arbitrator exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction…

Applying the test from *Horrocks*, the Tribunal concluded that while the *Labour Relations Act* provides arbitrators exclusive jurisdiction over matters arising out of a collective agreement (and by default matters arising under the *Human Rights Code* (the "*Code*"), the *Code* nevertheless demonstrates a clear legislative intent to displace labour arbitrators' exclusive jurisdiction over matters arising under the *Code*. The Tribunal based

its decision on sections 45 and 45.1 of the *Code*, which give the Tribunal the power to "defer an application in accordance with the Tribunal rules," and to dismiss an application if it "is of the opinion that another proceeding has appropriately dealt with the substance of the application," respectively.

The Tribunal noted the Legislature's failure to narrow or limit these powers, stating (para 41):

> In our view, the broad language used in the *Code* signals a clear intent to permit Tribunal decision-makers the power to decide whether to defer applications that could be decided elsewhere, including by arbitration, by grievance, by review or otherwise. The broad discretion provided to Tribunal decision-makers indicates a positive expression of the Legislature to maintain concurrent jurisdiction, thereby displacing labour arbitration as the sole forum for disputes arising from a collective agreement.

Ultimately, the Tribunal rejected the employers' request and allowed the applications to proceed in the Tribunal's adjudicative process. The Tribunal notes that the mere fact that it maintains concurrent jurisdiction does not necessarily mean the Tribunal will address all applications that are filed with it. Under Rule 14.1 of the Tribunal's Rules of Procedure, the Tribunal may still defer consideration of an application "on such terms as it may determine, on its own initiative or at the request of a party."

The bottom line is that unless the Tribunal's decision is overturned, unionized employees of provincially regulated workplaces can still pursue their *Code*-related allegations at labour arbitration or in a proceeding before the Tribunal.

C. COVID-19 VACCINATION UPDATE

Raymond Seelen

Trade unions and employers have now been living with the COVID-19 pandemic for nearly three years. Unsurprisingly, there has been a substantial amount of litigation concerning the reasonableness of COVID-19 vaccination policies and other matters related to the pandemic. This article aims to review some of the recent developments in this area of law and to provide insight into how the arbitral bar is dealing with the ongoing pandemic.

The decision of Arbitrator Nairn in *FCA Canada Inc.* is a recent decision where the Arbitrator struck down a vaccination policy on the basis that a 2 dose vaccine was no longer effective in light of the Omicron variant. The decisions of Arbitrator Rogers in *Toronto Professional Fire Fighters' Association* and Arbitrator Herman in *Coca-Cola Bottling Limited* each provide commentary on the evidence before Arbitrator Nairn, as

well as important insights into when discipline might be appropriate for failure to comply with a vaccination policy.

***FCA Canada Inc. v Unifor Locals 195, 444 and 1285*, 2022 CanLII 52913 (ON LA)**

In this case, the Employer was a manufacturer of automotive parts with facilities located in Brampton and Windsor. Like many employers, FCA Canada implemented numerous measures to protect its staff against COVID-19, including extra cleaning, physical distancing, barriers, and mandatory PPE. The Employer had also implemented a Vaccination Policy which required all staff to become vaccinated with two doses of a vaccine, or be placed on a leave of absence. The Union objected to the vaccination policy.

Ultimately, Arbitrator Nairn found that the vaccination policy was unreasonable and struck it down. The Arbitrator considered a number of studies provided by both parties and determined that a two dose vaccination course was ineffective at preventing transmission of the Omicron variant. The parties chose not to lead expert witnesses and, as such, no one appeared before the Arbitrator to explain, elaborate on, or answer questions about the studies in question. As such, the Arbitrator's determination was based on the text of these studies alone.

In addition, the Employer's evidence regarding the transmission of COVID-19 within the workplace showed that the vast majority of cases (817 out of 1,096) occurred during the Omicron "wave". The rapid increase in infections demonstrated that the vaccination policy was no longer preventing transmission as effectively as it had previously.

Based on these findings, the Arbitrator held that a two dose vaccination policy was unreasonable in the context of the more transmissible Omicron variant.

The key issue in this case is the efficacy of a two dose vaccination as compared to a two dose plus booster vaccination. Arbitrator Nairn explicitly states that she is not a vaccine skeptic and that she is not intending to send a message that the vaccine is ineffective. The point that the Arbitrator is making is that, based on the evidence before her, unvaccinated employees pose as much risk to their coworkers as employees who had not received a booster dose and, therefore it was inappropriate to hold them out of service. While she does not state it, the inference that Arbitrator Nairn appears to support is that the Employer ought to have either returned the unvaccinated employees to the workplace or required the vaccinated employees to receive a booster shot.

In short, this is an important decision to be aware of because it diverges significantly from prior jurisprudence. The decision stands for the proposition that the pandemic is constantly changing and that a policy which was once reasonable may become unreasonable as the underlying situation changes. With that in mind, it is also important to remember that this particular decision flowed from the evidence which Arbitrator Nairn

had before her. As is set out below, other arbitrators have not reached the same conclusions.

***Toronto Professional Fire Fighters' Association, IAAF Local 3888 v City of Toronto,* 2022 CanLII 78809 (ON LA)**

This award concerns a challenge to the City of Toronto's vaccination policy with respect to its fire fighters. Many vaccination policies provide for an unpaid leave of absence for unvaccinated employees, and warn said employees that they may suffer further consequences, up to and including termination. This language has generally been accepted as reasonable by arbitrators.

The City took a different approach and, instead, directed that all Fire Fighters would need to provide proof of vaccination by a certain date. Anyone who failed to do so received an unpaid disciplinary suspension. Anyone who received a suspension and failed to become vaccinated thereafter would be terminated for cause.

Arbitrator Rogers first reviewed the reasonableness of the policy as a whole. He determined that the implementation of a vaccination policy was reasonable given that the vaccines were effective at providing protection from the virus. In doing so, he considered expert testimony on the effectiveness of the vaccine and distinguished the *FCA Canada Inc.* decision on the basis of said evidence. The expert before Arbitrator Rogers specifically testified that two doses of a recognized vaccine offered significantly greater protection against COVID-19 compared with those who had not been vaccinated.

Next, Arbitrator Rogers considered how the policy was enforced. He found that the purpose of the policy was to coerce fire fighters who were hesitant to be vaccinated into becoming vaccinated. He found that the traditional approach of an unpaid but non-disciplinary leave had sufficient coercive effect to accomplish the policy's objective and that further coercion by way of disciplinary measures was, therefore, unnecessary.

The City had submitted that any fire fighter who failed to become vaccinated was guilty of insubordination and therefore could be terminated for cause. According to the City, the fire fighters had been issued a reasonable directive (i.e. become vaccinated) and had refused to comply. Arbitrator Rogers held that such a position was unreasonable as it ignores traditional defences and mitigating factors which can be raised in a termination for cause.

The Arbitrator does confirm there may be cause to issue discipline for insubordination in some cases. However, the question of an appropriate penalty for insubordination must consider the full circumstances of the situation, including whether there was an intent to undermine authority and whether there was a reasonable explanation for failing to comply with a direction. The Arbitrator observes there is a wide distinction between an employee who has a pathological fear of vaccination and an employee who refuses because he

believes the City had no right to require vaccination. The impact of the policy was that all refusals would result in discipline, and suspension followed by termination was automatically deemed the appropriate quantum of discipline in every case. It was the automatic aspect of the policy that rendered it unreasonable.

Moreover, the Arbitrator found that a termination for cause was unnecessary to deal with the health risk posed by unvaccinated fire fighters. Summarizing his views, he stated that all that was required to protect the health of vaccinated fire fighters was to remove unvaccinated fire fighters from the workplace. In Arbitrator Rogers' words, "Vaccinated fire fighters do not need the protection of the unvaccinated fire fighters being discharged for cause."

Ultimately, Arbitrator Rogers held that the automatic termination contemplated by the policy was unreasonable. His decision offers important insight into how Arbitrators will assess the reasonableness of a policy's enforcement mechanism, as well as which factors are relevant in determining individual grievances regarding failures to vaccinate.

***Coca-Cola Canada Bottling Limited v United Food and Commercial Workers Union Canada, Local 175*, 2022 CanLII 83353 (ON LA)**

In this case, the Employer implemented a policy which contemplated discipline or termination as a consequence of failure to become vaccinated. However, the Employer did not initially place unvaccinated employees on a leave of absence. Instead, the Employer required unvaccinated employees to undergo rapid antigen testing and wear a face-shield in addition to other PPE. It was only after one month on non-compliance that unvaccinated employees were placed on an unpaid leave of absence.

The Arbitrator considered whether the fact that the policy indicated that discipline or termination "may" be a consequence of non-compliance rendered the policy impermissibly vague. He found this was not the case. In doing so, Arbitrator Herman affirmed the prevailing view that automatic discipline would be impermissible, but discipline might be appropriate in individual cases. He goes on to set out some of the circumstances in which an employer might reasonably discipline an employee for non-compliance with a vaccination policy. For instance, he specifically cited a persistent refusal over an extended period of time, or a material, negative impact on the employer's ability to run its business if the employee remains on leave, as factors that may justify discipline.

Finally, Arbitrator Herman considered whether the Omicron variant altered whether a two dose vaccination was reasonable. Based on the expert evidence before him, Arbitrator Herman found that a two dose course provided protection against the virus, and the requirement was therefore reasonable. As with Arbitrator Rogers, Arbitrator Herman distinguished Arbitrator Nairn's decision on the basis of the testimony he received from an expert witness. The expert testified that two doses provided better protection than no vaccine, and Arbitrator Rogers accepted the expert's evidence. Arbitrator Rogers noted

that the provide greater protection offered by a third dose does not render the requirement of at least two doses unreasonable. Put simply, two doses are reasonable because they provide some protection, even if three doses provides more protection.

Conclusion

The jurisprudence with respect to vaccination policies continues to evolve. The decisions above are only a few of the landmark cases. An arbitral consensus has emerged which states that, generally speaking, a vaccination policy may be reasonable, but automatic discipline is not.

While the *FCA Canada Limited* decision diverges from that consensus, it raises important considerations that ought not be dismissed. The pandemic continues to shift and at a certain point, questions about lifting vaccine policies altogether, or on the other hand mandating third and fourth doses, seem inevitable. The *FCA Canada Limited* decision is the first step in consideration of these questions.

On the other hand, the *Coca-Cola* and *Toronto Fire Fighters Association* decisions affirm the present arbitral consensus and stress the importance of expert evidence when litigating pandemic related policies. Moreover, they provide important insights into when a disciplinary response might be merited for failure to comply with a vaccine policy.

D. RELIGIOUS EXEMPTIONS TO MANDATORY VACCINATION POLICIES

Jamie Corbett

How successful have claims for religious exemptions to vaccinations been in Ontario?

As of October 28, 2022, there are two instances in which arbitrators have found that an employer's application of a mandatory vaccination policiy (MVP) discriminates against an employee on the basis of creed. The cases relate to the use of fetal cell lines which originate from abortions performed in the 1970s and 1980s. Though the vaccines contain no cells directly from those fetuses, for some devout grievors, the use of cell lines in the production of the vaccines is sufficiently proximate to abortion to warrant religious objection.

In *Teamsters Canada Rail Conference v Canadian Pacific Railway Company*, released on October 18, 2022, Arbitrator Tom Hodges found that the employer discriminated against the grievor by placing him on unpaid leave after denying his request for religious exemption to the employer's vaccination policy.

As with all MVP-related decisions, the facts of the MVP and the grievance are important. In October of 2021, Transport Canada issued a Ministerial Order to CP. The Order included various recommendations for railway employers to consider in implementing their own vaccination policies. The recommendations included timelines for employees to show proof of their first and second doses, with a deadline of January 25, 2022. On that date, unvaccinated employees would be placed on unpaid administrative leave subject to medical or religious exemptions.

CP did not grant religious exemptions to its employees, including the grievor. In early November 2021, the grievor submitted a complete and sworn request accompanied by a letter of support from his church. CP denied the request via email the next day, reminding the grievor of the requirement to become fully vaccinated by January 25, 2022, lest he face an unpaid leave. The denial email did not include any explanation for the decision.

The grievor did not become fully vaccinated by that date and was placed on administrative leave on January 25, 2022.

There was little doubt about the sincerity of the grievor's belief at arbitration. CP, however, did raise issue with the grievor's use of the letter from his church and its assertions regarding the use of fetal cell lines in the production of the COVID-19 vaccines.

More central to the arbitration decision was the employer's inconsistent application of its MVP. At the time of arbitration, CP had allowed over fifty unvaccinated employees to continue working after the vaccination deadline of January 24, 2022. None of those unvaccinated employees had requested religious exemptions.

Furthermore, CP failed to investigate the reasons for the grievor's alleged non-compliance with the MVP—contrary to the Collective Agreement. Other employees, however, attended investigations for violations of COVID-19 policies not related to the MVP. This meant that CP's issues regarding the use of fetal cell lines in the vaccines only came up at arbitration, rather than at any point in the pre-arbitration grievance process set out in the Collective Agreement.

Based on the sincerity of the grievor's belief about the use of fetal cell lines in the vaccines, CP's decision to allow unvaccinated employees to continue working, and the lack of any investigation into the grievor's objection, Arbitrator Hodges found CP's actions amounted to an arbitrary application of CP's MVP. In effect, the grievor was discriminated against on the basis of his religious belief. Arbitrator Hodges ordered compensation for all lost wages and benefits with mitigation.

The *Canadian Pacific Railway Company* decision is preceded by another abortion-related religious objection. In *Public Health Authority, Sudbury & Districts v ONA*, 2022 CanLII 48440, the grievor was a nurse and a devout Roman Catholic. As part of her faith, she opposed the vaccines on the basis of fetal cell lines in the vaccines' production. Her church

– the Latin Mass congregation of Sudbury – did not forbid congregants from getting the vaccine, but encouraged followers to make their own choice.

As in the *Canadian Pacific Railway Company* decision, the grievor did not become vaccinated by the deadline, and was placed on unpaid leave.

At arbitration, the grievor testified that taking the vaccine would be tantamount to condoning abortion. The employer listed inconsistencies with the connection between the grievor's belief and her refusal to get the vaccine. For example, COVID-19 vaccines are not the first pharmaceutical to use fetal cell lines, yet the grievor had not researched the presence of fetal cell lines in medications that her family used. As a nurse, she had administered vaccines that were developed using fetal cell lines.

Sincere belief, however, does not require purity. Based on the grievor's testimony, the arbitrator was satisfied that at the time she found about fetal cell lines in the production of COVID-19 vaccines, she refused to take it. Her rationale was that taking the vaccine would jeopardize her relationship to her faith. The connection between her sincere belief and her refusal to comply with the employer's policy was sufficient for the arbitrator to find she faced discrimination on the basis of her religious belief.

The case, importantly, only deals with *prima facie* discrimination. Certain issues were left undecided at arbitration, including whether vaccination against COVID-19 is a *bona fide* operational requirement, or whether the employer could have accommodated the grievor to the point of undue hardship. Unlike in the *Canadian Pacific Railway Company* decision above, the grievance did not result in an order for compensation for the period of time during which the grievor was placed on unpaid leave.

Evidence issues

If a grievor claims they have a sincerely held religious belief that precludes them from becoming vaccinated against COVID-19, how much of their vaccination record can the employer demand as evidence in arbitration? In *CUPE Local 966 v Salvation Army*, 2022 CanLII 79068, Arbitrator Lawrence addressed the issue of the employer's production request for full vaccination records dating back to the grievor's childhood and medical records since her joining the church. Arbitrator Lawrence indeed ordered production, but significantly limited the period for which the Union had to supply vaccination records and medical records more generally.

Since 2017 or 2018, the grievor belonged to a church that promotes "natural law," which opposes "biomedicine" or Western allopathic medical practices, such as vaccines. The church's congregants are actively discouraged from taking vaccines or any other sort of

biomedicine. Instead, they are encouraged to seek natural remedies, such as vitamins, and the care of naturopathic practitioners.

When the COVID-19 vaccines became available and the employer implemented their MVP, the grievor requested accommodation, which the employer denied. The denial led to the grievor being placed on unpaid leave, following which the Union filed a grievance. As part of the grievance, the employer requested vaccination records dating back to the grievor's childhood as well as all health records from "any health professional" including medical doctors and naturopaths. The Union agreed to provide vaccination records since March 2019, but opposed the production of records before that date.

The issue at arbitration thus centered on the production of medical documents to assess the sincerity of the religious basis for the grievor's opposition to vaccination.

The arbitrator did not make such an order. Instead of medical records dating back to the grievor's childhood, Arbitrator Lawrence ordered production of vaccination records limited to the four-year period leading up to the imposition of the vaccination policy. As for medical records, she ordered the production of such back to January 1, 2019. The order for production also allowed the Union to redact anything other than biomedicine in the documents from that time period.

In her reasons, Arbitrator Lawrence states that when medical records are required to assess religious belief, the focus must be on **current** religious belief, not past beliefs dating back to childhood. This statement paraphrases the seminal SCC decision *Syndicat Northcrest v Anselem*, 2004 SCC 47. In that decision at paragraph 53, the Supreme Court states that belief is "fluid and rarely static" and thus changes over the course of a believer's life. Though *Anselem* is a *Charter* decision, it is a touchstone in arbitral decisions involving accommodations for religious beliefs and practices.

Arbitrator Lawrence's decision builds on a similar decision by Arbitrator Bernhardt, *Victorian Order of Nurses-Brant v ONA*, 2022 CanLII 34502. The grievors in Bernhardt's award opposed all vaccination on religious grounds. In response to their religious exemption request, the employer requested full vaccination records. Balancing the employer's interest in ensuring the religious exemption request was in good faith (*no pun intended*) and the grievors' privacy interests, Arbitrator Bernhardt ordered production of vaccination records dating to one year prior to the grievors' requests.

Both decisions exemplify the necessary balancing exercise, which weighs an employer's health and safety interest in protecting employees and clients against an employee's interest in privacy and human rights.

E. RECORD INFLATION AND RECENT TRENDS IN INTEREST ARBITRATION

Sukhmani Virdi

Unaffordable housing, price gouging at the grocery store, and dramatic jumps to the cost of gas. These issues are being faced by most union members and are being raised by many of our clients. Inflation has hit a 40-year high in Canada, and while the rate of inflation appears stagnant, it is no surprise that the focus of collective bargaining and interest arbitration has completely shifted to the concerning economic landscape.

In our spring newsletter, we wrote about the increasing rate of inflation, cost of living, and what unions should consider going into collective bargaining.

Since then and over the past year, we have seen a growing number of unions seeking to address inflationary pressures, most commonly through above-normative wage increases. Wage increases consistent or in line with the rate of inflation seek to preserve the value of wages. Conversely, wage increases at rates below the rate of inflation will invariably lead to wage erosion.

In many collective bargaining relationships, parties have not often considered inflation in prior rounds of bargaining. Employers often rely on that pattern to justify wage increases that do not take into account inflation. However, general principles of interest arbitration require a board of arbitration to consider the economic context. Parties bargaining in different economic climates will have different perceptions as to what wage increases are reasonable. Consideration for the economic climate only serves to contextualize the parties' bargaining. For matters governed by the *Hospital Labour Disputes Arbitration Act,* RSO 1990 ("*HLDAA*")*,* consideration of the economic situation of the province of Ontario is a statutory requirement.

Very recently, Arbitrator Stout released his interest arbitration award pursuant to *HLDAA* between the Service Employees' International Union, Local 1 Canada, and Participating Nursing Homes, often referred to as the "Central Award" in long-term care. Over the past 10 years of bargaining, the Central Award has seen general wage increases between 0% and 1.5%. This year, in light of the current economy and recent trends in collective bargaining, Arbitrator Stout awarded general wage increases of 3% - effectively doubling the prevailing rate of wage increases in this sector.

To be clear, general wage increases of 3% do not insulate members from wage erosion, particularly as inflation is expected to hover at 7% for the rest of the calendar year. However, when considered alongside the industry pattern described above, Arbitrator Stout's award serves as an important recognition that inflation, and the economy more broadly, is a fundamental consideration in collective bargaining, especially in this year.

We have also seen several unions proceeding to interest arbitration following failed ratification votes of tentative agreements. This has generally occurred where the bargaining committee tentatively agreed to renewal terms subject to ratification by the membership. Despite the inherently democratic exercise of voting to turn down a tentative agreement, we have seen significant reluctance and trepidation from interest arbitrators to award terms other than what was in the tentative agreement.

To this end, interest arbitrators have awarded the terms of rejected agreements in the following circumstances:

- Where the membership voted and went on strike rather than accepted the terms;
- Where the inflation rate doubled between the time the tentative agreement was negotiated and the time of the ratification vote; and
- The bargaining committee did not recommend the terms of the tentative agreement.

Trade unions will need to be careful when proposing general wage increases to ensure they reflect changing economic conditions, and that they have the bargaining unit's support when tabling proposals.

F. LABOUR RIGHTS RETURN TO THE SUPREME COURT: THE QUEBEC COURT OF APPEAL'S DECISION IN *ASSOCIATION OF EXECUTIVES OF THE SOCIÉTÉ DES CASINOS DU QUÉBEC C. SOCIÉTÉ DES CASINOS DU QUÉBEC*

Samir Silvestri

It has been over seven years since the Supreme Court of Canada last considered the rights conferred by section 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). However, on September 29, 2022, the Supreme Court granted leave to appeal the Quebec Court of Appeal's decision in *Association of Executives of the Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180. In that case, the Quebec Court of Appeal directly questioned the constitutionality of excluding managers from the definition of "employee" under Quebec's *Labour Code*, ultimately concluding that the exclusion offended section 2(d) of the *Charter*. Such exclusions are commonplace in labour legislation across Canada. As a result, the Supreme Court's uptake of the *Société des casinos du Québec* appeal has potentially wide-reaching consequences for the future of union organizing and representation.

The legal saga which led to the appeal has been winding its way through the Quebec legal system for over a decade. In 2009, the Association filed an application for certification to represent certain management employees (known as Operations

Supervisors) of the employer. Given the exclusion of managers from the *Labour Code*, the Association also asked the Quebec labour board to declare the exclusion constitutionally inoperative by virtue of section 2(d). In 2016, some 7 years later (and notably after the Supreme Court's 2015 "labour trilogy"), the Quebec labour board agreed with the Association. The labour board focused on the following noteworthy factors:

- The Operations Supervisors in question were "first-level" managers in an organization with five or more levels of management;
- The Operations Supervisors were the employers "eyes and ears on the casino floor" but did not have the same privileged relationship with the employer as upper levels of management;
- In 2001, a brief protocol of working conditions (not a collective agreement) for the Operations Supervisors had been negotiated between the Association and the employer. The protocol remained in place, unchanged, despite repeated requests from the association to renegotiate it;
- The employer had sole discretion in determining the group of Operations Supervisors the association was entitled to represent;
- There was no mechanism in the protocol to deal with labour disputes or grievances. The protocol did not provide employees with the choice to join the Association or ensure that the employer adhered to the duty to bargain in good faith; and
- The employer was able to refuse bargaining or renegotiating the 2001 protocol with no consequences. The result was the employer had the last word on the employment terms and conditions of the Operations Supervisors (despite the existence of the 2001 protocol) and exerted substantial control over the Association's ability to represent Operations Supervisors.

Based on the culmination of the foregoing factors, the labour board concluded that the exclusion of managers from the *Labour Code* offended the protections guaranteed by section 2(d) of the *Charter* for two reasons. Firstly, the purpose of the exclusion was to prevent representatives of an employer (i.e. management) from collectively bargaining. Secondly, the exclusion substantially interfered with the freedom of association of the Operations Supervisors because it undermined the right to strike and the employer's duty to bargain in good faith. Further, it effectively left Operations Supervisors dependent on their employer for representation. The Quebec Attorney General was unable to justify the *Charter* violation. As a result, the Labour Board struck down the exclusion of managers from the Quebec *Labour Code*.

In February 2022, the issue reached the Quebec Court of Appeal. In a lengthy decision, the Court of Appeal ruled in favour of the Association and upheld the labour board's decision. The Quebec Court of Appeal reviewed the legislative and academic history of

managerial exclusions, noting that when the exclusion was introduced, legislators were well aware it deprived managerial employees from the protections offered by labour legislation. According to the Quebec Court of Appeal, the exclusion imposed labour relations isolation on Operations Supervisors and deprived them of associational rights. In the result, the Quebec Court of Appeal upheld the labour board's decision. Notably, it suspended the declaration that the managerial exclusion was constitutionally inoperative for a period of 12 months, likely in recognition of the significant potential effect of the declaration on labour relations in Quebec.

Although the decision turned on the particular facts of the case, the bottom-line conclusion that managerial exclusions may be unconstitutional will have serious consequences for labour relations across Canada. Presently, each province excludes managers from collective bargaining in some manner. The exclusions are based on the well-accepted premise that management interests conflict with those of both the union and the employer. Indeed, union organizing and certification is often driven by the exclusion of managers from bargaining units. The decision in *Société des casinos du Québec* challenges this fundamental presumption, and may result in unions having to consider organizing employees in management roles. While this may provide exciting new organizing opportunities, it also put unions in the unenviable position of representing the same people they frequently disagree with on employment terms and conditions.

Given the potentially far-reaching implications of *Société des casinos du Québec*, we anxiously await the Supreme Court's decision on this crucial question.

G. ELECTRONIC MONITORING OF EMPLOYEES

Micheil Russell

The requirement for employers to establish an electronic monitoring policy is now effective.

Bill 88, *Working for Workers Act, 2022*, amended the *Employment Standards Act* ("*ESA*"), introducing a requirement for employers to have a written policy on electronic monitoring of employees. The requirement provides that a policy must be in place by October 11, 2022.

The requirement only applies to employers in Ontario with 25 or more employees (as of January 1, 2022) covered by the *ESA*, except the Crown, Crown agencies and authorities, boards, commissions, or corporations who are appointed by the Crown and their employees. In the future, the requirement will apply to every employer with 25 or more employees on January 1 of each year. The policy must be in place before March 1 of that year.

The Ministry has provided some examples of what constitutes "electronic monitoring". The Ministry's examples include:

- GPS tracking on an employee's delivery vehicle,
- electronic sensors to track how quickly employees scan items at a grocery store check-out; and
- tracking the websites employees visit during working hours.

What the Policy Must Include

An employer's policy must contain:

- a statement as to whether the employer engages in electronic monitoring of employees; and
- the date the policy was prepared and the date any changes were made to the policy.

If the employer electronically monitors its employees, the policy must also contain:

- a description of how the employer may electronically monitor employees;
- a description of the circumstances in which the employer may electronically monitor employees; and
- the purposes for which information obtained through electronic monitoring may be used by the employer.

The Ministry also gives examples of what a policy must include where (1) an employer tracks an employee's delivery vehicle using GPS, and (2) an employer monitors its employees' emails and online chats.

The Ministry's Written Guidance

The Ministry provides written guidance which discusses the following:

- The monitoring policy should capture:
    - Electronic monitoring that is done on devices and electronic equipment issued by the employer;
    - Electronic monitoring that happens while employees are at the workplace; and

  - Any other electronic monitoring the employer is engaged in, such as monitoring the employee through the employee's own personal computer that is used for work purposes.

- Significantly, an employer is not required to have the same policy for all employees. The employer can have one policy that applies to all employees, or it can have different policies for select groups of employees.

- The requirement to have a written electronic monitoring policy does not establish any new privacy rights for employees or any new right for employees not to be electronically monitored.

A link to the Ontario Ministry of Labour's Guidance on Electronic Monitoring Policies can be found here: https://www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-electronic-monitoring-employees

If you have any questions with respect to an electronic monitoring policy established pursuant to this legislation, please contact one of our lawyers for answers to specific questions.

H. UPCOMING AMENDMENTS TO FEDERAL LABOUR LEGISLATION

Daniel Anisfeld

There are significant changes afoot in federal labour legislation, with upcoming amendments to both the *Canada Labour Code* (the "*Code*") and the accompanying *Canada Labour Standards Regulations* (the "*Regulations*"). Many of these changes could have a significant impact on unions representing employees of federally-regulated employers.

Canada Labour Code Medical and Bereavement Leave Provisions

Bill C-3: *An Act to amend the Criminal Code and the Canada Labour Code* will usher in important changes to the medical and bereavement provisions of the *Code*.

Subsection 210(1) of *Code* currently provides for up to eight weeks of bereavement leave for the death of a member of an employee's immediate family or another family member where the employee is taking compassionate care leave or leave to care for a critically ill person at the time of death. Bill C-3 would expand eligibility for bereavement leave to include the death of a child or of the child of a spouse or common law partner. It would also require the right to leave where an employee or the employee's spouse or common-

law partner delivers a stillbirth child. In both circumstances, employees will be entitled to up to eight weeks of unpaid leave, which may be taken at any time during the period between the death and 12 weeks after the funeral, burial, or memorial, whichever comes last.

Subsection 206.6(1) of the *Code* currently provides employees of federally-regulated employers with a leave of absence of up to five days for specified reasons, including illness or injury. For employees with three consecutive months of service, the first three days are paid. Bill C-3 will expand the number of days of personal leave from five to ten. The first three days will now be paid for employees with 30 days or more continuous employment with the employer. Bill C-3 additionally provides that employees will accrue an additional paid day each month after the start of each month (after the initial 30-day bar has been cleared), to a maximum of 10 days per year.

The amendments contain several additional provisions that pertain to personal leave:

- Employees may roll over unused personal leave days to the following year, but each day carried over reduces the number of days that can be earned the following year by one day.

- Employers can now require that employees provide a medical certificate for any period of medical leave that lasts five days or more. The request must be made in writing within 15 days of the return to work.

- Additional record keeping requirements have been imposed on employers related to each period of personal leave with pay. These requirements include:

    - dates of commencement and termination of leave;
    - the year of employment when leave was earned;
    - the number of days of leave carried over from a previous year;
    - a copy of any written request for a medical certificate made by an employer; and
    - a copy of any medical certificate submitted by an employee.

<u>Regulation Changes</u>

The federal government published *Regulations Amending Certain Regulations Made Under the Canada Labour Code*, which propose to amend the *Regulations* in several respects, as detailed below.

Reimbursement of Work-Related Expenses

Bill C-86: *Budget Implementation Act, 2018, No. 2*, amended the *Code* by requiring employers to reimburse employees for certain work-related expenses. The proposed

changes to the *Regulations* would clarify the scope of eligible work related expenses. Pursuant to the proposed changes, in terms of whether the expense are work-related, the following factors are relevant:

- whether the expense is connected with the employee's performance of work;
- whether the expense was incurred to enable an employee to perform work;
- whether the expense is a requirement of continued employment;
- whether the expense was incurred to satisfy a requirement for the employee's work imposed by an occupational health or safety standard; and
- whether the expense was incurred for a legitimate business purpose, rather than for personal use or enjoyment.

In determining whether the expenses in question are reasonable, the employer must consider:

- whether the expense is connected to the employee's performance of work;
- whether the expense was incurred to enable an employee to perform work;
- whether the expense was incurred at the direction of the employer;
- whether the amount of expense is reasonable and does not include additional unnecessary expense;
- whether the expense is one that is normally reimbursed by employers in similar industries;
- whether the expense was authorized by the employer in advance;
- whether the expense was incurred by the employee in good faith; and
- whether the claim for the expense includes documentation, such as a receipt or invoice.

Where the expenses are both work-related and reasonable, the employer must reimburse the employee within 30 days.

Employee Information

Bill C-86 also amended the *Code* to require employers to provide employees a written statement with information related to their employment. The statement must be provided within 30 days of the employee's hire date. The proposed changes to the *Regulations* would require the statement to include the following information:

- the names of the parties to the employment relationship;
- the job title and brief description of their duties and responsibilities;
- the place of work;
- the date of commencement of employment;
- the term of employment;
- the probationary period, if any;

- the specific requirements of employment (e.g. driver's license, criminal records check);
- the required training;
- the hours of work specific to the employee (including how they are calculated and overtime rules);
- the rate of wages or salary (including overtime rates);
- the frequency of payments;
- any mandatory deductions; and
- the reimbursement of work-related expenses (process, authorization, etc.).

Additional Regulatory Changes

The proposed changes contain several other provisions of interest to unions:

- Service of documents: additional methods of service are now permitted, including courier, fax, email and leaving summonses with certain adults. Substituted service also allowed in certain circumstances.
- Regular Wage Rates: provides details over the appropriate rate of pay due to employees for appearance at the CIRB.
- Minimum Age for Hazardous Occupations: raises minimum age from 17 to 18 for certain occupations, including mining, dangerous work, and late-night work.

H. IMPACT OF WORKERS' COMPENSATION BOARD 'CHRONIC MENTAL STRESS' BENEFITS ON GRIEVANCES SEEKING DAMAGES FOR WORKPLACE HARASSMENT AND BULLYING

Erin Carr

This is a complicated area of law that is highly fact specific. The bottom line is that claims under the WSIB's Chronic Mental Stress Policy may impact employees' right to pursue a grievance on the same issue.

Workplace harassment has historically been addressed through several different means. The *Occupational Health and Safety Act* provides a framework for reporting and investigation of incidents of harassment. The *Human Rights Code* contains provisions on harassment in respect of protected characteristics. Meanwhile, labour arbitrators can address workplace harassment claims with and without human rights components.

In 2018, amendments to the *Workplace Safety and Insurance Act* ("WSIA") came into force which allow workers to claim compensation for chronic mental stress ("CMS")

injuries. The Workplace Safety and Insurance Board ("WSIB") CMS Policy states that workplace harassment and bullying can generally be considered a substantial work-related stressor that contributes to a chronic stress injury.

Since the 2018 WSIA amendments, employers began objecting to harassment grievances in cases where the grievor received WSIB benefits for a CMS injury rooted in the same facts. These objections rely on sections 26(2) and 28 of the WSIA, which state that "entitlement to benefits under the WSIA are in lieu of all other rights of action in respect of a workplace accident." In the seminal decision on this issue, the Grievance Settlement Board dismissed an employee's claims for damages on the basis that their injury would be compensable under workers' compensation laws (*Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services and Ministry of Children and Youth Services)*, 2010 CanLII 28621 (ON GSB)).

In some cases, however, arbitrators will defer a hearing on a harassment grievance if the grievor's WSIB claim is in the process of being adjudicated. In *Re London (City) and CUPE, Local 107 (DC)*, 2021 CanLII 13299 (ON LA), Arbitrator Gedalof described the governing principles for considering a deferral request as follows (paras 22-24):

> The decision whether or not to defer is a matter of discretion and highly fact-specific. Although articulated in slightly different ways across the various authorities cited by the parties, the key principles are not in dispute. Generally speaking, adjudicators will consider deferring a matter to another forum to avoid having multiple proceedings dealing with the same facts or issues, running concurrently. In addition to avoiding unnecessary duplication, deferral in these circumstances avoids the possibility of inconsistent decisions on the facts or the law…

In that case, Arbitrator Gedalof goes on to grant the employer's request to defer the grievance hearing pending the outcome of the grievor's WSIB claim. Arbitrator Gedalof notes the "substantial overlap" between the allegations underlying the grievor's WSIB claim and the particulars of the grievance, which he states raise concerns about duplicative efforts and a risk of inconsistent decisions arising from the two forums.

Further, not all aspects of incidents which may be compensable are necessarily beyond a labour arbitrator or labour board's jurisdiction. In *Charlton v. Ontario (Community Safety and Correctional Services)*, 2007 CanLII 24192 (ON PSGB), the fact that the employee received WSIB benefits for stress related to racial harassment did not preclude damages for the breach of her dignity interests under the *Human Rights Code*. The Grievance Settlement Board reasoned, "jurisdiction to provide a remedy in this case flows from the fact that one of the many working conditions and terms of employment between the grievor and the employer is a guarantee against workplace racial harassment."

Similarly, in *Association of Management, Administrative and Professional Crown Employees of Ontario (Wilson) v Ontario (Natural Resources and Forestry)*, 2017 CanLII 71789 (ON GSB), the Grievance Settlement Board recognized it had no jurisdiction to award monetary compensation for matters that were within the WSIB's jurisdiction. It was nevertheless not precluded from remaining seized over other aspects of the grievance relating to complaints of a toxic work environment and the employer's alleged failure to investigate the employee's allegations.

The foregoing cases demonstrate that limits to arbitrability in workplace harassment and bullying grievances will turn on the specific facts of each case. Relevant considerations include whether a WSIB claim was filed, whether the WSIB claim was allowed, whether the employee sustained a diagnosed injury, the specific violations alleged by the union, and the remedies sought. The bottom line is that employees should be aware that if they pursue a WSIB claim for CMS injuries caused by workplace harassment or bullying, the claim may impact their right to pursue a grievance on the same issue.

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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