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. OLRB DECIDES "REPLACEMENT WORKERS" CANNOT VOTE IN APPLICATION TO TERMINATE BARGAINING RIGHTS

Kathryn Carpentier

In a recent decision, *UFCW Local 175 and WHL Management Limited*, OLRB File No. 2882-14-R (unreported, April 2, 2015), the Ontario Labour Relations Board (the "Board") dealt with the issue of whether employees hired after the commencement of a strike were eligible voters for the purpose of a termination application under section 63 of the *Ontario Labour Relations Act.*

Two individual employees filed an application with the Board for the termination of the Union's bargaining rights on December 23, 2014. Members of the bargaining unit represented by UFCW had been on strike since August 13, 2013 (the "strike date"). A dispute arose between the parties prior to the vote as to whether the applicants had in fact demonstrated that 40% or more of the employees appeared to express a wish not to be represented by UFCW. It was the Union's position that the list of employees filed by the applicants included individuals hired by the company after the commencement of the strike, and that those individuals were not entitled to vote. Ultimately the Board ordered the vote and the ballots were segregated.

After the vote the parties made submissions on the issue of whether employees who were hired after the strike date were eligible to have their votes counted. The Applicants conceded that replacement workers hired to replace striking employees were not entitled to vote. However, the applicants asserted that additional individuals hired for *bona fide* business reasons, such as business expansion, were entitled to vote. To this end, the applicants attempted to argue that individuals employed before a strike commences and who cross the picket line are comparable to employees hired as a result of business expansion, and that because employees who cross a picket line are entitled to vote so too should new hires be entitled to have their vote counted.

WHL similarly took the position that employees hired for legitimate business purposes should be able to vote, and took the position that new hires after a strike commences are automatically swept in the bargaining unit.

UFCW argued that in determining this issue, the Board needed to consider the community of interest of employees and what would promote stable collective bargaining. Employees that were never members of the Union had no means to evaluate the Union's representation of its membership, which is part of the purpose of Section 63 of the *Act.* Furthermore, UFCW pointed out that the purpose of a strike, mainly to leverage pressure on the employer, is undermined by employees hired after a strike for the purpose of maintaining the employer's operations.

The Board concluded that only employees actually represented by UFCW prior to the strike were employees in the bargaining unit for the purpose of the termination application and entitled to have their ballots counted. In coming to this conclusion the Board considered the importance of the wording in section 63 "*that the trade union no longer represents the employees in the bargaining unit*", and determined that this had the effect of limiting what constituted the "bargaining unit" for termination applications to employees who had been represented by the trade union previously, as those are the employees in a position to actually evaluate the performance of the union and its representation of the members. The Board stated that the purpose of having section 63 as an evaluation tool for membership would be watered down if employees that were never represented could vote to remove the union for representing employees in their relationship with the employer.

Furthermore, the Board agreed with UFCW that employees hired after the strike do not share the same interests as the bargaining unit members involved in the decision to strike, as they are there to continue the employer's business rather than to disrupt it. The Board put considerable weight on the recent Supreme Court of Canada decision in *Saskatchewan Federation of Labour v. Saskatchewan* in which the court concluded that the right to strike was protected by the *Charter*. The Board noted that the importance of the collective ability to participate in a legal strike would be negatively impacted if employees never represented by the union whose interests were in conflict with the bargaining unit were permitted to participate in the decision regarding continued representation by the union. Such a result states the Board would, "adversely impact the collective bargaining strength of the union and impede the employees' collective ability to launch and maintain an effective strike."

As a result, ballots cast by employees hired after the strike date were not counted, and the application was ultimately dismissed.

This decision is currently the subject of a request for reconsideration.

B. CONFIDENTIALITY CLAUSES AND CLAWBACKS IN SETTLEMENT AGREEMENTS: THE JAN WONG CASE

Doug Wray

Employers have for some time insisted on confidentiality clauses in settlement agreements, probably for either or both of two reasons: they do not want grievors bragging and they do not want other employees (or other grievors) learning of the amount of settlements. Some employers also may not want the general public to know

about the terms of settlement. This concern about disclosure has been heightened with the advent of social media.

In many cases where a confidentiality provision is included in a settlement agreement, there is no express consequence specified if the provision is breached. If the adjudicator remains seized to deal with any disputes, the employer could return to the adjudicator and – if they could prove a breach – request that the adjudicator determine the appropriate remedy. The employer would likely request an order that the entity which breached the confidentiality provision (either the grievor or the union) re-pay the full amount of any monies paid by the employer pursuant to the settlement agreement. However, it is by no means certain that an adjudicator would necessarily conclude this would be the appropriate remedial response.

It is for this reason that employers are increasingly insisting that in addition to a confidentiality provision in a settlement agreement, the agreement include a "clawback" provision – that the agreement expressly state that in the event of a breach of the confidentiality provision by the grievor, the grievor must re-pay the full monetary amount of the settlement.

This trend will no doubt increase in light of the publicity generated by the Jan Wong case with The Globe and Mail wherein the Ontario Divisional Court recently upheld an arbitration decision dealing with these issues.

Ms. Wong was a journalist employed by The Globe and Mail. She was off work claiming illness and ultimately she was terminated. She filed grievances concerning unpaid sick leave and her termination which were referred to arbitration by her union. A Memorandum of Settlement resolving the grievances was signed by The Globe and Mail, the union and Ms. Wong. As part of the settlement, the employer paid money to Ms. Wong for the period of her unpaid sick leave and a separate (substantial) lump sum to resolve her termination grievance. The settlement document, included two separate provisions: a confidentiality clause and a clause wherein Ms. Wong agreed not to "disparage" The Globe and Mail or any of its current or former employees surrounding her employment and termination. The settlement document also stated that in the event of a breach of either of these provisions by the grievor, she would be required to pay back to the employer the lump sum payment.

The Globe and Mail later alleged that Ms. Wong had breached the confidentiality provision of the Memorandum of Agreement in a book she wrote and published. The dispute was referred back to the arbitrator. The arbitrator – Louisa Davie – held that the grievor had in fact breached the Agreement in four statements in her book and ordered that Ms. Wong re-pay the full lump sum amount.

Ms. Wong applied to the Divisional Court to challenge the arbitrator's award. The Court dismissed the application for various reasons. Part of the Court's reasoning was that

The Globe and Mail was prepared to pay the amount of the monies it did to Ms. Wong expressly on the condition of confidentiality. The Court stated:

> "It is clear that the one thing that The Globe and Mail wanted from this settlement was confidentiality. The Globe and Mail was prepared to pay for that confidentiality.... And yet, in the end result, The Globe and Mail did not get the one thing that it was paying for – confidentiality. In those circumstances, there is no inherent unfairness in a conclusion that the applicant should have to repay the monies that she received, and that she agreed to repay, if she breached the MOA."

In the result, it is likely that employers will increasingly request both confidentiality and clawback provisions in settlement agreements.

We suggest that if an employer wants these clauses, unions should attempt to negotiate higher monetary amounts.

Finally, if these clauses are included in a settlement agreement, the effect and consequences should be very clearly explained to grievors.

See, Jan Wong v. The Globe and Mail Inc. et al., (2014) ONSC 6372 (CanLII)

C. A HISTORIC VICTORY FOR TRADE UNIONS: SUPREME COURT OF CANADA FINDS A CONSTITUTIONAL RIGHT TO STRIKE IN *SASKATCHEWAN FEDERATION OF LABOUR V. SASKATCHEWAN*, 2015 SCC 4

Maeve Clougherty, Articling Student

In December 2007, the government of Saskatchewan passed *The Public Service Essential Services Act* (*PSESA*) and the *Trade Union Amendment Act, 2008* (*TUAA*). The *PSESA* gave all public employers in Saskatchewan the unilateral authority to deem certain employees "essential", which renders them unable to strike in the event of a labour dispute. The *TUAA* changed the union certification procedure by increasing the threshold for written proof of employee support from 25% to 45%. The Saskatchewan Federation of Labour ("the Federation"), on behalf of all trade unions in the province, challenged the constitutionality of both statutes. With respect to the *PSESA*, the Federation argued that the right to strike was protected by section 2(d) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") and that the *PSESA* denied them this constitutional right.

Writing for the majority, Chief Justice Beverly McLachlin held that the right to strike is an indispensable component of the freedom of association under s. 2(d) of the *Charter* and that the *PSESA* was an unjustifiable infringement on this right. In doing so, the Court overruled its previous line of jurisprudence on the right to strike issue, known as the 1987 "Labour Trilogy". The Court determined that this change was warranted in light of the broadened scope of 2(d) in recent years, which now protects the right to meaningful collective bargaining.

In a very recent decision, Mounted Police Association of Ontario v Canada (Attorney General) 2015 SCC 1, the Supreme Court held that s. 2(d) shields workers from "substantial interference" with their ability to organize and pursue workplace goals. Thus the issue for the Court to determine in Saskatchewan Federation of Labour was whether the *PSESA*'s restriction on public employees' right to strike amounted to substantial interference with their ability to collectively pursue their goals in bargaining.

The Court determined that the *PSESA* did in fact amount to substantial interference. Chief Justice McLachlin reasoned that the ability of workers to collectively withdraw their services is a crucial bargaining tactic that levels the playing field between management and employees. The Court rejected the argument that 2(d) should not protect strike activity because the interests of all implicated parties should be equally taken into account. Chief Justice McLachlin noted that this argument creates a false equivalence between employees and employers and "ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying" (para 56).

Interestingly, the Court also relied on Canada's international human rights obligations to support a constitutional right to strike. Chief Justice McLachlin noted that the several international treaties such as the International Covenant on Economic, Social and Cultural Rights, to which Canada is a signatory, mandate the right to strike. The Court also found it persuasive that several countries with very different labour relations schemes provide constitutional protection for strike action. This international consensus, they reasoned, lends support to the universality of the right to strike.

After finding that the right to strike is protected by s. 2(d), the Court considered whether the *PSESA* was a justifiable infringement under s. 1 of the *Charter*. They found that it was not. In particular, the Court was concerned about the *PSESA*'s total lack of a meaningful alternative dispute resolution ("ADR") mechanism for settling impasses, such as binding arbitration. Chief Justice McLachlin stated that the lack of such an ADR mechanism impaired the employees' right to strike far more broadly and deeply than was necessary for the continued delivery of essential services.

Furthermore, Chief Justice McLachlin held that the *PSESA* gave government employers unnecessarily broad discretion to designate services as "essential" in the event of a labour dispute with no right of review by the Saskatchewan Labour Relations Board.

She stated:

> [90] There is no evidence to support Saskatchewan's position that the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority. And its view that public employers can be relied upon to make fair decisions has the potential to sacrifice the right to a meaningful process of collective bargaining on the altar of aspirations. The history of barriers to collective bargaining over the past century represents a compelling reality check to such optimism.

Ultimately, the Court felt that the *PSESA* gave far too much power to public employers without adequate restrictions to ensure fairness to the affected workers.

With respect to the *TUAA,* the Court determined that the legislative changes to the provincial certification process were not unconstitutional.

The Supreme Court's decision in Saskatchewan Federation of Labour was a surprising victory for the labour movement. However, trade unions and their members should be careful when considering how the decision affects them, as the Court's reasoning was based on the specific facts of the case. The decision most likely does not apply to illegal strike situations or to essential services legislation that provides a remedial ADR mechanism such as interest arbitration. Nevertheless, the labour relations community should be pleased to receive such a bold affirmation of workers' rights from the highest court in Canada.

D. EMPLOYEE DISCIPLINE AND SOCIAL MEDIA TWITTER CASES

Micheil Russell

Two recent arbitration decisions involving the City of Toronto fire department considered situations within which employees may be terminated for off duty activity on a Twitter account.

The first employee tweeted a number of sexist and racist tweets that the arbitrator concluded were disparaging to women, the disabled, and also to visible minorities. It is significant that the employee posted a photograph of himself in his firefighters uniform on his Twitter account and clearly identified himself as an employee of the City of Toronto fire department.

The arbitrator applied the leading case, Millhaven Fibers, in assessing whether or not dismissal arising on account of off-duty conduct can be sustained. Based upon this decision, employers are required to demonstrate the following:

(i) the conduct of the grievor harms the Company's reputation or product;

(ii) the grievor's behaviour renders the employee unable to perform his duties satisfactorily;

(iii) the grievor's behaviour leads to refusal, reluctance or inability of the other employees to work with him;

(iv) the grievor has been guilty of a serious breach of the *Criminal Code* and thus rendering his conduct injurious to the general reputation of the Company and its employees;

(v) the grievor's conduct places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its working forces.

Perhaps of greatest significance in the arbitration award is the proposed amendment to the fourth question proposed by the arbitrator. She suggests that employers should consider not just whether or not it was a serious breach of the criminal code, but also of a human right's policy or code. It is my belief that this amendment is likely to be generally followed by other arbitrators.

Significantly, the grievor argued that he believed that his tweets were private and did not expect them to be widely circulated. The arbitrator rejected this line of thinking and stated that in her view any user of social media must accept responsibility when the content of the communication is disseminated in the manner promoted by the social media provider. This finding is in keeping with a number of other arbitration awards that have held that there is no expectation of privacy surrounding the use of social media.

The second firefighter who was also initially terminated was reinstated at arbitration and a three day suspension was substituted for his termination. There were a number of reasons for the lesser penalty including a finding that the tweet was an isolated incident, the tweet was not directed at any coworkers, the content of the tweet was less offensive than those tweeted by the first firefighter, and finally that he had a clean record at the time of his termination and apologized for making the inappropriate tweet. The issue of the extent to which off-duty activity such as using a Twitter account may be considered private was also considered. In this regard the arbitrator specifically noted that among the individuals that "followed" the firefighter on Twitter as well as individuals that he followed on Twitter, were a number of his coworkers.

In summary, when an individual uses social media and includes references to his work or has "friends" or followers on the various social media that are coworkers, it appears very likely that arbitrators will conclude that inappropriate comments made may be grounds for discipline. Further, the specific disciplinary penalty that may be appropriate will likely be determined by a consideration of the content of the messages communicated by social media as well as the usual mitigating factors considered by arbitrators in discipline cases.

See, The City of Toronto and Toronto Professional Firefighters Association, Local 3888 (Lawaun Edwards), 2014 CanLII 62879 (ON LA)

The City of Toronto and The Toronto Professional Firefighters' Association, Local 3888 (Matt Bowman), 2014 CanLII 76886 (ON LA)

E. HUMAN RIGHTS CLAIMS AND ARBITRATION PART 2: THE IMPLICATIONS OF CHOOSING NOT TO RAISE HUMAN RIGHTS ISSUES IN ARBITRATION

Robert M. Church

As noted in CaleyWray's last newsletter, the Human Rights Tribunal of Ontario (the "Tribunal"), in situations where an applicant has also filed a labour grievance on similar issues, now routinely examines not only whether human rights claims were raised and 'appropriately dealt with' in the arbitration proceeding, but actually whether the human rights issues *could* have been raised in the arbitration and were not. In some of these cases, employers have successfully argued that the Tribunal should dismiss an HRTO application as an abuse of process. In essence, the Tribunal has stated that the complainant (and often, the union) had the opportunity to bring forward a human rights argument in arbitration. By not doing so, the applicant's opportunity was forfeited.

As concluded in our last newsletter, if proceeding with an arbitration case in which human rights claims play a role, unions should be ready to consider addressing human rights issues in the arbitration proceeding or, alternatively, be prepared to explain to a grievor the consequences of not bringing forward human rights evidence and arguments in arbitration: that the Tribunal may dismiss a future application and their allegations will never be heard.

Given the interest in the topic and the frequency in which human rights concerns now play a part in grievances, it is important to further examine when these situations may occur.

The Tribunal has described how it approaches this overlap in various ways. In an early case on this issue, where a terminated employee had been before both a labour

arbitrator (supported by his union) and the OLRB in a duty of fair representation complaint (against his union, despite the union having filed 6 grievances on his behalf), the Tribunal stated that it may not look just to what issues were raised, but also whether they arise from the same facts as the prior case(s):

> "Where, as in this case, an applicant attempts to re-litigate the same factual circumstances where it is clear that the issue could have been dealt with in the prior proceeding the doctrine of abuse of process *will more often than not come into play.*"[1] (Emphasis added)

Unions must be cognizant of grievances which do raise human rights issues, even if they are not the grievor's primary concern, since the Tribunal has recognized that unions have considerable latitude to decide how to litigate cases in arbitration and that grievors are bound by the union's decisions.[2]

The Tribunal will, of course, look at the entire context of the proceedings to decide this question, and a dismissal of new claims is not automatic. In *Cunningham v. CUPE, Local 4400*, 2011 HRTO 658, a former TDSB employee brought claims against both the union and the employer alleging discrimination. There had already been a DFR complaint against the union, and the Tribunal noted with respect to those claims:

> "In any event a party is normally expected to bring their entire case forward and not split it up into several pieces, adding to the cost and uncertainties associated with duplicative litigation. Such a scenario engages the underlying policy rationales for the rules against relitigation articulated by the courts above: the potential for inconsistent results, prolonged uncertainty for the parties, as well as the drain on institutional and individual resources resulting from this re-litigation of the same case...That is not to say that there are not circumstances where different considerations might apply. I need not decide what might be an appropriate circumstance for splitting up a case; *however, one might imagine it appropriate not to apply s. 45.1 and dismiss an application where the parties to the other proceeding expressly acknowledged that not all of the issues were to be determined there, or where the nature of the underlying issues does not afford the applicant a real choice of forum.*"[3] (Emphasis added)

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[1] *Sutton v. United Food and Commercial Workers Canada, Local 175*, 2010 HRTO 935.
[2] *Bower v. Toronto Community Housing Corporation*, 2014 HRTO 542, at para. 15.
[3] *Cunningham v. Canadian Union of Public Employees, Local 4400*, 2010 HRTO 658.

When considered in conjunction with the Supreme Court's *Parry Sound* case discussed in Part 1 of this article, which held that labour arbitrators have jurisdiction (and quite possibly an obligation) to address human rights issues in grievances, it may be difficult to obtain such an acknowledgement.

The Tribunal has, at times, dismissed applications in these circumstances despite the fact that a clear *Code* concern may exist. For example, in *Blanchette v. Ontario (Minister of Natural Resources)*, 2010 HRTO 2280, the applicant was an employee (dog handler) with the Ministry of Natural Resources who accepted a job in Wawa, Ontario. It subsequently turned out that the Town of Wawa did not have adequate resources to care for the applicant's special-needs son, but the Ministry took the position that the job required the applicant to move to Wawa. The applicant was later disciplined and filed a grievance over being absent without authorization to attend his original residence. The applicant's grievances were heard by the Grievance Settlement Board, but the only issues raised were violations of the collective agreement, not the *Code*.

The Tribunal held that it was "inexplicable" that the applicant had not raised *Code* violations in the GSB hearing:

> "28. The applicant filed and pursued a grievance before the GSB [Grievance Settlement Board] in which he argued the Ministry's actions in terminating his employment were unreasonable. One of the grounds relied upon by the applicant, among others, related to the Ministry's requirement that he and his family live in Wawa. There is no evidence before me that the applicant argued this requirement discriminated against him on the basis of his family status. Instead, the applicant made other arguments relating to the residential requirement....The issue before the GSB was the reasonableness of the Ministry's actions. Actions that violate the *Code* are by definition unreasonable. The failure of the applicant to raise his human rights when dealing with the reasonableness of the Ministry's requirement that he and his family live in Wawa, when services were not available there to meet his son's special needs, is inexplicable. In my view, it is an abuse of process for the applicant to argue before the GSB that an action (the residential requirement) is unreasonable, without raising unreasonableness because of a *Code* violation, and then pursue the *Code* violation before the Tribunal. This goes to the very heart of the abuse of process doctrine."[4]

[4] *Blanchette v. Ontario (Minister of Natural Resources)*, 2010 HRTO 2280, at para. 29.

In conclusion, while the HRTO does not seem to be operating on a *presumption* that human rights allegations that could have been raised in a grievance arbitration should be dismissed, the cases show a clear reluctance to permit these claims to be raised where there was an earlier opportunity in arbitration.

The case law is not yet consistent enough to say with certainty that human rights allegations not raised in (but connected to) a grievance will be refused. But owing to the strong possibility of dismissal, unions should consider requiring grievors who wish not to raise human rights issues to sign a release confirming their election, which has the effect of not only helping to insulate the Union from future duty of fair representation complaints, but also hopefully crystalizing the seriousness of staying silent with grievors.

F. ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES – ACCESSIBILITY REQUIREMENTS

Meg Atkinson

Introduction

In 2005, the Ontario government passed the *Accessibility for Ontarians with Disabilities Act*,[5] (the "*Act*") with the purpose of "developing, implementing and enforcing accessibility standards in order to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises on or before January 1, 2025."[6]

Businesses and organizations, including not-for-profit organizations, charities, and trade unions must comply with various Accessibility Standards that are being gradually introduced through staggered compliance dates in the regulations, being mainly the *Accessibility Standards for Customer Service*[7] (the "Customer Service Regulation") and the *Integrated Accessibility Standards Regulation*[8] (the "Integrated Regulation"). These standards apply to many of CaleyWray's clients who operate in Ontario and to the employers who employ our clients' members. This article is designed to summarize these requirements.[9]

The Regulations apply differently to "large" (50 or more employees) organizations and "small" (fewer than 50 employees) organizations. There is also a distinction between

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[5] SO 2005, Chapter 11.
[6] *Ibid.*, s. 1(a).
[7] O. Reg. 429/07 ("Customer Service Standard").
[8] O. Reg. 191/11 ("Integrated Standard").
[9] As always, clients are encouraged to contact us with specific questions as the accessibility statute and regulations are detailed and nuanced, and not all elements are referred to herein.

designated public sector organizations and non-public sector organizations. This article will deal only with the requirements which apply private sector organizations.

Customer Service

The Customer Service Regulation sets out accessibility standards for customer service for, *inter alia*, organizations that provide services to members of the public and third parties.[10] By January 1, 2012, all organizations were required to develop policies, procedures, and practices to promote accessible customer service, including communication with persons with disabilities; the use of service animals and support persons; notices of temporary disruption; training of staff; feedback processes; and the availability and format of documents. Large organizations were obligated to develop written policies and documents and make such documents available upon request.

Accessibility Policies

By January 1, 2015, all organizations must have established accessibility policies "governing how the organization achieves or will achieve accessibility through meeting the requirements referred to in [the Integrated Regulation]."[11] Large organizations were to have done so by January 1, 2014, and to have developed written policies that were publicly available and in an accessible format upon request.

Training

As of January 1, 2015, large organizations must provide for the training of all employees and volunteers covering the requirements of the Integrated Accessibility Standards and the Ontario *Human Rights Code*[12] as it pertains to persons with disabilities and the obligation is ongoing in the event of any changes to the organization's policies.[13] Large organizations must keep a record of such training including the dates and number of individuals trained. Small organizations must comply with the training requirement by January 1, 2016.

Feedback

If a large organization has a process for receiving and responding to feedback, it must have ensured that the feedback processes were accessible to persons with disabilities by January 1, 2015 by providing them in alternate formats and notifying the public about those formats.[14] This requirement will apply to small organizations as of

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[10] *Supra* note 3, s. 1.
[11] *Ibid.* at s. 3(1).
[12] RSO 1990, C. H.19.
[13] *Supra* note 4, s. 7.
[14] *Ibid.*, s. 11.

January 1, 2016. The Customer Service Standard requires all organizations which provide goods or services to establish a process for receiving and responding to feedback about the manner in which it provides goods or services for persons with disabilities, and to provide the feedback service in various accessible formats.[15]

Self-service kiosks

There are accessibility requirements for organizations which offer self-service kiosks. Details are not summarized here, but can be found in s. 6 of the Integrated Standard regulation.

Accessibility Reports

Organizations are required to file an annual Accessibility Report relating to compliance with the Accessibility Standards.[16] Organizations which provided goods and services and employed more than twenty (20) people have been required to annually report on compliance with the Customer Service Standard since January 1, 2012,[17] while only large organizations must report on compliance with the Integrated Standard, effective as early as January 1, 2014.[18]

Employment

The Integrated Standard requires organizations who are employers to take certain measures with respect to its employees, including in the context of recruitment and accessible formats and emergency response, by January 1, 2016 (for large organizations) or January 1, 2017 (for small organizations).[19] These requirements may be further summarized in a future CaleyWray newsletter.

Built Environment

Changes have been made to the *Ontario Building Code*[20] through O. Reg. 368/13 in order to set the Built Environment Standard for access to public spaces for persons with disabilities in Ontario. "Public spaces" includes parking spaces, pathways, entrances and waiting areas. Compliance with Built Environment Standards for large organizations will not take effect until January 1, 2017 and for small organizations on January 1, 2018. However, it is advisable for all organizations who are considering taking on renovations or new construction to consider the Built Environment Standards in so doing.

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[15] *Supra* note 3, s. 7.
[16] *Supra* note 1, s. 14.
[17] *Supra* note 3, s. 2.
[18] *Supra* note 4, s. 8.
[19] *Ibid.*, ss. 20 – 32.
[20] O. Reg. 32/12.

Conclusion

Organizations, including trade unions, are advised to review the accessibility standards set out in the *Act* and regulations to ensure compliance with required standards as soon as possible. If your organization is behind, it is not too late to bring yourself into compliance. Trade unions may also wish to consult the online resources including the Accessibility Compliance Wizard[21] which allows users to input information relating to their organization and produces a timeline for compliance with the various standards. Failure to comply could lead to hefty fines against organizations and/or directors. Moreover, compliance with the standards is consistent with promoting accessibility and respect for human rights within our organizations and workplaces. CaleyWray would be happy to offer assistance in bringing any of our clients into compliance with the *Act* and regulations.

G. JUDICIAL DEFERENCE TO BOARD DECISIONS: THE ELLISDON CASE

Doug Wray

There is no right of appeal from a decision of a labour board or an arbitrator. The only means available to seek to challenge a labour board or arbitration decision in Ontario is by way of an application for judicial review under the *Judicial Review Procedure Act*. (Decisions of the CIRB can be challenged under the *Federal Court Act*.)

In recent years, some observers claimed there appeared to be a disconnect between the decisions of the Supreme Court of Canada and the results of judicial review applications in cases heard by the Ontario Divisional Court involving challenges to both arbitration and OLRB cases.

The Supreme Court of Canada, and in particular in a number of recent judgments written by Madam Justice Abella, emphasized and adopted judicial deference to decisions of labour adjudicators. (Madame Justice Abella was a former chair of the OLRB.)

Thus in Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, the Supreme Court rejected a challenge to an arbitrator's award because of alleged inadequacies of the written reasons. In Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59, the Court dismissed a challenge to an arbitrator's application of the doctrine of estoppel. In Construction Labour Relations v. River Iron Inc., 2012 SCC 65, the Court rejected a challenge to the decision of the Alberta Labour Relations Board. Finally, in Communications, Energy and Paperworkers Union of Canada, Local 30 v.

[21] https://www.appacats.mcss.gov.or.ca/eadvisor/

Irving Pulp & Paper Ltd., 2013 SCC 34, the Supreme Court upheld an arbitrator's decision involving mandatory random alcohol testing.

In the meantime, the Ontario Divisional Court had quashed several decisions of the OLRB.

One of those decisions involved the EllisDon Corporation. The Board's Decision was dated February 13, 2012. The case dealt with whether the Sheet Metal Workers and the IBEW held bargaining rights with EllisDon based on a 1958 Working Agreement with the Sarnia Building Trades Council. The Board, in extensive reasons, held that EllisDon was bound. However, the Board ordered that the company be given a two-year period to attempt to obtain political relief.

EllisDon challenged the Board's Decision. In a judgment of the Divisional Court dated September 2013, the Court quashed the Board's Decision. The Court went into considerable detail criticizing the Board's reasoning and result.

The Unions then appealed the decision to the Ontario Court of Appeal. The Court of Appeal had not dealt with a labour case for a couple of years. On November 17, 2014, the Court issued its judgment, allowing the appeal from the Divisional Court and reinstating the Board's decision.

The Court held that the Divisional Court had erred in concluding that the Board's Decision was unreasonable and in substituting its own decision for that of the Board.

The Court took the opportunity to emphasize that "the Supreme Court has recognized that the unique context of labour relations requires that arbitrators and labour boards receive a high degree of deference on judicial review" (para. 40). The Court held that the standard of review was reasonableness and that the Board's Decision was reasonable.

This is good news generally for trade unions. Employers are more likely to seek to challenge arbitration and labour board decisions. The Ellis-Don decision of the Ontario Court of Appeal may serve to discourage such challenges.

See:

Ellis-Don Limited, 2012 CanLII 6306

Ellis Don Corporation v. Ontario Metal Workers', 2013 ONSC 5808

EllisDon Corporation v. Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586, 2014 ONCA 801

Note: We understand that the company has sought leave to appeal to the Supreme Court.

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.*

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.

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.

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