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.

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A. LAKERIDGE HEALTH v. CUPE, LOCAL 6364 (Herman) Decided on April 26, 2023

Jamie Corbett

This very recent decision from Arbitrator Herman found that the Employer Hospital acted reasonably by terminating forty-seven CUPE members who declined to share their vaccination status pursuant to the Hospital's September 2021 Mandatory Vaccination Policy ("MVP").

The decision resulted from two policy grievances and four individual grievances brought by the Union and four grievors. The Union argued that the Hospital unreasonably terminated employees who declined to share their vaccination status under the Hospital's MVP.

The grievors include two Registered Practical Nurses, a medical secretary and a health information management professional. None of the grievors applied for medical or religious exemption, and only one of the grievors had a position that allowed for remote work.

Lakeridge comprises a group of hospitals, emergency departments and community health care locations.

The Hospital's Policy

To encourage its employees to receive the vaccine, the Hospital created a MVP in June 2022. That policy required employees to confirm their vaccination status and recommended that employees get the vaccine. There was a mandatory educational component for employees who did not disclose their status.

In August 2021, the Ontario Chief Medical Officer Health issued Directive #6, which, *inter alia*, required hospitals to establish vaccination policies. It required unvaccinated employees to be tested weekly. At this time, 11.1% of Hospital employees had not disclosed their vaccination status.

The Hospital's MVP, or "September Policy," was an amendment of the Employer's original June 2021 MVP, and required vaccination as a condition of employment. Part of the objective of the MVP, the Hospital argued, was to encourage vaccination among its staff.

Like all staff who declined to share their vaccination status, the four Grievors were put on unpaid leave in October 2021, followed by terminations beginning in November 2021 for failure to provide proof of vaccination. One grievor resigned (retired) in October 2021 while she was on unpaid leave.

In October 2021, Hospital calculated that forty-seven CUPE members would be subject to termination if they did not disclose their positive vaccination status. Include those CUPE members, the Hospital had around eight employees who had not shared their status.

In November 2021, the Hospital began terminating employees who did not disclose their vaccination status (including the grievors). On November 2, 2021, 2.29% of the Hospital's employees had not disclosed their vaccination status, marking a significant drop from the 11.1% who had not disclosed their status in August 2021.

Union's arguments

The Union did not argue that placing the grievors on unpaid leave was unreasonable. Instead, it argued that terminating the grievors was unreasonable. It argued that the Hospital should have reinstated those employees when the vaccine mandate expired in June 2022.

The timing of the terminations beginning in November 2021 was unreasonable as it did not give grievors enough time to get vaccinated before they became terminated.

The Union also argued that non-invasive alternatives should have been considered, such as weekly Rapid Antigen Testing ("RAT") or using previous positive test to prove immunity to the virus.

The vaccinations that employees received under the September Policy would have waned in efficacy by June 2022, especially since the MVP did not require subsequent booster shots. The Union brought in a medical expert to attest to the waning efficacy.

Lastly, the Union argued that the grievors, and the other unvaccinated employees whom the Hospital terminated, should have been provided with opportunity to present their views and circumstances before being placed on leave or terminated.

Hospital's arguments

Hospital's argued that it was reasonable to terminate the unvaccinated employees. Contrary to the Union's arguments, there were no reasonable alternatives to vaccination. RAT, it argued, is not reliable, as it generates false negatives. Testing also does not have preventative value. Maintaining lists of unvaccinated employees and their test results was a strain on the Hospital, as that documentation took up too much administration time.

Regarding terminating the unvaccinated employees, the Hospital argued that maintaining those unvaccinated employees on unpaid was not feasible giving staffing shortages and the challenges of attracting staff to replace unvaccinated employees on leave. In particular, leaving unvaccinated employees' "open" would make it difficult to fill the vacancies that those employees left at the Hospital. Temporary positions with an unknown end date are not as attractive to new hires as permanent positions.

Allowing employees to work remotely or in isolation would have been unreasonable. The Hospital deploys staff to where they are needed, especially in the event of an outbreak in the Hospital. Creating accommodated deployment plans for unvaccinated employees would not be reasonably feasible for the Hospital.

Furthermore, one RPN grievor worked in dialysis care, where COVID-positive patients continued to receive care by staff members who don appropriate PPE to protect themselves from contamination while giving life-saving service to those patients. It would not have been operationally possible to isolate her from COVID-positive patients.

Remote work similarly was not a reasonable alternative. Only one of the grievors was in a position to perform work from home. The Hospital argued that even when working remotely, staff members on occasion must come into the Hospital for trainings and meetings. Part of the MVP, it argued, was to encourage vaccination. Allowing employees to work from home and risk infection would have been contrary to the objectives of the MVP.

Decision

Arbitrator Herman largely found in favour of the Hospital, with one exception. Leaving forty-seven jobs "open" was not feasible, especially when the Hospital was having difficulties hiring new staff members to fill in the vacancies left by unvaccinated employees. Similarly, he found that the Hospital's hiring concerns were valid, as were the operational difficulties associated with isolating unvaccinated employees from potentially high-risk situations in the event of deployment.

The Arbitrator also accepted the Hospital's concerns about weekly RAT as an alternative to vaccination. Testing was neither adequate as a preventative measure nor operationally feasible for Hospital administration. As both parties had presented medical expert evidence on the topic, the Arbitrator was more convinced by the Hospital's expert who posited that testing is less reliable than vaccination for prevention.

Further regarding medical expert evidence, Arbitrator Herman was not convinced by the Union's argument that the waning efficacy over time of the vaccine against certain mutations made the terminations unreasonable. He was concerned with what the Hospital could reasonably have known at the time it implemented the September 2021 MVP. The Union offered evidence that arose after that time.

The Hospital was not unreasonable in not considering individual circumstances or giving the grievors a chance to make their case. Because the terminations were not discipline, mitigating factors such as length of service, good disciplinary record do not apply.

Timing, however, was not reasonable. Arbitrator Herman held that the employees should have been given more time to contemplate the consequence of the September Policy. The earliest termination should have only been in December 2021.

Key considerations

As with all MVP decisions, the particular facts and realities of the workplace in question was an overriding consideration in the decision. In particular, the effect of the staffing shortage is an important theme in this decision. The Hospital's need to fill vacancies was key to maintaining the delivery of service to patients and to the public more generally.

Importantly, the grievors did not claim religious or medical exemptions from the MVP. Employees who did claim such exemptions were not terminated in November 2021, but the details of their investigations were not part of this decision.

Lastly, Arbitrator Herman considered the medical evidence with a mind to what the Hospital reasonably knew or could have known at the time it created and implemented the MVP. Our current knowledge about the waning efficacy of the vaccine against certain COVID mutations, for example, should not cloud a consideration of what was reasonably known at the time that the MVP was created.

B. IMPEDIMENTS TO CORRECTING WAGE RESTRAINT LEGISLATION – A CASE STUDY OF BILL 124

Aleisha Stevens

In June 2019, the Ford government introduced the *Protecting a Sustainable Public Sector for Future Generations Act* (Bill 124) ostensibly for the purpose of reducing provincial debt. In reality, the law in its final form did nothing more than cap total compensation at 1% over the course of three years for, amongst others, individuals working in the health care sector. The vast majority of these individuals were working in long term care homes and hospitals and were women, with a significant number of them also visible minorities.

Within a year of receiving the message as to the inferior worth of their services, these same individuals were asked to work on the front lines of the COVID pandemic. They attended to patients on respirators in hospitals; drove ambulances to get the critically ill to overcrowded emergency rooms; and cared for the elderly in long term care homes in their final dying moments when family was prohibited from visiting. Their schedules were changed, vacations denied, and double and triple overtime was the norm rather than the exception.

Throughout it all, while purporting to value these frontline workers, the Ford government maintained the 1% cap, proving that his accolades were nothing more than disingenuous lip service. Compounding the misery was the subsequent skyrocketing cost of living, against which a 1% wage increase offered no relief.

Unions banded together to challenge the constitutionality of Bill 124, but in the meantime they were required to bargain in good faith and conclude contracts under the oppressive 1% cap. They did so, under protest, and with the caveat that if the courts found Bill 124 unconstitutional, the union and employer would return to the bargaining table to engage in free collective bargaining. Boards of interest arbitration ordered this "reopener" language be included in the collective agreement or, more often, simply retained jurisdiction through language in their Awards.

On November 29, 2022, almost 3 years after Bill 124 received Royal Assent, Justice Koehnen of the Ontario Superior Court of Justice declared the law to be void and of no effect. For a summary of the decision, please refer to the CaleyWray article released December 13, 2022 which can be found here.

The next task was to revisit all collective agreements concluded pursuant to the unconstitutional terms of Bill 124 and engage in free collective bargaining. While most employers and unions headed back to the table, some parties determined negotiations were unlikely to succeed and proceeded directly back to the board of interest arbitration that had issued an award – now a year or two old – to have the 1% cap corrected.

In at least one case, the case this article focuses on, an employer attempted to circumvent the reopener language entirely and maintain the 1% cap over the course of two collective agreements, despite the Court's finding that it was unconstitutional.

Mon Sheong Richmond Hill Long Term Care home is one of five long term care homes and numerous organizations operating as part of the Mon Sheong Foundation. The Richmond Hill location, which we will refer to simply as "Mon Sheong", is organized by the Service Employees' International Union Local 1 (SEIU), a union representing some 194 employees at the home.

Shortly after Justice Koehnen's decision, the SEIU issued notice to Mon Sheong of the need to return to the table to bargain; however, Mon Sheong not only refused to negotiate, it also refused to return to the previous two boards of interest arbitration for a resolution of the items in dispute. Instead, Mon Sheong took the position that, despite having issued reopener language, both Boards had exhausted their jurisdiction under *HLDAA* when the parties signed the collective agreements.

Complicating the situation further was the fact that the Chair of the first Board had passed away after the award issued. In the normal course, where a Chair is unable to act, the Union and Employer work together to appoint a new Chair. Failing agreement, the parties

can seek the assistance of the Ministry of Labour, Immigration, Training and Skills Development (Ministry) to appoint one under s. 6(8) of *HLDAA*. However, due to the fact that Mon Sheong disputed the board's jurisdiction, it was both unwilling to agree to a new Chair, and furthermore filed an objection when the SEIU sought the appointment of a new chair from the Ministry.

Mon Sheong's position was a dangerous one which, if accepted, it had the potential to cause irreparable harm to labour relations in Ontario. It would raise hesitancy to participate at the bargaining table where the parties were subject to a disputed statute. Similarly, parties would be unwise to finalize and execute a collective agreement if doing so could mean they were irrevocably bound by an unconstitutional statute. Both scenarios would serve only to destabilize labour relations and cause confusion and unrest.

Fortunately, both the Ministry and the second board of interest arbitration issued decisions rejecting Mon Sheong's jurisdictional objections. On April 17, 2023, the Director of Dispute Resolution for the Ministry issued a decision finding that the signing of a collective agreement was not determinative of a board's jurisdiction. The Director held:

> "The Board made it clear that it would remain seized to receive submissions should Bill 124 be overturned by the courts, even after the parties finalized a Collective Agreement. These events have occurred. The Randall Board's work in this respect is not complete."

The Director concluded that a Chair would be appointed "to enable the Board to complete its work".

The second board was chaired by Arbitrator Goodfellow, which had issued an Award on August 22, 2022 for a 2 year collective agreement between the parties. The first of the two years being subject to the 1% cap. As with the Ministry, the Goodfellow Board heard and rejected Mon Sheong's jurisdictional arguments. The Board – with a stated but no written dissent by the Employer nominee – noted that "like all other arbitration boards across the province of which we are aware" it had granted reopener language in the event the constitutional challenge to Bill 124 was successful. The Board opined on the necessity of issuing a decision and retaining jurisdiction:

> [13]Taking that step was necessary to avoid delay. One of the choices presented in many of these cases was for unions to simply wait – to defer an arbitrated resolution until the constitutional issue was decided. Obviously that was no choice at all. Retroactivity has its limits, practically, if not legally. Employees awaiting compensation improvements must live in the present, not retroactively. The only real choice was for the Union to proceed and ask for the reopener, which is what this and all other unions did.

The board went on to list a number of significant awards where parties had returned to a board of interest arbitration pursuant to reopener language and secured increases beyond the 1% cap.

These decisions are unique and helpful for confirming the enforceability of reopener language in circumstances where parties are bargaining in uncertain times. They provide assurances that parties can conclude a collective agreement while also reserving the option of returning to the deal if circumstances are altered retroactively. The decisions also support important labour relations principles including timely bargaining and the right to sign a collective agreement without binding oneself to an unconstitutional law.

C. ARBITRATOR FINDS EMPLOYER DISCRIMINATED AGAINST GRIEVOR IN DENYING HER CREED EXEMPTION TO COVID-19 POLICY

Erin Carr

In *City of Toronto v Canadian Union of Public Employees, Local 79*, Arbitrator McLean upheld a public health nurse's entitlement to a creed-based exemption under the City of Toronto's mandatory vaccination policy (the "Policy"). Arbitrator McLean determined that the Griever held a sincere belief against vaccination, with a sufficient nexus to her religion, and therefore she was entitled to human rights protections on the basis of creed.

Facts

The City's Policy required all staff to be fully vaccinated, subject to exemptions on protected grounds under the *Human Rights Code* (the *"Code").* Unvaccinated employees were placed on a leave of absence in late 2021 and dismissed in early 2022.

The Grievor was employed as a public health nurse in the City's Communicable Disease Liaison Unit. The Grievor advised the City that she could not receive the vaccine because she is an observant Roman Catholic and a member of the Latin mass community, which is a more traditional and orthodox subset of the Catholic Church. She stated that her creed prevents her from getting vaccinated because to do so would be contrary to her conscience and would be tantamount to condoning abortion, given the use of fetal cell lines in research for COVID-19 vaccines.

The City denied the Grievor's request for an exemption, arguing that a singular belief against vaccinations did not amount to creed within the meaning of the *Code*. The Grievor was placed on an unpaid leave of absence and later dismissed for "insubordination" and "willful disobedience" for failing to comply with the Policy and creating a health and safety

risk in the workplace. This was despite the fact that the Grievor had a pre-existing accommodation to work from home on a full-time basis, because she was taking care of her seriously ill mother, who lived in the United States.

The Union filed a grievance on her behalf. The issue was whether the Grievor has a *bona fide* belief in creed which supports her exemption request.

At the hearing, the Union argued that the City discriminated against the Grievor on the basis of creed because her religion precluded her from taking a vaccine associated with abortion. Although obtaining from vaccination was not an objective religious requirement, the Union argued that it was a subjective requirement in the Grievor's mind, which is enough to trigger protections under the *Code*. The Union argued that the Grievor's beliefs were clearly sincere, as evidenced in part by the fact that she was willing to sacrifice her career and ability to visit her seriously ill mother in the United States.

The City maintained that the Grievor's beliefs do not amount to a creed, because refusing to get vaccinated is a "secular act" - not a religious act (such as praying or attending religious services). The City relied on the fact that the Catholic Church officially condoned vaccination and did not consider vaccines to be associated with abortion. The City also argued that the Grievor's beliefs did not amount to a creed, because the connection to fetal tissue was too remote, and therefore any infringement of her beliefs was insubstantial. Finally, the City challenged the Grievor's sincerity given some inconsistencies in her past behaviour. The City pointed to the fact that the Grievor previously worked as a vaccination nurse administering vaccines that relied on the same fetal cell technology as the COVID-19 vaccines.

Decision

Arbitrator McLean determined that the Grievor's beliefs were sincere and that taking the vaccine was contrary to her religion and her personal relationship with God. Therefore, the City discriminated against the Grievor when it denied her exemption request.

Firstly, Arbitrator McLean rejected City's argument that in order to find a claim of discrimination, a "religious practice" must be engaged. Arbitrator McLean determined that creed-based protections are not confined to religious practices, but also apply to religious beliefs which call for a particular practice. According to Arbitrator McLean, the mere fact that the Grievor's beliefs *prohibit* vaccination, rather than impose a positive requirement, does not change the fact it is a religious practice protected by the *Code*.

In assessing the sincerity of the Grievor's beliefs, Arbitrator McLean considered the seminal case on religious freedom: *Sydicat Northcrest v. Anselem*, 2004 SCC 47 ("*Amselem*"). In *Amselem,* the Supreme Court states that a religious belief does not need to be an objective religious requirement to be protected. Rather, it only needs to be a

sincere belief with a nexus to religion.

Arbitrator McLean referred to Arbitrator Herman's award in *Public Health Sudbury & Districts*, 2022 CanLII 48440 (ON LA), which concerned another grievor who objected to the vaccines because it was developed using fetal cell lines from aborted fetuses. Arbitrator McLean quoted Arbitrator Herman's award, and in particular Arbitrator Herman's comments on *Amselem:*

> 44. The impact of this decision is that the grievor must demonstrate that she has a practice or belief, that has a nexus with her creed, that calls for a particular line of conduct, here the decision to not get vaccinated, "either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials." To meet the requirement that an applicant must establish a link between the conduct in question and his or her creed, the Court has therefore determined that a "subjectively engendered" personal connection with the divine or one's spiritual faith is sufficient.

Ultimately, Arbitrator McLean was satisfied that the Grievor was sincere in her belief that taking the vaccine was contrary to her religion. He considered the Grievor's testimony, and found that there was no doubt that she was Roman Catholic, and that many Catholics believe the vaccine is evil. Arbitrator McLean found that the Grievor conducted herself in a manner consistent with her understanding of the Latin Mass doctrine. In his view, the sincerity of the Grievor's beliefs was strengthened by her acceptance of the significant consequences of her decision not to get vaccinated, namely, that she could not travel to visit her seriously ill mother, and her career as a public health nurse was in jeopardy.

Takeaway

While each case will be decided on its own specific facts, Arbitrator McLean's analysis regarding sincerity and the nature of creed beliefs set a clear test for creed-based vaccine exemptions. Followed Arbitrator Herman's award, Arbitrator McLean recognizes that to qualify for an exemption from COVID-19 vaccination on the basis of creed, an employee must demonstrate:

> (i) they have a religion or creed;
>
> (ii) there is a nexus between their refusal to get vaccinated and their religion or creed; and

(iii) they are sincere in their belief that their religion or creed prevents them from getting vaccinated.

In examining whether an employee can satisfy the third criterion, Arbitrator McLean (and Arbitrator Herman) recognize inconsistencies in past conduct, but nevertheless, they give more weight to the evidence about current religious beliefs.

The bottom line is that if an employee sincerely believes that getting vaccinated would be inconsistent with the requirements of their religion, they ought to be accommodated up to the point of undue hardship.

D. CUPE 79 V. CITY OF TORONTO (PUSHMAN) (McLean) Decided on March 23, 2023

Jaime Corbett

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The City denied the Grievor's request for an exemption, arguing that a singular belief against vaccinations did not amount to creed within the meaning of the *Code*. The Grievor was placed on an unpaid leave of absence and later dismissed for "insubordination" and "willful disobedience" for failing to comply with the Policy and creating a health and safety risk in the workplace. This was despite the fact that the Grievor had a pre-existing accommodation to work from home on a full-time basis, because she was taking care of

her seriously ill mother, who lived in the United States.

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The bottom line is that if an employee sincerely believes that getting vaccinated would be inconsistent with the requirements of their religion, they ought to be accommodated up to the point of undue hardship.

E. UPCOMING AMENDMENTS TO THE OHSA REGULATIONS FOR CONSTRUCTION PROJECTS

Daniel Anisfeld

The Province of Ontario has issued a proposal to amend several aspects of the regulations to the *Occupational Health and Safety Act* (OHSA) that pertain to the construction sector.

The proposal, announced on March 15, 2023, would amend O. Reg. 213/91 (the "Regulation"), which is applicable to work on construction projects. The amendments are scheduled to come into force on July 1, 2023.

The amendment would begin by adding a new subsection to Section 21, "Protective Clothing Equipment and Devices," that would require employers to provide personal protective clothing that is a "proper fit, having regard to all relevant factors including body types."

The changes to the Regulation would also impose additional requirements on construction employers with respect to the provision of washroom facilities. The amendments would require construction employers to:

- Provide washrooms no more than 20 metres from the project site "where reasonably possible." Where doing so is not possible, the distance remains 180 metres. (Section 29 of the Regulation);
- Maintain washrooms in good repair (Section 29);
- Ensure that toilets have open front seats, toilet paper holders and an adequate supply of toilet paper as well as a self-closing door that can be locked from the inside (Section 29);
- Adequate light, heat, ventilation, and privacy and protection from weather and falling objects in all washroom facilities (Section 29);

- If a washroom has only one toilet, the toilet must be completely enclosed (Section 29.1);

- If a project requires five or more toilets, at least one of them must be for the exclusive use of female workers, clearly indicated as such, with proper disposal for sanitary napkins (Section 29.1);

- Single-toilet two-toilet facilities must have their own clean-up supplies in the same area of the project (Section 29.2); and

- A wash basin with running water must be supplied except where doing so would be unreasonable; in such cases an alternative method of cleaning hands with alcohol sanitizer must be provided. (Section 29.2)

Unions are reminded that there are certain remedies under the *Act* that can address retaliation against employees for seeking enforcement of any protections under the *OHSA*.

F. BILL C-228: FEDERAL GOVERNMENT PASSES ADDITIONAL PROTECTIONS FOR WORKERS' PENSIONS IN EVENT OF BANKRUPTCY OR INSOLVENCY

Raymond Seelen

For those lucky enough to have them, employees ought to be able to count on their pensions when they retire. It is therefore especially tragic where an employer falls into bankruptcy and its former employees see their pension benefits evaporate. Bill C-228 (the "*Pension Protection Act")* seeks to add additional protection to pensioners. This bill recently passed third reading in the senate and is now awaiting royal assent before it becomes law. While the *Pension Protection Act* is not yet codified into law, it will almost certainly cause a significant shift in how employers fund their pension programs and what kind of pension programs employers will be open to agreeing to.

When a company becomes bankrupt, each of its creditors (i.e. anyone who that company owes money to) has a claim on that company's assets. These creditors typically would include the federal and provincial government, banks, suppliers, trade unions and individual employees. Each creditor is entitled to a portion of the company's remaining assets. Some creditors have priority to other creditors and therefore have a right to have their debts fully satisfied before other debts are paid out. The more creditors with priority claims a company has, the less money will be left over for the other creditors.

Pension plans currently have a priority claim in bankruptcy, but the claim is limited. The only amounts which are required to go to the pension plan are amounts already deducted from employee wages, the normal cost of benefits during the plan year and any amounts payable to the plan administrator. Over the course of a plan year, an employer may be required to make other payments to into the pension plan in order to ensure that pensioners continue to receive their full entitlement. These "special payments" are not given a priority in the bankruptcy proceeding, meaning that pensioner benefits may be reduced or eliminated if the company lacks sufficient assets to continue to fund the plan.

The *Pension Protection Act* seeks to address this issue by including certain special payments in the pension plan's priority. Once the new legislation is in effect, the pension plan will have priority access to the company's assets in order to cover unfunded liabilities in the plan. In short, so long as the employer has sufficient assets to cover the costs, the pension plan can either continue to operate indefinitely or can be wound down in accordance with the applicable statutory guidelines. While the *Pension Protection Act* does not guarantee that pensioners will continue to receive an unreduced pension if their employer becomes bankrupt, it goes a long way towards protecting them.

This protection of existing plan members is not without its costs. Many experts are speculating that this new legislation will have adverse impacts on employers who participate in pension plans. The types of unfunded liabilities which this legislation gives priority to can be significant and can result in a major reduction of the amount of money left over for other creditors.

Banks, other financial institutions and investors are extremely sensitive to the risks associated with lending money. Prior to authorizing a loan, they will review a company's assets and liabilities in an effort to determine whether the company will be able to make payments against the loan and, if the company defaults, are there assets which can be seized to satisfy the loan. Pension liabilities can be extremely unpredictable and fluctuate based on a number of factors (for example, the number of pensioners, the number of contributors and the return on the plan's investments). Where a lender recognizes that there is a significant risk that, in the event of a bankruptcy, a substantial portion of the company's assets are likely to go to the pension plan and not to the lender, that lender will be looking to minimize its own risk. Strategies employed by lenders to mitigate this risk might include lending at a higher interest rate, requiring repayment over a shorter period or refusing to lend money at all.

This tension is likely to impact workers. Employers may be looking to wind down these pension plans in order to improve their relationship with lenders and to save costs in other areas. Employers will also recognize very quickly that the cost of maintaining a pension plan has increased as a result of this legislation and, as such, may use this fact to pressure concessions from unions on other items. This will be especially true for defined benefit plans, where the plan is committed to providing a fixed amount to each

pensioner. For these plans, there is a much greater risk of unfunded liabilities and therefore a much greater risk to creditors in the event of a bankruptcy.

While the *Pension Protection Act* has passed in both the House of Commons and the Senate, it has not received royal assent and is not yet entered into law. Moreover, when it does receive royal assent, it will not take effect until four years after the date of royal assent. While there is a degree of speculation in these comments, during the time between now and the full implementation of the *Pension Protection Act,* unions should anticipate significant push back on demands to improve pension benefits. This pushback will likely increase as the implementation date becomes closer and financial institutions begin implementing policies to curb their own risk. Unions ought to plan ahead and make any pension demands a priority during the next four years in order to secure improvements before resistance increases.

G. ONTARIO LABOUR RELATIONS BOARD RETURNS TO IN-PERSON PROCEEDINGS

Sukhmani Virdi

On November 21, 2022, the Ontario Labour Relations Board issued a Notice to the Community that it would re-open its doors for in-person hearings and mediations in 2023. The transition back to in-person hearings and mediations has commenced in the following three stages:

1. As of February 1, 2023, parties to any matter (whether newly-filed or existing) could jointly request that the matter proceed in person.

2. As of March 1, 2023, all new matters filed under the *Labour Relations Act, 1995* were being scheduled for in-person hearings and mediations.

3. As of April 1, 2023, all new matters (including ones filed under Acts under than the *LRA*) were being scheduled for in-person hearings and mediations.

The Board has made clear that in-person hearings are not hybrid hearings, and there will be no cameras in the Board's hearing rooms. Notices of Hearing will contain a Zoom videoconference link that is meant only to be used for electronic document sharing during the hearing.

Notwithstanding the dates for transition, certain matters have proceeded by videoconference as the "presumptive method of proceeding", including but not limited to, Case Management Hearings, Pre-Consultation Conferences, Regional Certification/ Termination Meetings, first day of hearing and/or mediation in certain types of applications and the first day of summons hearings.

For matters where the workplace is 200 road kilometers or more away from the Board, videoconference will remain the presumptive medium for hearings and mediations.

Parties are now able to request a change to the mode of hearing (from videoconference to in-person, and vice versa). The Board will weigh a number of factors before determining if a change is suitable.

The most updated guidelines for in-person hearings and mediations at the Board can be found here: https://www.olrb.gov.on.ca/News/2023/NoticeCommunity_February-28-2023-EN.pdf

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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