December 2011

mcmillan employment and labour newsletter

in this issue...

BC labour relations board dismisses Charter challenge

In companion decisions[1] issued on November 4, 2011 involving the *Canadian Charter of Rights and Freedoms*, the BC Labour Relations Board (the "Board") has dismissed a Charter challenge and unfair labour practice complaints brought by the Ambulance Paramedics of BC, CUPE Local 873 (the "Union") against the Government of British Columbia, the Health Employers Association of BC ("HEABC") and the Emergency and Health Services Commission ("EHSC"), which operates the province-wide British Columbia Ambulance Service.

McMillan LLP represented HEABC and EHSC in the proceedings before the Board.

Following the legislated end in November of 2009 to a seven month province-wide strike by ambulance paramedics, the British Columbia government designated the EHSC as a "health sector" employer under the *Health Care Employers Regulation*. This had the effect of bringing the EHSC and its employees, including ambulance paramedics, under the *Health Authorities Act* which establishes the legislated collective bargaining regime for the health sector in British Columbia. Under the *Health Authorities Act* all health sector employees in British Columbia are required to be placed within one of five statutory bargaining units.

Following the designation of the EHSC as a health sector employer, the HEABC as the bargaining agent for all health sector employers in the province, applied to the Board to place the ambulance paramedics in the facilities subsector bargaining unit, which is represented by the Facilities Bargaining Association. Placement within the facilities subsector bargaining unit, which is the largest of the five statutory health sector bargaining units with approximately 50,000 members, would result in the Union and its approximately 5,000 members becoming a minority constituent union group within the larger multi-union bargaining unit.

In contrast, prior to the designation of the EHSC as a health sector employer, the Union had historically been the certified bargaining agent for a standalone bargaining unit of ambulance paramedics and was thus able to represent its members and negotiate collective agreement terms and conditions directly with the EHSC.

In the proceedings before the Board the Union argued that the decision to designate the EHSC as a health sector employer and the placement of the Union and its members in the multi-union facilities subsector bargaining unit violated section 2(d) of the Charter since "as a minority within a larger

unit, its members will be prevented from associating as a group for the purpose of collective bargaining". In reliance on the decisions of the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Unit v. British Columbia*[2], ("*Health Services*"), and *Ontario (Attorney General) v. Fraser*[3] ("*Fraser*"), HEABC and the BC government contended that section 2(d) guarantees a right to the process of collective bargaining, but not to any particular bargaining outcome or any particular model of labour relations or bargaining method.

The Board agreed with the BC government and HEABC and confirmed that the Supreme Court in *Health Services* and *Fraser* clearly stated that section 2(d) of the Charter "guarantees collective access to a meaningful process, not one that necessarily maximizes or preserves the parties' collective bargaining interests".

The Board held that an inquiry under *Health Services* and *Fraser* "is more narrowly focused" and depends upon "how the impugned legislation impacts on the process of good faith bargaining", including the impact on the terms of the Local 873 Collective Agreement.

In reviewing the articles of association of the Facilities Bargaining Association the Board observed that the articles provided for a representational model of majority rule subject to the duty of fair representation. Among other protections, the articles also provide for the provision of a domestic arbitration procedure to resolve disputes between constituent unions, subject to the ultimate review of the Board, for the provision of a bargaining council consisting of representatives from each of the constituent unions, and for the establishment of a negotiating committee consisting of representatives of all of the constituent unions. The Board also observed that the Articles maintained an individual role for the constituent unions to represent their members in the administration of the collective agreement.

The Board held that the "impugned legislation establishes a collective bargaining regime that provides a meaningful process through which Local 873's members may associate as a group, both in furtherance of workplace goals and to reach terms of employment" and "exert meaningful influence over working conditions" through collective bargaining. Accordingly, based on the type of protections summarized above, the Board held that the provincial health sector collective bargaining regime established under the *Health Authorities Act* does not violate section 2(d) of the Charter.

In its decision the Board ordered that the Union collective agreement be attached as a separate appendix to the existing health sector collective agreement between the HEABC and the Facilities Bargaining Association, in order to satisfy the *Health Authorities Act* requirement that there be a single collective agreement for each of the five statutory health sector bargaining units. The Board stated that the matter of integrating the terms and conditions of the ambulance paramedics Union collective agreement into the existing Facilities Bargaining Association collective agreement was "a matter for the parties to address in the ordinary course of the collective bargaining process".

The Board's decision highlights that while section 2(d) of the Charter guarantees a meaningful process of collective bargaining, it does not guarantee any particular collective bargaining objectives, nor does it guarantee a particular model of labour relations or a particular bargaining method. As stated by the Supreme Court of Canada in *Health Services* and *Fraser*, section 2(d) prohibits interference that would impact a union's ability to "exert meaningful influence over working conditions".

In summary, although unions may rely on the Charter to guarantee collective access to a meaningful process, reliance cannot be placed on section 2(d) to achieve or

maintain a process that maximizes or preserves their particular collective bargaining interests or existing bargaining structures.

by N. David McInnes

[1] *Emergency and Health Services Commission – and – the Government of the Province of British Columbia – and – Ambulance Paramedics of British Columbia, CUPE, Local 873* (BCLRB No. B197/2011)

[2] *Health Employers Association of British Columbia – and – Emergency Health Services Commission* (BCLRB No. B198/2011)

[3] 2007 SCC 27

For more information on this topic, please contact:

N. David McInnes,
604.691.7441
david.mcinnes@mcmillan.ca

there's one month left to prepare for the AODA in Ontario – is your company ready?

The Ontario Government enacted the Accessibility for *Ontarians with Disabilities Act, 2005* (the "AODA") to develop standards to improve accessibility for Ontarians with disabilities in the areas of customer service, employment, information and communication, transportation and the built environment. Provincially-regulated private sector employers must be in compliance with the Customer Service Standard (the "CSS") and certain provisions of the Integrated Accessibility Standard (the "IAS") by January 1, 2012. Is your company ready?

application

With few exceptions, the CSS and IAS standards apply to private sector organizations that provide goods, services or facilities to the public or a third party business or organization and have at least one employee in Ontario (each, a "Provider"). In addition, where a Provider contracts with another organization to provide goods, services or facilities on its behalf, the Provider must ensure that the third party organization also complies with the CSS and the IAS.

overview of obligations

The CSS imposes the following principal obligations upon Providers as of January 1, 2012:

- *Policies and Procedure* – Establish policies and procedures regarding the provision of goods and services to people with disabilities, including in respect of:
    - use of assistive devices and services available to the public; and
    - support persons' and service animals' access to business premises.
- *Communication* – Develop alternative modes of communication with disabled individuals.

- *Notice of Disruption* – Develop a procedure to notify of a disruption to a facility or service and identify alternative facilities or services.
- *Training* – Provide training on the following issues to all individuals who may interact with the public or influence the development of policies, practices and procedures related to customer service:
    - the purpose of the AODA and the requirements of the CSS;
    - policies and procedures;
    - interacting and communicating with disabled people who have different restrictions, use assistive devices or have a service animal or support person;
    - use of assistive devices available on the organization's premises; and
    - what to do if a disabled person is having difficulty accessing the Provider's services, including advising of potential accommodations.
- *Feedback* – Develop a process for receiving and responding to feedback on the provision of goods and services to people with disabilities.

For more information on this topic, please contact:

Jennifer Bond
416.865.7023
jennifer.bond @mcmillan.ca

Darryl Hiscocks
416.307.4137
darryl.hiscocks @mcmillan.ca

- *Documentation/Accessibility Report* – If the Provider is a private sector organization with 20 or more employees or a designated public sector organization, it must disclose additional documentation and file an annual accessibility report with the Ontario Government.

The IAS imposes the following principal obligation upon Providers as of January 1, 2012 (with other obligations to follow in succeeding years):

- *Workplace Emergency Response Information* - Provide individualized workplace emergency response information to all employees with a visible or non-visible disability, if and as required.

What's the risk if your company does not meet these obligations as of January 1, 2012? While the AODA is premised on a system of self-certification, Ontario employers are at risk of being inspected and fined if they fail to meet their obligations. Offences carry significant fines of up to $50,000 for a director or officer of a corporation and $100,000 for a corporation, for every day or part day that the offence occurs.

implications for employers

There is no single way to provide accessibility for all disabled persons and, as a result, compliance with the AODA, and accessibility more generally, will be an ongoing process.

All Providers will have to comply with the CSS and certain provisions of the IAS in one month. Considering the significant obligations prescribed in these standards, Ontario employers are well-advised to contact their legal counsel now to assist with developing and implementing all required policies, procedures and training.

by Darryl Hiscocks and Jennifer Bond

labour arbitrators need not be "correct" – just be "reasonable"

The courts have long struggled with the degree of deference which should be shown to labour relations arbitrators. As labour disputes become increasingly complex, it is more and more difficult to see anything like a "simple" case. As a result, the system of specialized arbitrators who decide cases between employers and unions under collective agreements have become increasingly formalistic and the legal scrutiny which has been brought to bear on these decisions has increased.

In a development which is positive for labour relations practitioners, the Supreme Court of Canada ruled on December 2, 2011 that decisions of labour arbitrators should be shown a high level of deference. The Court's decision in *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, involved an appeal which focused on the nature and standard of review of the courts of arbitrator's rulings.

Jacqueline Plaisier had been employed by the Nor-Man Regional Health Authority for 20 years, and she and her union disputed the approach taken by her employer to the calculation of her vacation. The issue involved an interpretation under the applicable collective agreement and whether or not Ms. Plaisier was entitled to a "bonus" week of vacation on the basis of reaching her 20th anniversary with the organization. The collective agreement wording favoured Ms. Plaisier, with "employment" for the purposes of the agreement being equivalent to the period which commenced when she started working for the Health Authority. In actual fact, the employer's longstanding practice was to treat the employee's seniority date as the trigger for vacation entitlements. As a result of this, a period when Ms. Plaisier worked as a casual employee was not counted by the employer for the purposes of her vacation calculation.

The union submitted the matter to arbitration and was ultimately unsuccessful. While the collective agreement interpretation clearly supported the union's position (the seniority date practice of the employer was not mentioned in the agreement, and the reference was to employment as they alleged), the arbitrator refused to allow the union to rely on the express wording of the collective agreement. Instead, the arbitrator held that the union was subject to an estoppel which prevented them from relying on their collective agreement rights. This was based on a longstanding and widely-known practice of how the wording was applied by the parties. The employer was able to successfully rely on vacation credit statements provided to bargaining unit employees and relevant seniority reports which were distributed on an ongoing basis.

The union proceeded to seek judicial review of the arbitrator's decision on the basis that the decision to apply estoppel was "incorrect". The Manitoba Court of Queen's Bench judge who heard the application dismissed it, holding that the decision of the arbitrator was not unreasonable. In this decision, the Court found that the reasoning was intelligible, justifiable and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

The case was subsequently appealed to the Manitoba Court of Appeal, which took a different view. In that decision, the Court of Appeal held that the Court of Queen's Bench had erred by applying the reasonableness

standard with respect to the legal finding of estoppel which had been made by the arbitrator. On appeal, the Court of Appeal held that correctness was the relevant standard since the finding of estoppel raised a question that was of central importance to the legal system as a whole and was not one which fell within the specialized expertise of a labour relations arbitrator.

The employer successfully appealed to the Supreme Court of Canada. As a result, the original decision of the arbitrator was upheld, with the finding of estoppel ultimately prevailing. In writing for a unanimous court, Fish J. noted that arbitration awards under collective agreements are, as a general rule, subject to review on a standard of reasonableness. Put simply, if the arbitrator outlines a rational or reasoned basis for making a decision, it will not likely be subject to review by the courts.

While estoppel was imposed based on the circumstances unique to this case, this was a matter under the collective agreement and not deemed to be something which was therefore transformed into a question of general law. Further, the Supreme Court of Canada noted the importance of taking a contextual approach which includes the following factors:

1. the presence or absence of a privative clause which might limit rights on appeal;

2. the purposes of the tribunal (in this case the use of a specialized arbitrator was designed to make labour relations decisions on an expedited basis);

3. the nature of the question at issue (the issue here was ultimately whether or not a specific bargaining unit employee had a vacation entitlement for a period of time which would end once the then existing collective agreement expired); and

4. the expertise of the tribunal or decision maker.

The Supreme Court of Canada also made some very helpful comments about the importance of showing deference to arbitrators who have a broad mandate in fostering peace in industrial relations settings. As such, the ongoing relationship between parties depends in part on decisions which consider the long term interests of both employees and the employer, which is something which labour arbitrators are uniquely placed to decide.

Although this decision arose from a distinct set of facts, the outcome here may be of more broad application. In particular, there may be less of an appetite to seek judicial review of decisions of labour arbitrators given the clear statement from Canada's highest court regarding the high degree of deference to be shown to arbitrators.

by George Waggott

For more information on this topic, please contact:

George Waggott
416.307.4221
george.waggott@mcmillan.ca

Pooled Registered Pension Plan Act: Is this the Harper government's Edsel?

background

Bill C-25, an Act relating to Pooled Registered Pension Plans (PRPP) (Bill C25) passed first reading in the federal House of Commons on December 1, 2011.

Bill C-25 is based on the federal government's "Framework for Pooled Registered Pension Plans", released in December 2010 following extensive consultation with the provinces and various industry stakeholders. Its stated purpose was to increase pension coverage among the 60 per cent of Canadian employees and self-employed individuals who do not participate in an employer-registered pension plan. The PRPP design is based on the perceived needs of both groups. The government PRPPs is promoting PRPPs as the most " accessible, straightforward and administratively low-cost retirement option".

key features

The PRPP retirement savings concept that is similar to a Registered Retirement Savings Plan (RRSP) or registered defined contribution pension plan (DC Plan). Key features include:

- Employers may, but are not required to provide a PRPP to employees;
- Employers who provide a PRPP are required to select the Plan Administrator, choose investment options and set employee contribution rates;
- Employers who provide a PRPP may, but are not required to make contributions to the PRPP;
- Employers are require to automatically enroll employees in its PRPP (parti0time employees after 24 months continuous service);
- Within 60 days of enrollment, employees may opt out or remain in the PRPP but are permitted to set contribution level at 0%;
- Plan Administrators, described as a "certified financial institutions" without further definition, provide and administer PRPPs, rather than employers and act in a fiduciary capacity in relation to PRPP members;
- Plan Administrator are responsible for most administrative responsibilities undertaken by the employer administering a registered a pension plan; and
- Third party administration is expected to lower administrative costs and complexity for employers - pooling of different PRPP funds is expected to result in lower investment costs.

application of Bill C-25

Bill C-25 applies only to federally regulated industries and employees. Before Bill C-25 becomes law, federal regulations must be drafted and enacted. The federal government expects these regulations to be operational at the end of 2012 or in early 2013. In addition, draft tax regulations are needed to provide the necessary tax - deferral for PRPP contributions and earnings.

In terms of how the PRPP concept will be implemented by provincial regulators, Quebec, Manitoba and Saskatchewan already provide PRPP-type retirement

savings programs. Although the provincial Finance Ministers initially supported the PRPP concept, it is not universally favoured and it remains to be seen when and whether the remaining provinces will adopt the PRPP concept. In each case, legislative and regulatory reforms to minimum pension benefit standards legislation will be necessary before PRPPs can be offered.

considerations for employers

Key details still need to be worked out and set forth in regulations before an employer should consider whether the PRPP structure is the best alternative for its employees. In the interim, subject to the outcome of the Finance Ministers' meeting on December 18-19, 2012, employers could use this PRPP development period to test drive the PRPP concept with their employees to determine whether the concept fits its employee and organizational priorities.

by Mark Rowbotham and Karen Shaver

For more information on this topic, please contact:

Mark Rowbotham
416.865.7135
mark.rowbotham@mcmillan.ca

Karen Shaver
416.865.7292
karen.shaver@mcmillan.ca

time for a break – Family Day in British Columbia

British Columbians will soon be shaking off the winter blues with a new statutory holiday called Family Day which will be celebrated on the third Monday in February of each year. In the Throne Speech this fall, Premier Christy Clark's Liberal government announced the introduction of the new statutory holiday but stated "Given our economic circumstances, B.C.'s employers will need time to adjust to this new statutory holiday. Therefore, the first B.C. Family Day will fall on February 18th, 2013." Family Day will become British Columbia's tenth statutory holiday and will bridge the long gap between the existing New Year's Day and Good Friday statutory holidays. British Columbia will join Ontario, Alberta, Saskatchewan, Manitoba and Prince Edward Island, which already observe a mid-winter holiday in February. The delay in the introduction of the new Family Day holiday will allow employers time to adjust to scheduling and cost implications to their business operations for this additional paid holiday.

by Claire E. Morton

For more information on this topic, please contact:

Claire E. Morton
604.691.6866
claire.morton@mcmillan.ca

who is my employer?

Earlier this year, the Alberta Court of Appeal was required to consider whether the common law definition of "employer" should be expanded in the context of the *Alberta Human Rights Act* (the "Act"), where a worker who failed a drug test required by Syncrude was denied access to a Syncrude worksite in Fort McMurray. The case has implications particularly for companies that use contractors and have a relatively high level of control over the contractors' employees.

The case is *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3. The worker's direct employer was not Syncrude, but Lockerbie & Hole, an arm's-length subcontractor performing construction work on the Syncrude site. The question before the Court was whether Syncrude was also the worker's employer for the purposes of the Act. While recognizing that co-employment was possible in certain circumstances, the Honourable Mr. Justice Slatter, writing for the Court, held that the facts could not support a finding of co-employment in this case.

The worker, Donald Luka, had brought a complaint against both Syncrude and Lockerbie & Hole to the Alberta Human Rights and Citizenship Commission, under the section of the Act prohibiting discrimination by an employer. Mr. Luka had tested positive for marijuana but denied being a regular user. He claimed that the drug-testing policy and the way it was administered *treated* him as if he had a drug addiction (which would amount to a disability) although he did not. Therefore his claim rested on his being "perceived" to have a disability, and on a lack of reasonable accommodation by his employer. The human rights panel dismissed Mr. Luka's claim, finding that he had failed to show a disability or perception of disability, and thus had failed to establish a *prima facie* case.

However, on the question of whether an employment-based claim against Syncrude could even be supported in this case, the panel found that Syncrude was indeed Mr. Luka's employer for the purposes of the Act. It did so following other cases in which the concept of employment had been expanded to include the "utilization" of a worker's services, even in the absence of a conventional employment relationship – and also because it was Syncrude that controlled the pre-access drug testing requirement.

Despite having ultimately defeated the discrimination claim, both Syncrude and Lockerbie & Hole appealed the employment aspect of the panel's decision. The initial appeal, heard by the Honourable Mr. Justice Clackson of the Court of Queen's Bench, overturned the Commission's finding that Syncrude was Mr. Luka's employer, concluding that an employment relationship between Syncrude and Mr. Luka did not exist in the absence of an express or implied contract between the two. The Director of the Commission subsequently appealed to the Court of Appeal.

The Court of Appeal noted that

> the courts have repeatedly confirmed that remedial statutes such as human rights legislation require a flexible and contextual interpretation
>
> and that
>
> many remedial statutes intend a wider meaning of "employment" than existed at common law.

The Court accepted that there may be times where an employment relationship exists in spite of there being no direct contract between a company and a worker, and also that "co-employment" was indeed a possibility for the

purposes of the Act. However, the Court also made it clear that

> it will be rare that the concept can be extended so far as to encompass employment by two different parties in circumstances such as appear on this record.

The Court set out a non-exhaustive list of factors to consider. For the general question of whether an employment relationship exists under the Act, the factors listed were:

- whether there is another more obvious employer involved;
- the source of the employee's remuneration, and where the financial burden falls;
- normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips;
- who directs the activities of, and controls, the employee, and has the power to hire, dismiss, and discipline;
- who has the direct benefit of, or directly utilizes, the employee's services;
- the extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
- the perceptions of the parties as to who is the employer; and
- whether the arrangement has deliberately been structured to avoid statutory responsibilities.

For the specific context of where there may be a situation of co-employment, the Court listed the following additional factors:

- the nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
- the independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
- the nature of the arrangement between the primary employer and the co-employer, e.g. whether the co-employer is merely a labour broker, compared to an independent subcontractor; and
- the extent to which the co-employer directs the performance of the work.

In the case before it, the Court of Appeal found these factors to demonstrate that Syncrude was not Mr. Luka's employer for the purposes of the Act. The Court stated,

> His relationship with Syncrude was too remote to justify a finding of employment, even under the expanded meaning given to that term in human rights legislation. It is Lockerbie & Hole that must ensure that Mr. Luka's rights under the Act are respected … .

The Court further stated,

The Alberta Act likewise only prohibits discrimination in certain select relationships, such as "employment" and "providing services to the public". "Access to private property" is not a regulated activity. As a last word, the Court noted that a finding of co-employment under the circumstances of this case might lead to an absurd result:

> It is difficult to see how one could contain the concept of multiple employers in this situation. If Mr. Luka worked for one of Lockerbie & Hole's subcontractors, he presumably would have five employers: the subcontractor, Lockerbie & Hole, Marsulex, Kellogg Brown and Root, and Syncrude. If he was further down the contractual chain, he might have even more employers. This is not a result the Legislature should be taken to have intended by the use of the word "employer".

In the result, the Alberta Court of Appeal's decision means that in many cases companies can breathe easy, as arm's-length contracts and working relationships should be seen for what they are, and the mere utilization of a worker's services does not in itself make that worker an employee. Of course, there may be valid business reasons for a company to want greater oversight and control of a worker even where the worker provides services through a contractor. Accordingly, companies assessing their risk vis-à-vis employment-based human rights claims may find themselves required to consider the above factors with regard to relationships with workers not directly employed by them.

by Aaron Grach and Mark Klassen

For more information on this topic, please contact:

Aaron Grach
416.865.7292
aaron.grach@mcmillan.ca

Mark Klassen
416.865.7135
mark.klassen@mcmillan.ca

proposed amendments to PIPEDA: affecting employers and business transactions

introduction

On September 29, 2011, Bill C-12, *Safeguarding Canadians' Personal Information Act* was introduced by the federal government. If the bill is passed, it will amend the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").[1] Bill C-12 is a re-introduction of Bill C-29, which expired due to the dissolution of Parliament in March 2011. The stated purpose of the bill according to a press release from Industry Canada is "...to help protect consumers and businesses from the misuse of their personal information..."[2]

PIPEDA's history

Initially, PIPEDA only affected personal information collected, used, or disclosed in the course of commercial activities by federal works, undertakings, and businesses, such as banks and airlines. In 2004, application of the statute was extended to the collection, use or disclosure of personal information that arose during the course of any commercial activity. PIPEDA also applies to all personal information in all interprovincial and international transactions by all organizations subject to PIPEDA in the course of their commercial activities.

why have new amendments been proposed?

This Bill implements responses to concerns raised by the government's first Parliamentary review of PIPEDA. The proposed amendments are intended to:

- Protect and empower consumers;
- Clarify and streamline rules for business organizations;
- Improve investigation and enforcement of the privacy law; and
- Improve the language of legislation and technical drafting corrections.

significant proposed amendments to PIPEDA

Currently, PIPEDA requires that any personal information collected, used or disclosed, requires the individuals' knowledge and consent, unless a legislated exception applies. The amendments are aimed at clarifying the rules that organizations must abide by, and the significant amendments are as follows:

- Valid consent is defined for the purpose of collecting, using or disclosing personal information
- Personal information can be collected, used or disclosed, without the consent or knowledge of the individual for the following prescribed purposes:
    - It is produced in the course of their employment;
    - It is required to manage, establish or terminate employment relationships; or
    - It is related to business transactions
- Organizations must report material breaches to the Privacy Commissioner and notify affected individuals and organizations

discussion of the proposed amendments

definition of valid consent

Consent is considered valid when it is reasonable to expect that an individual grasps the nature, purpose, and consequences of their consent.

information produced in the course of an individual's employment

Currently, PIPEDA does not articulate any exception for the collection, use, or disclosure of personal information, without consent, if the information is produced in the course of an individual's employment. The proposed exception permits an organization to collect, use, or disclose personal information produced during the course of an individual's employment, business, or profession. This requires, however, that the personal information is used for a purpose consistent with the purpose to which the information was produced.

information for the management, establishment, or termination of an employment relationship

The proposed amendment introduces an exception to the consent requirement if the following two requirements are met:

- The collection, use or disclosure of the personal information is necessary to establish, manage or terminate an employment relationship between the federal work, undertaking or business and the individual; and
- The individual was informed that the personal information would be or may be collected, used or disclosed for the purposes described above.

exclusions related to business transactions

Bill C-12 also introduces a disclosure exception for personal information in the context of prospective or completed business transactions. The proposed amendments introduce a non-exhaustive definition of a "business transaction". This exception would permit disclosure of personal information, without consent or knowledge, if:

- The information is necessary for the parties to determine whether to proceed with the transaction, and the information is necessary to complete the transaction; and
- The parties have entered into a confidentiality agreement requiring the recipient organization to: (i) use and disclose information solely for purposes related to the transaction, (ii) use security safeguards to protect the information, and (iii) return or destroy the information to the disclosing organization, if the transaction does not proceed.

This disclosure exception does not apply if the primary purpose or result of the transaction is the acquisition of personal information.

material breaches of security safeguards must be reported

A significant amendment to PIPEDA is the mandatory reporting provision that requires any "material breach of security safeguards" to be reported to the Information and Privacy Commissioner. An organization must determine whether it is required to report the breach, having regard for the sensitivity of the disclosed personal information, the number of individuals affected by the breach, and whether the cause of the breach indicates a systemic problem.

The amendments further require organizations to notify the affected individual if it is reasonable to believe the breach "creates a real risk of significant harm to the individual." The legislation defines "significant harm" non-exhaustively, and includes "bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record, and damage to or loss of property." It can be seen from this definition that the legislature is attempting to capture offences that have developed as a result of the current marketplace. A real risk of significant harm is determined by considering the sensitivity of the information and the probability that the personal information is being or will be misused.

For more information on this topic, please contact:

George Waggott
416.307.4221
george.waggott@mcmillan.ca

conclusion

Bill C-12 re-introduces substantive amendments that will clarify a business' responsibility under PIPEDA, and these changes will impact existing approaches to privacy. As technology is swiftly changing, the ongoing changes to Canada's legislation will require continued compliance efforts and review of information practices.

by George Waggott and Katherine Ng, student-at-law

[1] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

[2] Industry Canada, Press Release, "Government of Canada Moves to Enhance Privacy of Individuals during Commercial Transactions" (29 September 2011)

stopped cold: the new workplace violence regime in Ontario in action

In one of the first decisions to closely examine the obligations of employers and employees under the workplace violence provisions of *Ontario's Occupational Health and Safety Act* (the "Act"), an arbitrator has upheld the dismissal of an employee for uttering a death threat to a co-worker.

background facts

In *The Corporation of the City of Kingston and C.U.P.E., Local 129*, Donna Hudson ("Hudson") had a long history of verbal outbursts towards co-workers and members of management. In April 2009, Hudson received a three-day suspension for a verbal outburst that took place in front of other employees. In September 2009, Hudson attended mandatory violence and harassment training in connection with the changes to the Act. On July 26, 2010, as part of a negotiated resolution to previous discipline, Hudson completed anger management counselling.

Hudson was scheduled to return to work from an absence on July 28, 2010 and was required to attend a return-to-work meeting to discuss any restrictions and accommodations. Hudson met with her local union President, John Hale ("Hale") prior to the meeting to discuss her return to work. During that meeting, Hudson became angry with Hale and mentioned a former union steward, who had recently died. Hale told her, "Don't talk about Brian – he's dead", to which Hudson replied, "Yes, and you will be too." Hudson was then terminated from her employment.

the decision

Hale's evidence at the arbitration hearing was that he did not interpret Hudson's words as a threat but that he was profoundly angry at her. However, the arbitrator found that "it is not necessary, in order to determine whether the threat was uttered, to find that the speaker of the words had the actual ability to carry out the threat." Nor was it necessary to find that the "victim" of the threat had an immediate and urgent fear of death. These are considerations that go to the seriousness of the incident.

In reviewing the legislation, arbitrator Newman found that the amendments to the Act have four significant effects on adjudicating this kind of misconduct:

1. Language is violence. What once might have been characterized as "an unfortunate choice of words" or "shop talk" is now considered violence under the Act and must be dealt with in the context of Ontario's health and safety regime.

2. Everyone stops cold. As arbitrator Newman stated in the decision, "the utterance of a threat in the workplace requires that the workplace stop cold." As with any other health and safety matter, the mechanisms of the Act apply: report, investigate and act.

3. Threats are serious workplace misconduct. Adjudicators can no longer find that an employee was "blowing off steam". A threat in the workplace is, in and of itself, serious workplace misconduct.

4. Safety must be considered. Because the Act is designed to prevent workplace accidents and ensure employees work safely, the adjudicator must ask whether the employee will continue to pose a risk to the safety of other employees, including the right of an employee to work free from workplace violence.

After reviewing the above factors in the context of the case, arbitrator Newman upheld the dismissal. While Hudson was a long-serving employee, her record of previous discipline coupled with her inability to take responsibility for her actions and failure to apologize for her behaviour, led the arbitrator to uphold the dismissal.

lessons for employers

This decision assists an employer in imposing discipline on employees who utter threats in the workplace. As arbitrator Newman rightly pointed out, not every threat will lead to the dismissal of an employee and an employer must still review the context in which the threat was made to determine if dismissal is an appropriate response. However, the framework outlined above confirms that an employer also has the right (and the responsibility) to ensure that an employee understands that threats in the workplace constitute serious workplace misconduct and violates the Act.

by Dave J.G. McKechnie

For more information on this topic, please contact:

Dave J.G. McKechnie
416.307.4221
dave.mckechnie@mcmillan.ca

character of employment not determinative of reasonable notice period

A very recent case from British Columbia provides notice to employers that they should not underestimate what a court may award as reasonable notice to a long-service employee simply because the employee held a modest, lower level type job.

In *Systad v. Ray-Mont Logistics Canada Inc.*, 2011 BCSC 1202, the British Columbia Supreme Court emphatically ruled that "character of employment" (i.e. the job held by the employee) should not be given "undue weight" in determining the appropriate notice period and is merely "another matter" to be taken into account together with the other relevant factors of age, length of service and anticipated difficulty in finding replacement employment, in determining the reasonable notice period.

Mr. Systad, a 65 year old employee with no supervisory duties, had been working as a truck driver for the employer Ray-Mont Logistics Canada Inc. at the time of termination. The court granted 18 months notice to Mr. Systad after 18 years of service.

The employer argued before the court that the statutory maximum of eight weeks notice under the B.C. *Employment Standards Act* was appropriate under the circumstances, given the "unskilled" nature of Mr. Systad's

work. Alternatively, the employer argued that a notice period of 10 months was reasonable, given the fact that Mr. Systad did not hold a supervisory or managerial position.

The court had no difficulty in dismissing the employer's first argument that the eight weeks statutory notice period under the *Employment Standards Act* was appropriate, given that Mr. Systad could not be described as a "young, low service employee with an entry-level job".

The court also rejected the employer's submission that the "concept" of a one month notice period for each year of service should be reserved for those employees whose "character of employment" carries with it more responsibility and seniority. The court concluded that there was no evidence to suggest that an employee with Mr. Systad's responsibilities would have an easier time finding a new job than an employee with more senior duties and adopted the approach from a decision of the New Brunswick Court of Appeal which held that giving undue attention to the character of employment represents "antiquated social values" and is "antithetical to the law's ultimate goal namely egalitarian justice". Accordingly, the court concluded that the reasonable notice period was 18 months.

The decision of the B.C. Supreme Court in *Systad* stands in stark contrast to another recent decision of the same court in *Waterman v. IBM Canada Limited*, 2010 BCSC 376.

In *Waterman* the B.C. Supreme Court held that a long-service employee was not entitled to an upper limit notice award because the employee held a non-supervisory / non-managerial position and "there were several levels of employment between himself and top management". The court in *Waterman* held that – all other things being equal – persons in managerial or supervisory roles are generally entitled to greater notice than employees at the "lower end of responsibility".

It is difficult – if not in fact impossible – to reconcile these two recent conflicting B.C. cases. However employers will be well advised to heed the clear warning in *Systad* that "character of employment" may well not be a determinative factor in assessing the period of reasonable notice.

by Gale Kim

For more information on this topic, please contact:

Gale Kim
778.328.1635
gale.kim@mcmillan.ca

love hurts – SCC refuses leave to appeal in *Love v. Acuity Investment Management Inc.*

Love hurts.

That's how Paul Love is feeling, now that the Supreme Court of Canada has refused his application for leave to appeal the Ontario Court of Appeal's decision in his wrongful dismissal action (*Love v. Acuity Investment Management Inc.*, 2011 ONCA 130). Love hurts despite the fact that the Court of Appeal took the unusual step of increasing Love's period of reasonable notice in his action against his former employer.

Love sued Acuity, an investment management firm, when he was dismissed without cause. He had been a senior vice president and, at the time of his dismissal, was 50 years old with approximately two and a half years of service. He also held two percent equity in the company with his annual compensation including salary, commissions, profit sharing and the value of his shareholdings totalling approximately $633,000. At trial, the judge awarded Love damages based on a five month notice period. Love appealed that finding and the Court of Appeal substituted a nine month notice period. The Court's decision was based primarily on its view that the trial judge over-emphasized one factor (in this case length of service) to the apparent de-emphasis of others (the character of employment including level of position and compensation, and the availability of comparable employment). So Love looked like a winner at the Court of Appeal. Right?

Not so fast. There were also the "small" matters of Acuity's cross-appeal and the issue of costs. The cross-appeal challenged the trial judge's finding that Love was entitled to the value of incremental capital appreciating on his shares ($219,000) plus the value of incremental profit sharing and dividends ($273,000), to the end of the notice period. Acuity argued that the trigger date for Love's obligation to sell his shares back to the company and their valuation occurred when his employment ended, and not at the end of the notice period. The relevant provision in the Investment Agreement between Love and Acuity read:

"Subject to paragraph 4 hereof, if at any time:

Love's employment is terminated by Acuity without cause; or

Love should cease to be an employee of Acuity by reason of death or disability,

…Love agrees that Acuity shall have the option…to purchase the shares for a purchase price, determined at the date that Love ceases to be an employee of Acuity...."

In reviewing the trial judge's finding on that issue, the Court of Appeal began by distinguishing the concept of notice of termination from payment in lieu of notice. The termination of employment without working notice is a breach of the implied contractual right to reasonable notice. Any payment by the employer in lieu of notice is not in compliance with the contractual right, but rather is intended to compensate for the breach. Contrary to the finding of the trial judge, the Court of Appeal agreed with Acuity and found that, based on the language of the Investment Agreement, the trigger date for Acuity's right to repurchase the shares and for valuing those shares was the date that Love's employment was

terminated without cause, and not at the end of the notice period. In making this determination, without expressly stating so the Court of Appeal was clearly distinguishing the Investment Agreement in Love from the share option agreement in a previous Court of Appeal decision: *Veer v. Dover Corp. (Canada) Ltd.* (1999), 2 BLR (3d) 234. That is, there is a distinction to be drawn between "*ceases to be an employee*" (*Love*) and "*terminate as of the effective date of such termination*" i.e. upon lawful termination (*Veer*).

Equally as important to the case, Acuity made formal offers to settle the case well before trial, in amounts that exceeded Love's ultimate award of damages. After adjustment of the costs by the Court of Appeal, Love remained on the hook for the majority of the costs. At the end of the day Love's damages were reduced from $528,000 to $131,434, while the costs awarded to Acuity were $269,568. It was a costly lawsuit for Love.

what *Love* means for employers

The Court of Appeal's decision, which the Supreme Court has chosen not to review, makes it clear that an employer must be very careful in crafting language that deals with an employee's entitlements around shares and share options on termination of employment. Moreover, an employer is well advised not to place too much weight on any single factor, such as length of employment, when assessing the notice entitlement of an employee it is about to dismiss without cause.

The Supreme Court having refused his application for leave to appeal, Love is left without a further remedy. In the words of the great Leonard Cohen: *there ain't no cure, ain't no cure, ain't no cure, for Love.*

by David Elenbaas

For more information on this topic, please contact:

David Elenbaas
416.865.7232
david.elenbaas@mcmillan.ca

update re Indalex Limited: new pension deficiency wrinkles for financiers

On December 1, 2011, the Supreme Court of Canada (the "SCC") agreed to hear an appeal of the landmark Ontario Court of Appeal decision in the restructuring proceedings of Indalex Limited ("Indalex") under the *Companies' Creditors Arrangement Act*.

In April of this year, the Court of Appeal of Ontario, to the surprise of many, rendered a decision that was inconsistent with what many viewed as accepted law in respect of the priority of certain pension claims. Briefly, the decision stated that certain wind up pension deficiencies of Ontario regulated defined benefit pension plans (that the Ontario Court of Appeal held to be protected by provincial deemed trusts) may, in certain circumstances, have priority over the court ordered charge granted to lenders providing interim financing during the proceedings ("DIP Lenders") and other creditors relying on the security of the working capital assets of the debtor company. In its decision, the Ontario Court of Appeal also cast doubt over whether the use of bankruptcy proceedings to defeat the priority of provincial statutory liens and trusts for pension and other claims is still acceptable. In so holding, the Ontario Court of Appeal created material implications for working capital lenders to businesses with Ontario regulated defined benefit pension plans and for such businesses seeking funding.

In addition, the Ontario Court of Appeal held that when an employer is also the administrator of a pension plan (which is normal in Ontario and was the case in Indalex), the employer in its capacity as plan administrator continues to owe a fiduciary duty to the pension plan beneficiaries after it files under the CCAA. The Court held that that duty did not prevent the employer from filing under the CCAA. However, it was improper for the employer to do nothing to protect the rights of the pension plan beneficiaries or to put someone else in the position to protect those rights. As a result of Indalex's breach of its fiduciary duties, the Court of Appeal held that it was appropriate to supplement the statutory lien and trust with a constructive trust to protect the pension plan which was not being wound up at the time of the sale of the business.

It should be noted, however, that the Court of Appeal made it clear that CCAA courts have jurisdiction to grant a super-priority charge over pension deemed trusts, however, whether such a charge should be approved by a Court must be determined on a case by case basis. The decision will force counsel to take additional procedural steps to ensure that DIP Lenders are assured priority over provincial statutory liens and trusts.

A detailed account of the case is available at http://www.mcmillan.ca/indalex.

A review of the Ontario Court of Appeal judgment by the SCC is welcome news to many lenders; however until overturned, DIP Lenders and working capital lenders are advised to take steps in order to mitigate some of the effects of the decision. Please contact any member of the restructuring and insolvency group at McMillan to discuss such risk management strategies.

by Wael Rostom and Reema Kapoor

For more information on this topic, please contact:

Wael Rostom
416-865-7790
wael.rostom@mcmillan.ca

Reema Kapoor
416-865-7082
reema.kapoor@mcmillan.ca

notice period cases in eastern Canada

case name	age	position	salary	length of service	notice pPeriod	other factors
Doran v. Fredericton Direct Charge Co-Op 2011 NBQB 293	46	senior grocery supervisor	$34,830.20 plus benefits	25 years	23 months	
Rowley v. High Strength Plates & Profiles Inc 2011 ONSC 6221	52	senior outside salesperson	$62,172.50 plus commissions and benefits	15 years	12 months	Received 12 months working notice of termination; Court dismissed constructive dismissal claim
Asselin v. Gazarek et al. 2011 ONSC 5871	35	service advisor at car dealership	$55,000 plus benefits	3 years	4.5 months	
Wright v. The Young and Rubicam Group of Companies 2011 ONSC 4720	49	executive vice-president; promoted to president	$285,000 plus stock option plan and benefits	5 years	12 months	
Yip-Young v. L-3 Communications Electronic Systems Inc. 2011 ONSC 4537	56	quality assurance specialist	$82,000 plus stock purchase plan and benefits	24 years	20 months	
Cybulski v. Adecco Employment Services Limited 2011 NBQB 181	53	contracts manager	$60,000 plus commissions and benefits	3 years	13 weeks	

notice period cases in western Canada

name	age	position	salary	length of service	notice period
Haftbaradaran v. St. Huebertus Estate Winery Ltd., 2011 BCSC 1424	38	Winemaker	$48,735	2 years	8 months
Szczypiorkowski v. Coast Capital Savings Credit Union, 2011 BCSC 1376	62	Senior Manager, Commercial Real Estate Lending	$100,000 - $150,000	18 ½ years	18 months
Balgoun v. Deloitte & Touche, LLP, 2011 BCSC 1314	49	Tax manager	$64,000	7 ½ months	2 months
Systad v. Ray-Mont Logistics Canada Inc., 2011 BCSC 1202	65	Specialized equipment driver	$75,380 + benefits	18 years	18 months
Waterman v. IBM Canada Ltd., 2011 BCCA 337	65	Advisory Software Services Specialist	$75, 114 + benefits	42 years	20 months
Kidder v. Photon Control Inc., 2011 BCSC 1016	Early 50s	President, CEO and a former director	$130,000	13 years	18 months

mcmillan

Vancouver
t 604.689.9111
Calgary
t 403.531.4700
Toronto
t 416.865.7000
Ottawa
t 613.232.7171
Montréal
t 514.987.5000
Hong Kong
t 852.3101.0213
mcmillan.ca