

July 14, 2023

**Court Rules
Employment
Contract Not
Frustrated By
COVID-19
Pandemic** 4

**Progress of
Legislation**

Federal 5

Manitoba 6

Recent Cases 6

The Economy 12

OPC TAKES FIRM STANCE ON PRIVACY IN THE WORKPLACE: TAKEAWAYS FOR EMPLOYERS

— Robbie Grant, Kristen Shaw, and Nandini Pahari. © McMillan LLP.
Reproduced with permission.

For the first time in 19 years, the Office of the Privacy Commissioner of Canada (“OPC”) has updated its ‘*Privacy in the Workplace*’ guidance document (the “Guidance”), bringing it more in line with employee privacy expectations in the fluid digital age.¹ In particular, the Guidance now takes a firmer stance on employee rights, provides guidance for employee monitoring, and lists eight practical tips for employers to manage their employee personal information in accordance with federal privacy legislation.

The Guidance lays out the OPC’s interpretation of privacy laws and obligations that apply to employee personal information, such as the Privacy Act for federal government institutions and the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) for federal works, undertakings, and businesses (such as banks, telecommunication companies and transportation companies). The Guidance applies to organizations’ relationships with current, prospective and former employees. This bulletin will focus on the implications of the Guidance for federally regulated private sector employers (subject to PIPEDA), as well as how these implications should inform other private sector employers.

Limited Application

Canada’s privacy laws apply in a haphazard manner to private-sector employees, because of the division of constitutional powers between the provincial and federal governments. Federally regulated employees are subject to PIPEDA. Employees based in British Columbia, Quebec and Alberta are subject to provincial privacy laws in those provinces.² In all other provinces, there is currently no omnibus privacy legislation applicable to employees. Instead, employers in these provinces may be subject to privacy requirements set out in the common law, contracts (including collective agreements), or narrow statutory requirements (such as Ontario’s electronic monitoring policy requirement).

Despite only applying to the subset of Canadian employers that are federally regulated, the Guidance is a useful resource for all employers looking to improve their workplace privacy policies and procedures.

¹ *Privacy in the Workplace* was originally published in April 2004. See the new Guidance [here](#).

² BC’s *Personal Information Protection Act*, SBC 2003, c 63, Alberta’s *Personal Information Protection Act*, SA 2003, c P-6.5, and Québec’s *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1.

OPC Removes “Balancing” Language; Emphasizes Specific Legal Requirements

The older version of the Guidance discussed the need for ‘balance’ between the employer’s need for information and the employee’s right to privacy. The updated Guidance omits this language, instead emphasizing the specific legal requirements set out under PIPEDA. In particular, the Guidance notes that there are two primary exceptions to PIPEDA’s consent requirement applicable to the employment relationship:

1. Consent is not required where the collection, use or disclosure of employee personal information is necessary in order to establish, manage, or terminate the employment relationship (though the employee must still be notified in accordance with PIPEDA);³ and
2. Knowledge or consent is not required if the personal information was produced by an individual in the course of their employment, business or profession and the collection, use or disclosure is consistent with the purposes for which the information was produced.⁴

Unfortunately, the Guidance does not provide any specific examples of when these exceptions will apply, such as whether employee monitoring for data security purposes would be considered necessary for managing an employee relationship.

British Columbia and Alberta’s provincial privacy legislation (which apply to provincially regulated employers in those provinces) provide a similar exception to (1) above. However, the exception extends to processing of personal information that is “reasonable” in order to establish, manage, or terminate the employment relationship, rather than “necessary.”⁵ Therefore, in those provinces, the potential scope of what falls under this exception is broader.

Employees Cannot Waive their Privacy Rights

The Guidance recognizes that some employers may be tempted to tell employees that their loss of privacy is a condition of employment, on the theory that by accepting their employment, the employee has provided a blanket consent for all the employer’s information handling practices. The previous version of the Guidance said it was “questionable” whether this approach complied with PIPEDA’s consent principles. The new Guidance clearly indicates that this approach does not align with consent requirements under PIPEDA, or with the general principle of only collecting personal information for appropriate purposes.

Where consent is required, it is crucial for employers to obtain consent in a clear, informed, and voluntary manner. Instead of an outright waiver, employers should seek employee consent to explicit, limited, and justified collections, uses, and disclosures of their personal information. Furthermore, employers must inform employees about the consequences of not providing the requested information and offer alternative solutions. Even if employees consent to waive their privacy rights, organizations still have an obligation to adhere to privacy laws. Consent does not justify the handling of personal information in a manner that contradicts legal requirements.

Employee Monitoring under PIPEDA

The updated Guidance contains a new section on employee monitoring, which includes practices such as verifying or assessing employee presence at work, tracking employee productivity, ensuring appropriate use of networks, and tracking the location of company vehicles.

The Guidance indicates that employee monitoring should be specific, targeted, and appropriate in the circumstances. Employers should only undertake employee monitoring after an assessment of the privacy risks and any mitigating measures. Such an assessment should establish the necessity of the practice, and consider whether any less intrusive methods would achieve the same purposes. Employers must also establish accountability measures and retention guidelines. Given that employee access rights extend to personal information collected for monitoring, employers should also have mechanisms in place to deal with employee access requests.

³ PIPEDA, s. 7.3.

⁴ PIPEDA, s. 7 (1) (b.2).

⁵ BC’s *Personal Information Protection Act*, SBC 2003, c 63, s. 13; Alberta’s *Personal Information Protection Act*, SA 2003, c P-6.5, s. 15.

Employers in Ontario should also be aware of the requirement for an electronic monitoring policy, as discussed in our previous bulletins [here](#) and [here](#).

The OPC's Eight Tips for Employers

The Guidance provides eight practical tips for employers seeking to implement privacy policies and procedures in the workplace. We summarize these tips with additional commentary below.

1. **Examine all relevant legal obligations and authorities.** These may include commitments made in collective agreements, federal and provincial privacy laws and other legal areas, such as tort, human rights, and other workplace laws.
2. **Conduct a Data Mapping Exercise.** Employers should identify all types of employee personal information collected and processed by the organization. This kind of data mapping exercise often reveals gaps in safeguards and access controls, and is very useful for assessing the impact of a privacy breach.
3. **Conduct Privacy Impact Assessments (PIAs).** A PIA is a formal risk management process to identify privacy requirements and impacts of programs and minimize privacy risks. While organizations subject to PIPEDA are not legally required to undertake a PIA, it is a useful way to ensure that new programs are developed with privacy in mind. The OPC's [Guide to the Privacy Impact Assessment Process](#) applies to the public sector organizations, but is transferable to private organizations too.
4. **Assess the Purposes of Processing Employee Information.** Employers planning to collect, use or disclose personal information should identify all purposes for doing so, and carefully assess the appropriateness of such purposes. In line with other OPC investigations and guidance, such an assessment should take into account (i) the sensitivity of the personal information; (ii) whether the organization's purpose represents a legitimate need or bona fide business interest; (iii) whether the collection, use or disclosure would be effective in meeting the need; (iv) whether there are less privacy invasive means of achieving the same ends at comparable cost and with comparable benefits; and (v) whether the loss is proportional to the benefits gained.
5. **Limit collection.** Organizations should collect only the personal information that is absolutely necessary for a stated purpose.
6. **Be Transparent and Open.** Organizations should develop clear and transparent policies with respect to employee privacy and communicate these policies to employees prior to putting them into practice. Employee privacy policies should identify: (i) what personal information is being collected from employees; (ii) the purpose for which the personal information is being collected; (iii) how the personal information will be collected; (iv) how the information will be used, including potential consequences for employees; and (v) how long the personal information may be retained.
7. **Respect Key Privacy Principles.** Whether or not consent is strictly required, other privacy principles continue to apply to employers, including (i) accountability requirements; (ii) accuracy of personal information; (iii) limiting collection, use, disclosure, and retention; (iv) safeguards requirements; (v) openness and transparency requirements; and (vi) rights for employees to access information or challenge an organization's compliance.
8. **Be Aware of Inappropriate Practices/No-Go Zones.** Finally, the Guidance cautions employers to avoid seeking types of information that the OPC has identified as a no-go zone. For instance, employers should not request access to password-protected areas of their employees' social media accounts.

Key Takeaways for Businesses

- Be vigilant of different frameworks of privacy rules and laws in Canada including collective agreements, federal and provincial privacy laws and other legal areas, such as tort, human rights, and workplace laws.
- Seek advice on what constitutes 'personal employee information' and consider mapping out what personal information is collected from employees and for what purposes such information is used.

- Be aware of consent requirements under applicable privacy laws. Where consent is required, it must be clear, informed, and voluntary. Exceptions to consent are available under applicable privacy laws, but in some cases, they are limited and narrow.

Kristen Shaw is an associate in McMillan's Vancouver office with a growing practice focused on employment and labour relations, construction disputes and privacy law. She assists employers in all aspects of labour and employment law, including employment standards, developing workplace policies, termination advice and strategy, and handling wrongful dismissal and human rights claims.

Robbie Grant is an associate in McMillan's Toronto office, where he is building a practice in privacy, data protection, anti-spam legislation. He frequently assists in drafting and reviewing privacy policies and advising on the privacy law dimension of business practices and transactions.

Nandini Pahari is a summer student at McMillan's Toronto office. She is an internationally trained lawyer and has worked with Band 1 (Chambers & Partners) law firms in India before moving to Toronto. She holds almost six years of experience in the fields of merger control, antitrust enforcement, competition advisory, compliance, due diligence and data protection and privacy.

COURT RULES EMPLOYMENT CONTRACT NOT FRUSTRATED BY COVID-19 PANDEMIC: EMPLOYER ORDERED TO PAY \$64,000 IN DAMAGES FOR WRONGFUL DISMISSAL

— Gabrielle Berron-Styan of Roper Greyell LLP. © 2023 Roper Greyell LLP—Employment and Labour Lawyers.

Fanzone v. 516400 B.C. Ltd. o/a Shady Tree Neighbourhood Pub, 2022 BCSC 2089, is the latest decision of the B.C. Supreme Court to consider the doctrine of frustration of contract in the context of a wrongful dismissal claim arising out of the COVID-19 pandemic.

The employer operated a pub in Squamish, British Columbia (the "Pub"). On March 17, 2020, all pubs and restaurants were forced to close by order of the Provincial Health Officer as a result of the COVID-19 pandemic. All of the Pub's staff, including its general manager, Marco Fanzone, were laid off. They were all issued cheques in payment of their wages to the date of layoff and all accrued but outstanding vacation pay.

In the weeks and months that followed, COVID-19 restrictions eased and many pubs and restaurants in the Squamish area reopened. The Pub, however, remained closed. Its owner stated that it was "impossible" to resume operations because the "physical dimensions of the kitchen prevented staff from maintaining a safe distance from each other". The Pub's owner also argued that he and his family were in isolation and could not reopen the Pub until the risk from the pandemic had decreased and he felt safe to return work. The Pub did not reopen for over two years.

As a result of this lengthy separation from his employment, Mr. Fanzone brought a wrongful dismissal action seeking damages for reasonable notice at common law.

At trial, the Pub argued that the COVID-19 pandemic had frustrated Mr. Fanzone's employment contract. The Pub relied on both the common law doctrine of frustration as well as section 65(1)(d) of the B.C. *Employment Standards Act* ("ESA"). That section of the ESA provides that notice of termination or pay in lieu is not required when the employment contract is "impossible to perform due to an unforeseeable event or circumstance".

Under the common law, frustration of contract occurs when, without the fault of either party, a contractual obligation becomes incapable of being performed because the existing circumstances render it "a thing radically different from that which was undertaken by the contract". Frustration is generally deemed to occur in situations where the employment relationship has become untenable due to a change of circumstances beyond the control of the parties. When frustration takes place, the parties are relieved of their obligations under the contract, and the employer is not required to provide the employee with termination notice or pay in lieu.

After reviewing the case law around the doctrine of frustration of contract, the B.C. Supreme Court concluded that it did not apply in the particular circumstances of Mr. Fanzone's case. The Court found that the Pub owner had made a

deliberate choice to keep the Pub closed rather than reopen after public health restrictions eased. Such a choice could not amount to frustration of contract as a matter of law. As a result, the Pub was liable to Mr. Fanzone for damages for wrongful dismissal.

The Court held that Mr. Fanzone was terminated from his employment on March 17, 2020. At the time of dismissal, he was 56 years old and had been employed as the Pub's general manager for about 23 years. Applying the well-known *Bardal* factors, the Court determined that he was entitled to damages equal to 20 months of reasonable notice or \$64,000 after taking into account his earnings in mitigation.

Notably, the Court did not deduct Mr. Fanzone's CERB payments from the damages award. It relied on the B.C. Court of Appeal's recent decision in *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398.

Takeaways

This case serves as a good reminder that an employer's economic circumstances, or the choices made by the employer, will generally not be grounds for frustration of contract.

Frustration is deemed to occur when the employment contract has become impossible or "radically different" from the bargain into which the parties first entered. It must be caused by factors outside the control of both parties.

Employers who decide to shut down, even for legitimate business reasons, cannot rely on economic circumstances to reduce employee entitlements on termination. The best way for employers to reduce their exposure in respect of terminations without cause is to work with experienced human resources professionals or capable legal counsel and provide for enforceable termination language—language to either limit or restrict employee entitlement to *ESA* minimums or some other predicable and manageable amounts above the *ESA*.

Gabrielle Berron-Styan is a lawyer at the Vancouver-based employment and labour law boutique of Roper Greyell LLP. She practises in all areas of employment, labour and workplace human rights law. She can be reached at gberronstyan@ropergreyell.com.

For more information about Gabrielle and the rest of the Roper Greyell team, please visit www.ropergreyell.com.

PROGRESS OF LEGISLATION

Federal

Canada Labour Code Amendments Proclaimed in Force February 1, 2024

Pursuant to SI/2023-17, certain amendments to the *Canada Labour Code* (the "Code") will come into force on February 1, 2024. The amendments are found in the *Budget Implementation Act, 2018, No. 2*, SC 2018, c. 27, which received Royal Assent on December 13, 2018.

The proclaimed amendments will repeal and replace section 230 of the Code, which currently requires employers to provide at least two weeks' notice of termination to an employee who is terminated without cause. The new section 230 will set out a sliding scale of termination notice requirements, ranging from two weeks' notice for employees with more than three months but less than three years of service, up to a maximum of eight weeks' notice for employees who have eight or more years of service. The new notice requirements will not apply to employees who are terminated for just cause.

The amended provisions will also require employers to provide terminated employees with a written statement setting out their vacation benefits, wages, severance pay, and any other benefits and pay arising from his or her employment.

Budget Implementation Act Receives Royal Assent

The *Budget Implementation Act, 2023, No. 1*, SC 2023, c. 26 (formerly Bill C-47), received second reading in the Senate on June 13, 2023 and third reading and Royal Assent on June 22.

As explained in the issue of *Labour Notes* dated May 15, 2023, the *Budget Implementation Act, 2023, No. 1* will amend a number of federal Acts, including the *Canada Labour Code*, the *Employment Insurance Act*, and the *Department of Employment and Social Development Act*. Among other things, the amendments will expand death or disappearance of a child leave under the *Canada Labour Code* and will establish the Employment Insurance Board of Appeal, which will be charged with hearing appeals of decisions made under the *Employment Insurance Act*.

The amendments to the *Canada Labour Code* came into force on the date of Royal Assent. The majority of the amendments relating to the new Employment Insurance Board of Appeal will come into force on a day to be fixed by order of the Governor in Council.

Act for the Substantive Equality of Canada's Official Languages Receives Royal Assent

An Act for the Substantive Equality of Canada's Official Languages, SC 2023, c. 15 (formerly Bill C-13), received third reading in the Senate on June 15, 2023 and Royal Assent on June 20.

As discussed in the issue of *Labour Notes* dated June 15, 2023, Part 2 of *An Act for the Substantive Equality of Canada's Official Languages* will enact a new *Use of French in Federally Regulated Private Businesses Act* and will also make certain consequential amendments to the *Canada Labour Code*.

The new Act and the amendments to the *Canada Labour Code* will come into force on a date to be fixed by order of the Governor in Council.

Manitoba

Employment Standards Code Amended

The Employment Standards Code Amendment Act, SM 2023, c. 41 (introduced as private member's Bill 235), received Royal Assent on May 30, 2023. On the date of Royal Assent, it amended *The Employment Standards Code* to increase the maximum length of unpaid bereavement leave from three days to five days.

In addition, the amendments enacted a new unpaid leave for loss of pregnancy. An employee who has been employed for at least 30 days is entitled to up to five days of unpaid leave if:

- the employee experiences a loss of pregnancy; or
- another person experiences a loss of pregnancy and the employee:
 - is the person's spouse or common-law partner or their former spouse or common-law partner,
 - is the current spouse or common-law partner of the former spouse or common-law partner referred to above,
 - had undertaken to be the guardian of the child born as a result of the pregnancy, or
 - is the spouse or common-law partner of a person who had undertaken to be the guardian of the child born as a result of the pregnancy.

RECENT CASES

Employer Had Just Cause To Dismiss Employee Who Deliberately Deleted Company Data

Ontario Superior Court of Justice, February 10, 2023

Park worked for Costco Wholesale Canada Ltd. ("Costco") in various warehouse locations for 19.5 years before transferring to Costco's head office. He worked his way up to the position of assistant buyer, a managerial position. He was bound by an employment agreement, which expressly indicated that termination for cause included wilful damage or destruction of company property and insubordination. In February 2012, Park was promoted to "buyer in training" in the seasonal and

toys department, where he remained for five months. He reported to Zapp, the assistant general merchandise manager. Park returned to assistant buyer in July 2012, which he took as a demotion, although he agreed that he had little desire to progress further. In March 2014, Breton became Park's direct manager. Breton reported to Zapp, who reported to Fleming, the general merchandise manager. Park did not like either Zapp or Fleming, as he felt Fleming provided undeserved negative feedback, and he resented Zapp and Fleming for being unreceptive to his concerns when he did not become a buyer. Park alleged Breton had made a racist comment, which Breton denied. Park took a medical leave of absence from January to March 2014, and again in February 2015. While on his second medical leave, Park requested a transfer to another department, although he failed to follow the required request process. Three weeks after returning to work, Park provided Costco with a physician's letter indicating he might benefit from a transfer. His transfer to the position of assistant buyer in the lawn and garden department was announced March 30, 2015, effective April 13, 2015. Beginning in late 2014, Park had built a Google cloud-based website for the toys department, which served as an online platform allowing users within the department to share files. In January 2015, Park provided a link to the website to management. Then, on April 10, 2015, Costco was no longer able to access the site. Breton requested Park provide access to the site on April 13, and that the ownership be changed. The next day, Park deleted the website. Costco was able to restore the site, but Park deleted it a second time, first from his computer and then from the computer's recycling bin. On April 22, 2015, Park was terminated for cause for deleting the website. Park brought an action for wrongful dismissal.

The action was dismissed. Park deleted the website twice and admitted that the deletions were deliberate. The first act of misconduct by Park was the deliberate deletion of the website. This amounted to damage or destruction of Costco property and was contrary to the terms of the employment agreement. Breton requested access to the website because Costco intended to use it, so it could not be said that it had no value. Other employees had access to the website, and Park had been sending updated links up to a few weeks prior to Breton's request. Park believed that the website would be a valuable tool for Costco. The second act of misconduct was the email Park sent to Breton indicating that he deleted the site because no one had indicated that they wanted to use it and suggested he had deleted the site some time ago, rather than in response to Breton's email. The third act of misconduct was when Park responded to Costco in an insubordinate and disrespectful manner. The fourth act of misconduct was when Park deleted the website a second time, from both his computer and the computer's recycling bin. This was a deliberate destruction of Costco property and amounted to insubordination. He acted dishonestly by failing to notify anyone of his second, permanent deletion of the website, and Costco was justified in dismissing Park. His misconduct could not be reconciled with his employment obligations, and his actions were intentional, discrete acts involving the destruction or attempted destruction of company property, insubordination, and sending a misleading email. Trust was essential to the effective performance of the functions of assistant buyer, and such trust was lost with Park's actions. Termination for cause was a proportionate response. This was not a single and isolated incident, but four discrete and deliberate acts where Park's misconduct was intentional and deliberate. It was clear that Park deleted the website twice after Breton requested access, and Park engaged in misconduct incompatible with the fundamental terms of his employment relationship with Costco. Summary termination was a proportionate response, and Park was not entitled to damages for wrongful dismissal. Park's mental health and transfer requests did not play a role in the decision to terminate him, so there was no entitlement to damages for breach of the duty of good faith or breach of human rights. Park was not entitled to damages for mental distress, as Costco did not engage in any conduct that was flagrant or outrageous.

Park v. Costco Wholesale Canada Ltd., 2023 CLC ¶210-039

Partial Owner of Family Company Was Constructively Dismissed When His Position Was Rendered Redundant Due To Sale of Division

Supreme Court of British Columbia, February 15, 2023

Algo Communication Products Ltd. ("Algo") was owned by three Zoehner brothers. Doug Zoehner and his brother Paul owned 44.3 per cent of the shares, and a third brother, Kerry, owned 11.34 per cent. Each brother held his share through his respective holding company. Algo's Interconnect Division was run exclusively by Doug, and the Manufacturing Division was run exclusively by Paul. The Interconnect Division was having financial difficulty and was sold to Digitcom Telecommunications Inc. ("Digitcom") on December 31, 2019. As part of the sale, Algo provided transitional services from Doug for a period of up to nine months. Digitcom agreed to pay Algo a management fee per month for these services,

and it could terminate Algo's transitional services on one month's notice. Doug provided services to Digitcom from January to April 2020, and on March 31, Digitcom gave notice that Doug's services would not be needed effective April 30, 2020. Doug believed that, as of May 1, 2020, he would continue to be employed at Algo, while Paul believed that Doug had retired with the sale of the Interconnect Division and that he was obliged to decline payment of his Algo salary. Doug understood that, after the Interconnect Division sale, the remainder of Algo would be sold off as well. He indicated that he was prepared to resign if Paul would buy out his shares or sell Algo. On January 7, 2021, Algo terminated Doug's employment. Doug Zoehner brought an action for wrongful dismissal.

The action was allowed. Algo chose to sell the Interconnect Division, which rendered Doug's position redundant. Doug arranged the sale and negotiated the terms, but the sale would not have occurred without all three shareholders agreeing. The sale was advantageous to Algo, since the division was unprofitable, and Algo was relieved of potential liabilities to employees and customers if the business had been shut down. The sale simplified Algo's business, and potentially facilitated the sale of Algo's profitable remaining business. Once the Interconnect Division was sold, and the transitional services were concluded, Doug's position with Algo was redundant. Paul assumed Doug would resign, but there was no agreement, and Doug believed he would stay employed by Algo until the remainder of the business was sold. Doug continued to perform minimal services for Algo after the sale, even though there was little meaningful work to do. He was not required to physically attend Algo's premises, and the failure to do so was not abandonment of his duties, especially given the COVID-19 pandemic public health orders in place at the relevant time. Doug did not "fail to report to work", his position as general manager was eliminated, and he was provided with no meaningful work to do or a reasonable alternative position. This was a substantial change in employment that constituted grounds for constructive dismissal. Doug did not accept Algo's repudiation of his contract, so there was no constructive dismissal and no termination of his contract of employment. He was not offered a reasonably equivalent position, or any position at all, and he did not refuse to perform an essential part of his duties since he had no substantial duties to fulfill after the sale. Doug did not repudiate his contract of employment. He refused to resign voluntarily, unless his shareholdings were bought out, and he was entitled to insist on being paid until his termination. Algo terminated Doug, effective January 7, 2021, without providing reasonable notice. Following his termination, Doug did not take reasonable steps to find alternate employment. He had no sincere desire to continue working, and intended to retire, provided he was paid for his shares. He took no steps to find alternative employment until seven months after his dismissal when he subscribed to an online employment service. He did not pursue any opportunities or obtain any interviews. He did perform some consulting work for a landscaping company from September to November 2021. While he failed to take reasonable steps to find alternate employment, there was little likelihood that he could have found another job. Doug was almost 63 years old, he planned to retire at 65, he had worked for Algo for his entire working life, his professional skills were limited, and he had health issues. It was unlikely any employer would hire Doug for a senior executive position at a similar salary. He could have reasonably sought work at a lower salary, perhaps for a limited term, and could have avoided approximately 20 per cent of his loss. Doug was awarded 24 months' reasonable notice, reduced by 4.8 months for a failure to mitigate, resulting in 19.2 months' reasonable notice. He was awarded reimbursement for the cost of replacing extended health insurance during the notice period.

Zoehner v. Algo Communication Products Ltd., 2023 CLC ¶1210-040

Stand-Alone Bargaining Unit of Employees at a Single Casino Was Appropriate for Collective Bargaining

British Columbia Labour Relations Board, January 19, 2023

Gateway Casinos & Entertainment Limited ("Gateway") owned and operated various casinos, including Cascades Delta. Unifor, Local Union No. 114 ("Unifor") filed an application for certification to represent a bargaining unit of employees of Gateway at Cascades Delta. At the expedited certification hearing, Unifor demonstrated sufficient support for the unit to be automatically certified. There were various bargaining units with Gateway represented by different unions, including four certifications for the B.C. General Employees union ("BCGEU"). In addition, Unifor held two single site certifications at casinos owned and operated by Gateway through wholly owned subsidiaries. Gateway and Unifor agreed that Gateway was the true employer at those locations. BCGEU objected to Unifor's certification application, claiming that the work performed at Cascades Delta was similar, if not identical, to work performed at casinos where BCGEU was certified.

The objection to the certification application was dismissed, and the certification application was granted. The employees were not functionally integrated across worksites, and Unifor was not attempting to divide classifications performing similar work at a single worksite. Unifor wanted to represent a stand-alone bargaining unit of employees at a single casino, which had occurred multiple times with Gateway. The employees Unifor sought to organize shared a similarity in skills, interests, duties, and working conditions at one work site. Gateway had common senior management overseeing operations, and used a centralized labour relations staff for higher-level issues, but another stand-alone unit would not cause industrial instability rendering the proposed unit inappropriate for collective bargaining. Gateway already had an administrative infrastructure to manage multiple gaming centres and bargaining units. There was no interchange between employees in the proposed unit at Cascades Delta and Gateway's other gaming centres. There were no integrated duties, continuous work processes, or overlapping and shared duties that would warrant a finding that a stand-alone bargaining unit would cause industrial instability. Cascades Delta was in a separate municipality from casinos where BCGEU was certified as bargaining agent. There were four bargaining units in the non-surveillance segment of Gateway's operations, all represented by BCGEU. Surveillance employees were required to be certified separately from employees they monitored, demonstrating a practice of stand-alone certifications and a history of multiple bargaining units at Gateway's casinos. There was an insufficient basis to find industrial unrest between BCGEU and Unifor rendering the proposed unit inappropriate for collective bargaining. Gateway and Unifor would be administering a unique collective agreement for bargaining unit employees at Cascades Delta. The fragmented bargaining structure at Gateway had been pursued by unions and was not opposed by Gateway and had been in place through multiple rounds of bargaining. Another stand-alone bargaining unit with Gateway at Cascades Delta would not constitute a unit inappropriate for collective bargaining. Gateway was a major operator in the casino sector in the province, and the practice and history of collective bargaining indicated stand-alone units were not unusual and may even have been typical. The practice did not appear to have caused general industrial instability in the sector. Unifor's presence at an employee orientation held by Gateway did not establish that either Gateway or Unifor engaged in coercion or intimidation that had the effect of compelling or inducing employees to become members of Unifor. Gateway and Unifor's cooperative relationship with respect to Unifor's organizing, leading to Unifor's presence at an employee orientation did not establish a lack of an arm's length relationship precluding a certification application. BCGEU was not allowed to raise the issue of build-up at such a late stage in the proceedings. Therefore, Unifor rebutted the presumption against the proliferation of bargaining units and a stand-alone unit of employees represented by Unifor at Cascades Delta was appropriate for collective bargaining.

Gateway Casinos & Entertainment Limited v. Unifor, Local Union No. 114, 2023 CLC ¶220-033

Excluding Municipalities from Specialized Bargaining Regime for Construction Industry Was Not Unconstitutional

Ontario Divisional Court, January 24, 2023

Non-construction employers ("NCEs") were not subject to the specialized regime for the construction industry set out in the Ontario *Labour Relations Act, 1995* ("LRA"). Under an amendment to s. 127 of the LRA, the categories of deemed NCEs included municipalities. As a result, the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (the "union") no longer represented any municipal employees in the ICI sector and the Carpenters' Provincial Collective Agreement (the "Collective Agreement") was no longer binding on the parties. The union brought grievances against several municipalities under the Collective Agreement, and the municipalities indicated that the Collective Agreement was no longer binding. The grievances were referred to arbitration, where the union challenged the constitutionality of the amended s. 127. The Labour Relations Board determined that it was bound by *Independent Electricity System Operator v. Canadian Union of Skilled Workers, 2012 CLC ¶220-038* ("*IESO*"), where the Court of Appeal determined that s. 127.2 of the LRA, which allowed employers to bring an application to be declared an NCE, did not infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms* ("Charter"). In the alternative, the Board found no breach of s. 2(d) and dismissed the application. A request for reconsideration was dismissed, and the union brought an application for judicial review.

The application for judicial review was dismissed. The Board correctly concluded that *IESO* was determinative of the issue before it. The consequences of a s. 127.2 declaration, at issue in *IESO*, was the same as the impact of the amendments on the municipalities in this situation. The Region of Waterloo employed a carpenter, Chiarot, who was covered by the

Collective Agreement prior to the amendments. The central issue in *IESO* did not involve the employer not employing any union members. Rather, it was that the union members' rights were not infringed because they were able to continue to bargain with their construction employers and were free to organize under the general provisions of the LRA. While construction employees of NCEs did not have the benefit of the specialized construction provisions, they had access to the LRA provisions allowing them to be members of a union, and all the rights that entailed. Section 2(d) of the Charter did not protect access to a particular statutory process, such as the specialized provisions for the construction industry, nor to the fruits of bargaining. Chiarot was a direct employee, but there was no substantial interference with his access to collective bargaining. He reverted to being part of the bargaining unit represented by the Canadian Union of Public Employees Local 1656, representing Waterloo's general staff. The other two municipalities, Hamilton and Sault Ste. Marie, did not employ members of the union when the amendments came into force. It was irrelevant that the union obtained bargaining rights by applying for certification at each of the municipalities, while the unions in *IESO* acquired bargaining rights by successor application. The municipalities had not indicated that they did not intend to directly employ carpenters in the future, but regardless the general provisions of the LRA remained available, even if the special construction provisions did not. The amount of work performed by union members for contractors/subcontractors to the municipalities was irrelevant and did not distinguish the facts from *IESO*. Employers deemed to be NCEs, such as municipalities, were given the unilateral and unfettered right to terminate bargaining rights or not, which was the same as the provisions in *IESO*, which allowed employers to unilaterally determine whether to apply for an NCE designation. Therefore, *IESO* was determinative. Even if it was not, there was no infringement of s. 2(d) of the Charter. The protection of collective bargaining rights in the Charter covered the right to a process, not a particular collective bargaining outcome or a particular model of labour relations. There was no constitutional entitlement to the specialized construction provisions in the LRA, and Chiarot had the general collective bargaining process provided in the LRA available to him. There was no constitutional entitlement to employment opportunities, so any concern about the union members' access to municipalities' work due to subcontracting provisions was not a Charter breach.

Carpenters' District Council of Ontario v. Hamilton (City), 2023 CLC ¶1220-034

Essential Character of Dispute Over Mandatory Vaccination Requirement Fell Within Exclusive Jurisdiction of Labour Arbitration

Court of King's Bench of Alberta, January 25, 2023

Atco Gas and Pipelines Ltd., Atco Electric Ltd., Atco Energy Solutions Ltd. and CU Inc. (collectively, "Atco") imposed a mandatory vaccination requirement, with consequences for failing to meet the requirements including being put on unpaid leave. A group of unionized employees brought an action against Atco, with the province of Alberta added in an amended version. A further amendment included allegations of coordination between Alberta and Atco in imposing vaccine mandates. Atco brought an application to strike the claims for employees working in a unionized environment, since there were collective agreements in place that provided for arbitration. The unionized employees argued that the nature of their claim went beyond the scope of the arbitration process. According to the unionized employees, remedies under the *Canadian Charter of Rights and Freedoms* ("Charter") and the *Alberta Human Rights Act*, put the dispute beyond the arbitration process jurisdictionally, and Atco was acting as an agent for the Crown in enacting a mandatory vaccination policy, which brought the dispute outside the arbitration process since His Majesty was not a party to the collective agreements.

The application to dismiss was granted. The collective agreements at issue contemplated a unionized setting and mandatory arbitration for workplace disputes. The essential character of the dispute was workplace related, namely defining the limits of Atco's authority and what terms it may or may not impose in the workplace. Even if His Majesty required a vaccination mandate, the dispute between the defendants and the unionized employees remained what Atco could or could not require in the workplace. It was a labour dispute, since conditions of work were imposed on the unionized employees, who did not agree with the conditions. The recourse against Atco for workplace disputes remained labour arbitration for unionized employees. There was no formal regulation or statute enacted to codify assistance to employers who imposed mandatory vaccination policies, and the policy was imposed by Atco, not Alberta. The Charter remedies at issue could be granted in a labour arbitration setting and by the Labour Relations Board, although it was difficult to contemplate how there would be a Charter remedy available against a private employer. The original

jurisdiction of *Alberta Human Rights Act* complaints lay with the Alberta Human Rights Commission, not the Court. It was noted that the union had grieved the vaccination policy, and the grievances were settled and resolved by the affected unions. Several unionized employees believed the settlement was inappropriate and filed duty of fair representation claims against their union, alleging their interests were not properly served. At least one such complaint was formally dismissed.

Bolduc v. Alberta, 2023 CLC ¶1220-035

Court Upholds Decision To Dismiss Human Rights Complaint for Being Out of Time

Ontario Divisional Court, December 2, 2022

Chen was a tenured member of the faculty of the business school associated with Western University ("Western"). He brought a human rights complaint alleging discrimination based on race and ethnic origin. He alleged that he was discriminated against through actions in implementing a private workshop policy in July 2014, denying his sabbatical request in November 2014, and an investigation launched by the Dean on June 8, 2015, into allegations of workplace harassment by Chen. The human rights application was made on September 29, 2016, and referred to the last event of the alleged breach occurring on March 18, 2016. This was within a year of the date that the application was commenced, but no reference was made to what allegedly occurred on that date. Western brought an application to dismiss for being outside of the required time limit, and for having no reasonable prospect of success. In response, Chen identified a "series of incidents" carrying through to November 23, 2015, when he was informed that he would be subjected to disciplinary penalties. The Tribunal determined that the "series of incidents" on which the discrimination allegations were based ended on June 8, 2015, when an internal workplace harassment complaint began against Chen. The allegations by Chen that followed, pertaining to the investigation report and subsequent discipline, were different in nature and kind to those asserted in respect to the period from May 2014 to June 2015. The application brought on September 29, 2016, was more than a year after the events occurred, and was out of time. The allegations arising from the independent investigation after June 8, 2015 were in relation to the conduct of a third party who conducted the investigation, and who was not named as a respondent. There was no allegation supporting bias in the investigation or investigator. Western disciplined Chen in November 2015 as a result of the investigation report, but the Tribunal found no allegation of fact supporting the conclusion that the discipline was discriminatory, so the allegations had no reasonable prospect of success and could not form part of a "series of incidents". Chen did not demonstrate that the delay in filing the application was incurred in good faith, and the application was dismissed. A request for reconsideration was denied. Chen brought an application for judicial review.

The application for judicial review was dismissed. The allegations relating to the investigation and report did not reflect the actions of the Dean, which occurred earlier. The issues were "discrete and separate". One dealt with the application of policies affecting the faculty at the business school, and the other related to the conduct of an investigation of a harassment complaint made by the Dean. The Tribunal's decision was reasonable. The finding that the allegations of discrimination, up to and including the making of the complaint by the Dean on June 8, 2015, were out of time was appropriate. Chen alleged that the investigation was a "sham" and that the investigation, and the investigator, were "biased". The Tribunal found these allegations were unsupported and were nothing more than bare assertions. The Tribunal was obliged to accept facts as proved but not to accept Chen's assumptions as to why those facts occurred. There must be a basis beyond mere speculation and accusations to believe Chen may have suffered from discrimination. It was reasonable for the Tribunal to find that, based on the facts taken to be true, there was no reasonable prospect that the application relating to the investigation and discipline would succeed. The assertion that the Tribunal breached the duty of procedural fairness was dismissed, as Chen's allegations were arguments about substantive issues rather than examples of a lack of procedural fairness. Chen attempted, on reconsideration, to have the Tribunal reconsider the findings it made in the original decision and override its own conclusions.

Chen v. Western University, 2023 CLC ¶1230-026

Employee Who Was Dismissed for Failing To Comply With Vaccination Policy Was Not Entitled To Employment Insurance Benefits

Federal Court, January 23, 2023

Cecchetto, an employee of Lakeridge Health since 2017, was suspended, and ultimately terminated, for failing to comply with Lakeridge Health's policy regarding COVID-19 vaccinations and testing. In implementing the policy, Lakeridge Health followed the rules set out by Ontario's Chief Medical Officer of Health in a Directive pursuant to the *Health Protection and Promotion Act*. Cecchetto participated in an education session regarding vaccines, as set out in the Directive, but did not get vaccinated or provide antigen test results as required. He was put on unpaid leave in September 2021, and dismissed in October. His application for Employment Insurance benefits was denied, as the Canada Employment Insurance Commission found that he had lost his job due to misconduct. A request for reconsideration was denied, and an appeal to the Social Security Tribunal—General Division ("SST-GD") was dismissed. The SST-GD determined that Cecchetto was aware his actions would result in job loss and rejected the claim that he had not been notified of the Directive's requirements. Cecchetto partly complied with the Directive by completing the education session, but failed to comply with the other components because he was unwilling to get vaccinated or seek an exemption, and he did not submit antigen test results. Therefore, he committed misconduct and was not entitled to Employment Insurance benefits. Leave to appeal to the Social Security Tribunal—Appeal Division ("SST-AD") was denied, as the SST-AD found Cecchetto had not demonstrated his appeal had a reasonable chance of success. Cecchetto brought an application for judicial review.

The application for judicial review was dismissed. There was no basis to find the SST-AD's decision unreasonable. Its limited role was to determine whether to grant leave to appeal from a decision of the SST-GD. The SST-AD reviewed the key factual findings on which the SST-GD based its decision, namely that Cecchetto was dismissed because he knowingly failed to follow the Directive, which Lakeridge Health was legally obligated to implement, and that constituted "misconduct" for the purposes of entitlement to Employment Insurance. Cecchetto disagreed, and claimed the findings were untrue, but could not indicate any issue which would justify overturning the decision of the SST-AD. The SST-GD made factual and legal findings. The SST-AD considered Cecchetto's argument and determined his appeal had no reasonable chance of success, which was reasonable. For an action to constitute misconduct, it must be performed consciously, deliberately, or intentionally, although it did not require an employee to act with malicious intent. Cecchetto faced multiple levels of discipline prior to his termination, and he had heard about the consequences of non-compliance with the policy and had the opportunity to remedy his behaviour when suspended. Hospital staff, including Cecchetto, received repeated notification of the policy both verbally and through email, and the SST-GD reasonably determined that Cecchetto committed misconduct. On appeal, Cecchetto did not raise any sort of error that could justify granting his appeal, and the SST-AD reasonably found that his appeal had no chance of success.

Cecchetto v. Canada (AG), 2023 CLC ¶240-004

THE ECONOMY

The statistics below provide a convenient overview of the latest Consumer Price Index (CPI) and other economic and labour indicators of interest. Do you need detailed CPI figures for all of Canada, individual provinces, regional cities, or specific goods and services (e.g., housing, food, and transportation)? If so, you can find the detailed CPI figures in the "Consumer Price Index" tab division of Volume 1 at ¶26 *et seq.*

Cost of Living—Up

The Consumer Price Index figure for April 2023 on the 2002 = 100 time base was 156.4, up 4.4% from the April 2022 figure of 149.8. On a monthly basis, the April 2023 percentage figure was up 0.7% from March 2023.

Industrial Production—Up

The preliminary, seasonally adjusted figure of industrial production for the month of March 2023, in chained 2007 dollars, was estimated at \$400,981 million, up 0.4% from the revised March 2022 figure of \$399,302 million.

Weekly Earnings—Up

In March 2023, the average weekly earnings (including overtime), seasonally adjusted at the industrial aggregate level, were \$1,185.03 up 1.4% from \$1,168.12 in March 2022, according to a preliminary estimate based on a sample survey of reporting units.

Unemployment—Up

For May 2023, the seasonally adjusted number of unemployed persons totalled 1,093,000, up 34,800 from April 2023, with an unemployment rate of 5.2% of an active labour force of 21,205,900. The employment level in May 2023 was 20,112,900.

Work Stoppages—Down

For major collective bargaining agreements (those with 500 or more employees) in May 2023, there were 267,330 person days lost from 2 work stoppages. For May 2022, there were 1,095,655 person days lost from 66 work stoppages.

LABOUR NOTES

Published twice monthly as the newsletter complement to the *Canadian Labour Law Reporter* by LexisNexis Canada Inc. For subscription information, contact your Account Manager or 1-800-387-0899.

For LexisNexis Canada Inc.

Jaime Latner, LLB,
Content Development Associate
905-479-2665
jaime.latner@lexisnexis.ca

Edward Noble, LLB,
Content Development Associate
905-479-2665
edward.noble@lexisnexis.ca

Janine Geddie, BA, LLB, Contributor

Editorial Board

Roper Greyell LLP — Employment and Labour Lawyers
James D. Kondopulos
604-806-3865
jkondopulos@ropergreyell.com
www.ropergreyell.com

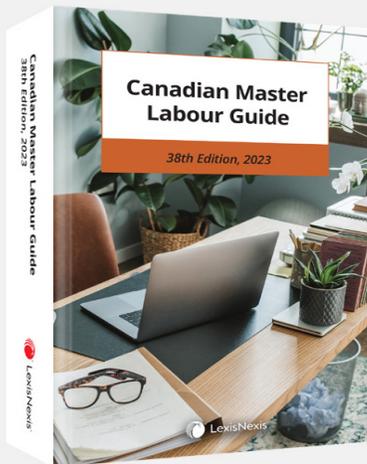
©2023, LexisNexis Canada. All rights reserved.

Customer Support
1-800-387-0899
service@lexisnexis.ca

Customer Service is available from 7 a.m. to 11 p.m. (ET) Monday to Friday, and from 9 a.m. to 11 p.m. (ET) on Weekends.

Notice: *This material does not constitute legal advice. Readers are urged to consult their professional advisers prior to acting on the basis of material in this newsletter.*

LexisNexis Canada Inc.
111 Gordon Baker Road
Suite 900
Toronto, Ontario
M2H 3R1



NEW EDITION

AVAILABLE APRIL 2023

\$190 | 2,064 pages | Annual

Softcover | ISBN: 9780433527510

Canadian Master Labour Guide, 38th Edition, 2023

LexisNexis Canada Editorial

This title makes it easier than ever to stay on top of changes in employment, human rights, and labour law throughout Canada. Readers of this guide will learn what these changes mean and will be able to respond appropriately.

What's New In This Edition

- Employment standards changes:
 - New entitlement to paid medical leave in the federal jurisdiction
 - New youth employment rules in British Columbia
 - National Day of Truth and Reconciliation added as a statutory holiday in British Columbia, Northwest Territories, Nunavut, and Yukon
- Labour relations changes:
 - Important amendments to the *Labour Relations Code* and regulations in Alberta, including new financial statement obligations for trade unions, amendments related to revocable elections, and a new *Financial Disclosure Regulation*
 - Introduction of card-check certification in British Columbia, as well as modification to construction industry certification periods
- Human rights, equal pay, and pay equity changes:
 - New *Pay Equity and Pay Transparency Act* (not yet in force as of date of writing) passed in Newfoundland and Labrador
 - *Non-Disclosure Agreements Act* becomes law in Prince Edward Island
 - Pay transparency legislation adopted in Prince Edward Island