Presented by MYERS LLP

***Construction & Specialized Workers' Union, Local 1258 and Wintec Building Services Inc.* (Arbitrator Rob Simpson, November 20, 2023)**

This decision illustrates the rare application of the remedy of "rectification" which occurs where an arbitrator corrects an error contained in a collective agreement. The arbitrator issued a remedy rectifying the term/duration clause of the collective agreement.

In 2019, the Union was issued a discretionary certification (following employer unfair labour practices) for a unit of labourers. The Employer is not a member of the Constructional Labour Relations Association of Manitoba (CLRAM) but hired CLRAM executive director Peter Wightman to bargain on its behalf. The parties engaged in collective bargaining over several months in 2019 and 2020. The Union initially proposed a term/duration clause that contemplated an April 30 termination date, with notice to bargain being provided 60 to 120 days before April 30. As bargaining progressed, the parties came to mutually exchange proposals where notice to bargain would be provided in January for a collective agreement expiring on April 30 (proposing different termination years.) A January notice to bargain window for a collective agreement expiring April 30 mirrors most duration/term clauses in the Industrial Commercial Institutional sector, including most CLRAM agreements.

On the last day of collective bargaining, in mediation, the Employer tabled a new proposal where the collective agreement would terminate on October 31, 2023 instead of April 30. The Employer's proposal did not include language for when notice to bargain would be provided for an October 31 termination date, nor did the parties discuss a notice to bargain window for an October 31 termination date. The Union accepted the Employer's proposal for an October 31 termination date, and a tentative agreement was finalized and ratified by the membership shortly thereafter.

The Employer drafted the collective agreement, and in drafting the term/duration clause, it used the language of prior proposals, such that the clause would require notice to bargain be provided in January 2023 for a collective agreement expiring on October 31, 2023. The Union signed the collective agreement without noticing or turning its mind to the fact that the collective agreement stated that notice to bargain must be provided in January, 10 months before an October 31 termination date.

The Union certified a second unit of drivers and operators, and the parties agreed to negotiate terms and conditions of employment specific to these new employees and add them into the existing collective agreement. The parties did not amend the term/duration clause during this round of bargaining.

In May of 2023, with the collective agreement due to expire on October 31, 2023 the Union was preparing for collective bargaining and realized that the term/duration clause stated that notice to bargain needed to be provided in January 2023. Notice to bargain had not been provided in January. The Union advised the Employer that the collective agreement contained an error in stating that notice to bargain needed to be provided in January, pointing out that this was the notice period being discussed in relation to an

April 30 termination date, but that the parties had not discussed or agreed to a January (or any) notice period for an October 31, termination date. The Union took the position that notice to bargain should be governed by the statutory window in *The Labour Relations Act*, which is 30-90 days before termination. The Union provided notice to bargain under the LRA timeframe and tried to schedule bargaining dates. The Employer took the position that the collective agreement did not contain an error, that January was the agreed upon notice period for an October 31, 2023 termination date, and that since the Union had not provided notice to bargain in January, the collective agreement automatically renewed for a year without changes. The Employer refused to meet to commence bargaining.

The Union filed a grievance and referred it to expedited arbitration, asking the arbitrator to rectify the term/duration clause.

The Arbitrator found that the Union met the strict legal test for obtaining the remedy of rectifying the collective agreement. He found that the Union made a unilateral mistake in signing a collective agreement with a January window for notice to bargain, as the Union had agreed to an October 31 termination date but the parties had not reached an agreement on when notice to bargain would be provided. The Arbitrator rejected the Employer's argument that January was an agreed upon notice to bargain period, regardless of the termination date. He further found that the Employer knew or ought to have known that the Union had made a mistake, such that permitting the Employer to take advantage of the mistake would amount to fraud or the equivalent of fraud, which can include unconscionable conduct or unfair dealing. He held that, if the Employer's intention was to propose an October 31 termination date while retaining a January notice period, it ought to have brought that expressly to the Union's attention in bargaining, and that Mr. Wightman "knew or ought to have known that the Union had never considered a January notice with an October 31st term".

The Arbitrator found as follows:

> I find that the Employer knew or ought to have known of the Union's mistake. As previously indicated: there was never a discussion of a January notice other than with an April 30th term; there was never any forewarning prior to May 28, 2020, that the Employer would be looking for an October 31st term or any term other than April 30th; the proposal containing the October 31st term did not set out the article and made no reference to notice; the change from a four month to a ten month notice, if intended, was significant but not discussed; and there was nothing that could have led the Employer to believe that the Union would agree to a January notice with an October 31st term. I accept that much can occur in the final stages of negotiation, but here bringing forward a totally new termination date and purporting to rely on a January notice date, which had been discussed in a different context, required the Employer to be

> upfront with what it was proposing. The Employer's silence was misleading.
>
> To allow the Employer to take advantage of the Union's error and rely on the January notice would be unfair and unconscionable. By relying on the missed January 2023 notice, 200 plus employees will have their salary and benefits frozen through October 31, 2024. I do not believe that the Union's failure to recognize the error earlier, takes away its access to rectification.

The arbitrator rectified the collective agreement by removing the reference to a notice to bargain period in the termination clause, which effectively meant that the statutory window in *The Labour Relations Act* applied. He further declared that the Union had given timely notice to bargain to the Employer within the statutory timeframe in s. 61(1) of *The Labour Relations Act*.

The Employer has applied for judicial review of the Arbitrator's decision.

Richmond Inn Hotel Ltd. v. Unite Here Local 40, **2023 BCSC**

The owners of two hotels were in the midst of a labour dispute with some of their employees who were represented by Unite Here Local 40. The employees were on strike and picketing near the hotels with support from the union. The hotel owners filed an application with the court seeking an interim injunction to limit specific activities and the volume of noise on the picket lines, stating the workers were producing noise that violated city bylaws.

The parties consented to an injunction order, paragraph 1 of which prohibited the union and any persons acting under their instructions from:

a) Using sirens, air horns, blow horns, or whistles at or hear the hotels' premises; and
b) Using drums, microphones, speakers, megaphones or any other electronic device to amplify sound or to play pre-recorded sounds or pre-recorded music over 75dBA on an approved sound meter as defined by the City of Richmond Bylaw No. 8856, emanating at least 6.1 meters from the source of the noise or sound.

Since the pronouncement of the injunction, the hotel owners alleged the union had deliberately failed or refused to comply with those terms, because the picketers had been making noise in excess of 75 dBA. They sought the following orders: i) to hold the employees in contempt of court ii) require them to cease their conduct in breach of the injunction; and iii) add a police enforcement clause to the injunction.

The union provided an affidavit from one of the organizers, stating that the union had advised picketers about the necessary changes and had ceased using the prohibited instruments. The organizer also referred to a 2019 acoustic report that indicated some noise-making devices could be used without violating the court order, provided they were not used excessively. The union claimed that drums and plastic hand clappers could be used without breaching the order, provided that the drums were not beaten with too much force and the noise making instruments were spaced at a sufficient distance from each other.

In a second affidavit filed by the union, the Vice-President of the union stated that she had been in regular attendance on the picket line outside one of the hotels. She said the noise measurements by security guards were not taken from the stipulated distance of 6.1 meters. She also mentioned efforts had been made to comply with the injunction, including instructing picketers to cease the use of megaphones, horns, and other loud instruments.

Both the union and the hotel owners filed affidavits from acoustic specialists in support of their respective arguments. The hotel owners' expert, Mr. Ghanouni, set up sound level measuring devices at five locations near the picket lines. Three of the five locations were reported to have yielded measurements in excess of 75 dBA. The source of the noise he measured was described as "crowd noise." Mr. Ghanouni's report stated "the

crowd can be seen using clappers and whistles to generate noise. We also observed drums being used to generate noise during our measurements.”

The union’s expert, Mr. Ng, also prepared an expert report based on sound measurements of the picketing at one of the hotel locations. The only readings he obtained in excess of 75 dBA came from one group of six and another group of 12 picketers, each using plastic hand-clappers and their voices to make the noises that were measured. Mr. Ng was critical of Mr. Ghanouni’s methodology and results, which he said were unreliable for various reasons, including a failure to set out the serial numbers of the measuring devices he used, or their last valid calibration dates. Mr. Ng was also critical of the devices used by the security guards and the manner in which they were used, all of which cast doubt, in Mr. Ng’s view, on the reliability of the measurements recorded by them.

The parties argued about the interpretation of the injunction with the hotel owners submitting the injunction must be interpreted in a manner consistent with its “spirit and intent,” to ensure the sound emanating from the picket lines was kept within reasonable limits. They argued the terms “drum” in para. 1(b) should be read to mean *all* percussion instruments, including plastic hand-clappers.

The union argued the hotel owner’s application rested on an overly broad interpretation of the injunction. They submitted the word “drums” could not reasonably be interpreted to mean all percussion instruments, including hand clappers. The union argued the use of drums (and the other devices listed) was prohibited only insofar as they, on their own, make a noise that is louder than 75 dBA.

The judge concluded paragraph 1 was ambiguous insofar as it failed to specify precisely what conduct was enjoined and stated “although it is clear that the picketers have regularly been generating noise in excess of 75 dBA, that by itself, is not what is enjoined. The primary source of that noise appears to be their voices and their use of plastic hand clappers, neither of which are specifically enjoined at any level.” Ultimately, the application was refused.

Gate Gourmet Canada Inc. and UNITE HERE, Local 40. 2023 BCLRB 128.

This decision deals with an employer's use of replacement workers to undermine strike efforts. In this decision, a reconsideration panel of the British Columbia Labour Relations Board upheld a decision finding that an employer breached the province's Labour Relations Code by using its own out-of-province workers to perform struck work during a lawful strike.

The employer provides catering services to airlines that fly in and out of the airports where its employees work. Its head office is in Ontario, and it operates out of airports in British Columbia, Alberta, and Ontario. The airlines choose whether flights will be "single-catered," meaning enough food and beverage is loaded on the aircraft for a single outbound flight, or "double-catered," meaning enough food and beverage is loaded for both the outbound and the return flight of that aircraft.

When the collective agreement between the employer and the union expired, the union's members went on strike, in the form of an overtime ban at its B.C. operations. In response, the employer advised all of its customers except Air Canada that it might not be able to provide catering services. However, when Air Canada learned of the strike notice, an Air Canada representative requested to have its flights "double catered" from kitchens located outside of British Columbia, and the employer followed the request.

The original panel determined that the employer used the services of persons who ordinarily work at another of its places of operations to perform the work of employees in the bargaining unit who are on strike and ordered them to cease and desist from breaching the Code by using the services of its employees in Alberta and Ontario to double-cater the Air Canada flights.

The employer argued that the Board erred in its interpretation of the *Code* in finding that they made "use" of the services of workers within the meaning of the *Code*, and that the work of double-catering the Air Canada flights was work the union's bargaining unit would have performed "but for" the strike. It also argued that provincial statutory boards have no jurisdiction outside the boundaries of the province, and thus cannot prohibit activities taking place outside B.C.

The union argued that the employer took active steps to fulfill Air Canada's request by "reassigning the struck work to its other locations, benefitting itself by being "better positioned to resist the effects of the Union's strike. The union further argued that the Board could enforce provincial legislation in a manner that had indirect effects on persons in other provinces.

The Panel concluded that:

> "…the evidence was that Gate facilitated and, in effect, implemented, the double-catering of flights from Ontario and Alberta in order to maintain catering services

> to Air Canada notwithstanding the strike. In these circumstances, we find the Original Decision correctly concludes that, in doing so, Gate made "use" of persons within the meaning of section 68(1) of the Code."

Finally, with respect to jurisdiction, the Panel concluded that, in the labour relations context, "the sufficient connection test is applied in a way that recognizes collective bargaining relationships may be centred in one province but acted out in another, and that the labour board with jurisdiction over the relationship must be able to regulate it in its entirety, even where aspects of the relationship occur outside the provincial border.

The Panel dismissed the employer's application.

JY and Canadian Human Rights Commission and VIA Rail Canada Inc., 2023 CHRT 25 (Kristen Mercer-Chairperson)

FACTS: This case deals with a female employee working as a locomotive attendant at the Toronto Maintenance Centre facility operated by VIA Real Canada. She experienced more than 20 incidents of harassment perpetrated by a male coworker which included: watching and photographing her while she worked, swearing at her, driving a company vehicle recklessly towards her on two occasions, refusing to move away when she was required to bend over in front of him, making rude and demeaning comments about her, criticizing her radio voice, ignoring her communications,, sitting outside a women's locker room and watching and photographing her entering it, etc.

The female employee first reported the conduct to management in January 2012, but at that time, no investigation was conducted. She then reported subsequent conduct and by December 2012 the working relationship had significantly deteriorated.

By March 2013 she advise a supervisor that she was no longer willing to work with the respondent coworker and submitted nine further letters of complaint of incidents that had occurred over the past year. It wasn't until April 2013 that the respondent coworker was moved off her shift and a formal investigation took place.

One of the main problems was that there was no final written report of the investigation, and the investigator was not involved in subsequent decision-making concerning the investigation or the complaint. VIA Rail determined that the respondent's behaviour was "conduct unbecoming" and issued him 25 demerit points and directed him to avoid contact with the complainant. The complainant was dissatisfied with the process and filed a complaint against the employer with the Canadian Human Rights Tribunal.

At the hearing, the employer took the position that while the respondent's behaviour was unprofessional, it was not discriminatory, nor was it sexual harassment. The Tribunal disagreed with the employer in this regard.

DECISION:

The decision of the Tribunal included the following:

- a finding that the respondent had engaged in discrimination on the basis of sex in violation of the Human Rights Act
- a finding that the respondent's conduct constituted harassment on the basis of sex
- however, for some strange reason, the Tribunal refused to find that the respondent's conduct constituted "sexual harassment" as contemplated by the Act
- a finding that the employer failed in its duty of due diligence on the basis that it failed to act in a manner that was "timely, mitigative, and preventative", and that this resulted in the complainant suffering additional harm

- a finding that it was partly due to the employer's inaction that the situation worsened and that had the employer acted more rigorously at the time of the initial complaint, and acted more proactively, it is unlikely that the situation would have become as serious as it did
- a finding that while the standard for investigations is "reasonableness, not correctness or perfection", and while the investigation interview process appeared to be "thorough and comprehensive", the Tribunal concluded that the lack of transparency in the employer's subsequent decision-making process coupled with the absence of a written investigation report led to the conclusion that it had not exercised all due diligence in its investigation process.
- A finding that the failure of the employer to address the respondent's "apparent lack of understanding about the nature of his conduct" leaves open the question of whether the source of the conflict was "meaningfully remedied or simply relocated"

REMEDY:

- the Tribunal accepted that the complainant had experienced pain and suffering because of the discrimination and awarded an amount of $12,000.00 in general damages
- the Tribunal found that "VIA Management did repeatedly fail to intervene in a situation that was clearly not functioning in an appropriate manner" and awarded $3000.00 in special damages
- the Tribunal also awarded $6359.85 in lost wages as a result of the complainant's refusal of overtime shifts to avoid working with the respondent (this also included times where the employer itself avoided assigning overtime to the complainant in order to prevent her from working with the respondent)

COMMENT

One of the central considerations of the Tribunal's finding of sex-based discrimination and harassment was that it was important to detect and consider conduct carrying "the subtle scent of discrimination", rather than merely "glaringly obvious" discrimination. The Tribunal discussed the importance of the role of "context" in this analysis:

"**It is worth noting that comments and behaviour that might appear to be neutral to someone who carries dominant culture privilege in a particular context can feel and in fact be excluding, othering and discriminatory to someone who does not hold the same privilege in that context.**

For example, comments about a sex characteristic, such as the tone of a woman's voice or the appropriateness of her clothing, in an historically male context may create an experience of "otherness" that has the effect of diminishing or demeaning someone on the basis of a protected characteristic… These kinds of

comments are increasingly understood as a form of discriminatory conduct called micro-aggressions."

<u>Ottawa Police Services Bd. v. Ottawa Police Assn. 2023 CarswellOnt 17321, 2023 ONSC 6225</u>

The issue was whether or not the National Day of Mourning, which was "proclaimed" following the passing of Queen Elizabeth II, was to be treated as a paid holiday under two collective agreements.

The Collective Agreements (one for sworn officers, one for non-sworn personnel) listed designated statutory holidays, along with "…any day <u>proclaimed</u> by the Governor General in Council or the Lieutenant Governor in Council for the Province of Ontario, or the City of Ottawa shall be a statutory holiday."

Queen Elizabeth II passed away on September 8, 2022.

On September 13, 2022, the Governor General in Council directed that a proclamation be issued requesting that the people of Canada set aside September 19, 2022 as the day on which they honour the memory of Her late Majesty Queen Elizabeth the Second.

A Proclamation was then published in the Canada Gazette (the official gazette of The Government of Canada) in accordance with the Governor General in Council's direction. However, the day was never proclaimed as a statutory holiday, i.e., proclaimed through legislation that passes through the House of Commons and the Senate, and receives Royal Assent.

Instead, the Federal Government made the day a one-time holiday for federal employees through a direction from the Federal Office of the Chief Human Resources Officer.

September 19, 2022 was never made a holiday under the *Canada Labour Code*, the Holidays Act, the Ontario *Employment Standards Act, 2000*, or any other legislation.

At arbitration, the Ontario Police Association argued that the language of the Collective Agreements did not require that a day be proclaimed <u>as a holiday</u> in order for it to be regarded as a paid holiday (i.e., a statutory holiday), just that it had to be proclaimed by the Governor General in Council, which it had been in this instance. The criteria had been met.

The Police Services Board argued that the National Day of Mourning was not "proclaimed" within the meaning and intent of the Collective Agreements and that the term "proclaimed" has a specific meaning that is linked to the legislative process. The federal government did not take steps to proclaim the day as a statutory holiday, and so it was not a designated holiday under the agreements.

The pivotal issue for the Arbitrator was whether the language used in the Collective Agreements should be interpreted to require that the day be "proclaimed as a holiday",

or whether for that day to be designated a statutory holiday under the Collective Agreements, it was enough for the day simply to be "proclaimed".
The arbitrator agreed with the interpretation advanced by the Police Association. They were influenced by the “inescapable fact” that by issuing a Proclamation, the Governor in Council had “proclaimed” a day to honour the memory of the Queen.

As such, the day met the requirements of the relevant language in the collective agreements to be treated as a paid holiday. Whatever unfairness resulted to the Employer, it had to live with that result, under the language utilized in the collective agreements. The grievances were allowed.

The Police Services Board filed for judicial review, claiming that the arbitrator had failed to apply established principles of collective agreement interpretation, including the need to seek out the mutual intent of the parties, which would not have been intended to permit any day proclaimed in this nature to be a paid holiday; and that the decision led to an absurd result, given that it would open the door to other holidays “proclaimed” in the same manner to be treated as paid holidays, which would create an accumulating and significant expense that could not be planned or budgeted.

The Court agreed with the Employer, finding that the arbitrator had failed to interpret the collective agreement language in accordance with the spirit and intent of the parties, and that their interpretation would result in unanticipated consequences- the proliferation of many other paid holidays for days proclaimed as a holiday but not proclaimed as a statutory holiday, including days in remembrance of the 2017 Quebec Mosque Attack, days in recognition of the efforts of Canadians during the pandemic, days in memory of victims of air disasters, days in honour of the memory of victims of terrorism, and the contributions of firefighters.

Significance: entitlement to paid holidays or newly established holidays is entirely dependent on the language of your collective agreement, and the intent of the parties when that language was agreed upon.

Ontario English Catholic Teachers Association v. Ontario (Attorney General), 2024 ONCA 101

The majority of the Ontario Court of Appeal dismissed the Government's appeal of the decision of the Ontario Superior Court of Justice, which held that Bill 124, the Ford Government's public sector wage restraint legislation, violated the right to collective bargaining protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (freedom of association) in a way that was not justified under s. 1 of the *Charter*.

Bill 124 will give many of us déjà vu to Bill 28 (*The Public Services Sustainability Act*), the Pallister Government's public sector wage restraint legislation. The Manitoba Court of Appeal overturned the decision of the Manitoba Court of King's Bench, which held that the legislation imposing a four-year sustainability period during which compensation increases were capped at 0%, 0%, 0.75%, and 1%, violated s. 2(d) of the *Charter*.

Bill 124 imposed a series of 3-year "moderation periods" in the form of salary and compensation caps on a variety of public sector unionized and non-unionized workplaces. During these periods, increases to both salary rates and to existing or new compensation requirements (including salary rates) were capped at 1% per year, subject to certain exceptions.

The Court of Appeal applied the following framework for determining substantial interference with the right to collective bargaining set out by the Supreme Court of Canada:

a. First, the court must assess "the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert."

b. Second, the court must assess "the manner in which the measure impacts on the collective right to good faith negotiation and consultation."

The Court emphasized that every case will be a contextual and fact-specific inquiry. Of particular importance, the Court confirmed that prior cases which found that the federal *Expenditure Restraint Act* (the "ERA") did not violate s. 2(d) of the *Charter* were not determinative of the constitutionality of Bill 124. The Court held that these cases had not "suggest[ed] that wage restraint legislation is compliant with s. 2(d) *per se* if it has specified characteristics", and that courts must instead "look at the circumstances under which the legislation was passed, the content of the legislation and the impact of the legislation on collective bargaining in the particular circumstances of the case to determine whether the legislation constitutes a substantial interference."

In making this finding, the Court clearly disagreed with the decision of our Manitoba Court of Appeal, which effectively held that broad-based, time-limited wage restraint

legislation, like the ERA, is always constitutional. This approach does not reflect the required contextual and fact-specific approach.

At the first step of the analysis, the Court found, consistent with prior case law (including the Manitoba Court of Appeal decision) that wages and compensation are matters of central importance to collective bargaining.

At the second step, the Court found the following specific features of Bill 124, in combination, led to the conclusion that the legislation substantially interfered with the affected unions' ability to participate in good faith negotiation and consultation with their employers:

- Bill 124 did not come after a significant or meaningful process of collective bargaining;
- while this could have been attenuated by meaningful consultation over Bill 124 itself, no meaningful consultation took place;
- the broad definition of compensation under Bill 124 (which applied to any kind of benefit or compensation that can be monetized, such as sick days, vacation days and other benefits) significantly limited the areas of potential negotiation left on the table for collective bargaining;
- Bill 124 did not provide a meaningful avenue for negotiating or seeking potential exemptions from the 1% cap in appropriate circumstances; and
- The 1% cap on salary and compensation increases did not replicate collective agreements reached in other public sector bargaining.

Accordingly, the Court concluded that Bill 124 violated s. 2(d) of the *Charter*.

The Court further determined that Bill 124 was not saved by s. 1 of the *Charter*. The Court accepted managing finances and budgetary considerations as a pressing and substantial objective of the provincial government. However, the Court further found:

- there was no rational connection between Bill 124 and the broad range of workers captured within its scope, such as workers in the electric and university sectors, whose funding models had little to do with employees' wages;
- Bill 124 did not minimally impair unionized public workers' right to collectively bargain, as the Government failed to demonstrate why it could not pursue less restrictive measures than a blanket three-year wage increase prohibition for a broad range of public sector workers; and
- Bill 124's salutary effects were not proportional to its detrimental effects, as the Government failed to demonstrate why wage restraint could not have been achieved through free good faith collective bargaining.

In response to the Court's ruling, the Ontario Government announced that it would not seek leave to appeal the decision to the Supreme Court of Canada.

Bonus: ***Manitoba Federation of Labour et al v The Government of Manitoba*, 2023 MBCA 65** – in good news out of Manitoba, our Court of Appeal upheld the precedent-setting $19.4 million award of damages pursuant to section 24(1) of the *Charter* against the Province of Manitoba for having breached the University of Manitoba Faculty Association's section 2(d) *Charter* right by substantially interfering in the 2016 collective bargaining between the University of Manitoba and UMFA.

<u>Amalgamated Transit Union, Local 1587 and The Crown in Right of Ontario (Metrolinx) 2023 CanLii 72192 (ON GSB)</u>

Five bus drivers were terminated for alleged sexual harassment after the Employer's investigation concluded they engaged in a series of WhatsApp messages on their personal cell phones which included sexually inappropriate comments about their co-workers that suggested they had obtained promotions in exchange for performing sexual acts on supervisors.

The arbitrator found that WhatsApp messaging, unlike other social media platforms which are more public in nature, provides for encrypted private conversations which would reasonably be expected to be kept private by those engaging in the messaging. In that respect, the conversations were similar to private conversations and, given they occurred after work hours, the Employer did not have the right to investigate and impose discipline.

In reaching his conclusions, the arbitrator was also very critical of the manner in which the employer conducted its investigation including its demand that an employee disclose the contents of his personal cell phone under threat of discipline which violated the employee's right to privacy. This improperly obtained evidence led to the employer conducting a "fishing expedition" to find evidence against the employee's colleagues. Because of this privacy violation, all evidence obtained that implicated the grievors was deemed inadmissible.

> *A personal cellphone is a very private device. It is fair to say that for some people, it is part of their very being…Unless the employer can establish a clear contractual right to disclosure of any of the contents of an employee's personal cellphone, or can point to some statutory or judicial authorization for access to the records of anything within that device…the employer has no right to demand, let alone receive, any of the contents of that cellphone.*

The arbitrator also concluded that, even if he had allowed the improperly obtained evidence, he would have concluded that there had been no violation of the employer's harassment policy. There was no evidence that the conduct of the grievors (which the arbitrator acknowledged was entirely juvenile and inappropriate) was conduct that occurred in the workplace and was known or ought reasonably have been known to be unwelcome, or that the words transmitted were demonstrated to have had a negative impact manifested within the workplace.

All of the grievors were reinstated with full compensation and no loss of seniority.

***Wexford Residence Inc. v Canadian Union of Public Employees and its Local 3791*, 2023 CanLII 39486 (ON LA)**

In this decision, the arbitrator upheld an employee's dismissal for time theft but allowed a second grievance alleging that the grievor had been sexually harassed by her supervisor. The arbitrator ordered $10,000 in damages for the sexual harassment, and an additional $5,000 for the employer's failure to conduct a reasonable investigation.

At this workplace, there was also a known expectation and requirement that employees swipe in and report directly to their workstation/department for the start of the shift. The employer also had a Parking Policy that prohibited employees from parking on the property between 7:00 a.m. and 8:00 p.m., in order to reserve parking spots for visitors.

The grievor, who had recently received a written warning for arriving late and leaving early, sought to avoid further lateness incidents. To do so, she engaged in a deliberate scheme to manipulate the employer's timekeeping system to avoid detection of her lateness, which would also result in pay for time not worked.

On the day in question, the grievor's manager questioned her about being late that day. The grievor asked if he had checked the swipe machine. When the manager indicated that he had the right to ask questions, the grievor said that she was tired of him harassing her and that she wanted to see the Executive Director and CEO. She then proceeded to complain to the CEO and pointed out that "she would always be honest with her, that she would not lie, and there was no point in not telling her the truth."

After receiving the grievor's complaint, the CEO decided to review video footage. On that day, the grievor was scheduled to work from 3:00 to 11:00 p.m. The video showed that the Grievor came into the building and swiped in at 2:57 p.m., but she then left to find parking. She re-entered the building at 3:16 with a cup of coffee. The employer discovered three other similar incidents within the previous 30 days.

Later that day, the grievor, her manager and a union representative met. The grievor once again did not mention that she had left the building after she swiped in or that she had been waiting to park in the Wexford lot. The manager said that he knew that the grievor had left the building after swiping and asked if she had anything to say. She said that she did not. Just before this meeting ended, the grievor raised three harassment allegations against her manager, including that told her that she had a nice ass, made a comment to her that he was at work more than he was having sex with his wife, and that he had fixed her collar. She was unable to specify when these events took place and did not reply when asked why she had not mentioned these incidents before. The manager admitted to the comment and to fixing her collar and he received a written warning.

The employer terminated the grievor for breach of trust, time theft, lying, and falsely accusing her supervisor of harassing her by accusing that she was late for her shift. The union filed a grievance, and the arbitrator determined that the employer proved the allegations, the termination was not motivated by the complaint of sexual harassment,

and the seriousness incidents of theft combined with a lack of acknowledgement of any real responsibility undermined the grievor's rehabilitative prospects.

The union also filed a second grievance seeking damages for sexual harassment, which resulted in the arbitrator determining that the manager touched the grievor’s breast while adjusting her collar, which amounted to sexual harassment. The arbitrator also determined that the manager did make the comment that he spent more time at work than having sex with his wife, which was harassment, but not sexual harassment. The employer was ordered the employer to pay $10,000 in general damages as well as $5,000 in general damages for not taking reasonable steps to investigate the sexual harassment complaint. In finding that the employer's investigation of the grievor's sexual harassment allegations violated the employer's policy and was unreasonable, the arbitrator stated that "[r]easonable steps to investigate a sexual harassment complaint are necessary to promote the integrity of the investigative process."

> *The 'Formal Complaint Resolution Process' provides for the assignment of a Management Investigator. In that regard, the Harassment Policy sets out some basics. It provides, in part, that: “The Management Investigator conducts the investigation and interviews the complainant, the respondent, witnesses and relevant others and reviews relevant materials and documentation.” and “The Management Investigator will write a report identifying whether the complaint has been substantiated or not substantiated and suggest recommendations for corrective action.” After that, the Executive Director, and Payroll/Human Resources Coordinator will review the investigation report. The complainant and respondent will receive notification letters of the findings of the investigation from the Executive Director.*
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> *"In my view, the “investigation” here did not meet a standard of reasonableness. At the second meeting on February 10, Ms. Archibald provided only the briefest detail to Ms. Bassett without any context. For example, Ms. Archibald told her that Mr. Manalo fixed her collar. <u>No steps were taken to seek further details or context that may or may not substantiate this allegation or the other two allegations</u>. <u>No steps were taken to ask whether any other person may have information that could shed further light on what occurred regarding any subsequent actions Ms. Archibald may have taken that could corroborate or contradict her account</u>. Additionally, <u>Ms. Archibald was not advised about the Employer’s findings</u>. The discharge letter provided, in part, that Ms. Bassett had spoken to Mr. Manalo about the events and that she would deal with him separately.*
>
> *Reasonable steps to investigate a sexual harassment complaint are necessary to promote the integrity of the investigative process. In this case, the “steps” the Employer did not take undermined the efficacy and the integrity of a reasonable investigation of Ms. Archibald’s sexual harassment allegations/complaints. This is an important and critical obligation that was not met here. Having regard to the foregoing, I order the Employer to pay $5,000 in general damages to Ms. Archibald.*

<u>Iron Forming Inc. v Labourers' International Union Of North America, Local 183, 2023 CanLII 39143 (ON LA)</u>

An arbitrator ruled in favor of an employee who was called a racial slur at work during a verbal altercation with a coworker, finding that the employer was responsible for human rights damages.

Following the incident, the company's investigation failed to adequately address the issue, and the grievor experienced reprisal through undesirable work assignments. Despite his discomfort, he was repeatedly placed in close proximity to the individual who used the slur, exacerbating the situation.

The Union argued that the single use of a racial slur in this case was enough to constitute a poisoned work environment, of which the Employer should be held liable for. The Employer argued that a poisoned work environment required there to be a finding of persistent or repeated wrongful behaviour and that there had never been a case where a single racial slur was enough to conclude that the existence of a poisoned work environment.

In his decision, the arbitrator acknowledged the evolving understanding of discrimination law, finding that a single incident, such as the use of a racial slur, could create a poisoned work environment. In the alternative, the arbitrator explained that even if he was wrong in this conclusion, the Employer had failed to properly investigate the issue and had engaged in reprisals through undesirable work assignments.

In the result, the arbitrator allowed the grievance, holding that the use of the racial slur created a poisoned work environment for which the employer was liable, and ordered it to pay to the grievor the total of $15,000 ($4,000 for the reprisal and $11,000 for the slur) as compensation for injury to dignity, feelings and self-respect.

<u>Amalgamated Transit Union Local 113 v. Ontario, [2023] O.J. No. 2665, 2023 ONSC 3618</u>

This case deals with the right to strike.

In 2011, the Ontario government passed the *Toronto Transit Commission Labour Disputes Resolution Act, 2011* (“the TTC Act”). The TTC Act created a prohibition on strikes for <u>all</u> unionized TTC employees and required that all collective bargaining disputes be referred to a mediation-arbitration process ending in binding interest arbitration.

The TTC had approximately 12,000 employees. Its unionized employees were represented by ATU Local 113 and CUPE Local 2. Notably, the strike ban applied to all unionized employees, from operators, tradespersons, to customer service representatives.

In 2015 the Unions challenged the constitutionality of the TTC Act. On May 8, 2023, Justice Chalmers of the Ontario Superior Court of Justice found that the TTC Act infringed the Unions’ right to freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*, because by removing the right to strike for all TTC employees, it "substantially interferes" with meaningful collective bargaining. The court also found that the TTC Act was not justified or saved by s. 1 of the *Charter*. The court declared that the TTC Act is unconstitutional and of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*.

The court commented on how the legislation came to be (which was concerning for the court). The court noted that for over 100 years in the case of ATU and over 50 years in the case of CUPE the parties had a productive collective bargaining relationship. On December 1, 2010, Toronto’s City Council (at the behest of then Mayor, Rob Ford) passed a motion to request that the province designate public transit an essential service.

The collective agreements with the TTC unions were to expire in 2011, and the Unions were concerned that the legislation would be rushed through without appropriate consultation before the collective agreements expired. To deal with that concern, the TTC unions committed that any issues not resolved in that round of collective bargaining would be referred to interest arbitration. The president of ATU Local 113 wrote to Ontario’s Minister of Labour and said that the commitment was made so the consultation "should not be driven by an arbitrary deadline that would unnecessarily limit the time available for the thoughtful and thorough deliberation that is the hallmark of a parliamentary democracy". The Government nevertheless rushed the legislation through, with the TTC Act being passed On March 30, 2011, the day before the various collective agreements expired.

In conducting the *Charter* analysis, the judge had to address the following 2 questions:

(a) Have the Applicants established that the prohibition on the right to strike is a "substantial interference" to meaningful collective bargaining under s. 2(d) of the Charter? And

(b) If so, has the Government established that the violation is justified or saved under s. 1 of the Charter?

On the first question, the Government unsuccessfully argued that the ban on strikes did not substantially interfere with the Unions' s.2(d) rights because the right to strike was replaced with compulsory binding interest arbitration, which maintains the balance between workers and employers, and allows for meaningful collective bargaining.

Notably, this appears to be the first case where a court considered the constitutionality of a no strike/compulsory arbitration system imposed by statute. (In the watershed *SFL* decision – where the SCC gave the right to strike "constitutional benediction" – the legislation at issue prohibited the right to strike by designated public employees <u>and</u> denied access to any substitute dispute mechanism. In the context of that particular case, the SCC found that the statute prohibiting the right to strike by public employees <u>without any access to a substitute process</u>, violated s. 2(d). The failure of the legislation to provide for an alternative dispute resolution process was a factor in concluding that the legislation was unconstitutional. Accordingly, the situation in the TTC case was somewhat different).

There was expert evidence about the impact of removing the right to strike and replacing it with mandatory interest arbitration. The expert evidence was that mandatory interest arbitration can have a "chilling effect" on bargaining (the effect of parties not moving closer to a settlement position while bargaining) as well as a "narcotic effect" (parties become dependent upon the arbitrator and over time the parties may lose the ability to negotiate without third-party assistance).

The court also found that the introduction of the TTC Act had a real, negative impact on collective bargaining between the Unions and the City. The City's negotiators were more confrontational and aggressive. The negotiators stated that they had less incentive to be conciliatory because the Unions did not have the right to strike, and the Government did not file an affidavit from any TTC negotiators to rebut that evidence.

There was also evidence that the removal of the right to strike lessened member engagement with the Union (since meetings dealing with bargaining and/or ratification/strike votes are where members show greatest interest).

The court found that the legislation substantially interfered with the Unions' right to freedom of association, and so, the question turned to whether it was justified under s.1 of the *Charter*.

A government relying on s.1 to justify legislation that interferes with a *Charter* right has to show 4 things:

1. The objective of the measure is pressing and substantial.
2. There is a rational connection between the object and measures taken to achieve it.
3. The measure taken minimally impairs the Charter right.
4. The benefits achieved by the measure outweigh the negative impact on Charter rights.

The Government failed to meet any of these tests, though the fact it failed on the first stage was determinative.

On the "pressing and substantial" stage of the s.1 analysis, the court was not satisfied that the TTC was an essential service as that term has been defined in the caselaw. The court found that a TTC strike would not "threaten serious harm" or "endanger the life, personal safety or health" of the whole or part of the population.

The court also found that the Government did not establish that there are "serious" and "especially injurious" economic consequences from a TTC strike. While noting that there were millions of people who relied on TTC services, including people in equity seeking groups, the impact on them did not meet the legal tests involved in determining whether the objective of the legislation was “pressing and substantial”.

On the other stages of the test, the court commented upon the fact that the legislation banned strikes for all TTC workers, and that it was difficult to see how a strike by a customer service representative could cause serious harm or cause safety concerns. The court also commented that there was a “lack of care” in the design of the legislation, as it was rushed through, with little consultation with the Unions, and that other systems (i.e. an essential services agreement system) were not considered – “*the legislation is a blunt instrument and does not provide a tailored and nuanced approach to the issue.*”

As noted, the legislation was struck down (with immediate effect). The Government appealed the decision, and the parties argued in the Ontario Court of Appeal on January 15, 2024, and we await the ONCA’s decision.

<u>St. John's Firefighters Association v. International Association of Firefighters, Local 1075, Interest Arbitration Board chaired by James Oakley, January 18, 2023</u>

This is a preliminary decision of an interest arbitration board appointed pursuant to the *City of St. John's Act*, to settle the terms of the firefighters' collective agreement.

Issue: Are bargaining proposals that were marked "without prejudice" and exchanged during collective bargaining, relevant and admissible at the interest arbitration?

During bargaining, the Association made proposals on wages and training and then changed its position in its submissions to the Board. The Employer, which wanted to rely on the Association's bargaining proposals in the interest arbitration, argued:

- marking something "without prejudice" does not make it so;
- interest arbitration is an extension of bargaining and seeing the proposals exchanged will help the arbitrator apply the "replication principle" (more on this below); and
- past case law supported the Employer's position.

The Association relied on settlement privilege, labour relations policy, and arbitral authority to object to the employer's reliance on the Association's earlier proposals.

Decision: Bargaining proposals marked "without prejudice" are <u>not</u> admissible at interest arbitration. The purpose of exchanging proposals on a without prejudice basis is to promote open and creative discussion of the issues. The Association's reasonable expectation was that its without prejudice proposals would <u>not</u> be considered by the Board. To promote effective and efficient bargaining, labour relations policy supports that the proposals must not be admissible.

The "replication principle" requires interest arbitrators to replicate what the parties would have negotiated in collective bargaining – if left to reach final agreement. However, this is an objective, not a subjective, analysis. Replication is achieved by considering "objective collective bargaining facts", including prevailing terms and conditions in the collective agreements of comparators. It is not an attempt to duplicate the back and forth of the parties' bargaining. Therefore, the proposals do not assist the process.

The Board agreed with the Association that the goal of efficient, expeditious arbitration proceedings weighed against the proposals being admissible.

Settlement privilege was also a basis to exclude the proposals, since:

1. there was a litigious dispute in existence or within contemplation;
2. communications were made with the express or implied intention that they would not be disclosed to the decision maker if negotiations failed; and
3. the purpose of the communication was an attempt to effect settlement.

Note: A Memorandum of Settlement ("MOS") signed off on during bargaining is different and may be admissible at the interest arbitration if the MOS is not ratified. Once a tentative agreement is reached at the bargaining table, the purpose of without prejudice/confidential negotiation has been satisfied and each side knows that a signed

MOS – and their signed preparedness to recommend the contents – waives any privilege that applied during bargaining. The weight given to the MOS will depend on whether and to what extent the parties agreed to recommend it.

***Smolik v. Seaspan Marine Corporation*, 2021 CHRT 11**

Andreas Smolik was the complainant (the "Complainant"). He worked for Seaspan Marine Corporation (the "Employer"). He alleged that his Employer treated him in an adverse differential manner on the basis of his family status, under section 7 of the *Canadian Human Rights Act* (CHRA), by failing to accommodate him with a work schedule that would allow him to fulfil his childcare obligations. The Employer submitted that the Complainant had failed to establish a *prima facie* case of discrimination and that the case should be dismissed. In the alternative, the Employer said that it had offered reasonable accommodation to the Complainant, to the point of undue hardship.

The Complainant worked 12-hour shifts, five to seven days a week. The Complainant was married with two children. The Complainant's wife's employment permitted flexible work hours and from 2003 to 2013 the Complainant and his wife were able to meet their childcare obligation themselves. In March 2013, the Complainant took a leave of absence to care for his two children and his wife, who had been diagnosed with cancer in 2011. She passed away in May 2013 and the Complainant went on bereavement leave.

The Complainant became the sole caregiver for his children aged 9 and 6 at the time. By September 2013, the Complainant felt that his children's emotional state had stabilized sufficiently that he could return to work. He met with his Employer to discuss a return to work. He testified that he told his Employer that he could not work on their coastal vessels because of his lack of childcare options and his children's emotional needs. He advised he needed full-time employment such that he had prior to his bereavement leave, when he worked 12-hour shifts with no long-haul assignments (during his bereavement leave, the two coastal ferries that the Complainant had worked on were removed from the Employer's fleet) or another schedule that was flexible enough to allow him to meet his childcare obligations. The Complainant testified that he considered relatives as caregivers but he did not consider them as suitable caregivers. He also testified that he considered a nanny but felt that he could not trust one to care for his children for either weeks at a time or an erratic schedule.

The Complained remained in contact with his Employer throughout the fall of 2013. They discussed the option of placing the Complainant on the call-out list to provide him the flexibility to turn down callouts that did not work with his schedule. It was at this time that the Complainant provided the Employer with a copy of the *CHRA* to flag its duty to accommodate based on family status.

In January 2014, the Employer presented a proposal for call-out work which the Complainant accepted. It was for a one-year term and would be reviewed after six months. Unfortunately, the amount of work from this proposal ended up being far less than what the Complainant expected. In January 2015, the Complainant met with the Employer to discuss a position as a marine dispatcher. He turned it down because it would result in the loss of his engineer certification.

In March 2015, the Complainant requested and received a one-year leave of absence from the Employer to seek full-time employment elsewhere. He found a job as a replacement marine engineer. The job lasted until June when the employee he was replacing returned from leave. Over the following months, the Complainant continued to propose numerous solutions, all of which the Employer rejected, citing seniority concerns as an issue for many of the proposals. The parties did reach an agreement in principal involving the designation of "super seniority" of the Complainant during a one week on, one week off schedule. Unfortunately, the Guild did not support the settlement because it said it contravened provisions of the collective agreement. The Employer did not take any further efforts to accommodate the Complainant. The Employer eventually granted the Complainant another unpaid leave of absence. The Complainant found work at a competitor of the Employer's.

Canadian Human Rights Tribunal member Alex Pannu allowed the complaint. They found that the Employer discriminated against the Complainant and did not accommodate the Complainant to the point of undue hardship.

Pannu began their analysis by considering whether the Complainant had established that the Employer had discriminated against him based on section 7. Pannu indicated that in assessing whether there was discrimination on the basis of family status, the Complainant must meet the requirements in the four-stage test set out by the Federal Court of Appeal in *Attorney General of Canada v. Johnstone*, 2014 FCA 110 which requires complainants to establish that:

> 1) a child is under their care and supervision;
>
> 2) the childcare obligation engages the individual's obligation for that child rather than personal choice;

3) they have made reasonable efforts to meet that childcare obligation through reasonable alternative solutions and that no such alternative solutions are reasonably accessible; and

4) the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.

There was no dispute between the parties that the Complainant met the first requirement of the test. However, the Employer disputed that the Complainant had met the second requirement of the test. They argued that the Complainant's legal obligation to provide childcare for his children did not mean that he was the only one that could provide it. Pannu disagreed and concluded that the Complainant was a sole parent with no spouse or partner. His claim clearly related to his childcare obligations and not a personal choice. With respect to the third requirement of the test, the Employer argued that the Complainant did not make reasonable efforts to satisfy his childcare obligations through reasonable alternative solutions. Pannu rejected the Employer's submission, finding on the evidence that the Complainant had considered various family members and nannies as options for childcare and agreeing with his assessment that it would be too onerous to expect family members to provide childcare if he were at sea for 1–3 weeks at a time, or to expect family members to provide childcare on short notice on unstructured schedules. Lastly, Pannu considered the fourth requirement of the test, and concluded that the Complainant had met this final requirement finding that the Employer's work opportunities and schedules made it almost impossible for the Complainant to return to work without an accommodation for his childcare obligation.

Pannu concluded that the Complainant had established a *prima facie* case of discrimination against him on the grounds of his family status contrary to section 7 of the *CHRA*.

Pannu next considered the question of whether the Employer had established a valid justification for its otherwise discriminatory actions. Pannu indicated that the test for establishing a *bona fide* occupational requirements ("BFOR") was set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* (*Meiorin*).

Pannu examined the efforts the Employer made to accommodate the Complainant. Pannu concluded that the Employer did not appear to react with any urgency in dealing with this matter, despite the Complainant raising the issue of accommodation in the

context of human rights obligations and then filed a human rights complaint. Pannu also considered the Complainant's rejection of the dispatcher job to be reasonable, given the lack of crucial information regarding the position, the possible impact on his certification, and the unexplained one-day deadline to accept. Accordingly, Pannu held that the Employer had not established undue hardship and had therefore discriminated against the Complainant on the basis of family status.

Pannu awarded $15,000 to the Complainant for pain and suffering and $10,000 for the Employer's willful and reckless behaviour. With respect to wage loss, they awarded $578, 570.68 however, they found that the Complainant earned $109, 778 mitigating his damages. The Employer was liable for $469, 392.68 in wage loss. They further ordered the Employer to pay the Complainant $27,239.84 for pension and other contributions for 2014-2017. Lastly, they ordered the Employer to pay the Complainant $10,392.23 for out-of-pocket health and dental expenses.

Pannu also ordered that the Employer cease any discriminatory practices and, in consultation with the Canadian Human Rights Commission, take measures to ensure future discrimination did not take place, including creating and/or reviewing policies and procedures that applied to family status accommodation.