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The Year in Review in Labour and Employment Law

Presented at:

THE CANADIAN BAR ASSOCIATION'S 14TH ANNUAL NATIONAL ADMINISTRATIVE LAW AND LABOUR & EMPLOYMENT LAW CONFERENCE

November 29, 2013

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The Year in Review in Labour and Employment Law[1]

2013 was another eventful year on the labour and employment law fronts. The workplace continues to be the locus of much litigation before courts and tribunals, litigation that – amongst other things – tests the boundaries of government attempts to circumscribe the collective bargaining process, tests the creative ways in which employers terminate or suspend employees, and the remedies that might flow from such attempts, circumscribes the extent to which employers can exercise flexibility in scheduling employees who owe important parental duties to their children, and reflects increasing concerns with the intrusion by employers in the private lives of its employees.

In preparing this paper, we reviewed a significant number of cases. We could not possibly analyze or include each of these, or even the majority of these, in a paper of this nature. We have attempted to provide a broad sampling of what we see as interesting cases, cases that advance certain arguments, cases that reflect a retrenchment in other areas, cases that question previous practices, and cases that are otherwise interesting to practitioners and their clients.

This paper is divided into two parts. In PART I, we summarize, by topic, interesting and important cases in the field of labour law, that is, in workplace law where a union is present. In PART II, we summarize, again by topic, interesting and important cases in the field of employment law. The time period for this review is November 2012 to November 2013.

As the reader will see, while the Supreme Court has weighed in on a few cases in the labour law field during this time, traditional employment law cases did not make it to the Court over the past year.

Looking forward to 2014 – At the Supreme Court

Before looking back, a brief look ahead.

In 2014, the Supreme Court will hear appeals in four (4) important labour cases, three of the appellate decisions of which are summarized below. The Court will be asked, in an appeal from Saskatchewan, to determine whether the use by an incoming right-leaning government of legislative provisions that permitted them to end the terms a labour board

[1] Special thanks go to Adrienne Telford, an Associate with Cavalluzzo Shilton McIntyre Cornish LLP, and to Emily Dixon and Aminah Hanif, Articling-Students-at-Law with the firm, for their research and preparation of parts of this paper.

Chair and two (2) Vice-Chairs is something that can be challenged on administrative law or Constitutional grounds. The Court will also hear another appeal from Saskatchewan which raises the important question of whether S.2(d) protects the right to strike in the context of essential services legislation. In February 2014, the Court will hear two appeals relating to the application of S.2(d) to the labour relations of the Royal Canadian Mounted Police. The first raises the question of whether S.2(d) protects the right of workers to an association of their own choosing and which is independent of management. The second appeal deals with a challenge by some RCMP officers to federal wage restraint legislation which nullified some of their promised salary increases.

On the employment law side, in 2014, the Supreme Court will hear appeals in two noteworthy cases, one of which is directly an employment law case, while the other might have implications beyond its commercial/contractual sphere that could impact on employment law. In *Potter,*[2] the Supreme Court will hear an employee's appeal from a New Brunswick Court of Appeal decision summarized below. The Court will be asked to decide, amongst other issues, whether a paid suspension of an employee amounted to the constructive termination of their employment and whether that employee, by commencing litigation while under suspension (and while, as we understand it, negotiating with the employer to resolve the issues arising from the suspension), repudiated their employment so as to give the employer the right to treat the employment as at an end without the payment of any damages in lieu of notice of termination. This latter question is fascinating, as it tests the extent to which wrongful dismissal law, one founded on the law of master and servant, where the servant gives his or her loyalty and obedience to the master, can tolerate, in today's age, employees who effectively grieve while employed. We know that the actions of this employee are tolerated and indeed encouraged on the labour law front, but, in our litigious society, will the Supreme Court endorse the idea of employees working with employers while suing them too? Or will the Court treat the commencing of litigation by an employee as repudiation of the relationship? The answer will certainly affect the balance of power in employer/employee relations.

The Supreme Court is also slated to hear an appeal from a commercial case called *Bhasin*.[3] Bhasin worked for a company that sells RESPs. He was a sales manager, managing a territory and team of sales representatives. While he technically was not an employee, the nature of his independent contract made it such that he was, at minimum, a dependent contractor. He could not work for any other company, even doing non-competitive work, had to exclusively sell the company's products, and was subject to onerous terms that gave the company almost exclusive control over the

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[2] *David M. Potter v. New Brunswick Legal Aid Services Commission, a statutory body corporate pursuant to a special act of the Province of New Brunswick*, SCC File No. 35422

[3] *Harish Bhasin, carrying on business as Bhasin & Associates v. Larry Hrynew, et al.*, SCC File No. 35380.

workings of Bhasin's territory. In this case, Bhasin was notified that his contract was ending and would not be renewed. However, the company did so not to assist Bhasin's transition from this workplace to another, by transitioning his sales force to, for instance, another one of the large players in the RESP industry. The trial judge found that the company exercised the non-renewal clause to force Bhasin into a merger, a merger that they had attempted to force upon him through pressure, threats, lying, and other problematic means. The legal question here is whether this company had the right to exercise the black letter of the contract in a bad faith manner: is there a general duty of good faith in commercial agreements or is there, in the Bhasin case, an implied duty in what was a quasi-employment type of agreement? The case will build on the Supreme Court's ground-breaking decision in *Honda*.[4] It is one to watch, if anything, to see how the Court might define the scope of the good faith duty at the moment when an employer terminates an employee's relationship, and to see what kinds of conduct the court might characterize as amounting to bad faith at that crucial moment.

PART I – LABOUR LAW

2013 was a busy year on the labour law front, providing us with a number of interesting cases worthy of inclusion in this paper. The disruption in teacher services in Ontario provided some interesting jurisprudence and there were a number of new decisions in cases where employers tried to impose random drug testing policies in the workplace. Section 2(d) of the *Charter*, the freedom of association section, continues to be the source of a number of applications by unions for relief from legislative provisions that seek to curtail or limit employees' bargaining rights in what is being dubbed the "Age of Austerity". After the Supreme Court in *BC Health Services* appeared to swing the pendulum in favour of these kinds of applications, the *Fraser* decision, raised questions as to the ultimate reach of BC Health Services. The uncertainty created by *Fraser* is being cited to limit number of these challenges, be they challenges to wage freeze legislation or legislation that limits employees' and union's right to strike.

Freedom of Association – Section 2(d) of the *Charter*

Two more appellate courts weighed in this year on the constitutionality of federal wage restraint legislation. In 2009, the federal government enacted the *Expenditure Restraint Act* (*ERA*), which imposed protracted wage caps on workers in the federal public service.[5] A number of unions filed separate *Charter* challenges to the *ERA* on the basis that it violated the constitutionally protected right to collectively bargain. At the time of writing, three appellate courts have upheld the constitutionality of the legislative scheme

[4] *Honda Canada Inc. v. Keays*, 2008 SCC 39

[5] For most bargaining units, the restraint period lasted four years. For three bargaining units, wage caps were imposed for five years.

(two of which overturned the lower courts' decisions),[6] and one appellate court and one superior court have reserved judgment.[7]

The two appellate decisions issued this year were from the British Columbia Court of Appeal and Federal Court of Appeal. The decisions turn on their particular facts.

***Federal Government Dockyard Trades and Labour Council* v. *Canada (Attorney General)*, 2013 BCCA 371**

In *Dockyard Trades*, the British Court of Appeal upheld the lower court's ruling that the *ERA* did not violate the Union's right to collective bargaining. The Union represented a bargaining unit of employees of the Treasury Board of Canada that was in the middle of interest arbitration when the government announced in November 2008 its intent to legislate wage caps. In January 2009, the arbitrator awarded the employees a five percent wage lift as of October 2006, and wage increases for 2007 through 2009. The *ERA* came into force in March 2009 and retroactively clawed back the 2006 wage lift as it exceeded the legislated wage caps. The wage increases for the subsequent years were within the *ERA* limits. The Union challenged the legislation on the basis that the nullification of the five percent wage lift infringed s. 2(d) of the *Charter* and was not justified under s. 1.

The British Columbia Superior Court dismissed the challenge on the basis that the arbitration process does not fall within the scope of s. 2(d) protection. The lower court reasoned that the wage lift was not a term of the collective agreement that originated through the "constitutionally protected collective bargaining process" but rather was imposed through binding arbitration. In the alternative, the lower court found that even if arbitration is part of the constitutionally protected process, the infringement is demonstrably justified under s. 1 of the *Charter.*

While upholding the lower court's decision in the result, the British Court of Appeal found that:

> "the judge erred in giving an overly narrow meaning to the term "collective bargaining referred to in the jurisprudence as a constitutionally protected process, and that on a robust view of

[6] *Association of Justice Counsel v. Canada (Attorney General)*, 2012 ONCA 530, overturning 2011 ONSC 6435; *Meredith and Roach v. Canada (Attorney General)*, 2013 FCA 112, overturning 2011 FC 735; and *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2013 BCCA 371.

[7] The Québec Court of Appeal recently heard the appeal from the Québec Superior Court's decision in *Association des Réalisateurs c. Canada (Procureur général*) 2012 QCCS 3223. The Ontario Superior Court of Justice recently heard two applications jointly: *Public Service Alliance of Canada (PSAC) et. al. v. Attorney General of Canada* (CV-09-377318) and *Professional Institute of the Public Service of Canada (PIPSC) et. al. v. Attorney General of Canada* (CV-09-375977).

> collective bargaining, one cannot draw the line between a term awarded by this Arbitration Board and a term settled at the bargaining table."

The Court went on to find that the *ERA*'s nullification of a collective agreement term did not amount to substantial interference. The Court's analysis focused on the fact that the *ERA* only nullified the wage increase and did not prohibit future bargaining of wages upon the expiry of the restraint period.[8] Moreover, the Court minimized the importance of the nullification of the 5 percent wage increase to the collective bargaining process:

> The 5.2% wage increase in issue is certainly valuable to the employees represented by the Council. Its nullification, however, in my view, is not antithetical to associational activity. The term is not so essential to the structure of the collective agreement, nor future restrictions on bargaining so durable, that its loss can be said to evidence impermissible interference with the protected process. It bears observing that this single foregone wage increase is an economic circumstance that may be discussed in future rounds of collective bargaining, along with other economic issues. Employment relations have about them an essential, pragmatic, dynamic, business aspect that precludes, in my respectful view, a single, time-limited wage increase from rising to such significance that its loss amounts to breach of the constitution of Canada.

The Court concluded that the *ERA* did not substantially interfere with associational activity or the collective bargaining process and, accordingly, did not infringe s. 2(d) of the *Charter*.

***Meredith v. Canada (Attorney General)*, 2013 FCA 112**

The Federal Court of Appeal in *Meredith* likewise found that the *ERA* did not infringe the RCMP's s. 2(d) *Charter* rights. This case concerned an idiosyncratic labour relations model in which the pay and allowances for members of the RCMP are established by the Treasury Board without any collective bargaining process. Specifically, RCMP members have a Pay Council which makes non-binding recommendations regarding wages of members to the Commissioner of the RCMP, who in turn has discretion to accept or reject the recommendations. If the Commissioner accepts the recommendations, he forwards them to the Minister responsible for the RCMP, who in turn may submit them to the Treasury Board. The Treasury Board does not have to accept the Commissioner's recommendation and has full discretion to establish the pay and allowances paid to RCMP members.

[8] Notably, the Union did not challenge the provisions wage increases that were set during the five year restraint period.

In June 2008, the Treasury Board announced pay increases for RCMP members for the years 2008 to 2010. The *ERA* subsequently reduced these pay increases upon coming into force in March 2009 and imposed the legislated increases for 2008-2011.

The Federal Court of Appeal distinguished this case from *BC Health Services*[9] on the basis that the RCMP's Pay Council is only indirectly engaged in the determination of RCMP salaries and that it has no direct consultation or negotiation with the ultimate decision-maker, the Treasury Board. Moreover, there is no collective agreement between the employer and the "entity" representing the members.

The Court concludes that the *ERA* did not substantially interfere with the RCMP process, because:

> (1) RCMP members do not bargain directly with their employer; moreover, the *ERA* did not undo terms of a collective agreement, but rather, it modified terms and conditions which the Treasury Board was authorized to set.
>
> (2) Conduct immediately prior to and following the enactment of the *ERA* demonstrated that the associational process continued to function and substantial allowances were implemented in June 2009.[10]
>
> (3) There was no prohibition on future associational activity "on the scale" considered in *Health Services*. The Court notes that the original Treasury Board decision provided for wage increases for the RCMP in 2008-2010 and that the only post 2010 effect of the *ERA* was to limit wage increases for the 2010-2011 fiscal year. The Court concluded that the effect of the *ERA* was to limit for three months (January to March 2011) one aspect of the terms and conditions of employment of the RCMP and that this did not make it substantially impossible for members to exercise their freedom of association in the future.
>
> (4) Parliament was not required to consult with the Pay Council or others before enacting the *ERA*.

Accordingly, the Federal Court of Appeal concluded that the RCMP's associational rights were not substantially interfered with by the *ERA*. The RCMP has been granted leave to appeal this decision to the Supreme Court of Canada. It will be heard along with the *Mounted Police Association of Ontario v. Canada*[11] in February 2014.

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[9] *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.

[10] Indeed, the *ERA* carved out an exception in s. 62 of the Act for RCMP allowances which advanced a "Transformation Initiative".

[11] 2012 ONCA 363. At issue in the *Mounted Police Association Of Ontario* is the constitutionality of the idiosyncratic labour relations model.

***Saskatchewan v. Saskatchewan Federation of Labour*, 2013 SKCA 43**

Facts: Appeal by the Province from a declaration that The *Public Service Essential Services Act* (*PSES Act*) was unconstitutional and of no force and effect. Cross-appeal by the Saskatchewan Federation of Labour (SFL) and several unions from the dismissal of their action to have the *Trade Union Amendment Act* (*TUA Act*) declared unconstitutional. Both statutes were proclaimed in 2008 and met with opposition by unions. The *PSES Act* restricted the number of public employees allowed to strike through the introduction of "essential services agreements." The *TUA Act* altered various thresholds and requirements, which made certification harder and decertification easier. The SFL and the unions argued that the legislation unjustifiably infringed employees' freedom of association. The trial judge found the *PSES Act* violated the *Charter* because s. 2(d) of the *Charter* protected the right to strike. However, he declined to strike down the *TUA Act*, holding that it didn't violate the right to bargain collectively.

Issue(s): Whether the *PSES Act* and *TUA Act* were unconstitutional?

Decision: Province's appeal with respect to the *PSES Act* was allowed, cross-appeal of SFL and the unions with respect to the *TUA* was dismissed

Reasoning:

- *PSES Act*: while the Supreme Court's jurisprudence in this area has been evolving, its early rulings that s. 2(d) does not shelter strike activity have not been overturned. Right to strike does not have *Charter* protection, trial judge erred in finding it constitutionally invalid

- *TUA Act*: While it makes certification more difficult by bumping up the minimum level of support and eliminating automatic certification based on membership cards, it does not substantially impair the exercise of associational freedom. The freedom guaranteed by s. 2(d) establishes only the minimum substantive content of any labour relations regime and so long as that minimum standard is satisfied, there is no violation.

***L'Écuyer v. Côté*, 2012 QCCS 973**

Facts: Les Travailleurs et travailleuses unis de l'alimentation et du commerce (the union) applied to the Commission des relations du travail (labour board) to be the bargaining agent for 6 seasonal migrant workers hired to work on a Quebec farm. L'Écuyer (the employer) contested the motion on the basis of paragraph 5 of section 21 of the *Quebec Labour Code* which excluded farm workers from certification unless at least 3 workers were ordinarily and continuously employed. The labour board certified

the unit of farm workers by declaring paragraph 5 of section 21 contrary to section 2(d) of the *Canadian Charter of Rights and Freedoms* and article 3 of the *Quebec Charter of Human Rights and Freedoms.* The Attorney General and employer applied for judicial review to reverse the labour board's decision and the union applied for judicial review to have the section also declared in violation of equality rights under section 15 of the *Charter*.

Issue(s): Whether paragraph 5 of section 21 of the *Quebec Labour Code* violated the *Charter*?

Decision: Motions for judicial review dismissed.

Reasoning: Applying the principles confirmed by the Supreme Court of Canada in *Fraser*, the Court concludes that, in relation to agricultural workers who work on farms which ordinarily and continuously employ less than three workers, paragraph 5 of section 21 of the *Code* is discriminatory as being a significant hindrance on their ability to exercise their fundamental right of freedom of association. They are vulnerable and disadvantaged workers. The Commission was correct in concluding that their exclusion from the collective bargaining regime was not a minimal impairment to their right to free association

Any difference in treatment does not arise as a result of their status as migrant workers, but rather as a result of the nature of the industry in which they work. The effect of paragraph 5 of section 21 is the same for migrant farm workers and Canadian workers.

<u>Drug Testing Policies Come Under Careful Scrutiny</u>

A number of appellate decisions, including the Supreme Court's decision in *Irving Pulp & Paper*, indicate that courts and arbitrators will carefully scrutinize employers' attempts to impose random drug and alcohol testing policies, even in safety-sensitive industries.

***Communications, Energy and Paperworkers' Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.,* 2013 SCC 34**

Facts: An appeal from a decision of the New Brunswick Court of Appeal. An arbitrator had held that mandatory random alcohol-testing policy implemented by the employer at a paper mill was beyond the scope of management rights without any evidence of an alcohol-related problem. The Court of Appeal had set aside the arbitrator's award based on the safety-sensitive nature of the workplace.

Issue(s): Whether the unilateral exercise of the management rights clause in this case was reasonable and properly balanced the interests of both parties.

Decision: Appeal allowed.

Reasoning: While safety was an important factor, the random drug-testing policy disproportionately impacted employees' privacy where there was little evidence of an issue with intoxication at the workplace. As such, the employer exceeded the scope of the management rights clause and the arbitrator's decision was reasonable.

***Communications, Energy and Paperworkers' Union, Local 707 v. Suncor Energy Inc.,* 2012 ABCA 373**

Facts: The employer tried to implement a new random alcohol and drug test policy in safety-sensitive positions at its Athabasca oil sands operation but the union got an injunction preventing its implementation until its grievance challenging the policy was arbitrated. The employer appealed the injunction.

Issue(s): Whether allowing the policy to proceed would cause irreparable harm.

Decision: Appeal dismissed.

Reasoning: Collecting bodily fluids of employees without their consent was a significant breach of their privacy rights and would cause them irreparable harm. The chamber judge's decision was not unreasonable.

***Halifax (Regional Municipality) v. Canadian Union of Public Employees, Local 108*, 2013 NSSC 164**

Facts: Grievor worked for the Halifax Streets Department and was terminated after he refused to take a drug test and cooperate with a substance abuse professional after a supervisor smelled marijuana in a city truck in which he was a passenger. The grievor was a recreational user but argued that he never smoked at work. At arbitration, the arbitrator ordered reinstatement, holding that the mere smell of marijuana, in the absence of evidence of impairment, was not enough and termination was unreasonable. City applied for judicial review

Issue(s): whether the arbitrator's decision was reasonable.

Decision: application dismissed.

Reasoning: Arbitrator's reasons lead logically to her conclusions that the employer failed to prove impairment at work and failed to make a case for a drug test or assessment under the terms of its own policy.

Judicial Independence of Labour Boards

Just as unions find themselves attacking legislation on *Charter* grounds, a case out of Saskatchewan late last year dealt with an attempt by over a dozen unions to have declared illegal the government's decision to terminate the Labour Board's chairperson and certain vice-chairpersons when the new right wing Saskatchewan government came into office. The decision to terminate these persons was authorized by statutory provisions that allow a new government to end the term of office of certain board chairs. The union applicants sought – unsuccessfully – to invoke the unwritten constitutional principle of judicial independence to attack these terminations. The decision dismissing the application, of the Saskatchewan Court of Appeal, is summarized in the next paragraph. The Supreme Court last month granted the unions' application for leave to appeal that decision.

***Saskatchewan Federation of Labour v. Saskatchewan (Attorney General)*, 2013 SKCA 61**

Facts: Appeal by the Saskatchewan Federation of Labour and two unions from the dismissal of their application for a declaration that Order-in-Council 98/2008, which effectively terminated the terms of office of the then chairperson and two vice-chairpersons of the Saskatchewan Labour Relations Board and appointed a new chairperson, was invalid. This was done using section 20 of the *Interpretation Act* which allowed the Lieutenant Governor, on a change of government, to end the term of office of any member of any board, commission, agency, or other appointed body of the Government of Saskatchewan. The SFL and unions argued that section 20 of the *Act* was unconstitutional because it was violated the principle of judicial independence in the *Constitution Act, 1867*.

Issue(s): whether the unwritten constitutional principle of judicial independence extends to the chairperson and vice-chairpersons of the Labour Relations Board so as to have precluded the Lieutenant Governor from validly terminating their terms of office on the authority of 20 of *The Interpretation Act, 1995*.

Decision: Appeal dismissed

Reasoning: Per the SCC's decision in *Ocean Port*,[12] in light of the fundamental distinction between courts and administrative tribunals, the independence of the courts is constitutionally secured, whereas that of administrative tribunals is not, unless the proceedings before a tribunal engage the rights guaranteed by section 7 or 11(d) of the *Charter.* While administrative tribunals could possess adjudicative functions, they

[12] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52

ultimately operated as part of the executive branch of government, under the mandate of the legislature. They were not courts, and did not occupy the same constitutional role as courts.

Illegal Strikes in Ontario – Teachers Unions Fight Government Austerity Measures

***Trillium Lakelands District School Board*, [2013] O.L.R.D. No. 1439**

Facts: After the passing of Ontario's Bill 115 (*Putting Students First Act, 2012*) the Elementary Teachers Federation of Ontario called for their members to withdraw from extracurricular activities. The Trillium Lakelands and Upper Canada school boards applied to the Ontario Labour Relations Board to have the actions declared an unlawful strike.

Issue(s): whether the withdrawal constituted an illegal strike

Decision: application allowed, the withdrawal constitutes a strike

Reasoning: Extracurricular activities fall within the definition of strike in s. 227 of the *Education Act*, and the union ETFO is interfering with the operation of a school or program in a school and with the normal activities of a school board. The fact that activities are voluntary doesn't preclude them from falling within the definition of strike.

***Hammond,* [2013] O.L.R.D. No. 19**

Facts: ETFO announced a day of action to protest the imposition of collective agreements in January, 2013. The planned day of protest, January 11, 2013, involved a full withdrawal of services by ETFO membership across the province that day. The Minister of Education applied to the OLRB to have the protest declared to be a declaration or threat of an unlawful strike.

Issue(s): whether a planned day of protest constituted an unlawful strike

Decision: application allowed, protest would be an unlawful strike

Reasoning: a political strike is still an unlawful strike. The Board was not persuaded by union's argument that that standard only applies in regard to freely-negotiated collective agreements.

Legal Strikes and the Picket Line

Unions go on legal strike with the democratic blessing of their members. Or, in some cases, employers lock out their unionized staff. The resulting withdrawal of services,

angry leaflets and blogs, and sometimes aggressive picketing, can be a messy affair. Every year, employers in these situations seek the court's assistance and, every year, a myriad of seemingly inconsistent, poorly reasoned, and opaque decisions restricting picketing (or not) is the result. The quality of such decisions is not unsurprising given the speed at which judges are asked to issue their decisions on a spotty record, decisions which assume that the reader knows the facts, facts often not communicated in such reasons.

Rarely, though, a decision is rendered that attempts to provide clarity in the area of picketing injunctions. 2013 resulted in one such decision.

***Sobeys v UFCW, Local 175*, 2013 ONSC 1207**

Facts: In the midst of a legal strike, Sobeys brought a motion for an interlocutory injunction to restrain the union's picketing of its Milton and Whitby warehouses. Though peaceful and orderly, the picketing delayed entry and exit of personnel and deliveries from the warehouses between 90 minutes to 8 hours. The police declined to interfere. The plaintiff employer requested an order that would limit delays to a range of 15 minutes to 1 minute depending on the location, purpose, and time of entry and exit, and no delays for emergency vehicles, fuel trucks and security personnel. The defendant argued that picketing is a fundamental right that flows from constitutional protected freedom of expression and association and the delays were necessary to allow the picketers to meaningfully exercise those rights and communicate information to those crossing the picket line.

Issue: Should an interlocutory injunction be granted?

Decision: Injunction granted; proposal of employer accepted.

Reasoning: The conflicting positions that courts have taken in the past, where some were unwilling to tolerate any delay and others were unwilling to grant any injunctive relief unless the employer could show financial loss, are no longer sustainable. The employer has a right to access its property and continue its business during a strike. However, it is not entitled to do so without inconvenience. It is not appropriate to protect the union's rights by attempting to constitutionalize the right to delay because freedom of expression does not include the right to force anyone to listen to your views. The balancing of interests is to be achieved by the court exercising its remedial discretion to allow some delay in order to be sensitive to the interests of both parties.

This decision is refreshing insofar as it rejects the "all-or-nothing" approaches one sees in much of the jurisprudence: no injunction vs. injunctions that effectively ban picketing. The decision is an important read for those engaged in the tough slog that is the picketing injunction.

Certification in the Film Industry

***International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts, Local 849 v Egg Films Inc.,* 2012 NSLB 120**

Facts: The IATSE applied to represent a group of movie technicians that were working on a one-day shoot. The employer opposed the application, arguing that they were freelance independent contractors and exempt from unionizing. The union argued that they were employees because of the level of control and direction the employer had over them and the requirement that employees eligible to vote must be present on both the date of the application and vote unfairly excluded such workers from unionizing.

Issue(s): whether the workers hired for one day were employees capable of certification

Decision: Application allowed, union certified

Reasoning: Regulation of labour relations has ignored occupational unions and focused on the general industrial and construction sectors. In the new economy, the technicians are non-self-dependent workers and are employees. Similar to the construction industry, employees can be unionized despite not having a long-term dependency on a particular employer. The same approach with regard to the date of application, as in the construction industry, should be used.

Guidance for Negotiating or Adjudicating Terms and Conditions of Employment

An interesting interest arbitration award and a case involving an employer negotiating individual terms of employment with employees highlight 2013's offerings.

***Springhill Police Assn., Local 203 of the Atlantic Police Assn. v. Springhill (Town)*, [2013] NSLAA No. 2**

Facts: The police association filed for interest arbitration seeking to require the municipality to grant a wage increase. The employer argued its ability to increase police wages was severely constrained by other economic forces and its ability to pay should be a factor considered. The union argued ability to pay had little or no role to play in the resolution of the issue. Rather, wage increases should mirror increases in police bargaining units in similar communities.

Issue(s): whether budgetary concerns are relevant to wage increase considerations?

Decision: wage increase imposed.

Reasoning: A small municipality's inability to raise income did not mean it could avoid the social policy decisions it was required to make. Ability to pay was a political issue that could always be resolved in some manner over time. The matter was governed by the principles of replication and comparability with similar municipalities. Nova Scotia has well-recognized and well-reasoned interest arbitral jurisprudence to the effect that ability to pay should play a minor role in an interest arbitrator's deliberations.

***York University Faculty Assn. v. York University*, [2013] OLAA No. 89**

Facts: The collective agreement between the parties permitted the University to negotiate some aspects of the employment relationship directly with faculty members. The University negotiated a salary for a newly appointed tenure-track faculty member that was less than he would have received under the collective agreement due to budget restraints. The union argued that the scope for individual bargaining is restricted to negotiating terms and conditions which are superior to those under the collective agreement.

Issue(s): whether the collective agreement permits the University and an individual faculty member to negotiate a salary that is less than such faculty member would be entitled to under the collective agreement.

Decision: Grievance dismissed

Reasoning: The language "if the faculty member so desires" is, on its face, clear and unambiguous. The language contains no limitation regarding the nature of the agreements which will be respected. Given the competitive marketplace, the bargain reached does not result in an absurdity but is logical and rational.

<u>Union Communications to Members</u>

While it is not uncommon for union members, employers, grievors, and non-unionized employees working for an employer that employs unionized employees, to launch litigation against a union over communications the union put out to its members concerning an employer’s operations, such litigation generally being couched in the language of defamation law, it is highly unusual for such cases to result in trials and fully reasoned judgments. 2013 provides one such case, where a professor was successful in obtaining substantial damages from a union over allegations the union made about him in communications to its members.

***Rubin v. Ross*, 2013 SKCA 21**

Facts: The plaintiff appealed the decision of the trial judge to dismiss his action for defamation against a union and its officers. The defendants, a union and its officials, had published materials alleging that the plaintiff, the director of a veterinary teaching

hospital, was alleged to have failed to prevent harassment and provide a workplace free of harassment. Prior to an arbitration hearing, the union attached the grievance report to notices posted on bulletin boards in the workplace, mass mailed information to union members, and posted information on the union's website. The plaintiff eventually resigned his position and commenced an action in defamation. The trial judge found there was defamation but upheld the union's defence of qualified privilege to communicate to the union membership in the manner it did. The trial judge provisionally assessed general damages at $25,000.

Issue(s): Were the defamatory statements covered by qualified privilege?

Decision: Appeal allowed.

Reasoning: the trial judge did not give sufficient effect to: (i) the wording of the defamatory expressions; (ii) the circumstances under which they were published and, in particular, the chronology of events and the separate instances of publication; (iii) the persons to whom the words were published; and (iv) whether what was published on each occasion was germane and reasonably appropriate to that specific occasion. Having regard for the manner of communication, the wording of the communications, their timing and to whom they were given, the trial judge erred in law by concluding that the defence of qualified privilege applied.

The trial judge justified his award by undervaluing the impact of what had happened to Dr. Rubin and the effect upon him. Damages of $100,000 are appropriate.

This decision serves as an important reminder that, while a union may be perfectly justified in communicating with its members about grievances, particularly where the union wishes to gather facts and evidence and locate witnesses, the union must be careful about style and presentation. What undid the union here was the use of bold headings, and strong and evocative words, and the union's failure to try to communicate the information to union members only. The union's use of a website, accessible to the public generally, was singled out as cause of concern. The decision suggests a different result had the union published the materials on an internet site that is made accessible to union members only.

The union sought leave to appeal this decision at the Supreme Court, but the application was recently dismissed.

<u>Just Cause to Terminate – The Impact of Criminal Charges</u>

While the jurisprudence provides little protection to an employer challenging a for cause termination when the underlying reason for the termination is criminal behaviour, and where that criminal behaviour results in a guilty finding in a criminal court, the impact of criminal charges and an acquittal has not been litigated as often before arbitrators. A

recent case provides some guidance and confirms that – where there is an acquittal – all of the factual findings leading to the acquittal can be re-litigated by an employer alleging cause to terminate.

***Sault Area Hospital v. Ontario Nurses Assn.,* [2013] OLAA No. 113**

Facts: Preliminary motion by union. The grievor, a nurse, was discharged for allegedly abusing a patient. Criminal charges arising from the same incident were also laid against her, however she was acquitted at trial. The union argued that the grievor ought to be reinstated on the basis of the findings of fact made by the trial judge, otherwise it would be an abuse of process to re-litigate the factual findings of the judge, as per the Supreme Court's decision in *CUPE v Toronto*.[13] The union also argued that the employer should be precluded from calling evidence on those issues on which the trial judge had already made findings of fact.

Issue(s): whether the findings of fact made by the trial judge had any bearing on the arbitration

Decision: Preliminary motion denied.

Reasoning: The Ontario Court of Appeal decision in *Polgrain Estate*[14] is the leading decision on the impact of a criminal acquittal and any specific findings of fact made by a trial judge in providing reasons for the acquittal on a subsequent civil proceeding. Any factual findings should not be given any legally binding effect in a subsequent civil action. It should be noted, as the arbitrator here observed, that previous arbitral jurisprudence on this question had been inconsistent or had, at most, leaned in favour of precluding employers from relitigating findings of fact made in a failed criminal prosecution. *Sault Area Hospital* represents a clear change in direction in this area.

Having said that, the arbitrator, at the end of his decision, posited that he might be able, if the circumstances arise, to give some effect to statements made by the criminal trial judge. Presumably, an observation by a trial judge of how a particular witness testified to certain facts is what the arbitrator meant, or is included in what he meant, by such comments, but it remains to be seen whether, inferentially, a trial judge's comments in favour of an acquittal can be given some weight in subsequent arbitral proceedings.

<u>Just Cause Over Employee Communications – The Right to Free Expression</u>

***British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.,* 2013 BCCA 241**

[13] *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64

[14] *Polgrain Estate v. Toronto East General Hospital*, [2008] O.J. No. 2092 (C.A.)

Facts: In response to a campaign by the BC Teacher's Federation leading up a provincial election, the Southeast Kootenay school district issued a directive that political posters or information should not be displayed in school hallways, classrooms, or on school grounds, but that union material could be posted on assigned bulletin boards in staff rooms. Two teachers posted campaign materials in the hall outside their classrooms and were told to remove them. The issue proceeded to grievance arbitration where the arbitrator found that the directive violated freedom of expression but was rationally connected to insulating students from political messages, minimally intrusive upon the teachers, and proportional to the objective of protecting students. The BCTF appealed the arbitrator's decision.

Issue(s): Whether the directive violated teacher's freedom of expression under the *Charter*? If so, was it a reasonable limit?

Decision: Grievance allowed, arbitrator's award set aside.

Reasoning: The arbitrator misapplied the B.C. Court of Appeal's 2005 decision in *Munroe*,[15] which dealt with the exact same issue and found that the restriction was not minimally impairing. The arbitrator misapplied the minimal impairment and proportionality tests and failed to consider any less restrictive means of expression or any evidence of actual harm to students.

Unsurprisingly, Many Interesting Discrimination/Accommodation Cases

The ability to grieve violations of human rights legislation continues to be a source of significant arbitral awards and jurisprudence. That being said, there is a recent decision in which the arbitrator refused to entertain discrimination/accommodation grievances. A few other interesting cases of note are highlighted below.

***Forsyth v. Coast Mountain Bus Co.,* 2013 BCCA 257**

Facts: The appellant alleged that he had been discriminated against on the basis of age contrary to BC's human rights code. The appellant, 66 years of age, was hired on a temporary basis by the employer as an overhead trolley lineperson. Company policy was to hire people over 64 only on a temporary basis. When he was laid off and not successful obtaining a permanent position the appellant asked the union to file a grievance, which the union refused to do. The Human Rights Tribunal dismissed his complaint and the Supreme Court of BC refused his petition to judicially review the Tribunals' decision.

[15] 2005 BCCA 393

Issue(s): Whether the appellant was discriminated against by his employer and union on the basis of age

Decision: Appeal dismissed

Reasoning: The Court of Appeal held that the employer was not in contravention of the *Human Rights Code* at the time of hiring, as age was at that time defined to include "less than 65". Because there were no further decisions made by the employer or union on the basis of his age, there was no ongoing conduct bringing the amended provisions of the *Code* into play and constituting discrimination.

***Alberta Union of Provincial Employees v. Alberta*, 2013 ABCA 212**

Facts: The union grieved the dismissal of a co-op student who had cerebral palsy on the basis that it discriminated against him on the basis of his disability. Because he was a temporary employee, the grievance was heard by a designated officer of the employer rather than an arbitration board, per the terms of the collective agreement. The union argued it should have been adjudicated by an arbitrator because of the alleged human rights breach. An arbitrator, ruling only on jurisdiction, found that such grievances were not required to be resolved through arbitration. The union appealed to Court of Appeal after its application for judicial review of the arbitrator's decision was dismissed.

Issue(s): Whether, in Alberta, the adjudication of a grievance arising from the alleged breach of human rights legislation requires resolution by an adjudicator who is entirely independent of the employer.

Decision: Appeal dismissed

Reasoning: The Alberta *Labour Relations Code* required only that every collective agreement include a way to settle disputes, it did not require arbitration for the breach of statutorily-created rights. The SCC's ruling in *Parry Sound* that arbitration was the proper forum for allegations of discrimination was based on the particular wording of the Ontario Labour Relations Act. The arbitrator's decision was reasonable.

***Telecommunications Workers Union v. Telus Communications Inc.,* 2012 ABQB 298**

Facts: The grievor, who had Asperger's Syndrome, was terminated near the end of his probationary period for being unsuitable. The union grieved the termination, citing discrimination on the basis of disability. The arbitrator upheld the termination; despite her finding that the grievor's disability contributed to his performance, the employer had no knowledge of his disability. The grievor had marked a box his application that he had

a disability but did not provide any further information to the employer. The union applied for judicial review of the arbitrator's decision.

Issue(s): Did the employer have knowledge of the disability? Did the employer have a duty to investigate beyond the ticked box in the application?

Decision: Application dismissed

Reasoning: The arbitrator's statement that establishing a *prima facie* case of discrimination required the complainant to show that the respondent was aware or ought reasonably to have been aware of the applicant's disability and his need for accommodation was correct, as was her conclusion that the employer had no such knowledge. The arbitrator's conclusion that the duty to accommodate did not require the employer to follow up on the information they had about the employee's disability was not unreasonable as she took into account the appropriate facts, including that no accommodation was possible in the circumstances.

***ATU v TTC*, 114 CLAS 357**

Facts: The grievor had worked for the TTC for 11 years and had been struggling with substance abuse throughout his employment. He had a lengthy disciplinary record. The employer had accommodated him times by providing him with sick benefits to attend rehab several times and changing his shift to accommodate ongoing outpatient treatment despite his lack of seniority, providing extra supervision and flexibility. He had also signed a last chance agreement which he had already breached. He was terminated after showing up to work intoxicated. The union grieved the discharge arguing the employer failed to accommodate him to the point of undue hardship.

Issue(s): whether the employer failed to accommodate the grievor

Decision: grievance dismissed

Reasoning: the collective agreement specified that dismissal was a potential penalty for intoxication while on duty, thus, the arbitrator had no jurisdiction to substitute another penalty. On a human rights analysis, the employer has met the duty to accommodate and is under no obligation to endure more financial and management resource costs to deal with his addiction.

***ONA v London Health Sciences Centre*, [2013] OLAA No. 24**

Facts: The grievor, a nurse, was discharged for cause after she stole narcotics and other drugs from patients and falsified documents to cover up her thefts. She used

these exclusively on herself. The union argued that she had a substance abuse problem and/or was addicted and was not accommodated to the point of undue hardship by the employer.

Issue(s): whether the employer failed to accommodate the grievor

Decision: grievance allowed,

Reasoning: On a discipline analysis, there was just cause for termination. However, her addiction was the cause of her misconduct. The hospital discriminated against her when it terminated her and had to, as a result of the Award, reinstate her and start the process of reasonable accommodation. This decision provides unions and employers with excellent guidance on the kinds of evidence one should bring to bear to obtain a favourable result for an employee who suffers from substance use or addiction problems in the workplace.

***Teamsters Local 647 v. Agropur Division Natrel*, 2012 CanLII 69477**

Facts: The grievor was terminated after his mental health conditions resulted in his suffering from occasional brief psychotic outbreaks. He was invited to apply for LTD benefits but did not do so. The union argued that he could be successfully reinstated and shouldn't be discriminated against because of his disability. In the alternative, the union argued that he should be reinstated to apply for LTD. The employer argued that his behaviour was unpredictable and unstable and could not be accommodated without undue hardship. It also argued that the grievor had already been given an opportunity to apply for LTD.

Issue(s): whether the employer failed to accommodate the grievor

Decision: reinstatement to active employment not appropriate

Reasoning: the medical evidence shows that he continues to suffer from psychotic outbreaks and the workplace may be a trigger. He should be reinstated for 3 months to give him an opportunity to apply for LTD, which he failed to do initially likely because of the disability.

PART II – EMPLOYMENT LAW

We reviewed a number of decision emanating from tribunals and courts in the employment law field. In conducting our review, we chose to select, in addition to traditional employment law cases such as wrongful dismissal cases, cases that make an interesting contribution to Canadians' working lives, including cases concerning important statutory benefits and human rights cases that outline the limits on an employer's powers to schedule and terminate employees.

Wrongful Dismissal – The "Rule of Thumb" and More than 24 Months' Notice?

Employment law practitioners, particularly in Ontario, have noticed a gradual creeping up of the notice periods awarded to employees, particularly where older employees' employment is terminated. This creeping up appears to be taking place, we suggest, because of the tougher economic times in Canada of late, particularly in the job market. It also seems to stem from a rejection by courts of the use of length of service as the primary guidepost to setting the notice period, not to mention the outright rejection of a "rule of thumb" that notice of termination ought to be set at one (1) month per year of service, capped at 24 months' notice (and at one time, at 12 months' for certain kinds of employees). The rejection of any "rule of thumb" happened some time ago, and the 2013 case law confirms the trend towards rejecting any hard and fast notice period rules.

***Capital Pontiac Buick Cadillac GMC Ltd v Coppola*, 2013 SKCA 80**

Here, a 34 year employee with merely 22 months' service was terminated from a Fleet Manager and/or Finance Manager position with an automotive dealership. He earned over $120,000.00 a year in that role. The trial judge awarded a six (6) month notice period, in keeping with the trend of disregarding this employee's young age and short service. The Saskatchewan Court of Appeal upheld this award while observing that the trend for short service employees is to award, in some cases, up to 12 months' pay in lieu of reasonable notice. In upholding the notice period awarded, the Court observed that length of service continues to hold some *moral* persuasion: the longer the service, the longer the notice period. Having said that, though, the Court rejected outright the use of any "rules of thumb", notably the rule that one month's notice should be awarded per year of service. In rejecting this, the Court agreed that a six (6) month notice period was reasonable in the circumstances. The Court supported this conclusion on the theory that a short service employee might suffer from some problems that justify a longer notice period, including explaining their short service to a prospective employer who might choose not to take a chance on them.

***Abrahim et al v Sliwin et al & McCalla v Sliwin et al*, 2012 ONSC 6295**

This case involved a motion for default judgement in a group action for damages for wrongful dismissal. A business operated by one of the defendants was discontinued

and the plaintiffs were dismissed with little or no notice and no termination or severance pay.

The Ontario Superior Court ruled that the plaintiffs were entitled to damages for wrongful dismissal, holding that the plaintiffs' proposed damages of one month for each year of service, capped at twenty four-months, is not unreasonable based on the facts of the case. However, Justice Gray noted that the Ontario Court of Appeal's rejection of a "rule of thumb" formula for one months' severance pay for each month of service with a 24-month cap in *Minott v O'Shanter Development Co*[16] could have resulted in an award of "more than 24 months' pay had such a request been made," because of the length of the plaintiffs' service and their older age.

While wrongful dismissal periods in excess of 24 months are not unheard of, they are highly unusual. This suggestion in a recent Superior Court case that a longer period might have been used is interesting, as is the confirmation that a "rule of thumb" should not be used.

Suspending Employees – Employee Fights Back, and Loses

In the labour law context, where employees generally have access to quick remedial processes through grievance arbitration, processes an employee can engage in while continuing to work for their employers, actions by employers where a union is not present short of the complete termination of employment do not readily attract legal intervention. Unless an employer's actions rise to the level of constructive dismissal, an employee is often left with little, if any, remedy. Worse, if an employee attempts to seek a remedy, the employee may fall into the trap of having acted in a way that will be regarded by courts as a repudiation of their employment contract (they've quit, in other words). Older case law is equivocal on whether the retaining of a lawyer by an employee, the writing of a demand letter, or threatening legal action amounts to repudiation. Most of the case law, however, holds that the commencing of legal action amounts to repudiation by the employee of the employment contract. This case law is quite old and, in the authors' opinion, may no longer be consistent with employment law in the 21st Century where, in our litigious society, it is not uncommon for parties to maintain some form of relationship while seeking remedies for alleged breaches of contract. Indeed, the commencement of litigation is not always a repudiation, in our estimation, and can often be a step towards trying to find a negotiated resolution of an employment dispute.

Nowhere is this issue more prevalent than in cases where an employer suspends an employee with pay, often for long periods of time. A unionized employee would simply

[16] 42 OR (3d) 321 (ONCA).

grieve such a suspension, while a non-unionized employee faces the prospect, without any remedy, of having to wait out the suspension for months, if not years. Years later, the employee may become redundant and the target of a simple termination of employment given that redundancy.

The *Potter* decision, below, amplifies these concerns. Fortunately, the Supreme Court has picked up on the importance of clarifying how courts should respond to these situations, and has granted the employee's request for leave to appeal.

***Potter v New Brunswick (Legal Aid Services Commission)*, 2013 NBCA 27[17]**

In *Potter,* the New Brunswick Court of Appeal reviewed an appeal which alleged that the appellant was constructively dismissed while suspended with full pay. The appellant, Potter, was appointed by the Lieutenant-Governor in Council as the Executive Director of the Legal Aid Services Commission of New Brunswick. After relations with his supervisory Board "soured," the appellant was placed on a fully paid administrative suspension. Potter then brought a "wrongful and constructive" dismissal claim, arguing that the Board repudiated the terms of his employment contract by committing a "series of unlawful acts, including his suspension.

The trial judge rejected the appellant's argument that his suspension was "unlawful," as the trial judge was not convinced that the Board lacked the authority to suspend him. Secondly, the trial judge held that the appellant was not constructively dismissed, noting that the Board had no statutory to authority to terminate Potter. The trial judge further ruled that, by commencing a civil claim, the employee "made the employment relationship untenable" and effectively resigned.

Drapeau CJNB, in a unanimous Court of Appeal ruling, upheld the findings of the trial judge and dismissed the appeal. In rejecting Potter's argument that he was constructively dismissed, the Court noted that, as a "senior lawyer," the appellant "knew or ought to have known" that if his claim was unsuccessful at trial, his failed lawsuit would constitute a resignation from employment. The Court clearly stated that a suspension with pay for an indefinite period, in and of itself, does not constitute constructive dismissal. Instead, there must be a "fundamental or substantial change" to the contract of employment. Here, there was no breach of contract and thus no constructive dismissal: instead the appellant elected to terminate his own employment, so the Court reasoned, by commencing litigation.

<u>Using Summary Judgment in a Wrongful Dismissal Claim</u>

[17] leave to appeal granted, [2013] SCCA 256

When Ontario relaxed its summary judgment rules in 2010, the employment law bar was thrilled with the chance to utilize the new *Rules* to obtain quick justice for employees wrongfully dismissed from employment where cause to terminate is not an issue. Indeed, before the 2010 changes, Ontario's old summary judgment rules (the ones still used in most Provinces), enabled plaintiffs in similar cases to obtain summary judgment somewhat readily. Any decisions by courts showing a willingness, or not, to grant summary judgment under the new *Rules*, can help guide employment lawyers and litigants in this Province and elsewhere search for a quick way to resolve what should be fairly simple disputes.

2013 saw the presence of two summary judgment decisions which show that summary judgment is not as available as one might first think. These new decisions turn on whether the plaintiff's mitigation attempts could be the subject of a summary judgment motion or not. Where the employer raises an arguable issue that the plaintiff's mitigation attempts were sub-standard, a court will be less willing to grant summary judgment. Naturally, these cases tend to turn on the facts and the quality of the plaintiff's record in demonstrating, or not, his or her mitigation efforts.

***Anderson v Cardinal Health,* 2013 ONSC 5226**

In *Anderson,* the plaintiff brought a motion for summary judgment in a claim for wrongful dismissal. The Ontario Superior Court rejected the plaintiff's motion, holding that a trial is required as the record did not disclose sufficient evidence regarding the plaintiff's efforts in finding alternate employment, evidence that was required to assess mitigation and the reasonable notice period. Although many wrongful dismissal cases are dealt with by summary judgment, this case suggests that, where mitigation is a live issue, summary judgment is not appropriate.

***Kotecha v Affinia*, 2013 ONSC 4817**

By contrast, in *Kotecha*, the plaintiff, a seventy-year old machine operator, brought a motion for summary judgement in a wrongful dismissal action against his former employer, an auto parts manufacturer. The plaintiff worked for the defendant for twenty years when he was given less than two months' notice of his termination. The defendant employer acknowledged that the plaintiff was dismissed without cause, thus, only the reasonable notice period and quantum of damages were at issue. The plaintiff submitted "detailed evidence" of his attempts to mitigate, demonstrating that he applied for work at 225 companies without any success, even in terms of obtaining a job interview.

Justice Hambly of the Ontario Superior Court ruled that the plaintiff can proceed with summary judgement. In applying the test for summary judgement under Rule 20.04(2) of the *Rules of Civil Procedure*[18] and the Ontario Court of Appeal's decision in

[18] RRO 1990, Reg 194.

Combined Air v Flesch,[19] Justice Hambly found that the material submitted by the plaintiff facilitated a"full appreciation of the evidence and issues" in the claim. Turning to apply the *Bardal* factors, Justice Hambly found that the plaintiff's older age and limited job skills restricted his employment opportunities. The plaintiff was thus awarded 22 months' of notice.

Cause in the Internet Age

More and more employment law cases, where cause is alleged, involve employees' unauthorized uses of their computers or other electronic devices. The courts remain vigilant in ensuring that employers do in fact have cause in such cases.

***Asurion Canada Inc v BB and GC,* 2013 NBCA 13**

In *Asurion Canada Inc*, the employer summarily dismissed two employees after they received pornographic images while on shift on their work computers. The employer appealed the trial judge's award for damages in lieu of notice, arguing that the trial judge erred in holding that the legal test for assessing dismissal based on misconduct requires deceitful behaviour and that dismissal was too severe a penalty.

The New Brunswick Court of Appeal ruled that the trial judge erred in holding that the test articulated by the Supreme Court of Canada in *McKinley v BC Tel* (*McKinley*)[20] requires deceitful conduct in order to justify a dismissal based on misconduct. The Court noted that proof of deceit is only required where the cause for termination is rooted in dishonesty. Here, the termination was based in a violation of the employer's internet policy, so *McKinley* does not apply. However, as the employer's internet policy was ambiguous and the employee misconduct did not meet the high standard required for summary dismissal, the trial judge's finding that termination was a disproportionate penalty was upheld.

Where to Sue?

In Ontario, possibly more than in any other Province, a plaintiff occasionally faces the challenge of figuring out in which part of Ontario they should file their Statement of Claim. If one is filed in an inappropriate locale, or an arguably inappropriate locale, the employee risks a costly motion to transfer the Claim to another Superior Court location. There are few cases in the employment law context where such motions have resulted in a decision. An interesting 2013 decision reminds us that, in an age when many employees find themselves commuting to work, reporting to persons across the

[19] 2011 ONCA 764 at para 74.
[20] 2001 SCC 38

Province, working from home on special arrangement with their employer, or where their employment generally has connections to wide swathes of the Province, such a motion is not likely to succeed unless the employee's choice of location is clearly offside.

***Siegel v Canadian Mental Health Association*, 2013 ONSC 4356**

In *Siegel*, the plaintiff brought a wrongful dismissal suit against her former employer, proposing the place of trial in her statement of claim as Kitchener. The defendant brought a motion arguing that it is in the interests of justice to change the place of trial to Owen Sound. Justice Hambly of the Ontario Superior Court denied the motion based on an examination of factors such as the location of the events which gave rise to the claim, the subject matter of the proceeding and the most convenient place for the witnesses and the parties. *Siegel* highlights the factors counsel must consider when deciding where to sue. As the employment relationship becomes increasingly globalized and employees are geographically separated from their employer, this analysis may become more commonplace.

The Old "Layoff" Ploy

Lawyers in labour law are very familiar with the notion of laying off employees. Indeed, the core of many collective agreements centres on how an employer goes about laying off employees, and what constitutes a layoff. Employers who engage in layoffs must respect statutory minimum legislation as well, which often defines how, when a layoff lasts a certain length of time, it becomes a "termination" for the purposes of obligating the employer to respect statutory provisions requiring the payment of termination and severance pay.

Employment law and employment contracts rarely run into "layoffs". The layoff concept is a poor fit within the notion that an employer either employs the employee or doesn't, by terminating their employment on the provision of reasonable notice or pay in lieu. Employment law rarely offers any sort of "middle ground", which a layoff would appear to represent.

Despite this, some clever employers have been trying, with increased frequency in our experience, to avoid or delay the providing of reasonable notice of termination or pay in lieu by merely "laying off" their employee. Usually, the layoff takes on the form of a polite layoff letter and the continuation of the employee's enrolment in the employer's benefit plans: however, on laying off the employee, the employer stops paying them. The case law, until 2013, clearly states that this form of "layoff" is in fact a termination in the employment law sphere. Then, along came the *Trites* decision.

***Trites v Renin Corp.* 2013 ONSC 2715**

In *Trites,* Moore J. of the Ontario Superior Court assessed if a lay-off is a constructive dismissal or a temporary lay-off under Ontario's *Employment Standards Act, 2000* (the *Act*), thereby analysing the interplay between statutory and common law rights. Although the employee in *Trites* was laid off within the period qualifying for temporary lay-off under the *Act*, as she did not receive "substantial payments" or supplementary unemployment or medical benefits from the employer as defined in the *Act*, Moore J held that the statutory requirements for temporary lay-off were not met. Instead, the employee was constructively dismissed and was therefore entitled to damages based on a notice period of thirty three weeks.

But more importantly for the development of the law in this area, in *obiter*, Moore J states that, where an employer has temporarily laid-off an employee in accordance with the *Act,* this precludes a common law constructive dismissal claim.

This comment conflicts with prior case law which states that a laid-off employee can sue for damages where their job and their remuneration are taken away, even if the layoff is conducted in accordance with the *Act.*[21] If this principle from *Trites* is adopted, it may shift a settled area of the law and enable employers to 'lay-off' employees in accordance with the *Act,* therefore relieving them of their obligations, or at least delaying the employer's obligation, to make payments in lieu of reasonable notice of termination. We regard these *obiter* comments as holding little weight when balanced against the other authorities that have ruled differently in this area. The *Trites* decision is also unprincipled. Normally, where an employer reduces an employees' remuneration by 10-15%, and certainly if they reduce it by more, the employer creates a constructive dismissal situation. How an employer can avoid the constructive dismissal label by reducing the employee's income by 100%, just by calling it a "layoff", strikes one as a triumph of form over substance. A 100% reduction in income and the loss of the work itself is the kind of fundamental change of employment that courts routinely regard as the constructive dismissal of an employee. An employee should not be compelled to sit at home in these circumstances without pay and without remedy just because the employer has complied with a statutory minimum requirement regarding the payment of statutory termination pay on an authorized lay-off.

Using the *Human Rights Code* in Court

***Wilson v Solis Mexican Foods Inc.*, 2013 ONSC 5799**

Wilson represents the first case in which damages for a human rights violation were awarded in a civil wrongful dismissal claim. The plaintiff, Wilson, alleged that she was

[21] See *Chen v Sigpro Wireless Inc*, [2004] OJ 2280 (S.C.J.) at para 12; *Style v Carlingview*, [1996] O.J. No. 705 (S.C.J.) at paras 12-14*;* and, *Martellacci v CFC/INX Ltd,* [1997] O.J. No. 6383 (Gen. Div.) at paras. 23-25

terminated after sixteen months of employment because of a back condition. The employer did not argue cause for termination. Wilson subsequently sought damages under the *Human Rights Code* (the *Code*) in the Ontario Superior Court of Justice.

In applying the factors from *Bardal v Globe & Mail Ltd*[22] to assess the reasonable notice period, Grace J, writing for the Court, held that the appropriate period was three months, noting the plaintiff's short length of service. Turning to the human rights claim, Grace J found that the plaintiff's physical disability was a "significant factor" in the employer's decision to terminate, therefore contravening the right to equal treatment under the *Code*.

Grace J then applied section 46.1(1) of the *Code,* which allows courts the same remedial powers as the Human Rights Tribunal. Grace J noted that the Tribunal now recognizes damages beyond loss for injury to dignity, reflecting that compensation attempts to take into account the inherent value of human rights. Accordingly, the plaintiff was awarded $20,000 in damages, reflecting the significance of the infringement and the "impact of the defendant's conduct".

Notable Human Rights Cases

Taking us now away from pure employment law cases, including cases like *Solis* where human rights and anti-discrimination principles are brought to bear in an employment law Action, one finds a plethora of cases where employees have successfully demonstrated that their employment was terminated for discriminatory reasons, resulting, in some cases, in the payment of substantial sums in damages.

***Wali v Jace Holdings Ltd (c.o.b. Thrifty Foods),* 2012 BCHRT 389**

The complainant here alleged discrimination in employment on the grounds of disability and political belief. The complainant was terminated without cause after he lobbied against a proposed bylaw of the British Columbia College of Pharmacists (the College), of which he was a member. The employee complainant also suffered from depression at the time of his termination.

The British Columbia Human Rights Tribunal ruled in favour of the applicant, deciding that his depression constituted a short term disability and was a factor in his termination. The Tribunal held that the applicant's lobbying in response to the College's changes to its professional regulation fell within the scope of political belief as protected by British Columbia's *Human Rights Code*. As the employer admitted that the applicant's participation in lobbying was a reason for his termination, he thus faced discrimination in

[22] [1960] OWN 253 (Ont HCJ).

employment. The Tribunal ordered damages for injury to dignity, feelings and self-respect, noting an increase in damages due to two distinct grounds of discrimination, and compensation for lost wages.

***C.R. v Canadian Mental Health Association,* 2013 MHRBAD 1**

The complainant alleged discrimination in employment based on disability. Although no medical evidence was submitted to establish that the complainant suffered from alcoholism, the Manitoba Board of Adjudication ruled that the complainant experienced discrimination based on the employer's perception that she was an alcoholic. The Board ordered damages for injury to dignity, feelings and self-respect, compensation for lost wages and a monitoring order to ensure that the employer uphold its obligations under the Manitoba *Human Rights Code.*

***Fair v Hamilton-Wentworth District School Board*, 2013 HRTO 440**

In a previous decision, the Ontario Human Rights Tribunal had held that the applicant in discrimination in employment on the ground of disability. The applicant had generalized anxiety disorder, which the respondent employer failed to accommodate. The employer eventually discharged the employee.

Noting the remedial objective of making an applicant "whole," the Tribunal ordered that the applicant be reinstated. In addition, she was successful in obtaining a significant monetary award to compensate her for the entire nine-year period of unemployment. This included approximately $420,000 in lost wages (plus interest), pension adjustments, reimbursement for health and insurance benefits and $30,000 in general damages as compensation for the injury to her dignity, feelings and self-respect.

***Chieriro v Michetti,* 2013 AHRC 3**

In *Chieriro v Michetti,* the Alberta Human Rights Commission evaluated a claim for lost wages and general damages brought by a terminated employee who alleged discrimination on the grounds of colour, race, place of origin, ancestry and religion. The complainant, Chieriro, was a recently arrived refugee who worked as a bookkeeper with the respondent employer. Chieriro alleged that his supervisor verbally abused and intimidated him, refused to accommodate his religious practice, exploited him by involving him in “questionable car and mortgage schemes,” reduced his wage and withheld his employment insurance benefits.

In finding a *prima facie* case of discrimination on the above stated grounds, the Commission held that the employer’s mortgage and car schemes were inextricably connected to the discrimination suffered by the complainant. In assessing damages, the Commission noted how the discriminatory treatment caused the complainant fear, emotional stress and eroded his belief that Canadian employers treat new immigrants fairly. Further, the Commission ruled that in addition to compensation, the purpose of

remedial damages is to send a message to employers that such “egregious” treatment is unacceptable. Accordingly, the Commission awarded Mr. Chieriro $20 000 in general damages, in addition to lost wages.

***Johnstone v Canada (Border Services)*, 2013 FC 113**

In *Johnstone),* the Federal Court judicially reviewed a decision of the Canadian Human Rights Tribunal. The complainant worked for Canada Border Services Agency (CBSA) and requested accommodation in her shift schedule to allow her to arrange childcare. The Tribunal held that CBSA failed to accommodate the complainant and discriminated against her based on family status. The Tribunal ordered compensation for lost wages and benefits, general damages in pain and suffering, special compensation for wilful and reckless conduct and ordered CBSA to cease its discriminatory practices and to establish policies on accommodation for childcare.

The Court upheld the decision of the Tribunal, based on a standard of reasonableness. Although a complainant alleging discrimination on the ground of family status must demonstrate significant hardship and "the complainant must have tried to reconcile family obligations with work obligations," the Court affirmed the Tribunal's finding that proving discrimination based on family status does not require a more rigorous standard of proof than other grounds protected in the *Canadian Human Rights Act* (the *Act*). In turn, the Court rejected that *Health Sciences Assn of British Columbia v Campbell River and North Island Transition Society*[23] requires that an applicant must prove "serious interference" with parental obligations in order to be successful in proving discrimination on the ground of family status.

However, the Court found that the Tribunal erred in part regarding their finding of compensation for lost wages. Finally, the Court held that the Tribunal exceeded its jurisdiction when it ordered that CBSA develop accommodation policies satisfactory to the complainant, because the *Act* does not allow for a complainant to participate in the development of remedial policies.

***Closs v Fulton Forwarders Inc,* 2012 CHRT 30**

In *Closs v Fulton Forwarders Inc*, the Canadian Human Rights Tribunal examined a complaint alleging discrimination in employment on the grounds of disability and family status. Regarding family status, the complainant alleged that he was denied accommodation stemming from the trauma his family suffered when his partner miscarried. The complainant was successful in proving discrimination on both grounds.

In assessing family status, the Tribunal applied its decision in *Johnstone v Canada Border Service Agency,* affirming that family status does not require a more "onerous

[23] 2004 BCCA 260.

prima facie standard". The Tribunal further noted that the miscarriage was experienced as a family unit, thus warranting protection under the *Act*. When the employer failed to accommodate the employee by denying his request for time off, these quasi-constitutional obligations were violated. The complainant was successful in obtaining compensation for lost wages, compensation for pain and suffering and damages for the employer engaging in discriminatory conduct recklessly.

Statutory Benefits Cases

Papers on employment and labour law sometimes tend to forget the wealth of interesting decisions emanating from tribunals and courts on simple issues of entitlement to statutory benefits related to the workplace. Two very interesting employment insurance cases in the Federal Court of Appeal are worth mentioning.

***Canada v Hunter,* 2013 FCA 12**

In *Hunter,* the Crown applied for judicial review of a decision of an Umpire that ruled that the respondent qualified for parental employment insurance benefits under *Employment Insurance Act* (the *Act*).[24] The respondent was given custody over her grandchild by way of temporary apprehension order, absented herself from the workplace for about a year to care for the grandchild, and began working towards adopting the child. Requiring time off of work, the respondent applied for employment insurance parental benefits, benefits which are given not just to natural parents but to persons who have custody over children and intend to adopt them as well.

Entitlement to parental benefits under the *Act* required the respondent to prove that the child had been placed with her "for the purposes of adoption". However, given the emergency nature of the placement order, and given the length of time it takes to start an adoption process, let alone obtain an adoption order, the respondent could only advance her own evidence regarding her intent to adopt, as opposed to a court order that reflected a permanent custody order. Two out of three judges on a panel of the Federal Court of Appeal ruled in favour of the respondent, upholding the Umpire's decision as reasonable. Sharlow JA, writing the majority of the Court, noted that section 23(1) of the *Act* relies on broad terms, which reflect the legislative intent that "the placement of a child for a purpose of adoption may arise in a variety of circumstances". Prior to this majority decision in *Hunter*, the EI Commission had been denying adoptive parental leave claims where the order placing the child into the non-parent's custody was regarded as more temporary in nature. The majority decision gives hope to many putative adoptive parents that, if they merely have custody and some evidence of an

[24] *Employment Insurance Act*, SC 1996, c 23

intent to adopt the child, they can claim important EI benefits during the crucial first year following placement of the child with them.

In contrast, the very lengthy and dissenting judgment of Nadon JA, after conducting an exhaustive review of the Record, states that the provision of benefits was unreasonable as the potential of the mother to care for the child in the future was unknown at the time of placement and that the placement of the child was not made for the purposes of adoption when it occurred.

Prior to this case, the jurisprudence on parental benefits and adoption was inconsistent, leaving many relatives who took custody over children and took important time off work to care for them unable to access employment insurance benefits where they did not have concrete documentation to show a pending adoption. *Hunter* suggests that, in cases where there are limited facts that establish a potential adoption, evidence of intent to adopt will meet the statutory test. In *Hunter*, that evidence came almost entirely from Ms Hunter herself and from the nature of the problems her grandchild and her daughter faced, such that Ms Hunter's intent to adopt in the future was reasonably grounded in her family's circumstances.

***The "Twins Case" – Martin v Canada (Attorney General)*, 2013 FCA 15**

Although Nadon J.A. found himself the dissenter in *Hunter*, writing in support of a regressive interpretation of the *EI Act*, Nadon JA attracted a unanimous decision in the regrettable decision in what has become known as the “Twins Case”.

In *Martin,* the Federal Court of Appeal judicially reviewed the decision of a Federal Court judge acting as an Umpire under the *Act* which ruled that the applicant and his spouse were not entitled to receive more than 35 weeks of EI parental leave benefits after having twins. The Umpire also dismissed the applicant's section 15 *Charter* argument, holding that the distinction in the *Act* between parents of multiples and other parents did not constitute discrimination as it did not perpetuate stereotyping or prejudice.

Under section 12 of the *Act,* parents can receive employment insurance benefits for up to 35-weeks. The applicant argued that, where two spouses claim parental benefits following a multiple birth, the interpretation of this provision in conjunction with the purpose of parental leave suggests that each parent, bringing a separate claim, can receive the 35-week maximum for each child.

In a unanimous judgment, Nadon JA dismissed the application. In affirming that the Umpire's interpretation of the *Act* was correct, Nadon JA held that Parliament's intent was to provide a maximum of one period of thirty-five weeks of leave for "one or more newborn children" to a "mother or father, as individual or separate claimants". The maximum period of parental leave thus remains 35 weeks, regardless if the birth is single or multiple. Nadon JA further held that this interpretation is consistent with what

he thought was the purpose of parental leave under the *Act,* which is not to recognize the needs arising from a multiple pregnancy but is to provide "temporary income replacement" to "compensate parents for the interruption of their earnings resulting from their taking time off to care for a child or children".

Finally, the Court also upheld the Umpire's determination of the applicant's *Charter* argument on a standard of correctness. In so doing, Nadon JA noted that there was no evidence that parents of twins suffer from "pre-existing disadvantage". The Court held that the *Act* is not a "social welfare program" but a "temporary partial income replacement," which is sufficiently flexible enough to accommodate "the needs and circumstances of the applicant's group". As such, parents of multiples could not claim that their dignity had been unduly impacted when their needs were being recognized through the provision of some, albeit imperfectly tailored, parental leave benefits.

The *Martin* decision affirms Canada's dubious status as an outlier amongst developed nations in failing to account for the presence of a multiple birth (and the adoption of two or more children, a common scenario) in setting the rate of EI parental leave benefits. With the denial of Mr. Martin's leave application by the Supreme Court[25] and the failure of Parliament to send a recent private member's Bill, on Second Reading, to Committee (albeit by a slender vote margin),[26] employees in Canada may be compelled to look to their employers for assistance when a multiple birth or adoption takes place. Worse, given the EI parental leave program's success rate in securing long-term employment and stability in the labour market, the limited availability of EI benefits when a multiple birth is involved and the increasing prevalence of multiple births in Canada may mean, in the long-term, additional labour market disruption as more and more people take increasing periods of time off to care for their multiples, as opposed to returning to the workplace after a more temporary absence.

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[25] SCC File No. 35281

[26] Bill C-464, *An Act to amend the Canada Labour Code and the Employment Insurance Act (parental leave for multiple births or adoptions)*, 41st Parliament, 1st Sess.