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LABOUR AND EMPLOYMENT LAW NEWS

Borden Ladner Gervais

LABOUR AND EMPLOYMENT LAW NEWS

EDITORS' MESSAGE

This edition of the *Labour & Employment Law News* addresses a recent Supreme Court of Canada decision in which a differential labour relations scheme for the farm industry in Ontario was upheld as constitutional, the tax implications of hiring US contractors to work in Canada and Saskatchewan's recent decision to abolish their human rights tribunal. In addition, an update is provided on Bill 168, Ontario's workplace anti-violence and harassment legislation.

Finally, our Hot Off the Press column keeps you informed of breaking legal developments.

We trust that you will find that this newsletter provides you with critical information relevant to managing your employees in today's environment. If you have any issues you would like addressed in s subsequent edition, please contact us directly.

EDITORS

Jennifer M. Fantini
416.367.6726
jfantini@blg.com

Naomi E. Calla
416.367.6129
ncalla@blg.com

IN THIS ISSUE

ANNOUNCEMENTS

A lot has been happening here at L&E@BLG! To keep you up-to-date:

Nationally: Francois Longpre (Montréal) has stepped down from his position as our National Practice Group Leader, passing the mantle to **Matthew Certosimo** (Toronto). Thank you Francois for your leadership, and welcome Matt!

Vancouver: Gabriel Somjen has recently stepped down from his role as Regional (Vancouver) Practice Group Leader, a role which he has occupied since 2004. Vancouver's new Practice Group Leader is **Steve Winder**. Thank you Gabe for all of your hard work, and welcome Steve!

We would also like to welcome **Lisa Carlson,** who has joined our practice group in Vancouver as an associate.

Toronto: Matthew Certosimo has stepped down as Regional (Toronto) Practice Group Leader. Toronto's new Practice Group Leader is **Melanie Warner**. Thank you Matt for all of your hard work, and welcome Melanie!

Finally, we are pleased to announce that two new associates have joined our Toronto Practice Group, **James Fu** and **Adam Guy**.

HOT OFF THE PRESS

BRITISH COLUMBIA MINIMUM RAISE ON THE RISE

Just a reminder that, as of November 1, 2011, the general minimum wage in British Columbia will be increasing again to $9.50 per hour.

AMENDMENTS TO ONTARIO *PENSION BENEFITS ACT*

The Ontario Government recently amended the family law provisions of the *Pension Benefits Act.* These amendments will come into effect on January 1, 2012. The changes establish a new process for the valuation and division of pension assets following the breakdown of a spousal relationship. The new process requires the pension plan administrator to calculate the value of the pension, provides for immediate division, and mandates the use of Superintendent of Financial Services approved forms throughout the process. To that end, the Financial Services Commission of Ontario (FSCO) has developed proposed family law forms to be used in the various steps in the new process. FSCO intends to finalize the forms and post the final versions by December 31, 2011. The proposed forms can be found on FSCO's website.

SASKATCHEWAN ABOLISHES HUMAN RIGHTS TRIBUNAL

Ontarians will recall Tim Hudak's proposal, during his campaign for leadership of the Progressive Conservative Party of Ontario in 2009, to "scrap" Ontario's Human Rights Tribunal. In his recent campaign for Premier of Ontario, Mr. Hudak abandoned that idea in favour of reforming the existing system. Saskatchewan, on the other hand, has forged ahead with its own plans to eliminate its Human Rights Tribunal (the Tribunal) .

The *Saskatchewan Human Rights Code Amendment Act, 2010,* S.S. 2011, c. 17 (Bill 160) was introduced on November 29, 2010 by the conservative Saskatchewan Party government. It was proclaimed into force on July 1, 2011. Human rights complaints in Saskatchewan will continue to be received and investigated by the Saskatchewan Human Rights Commission (the "Commission"), but hearings will now be conducted by the courts. There are several other changes in Bill 160, including the following:

- A person filing a complaint must provide "sufficient evidence that reasonable grounds exist" for believing there has been a violation of the Saskatchewan *Human Rights Code.* Previously, a person only needed to believe that reasonable grounds existed to bring a complaint.

- Complaints must be filed within one (1) year of the alleged violation. Previously, the limitation period was two (2) years.

- The Commission may require the parties to enter into mediation, if there are no grounds to dismiss the complaint. Additionally, the Commission may dismiss the complaint if the complainant rejects a "fair and reasonable" settlement offer from the respondent.

- There is no administrative appeal from a Commission decision to dismiss a complaint.

- The Commission may apply to the court for a hearing of the complaint at any time. Parties to the hearing include the Commission, which will have carriage of the complaint, the complainant, and the respondent.

- The court has broad remedial powers, including ordering a respondent to comply with the *Human Rights Code,* adopt anti-discrimination/anti-harassment programs, reinstate a complainant to employment, compensate a complainant for all losses and expenses arising from the violation, and/or provide accommodation to the point of undue hardship.

- The court may award up to $10,000.00 if the respondent acted "wilfully and recklessly", or the complainant has suffered injury "with respect to feeling, dignity or self-respect".

- The court may not award costs to any party unless it determines that there has been "vexatious, frivolous or abusive conduct on the part of any party".

Ontario's human rights regime was substantially altered in June 2008, but in different ways than Saskatchewan's. Prior to June 2008, individuals filed complaints with the Ontario Human Rights Commission, which investigated, mediated, and made decisions as to which complaints should be referred to Ontario's Human Rights Tribunal for hearing. Now, complaints are filed directly with the Tribunal, which purports to take an active approach to adjudication, with greater emphasis on operational efficiency and expediency. However, the system still struggles to deal with a large number of complaints each year.

The new Saskatchewan regime is still in its infancy. Proponents describe it as a progressive, constructive model that is focused on finding resolutions (through alternate dispute resolution mechanisms) rather than confrontation. They also point out that the public lacked confidence in the "old" regime, because the Tribunal was not perceived as independent. Detractors, however, assert that judges do not have the same level of expertise in human rights matters as members of the Tribunal, and transforming the system involves an unnecessary expenditure of resources.

It will certainly be interesting to see whether the volume of complaints will change, and how court decisions will compare with old Tribunal decisions.

Melanie Warner
Toronto
416.367.6679
mwarner@blg.com

BILL 168: THE YEAR IN REVIEW

It has now been over a year since Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)* came into force. So far, there have not been any reported prosecutions dealing with workplace violence or harassment. However, Ministry statistics make it clear that the new law is being taken seriously. In the period between June 15, 2010 and March 31, 2011, Ministry of Labour Inspectors investigated more than 400 complaints involving workplace violence and more than 1000 complaints involving workplace harassment.[1] In addition, 600 orders associated with workplace violence and 1100 orders associated with workplace harassment have been issued.[2] Workplace violence and harassment are clearly on the Ministry's radar screen.

[1] Ontario Ministry of Labour, *Safe at Work Today,* Issue #7, June, 2011.

[2] *Ibid.*

As a refresher, as of June 15, 2010, most employers in Ontario were required to: (i) undertake a workplace violence risk assessment; (ii) prepare internal programs and policies aimed at identifying and controlling risks for workplace violence and workplace harassment; (iii) create procedures for summoning immediate assistance when workplace violence is imminent or occurring; (iv) create procedures for reporting and investigating complaints of workplace violence or harassment; and (v) provide information and instruction to all staff on the internal programs and policies put in place.

Employers who have not yet complied with the legislation can still do so, and there are now many on-line resources, publications and other helpful documentation to assist. For those who have met the initial requirements, it is important to remember that the legislation also requires employers to review their policies and procedures at least annually and to review and update their assessment of the risks of workplace violence as often as is necessary to ensure that workers are protected.

While there have been no reported Ministry of Labour prosecutions dealing with workplace violence or harassment, some adjudicators have commented on the impact of the legislation in a discipline and discharge context. For example, in *H.J. Heinz Co. of Canada Ltd. and UFCW, Local 459 (Pursel) (Re),*[3] a discipline case involving a physical fight between two co-workers, Arbitrator Marcotte commented as follows:

> I also note that the enactment of Bill 168 reflects societal concerns about violence in the workplace and in some respects, in counsel's words, it is a "codification of common sense," such that its occurrence in the workplace is a serious matter that attracts serious discipline. By way of engaging in workplace violence on June 11, 2010, it is appropriate that the discipline be greater than had been imposed by the Company prior to Bill 168.[4]

Other arbitrators, in similar cases, have emphasized that while violent conduct in the workplace may be grounds for summary dismissal in appropriate cases, the passage of Bill 168 and an employer's policies aimed at eradicating violence in the workplace, do not automatically lead to discharge as the appropriate penalty. Rather, arbitrators are still called upon to weigh all the factors and properly assess the circumstances to ensure a proportionate disciplinary response. Accordingly, in many recent cases, while the employer's decision to terminate an employee for engaging in violence in the workplace have been overturned, arbitrators have upheld lengthy unpaid suspensions in the magnitude of 6 months or more.[5]

It is clear therefore that workplace violence and harassment and an employer's attempts to rid the workplace of such conduct have become a matter of public policy and consciousness.

Susan Sorensen
Toronto
416.367.6017
ssorensen@blg.com

[3] 2011 CLB 1872.

[4] *Ibid,* at para 77.

[5] See: *Georgia Pacific Canada Inc. and Communications, Energy and Paperworkers Union of Canada, Local 192* (2011) CanLII 18182 (Luborsky); *Zochem, division of Hudsons Bay Mining and Smelting Co. Ltd. v. CEPU, Local 591G (Harvey Grievance),* [2010] OLAA No. 466 (Monteith); and *Metro Ontario Inc. and CAW Local 414 (Ritchie Grievance),* [2011] OLAA No. 202 (Hinnegan).

CANADIAN TAX IMPLICATIONS OF HIRING U.S. CONTRACTORS TO PERFORM WORK IN CANADA

Many Canadian companies hire contractors from south of the border to perform services in Canada. The last edition of the Labour and Employment News featured an article reviewing some of the basic immigration implications that should be considered before having an employee based in the United States perform work in Canada. This article focuses on the tax implications in such a situation. Canadian employers are well advised to consider such implications in advance of engaging American contractors.

There are Canadian income tax implications even when a foreign worker is only in Canada for a relatively short period of time. It does not matter whether the worker comes to work in Canada as an employee of a company from the United States or to perform services in Canada as an independent contractor.

Income derived by a non-resident of Canada from employment in Canada will generally be subject to tax withholding upon the same deduction tables applicable to Canadian residents. Pursuant to section 153 of the *Income Tax Act* (Tax Act) and Regulation 102, an employer resident of the United States is required to withhold Canadian payroll deductions from salary or wages, including taxable benefits, paid to employees performing services in Canada. The expression "performing services in Canada" is interpreted broadly to include not only those employees who are in regular and continuous employment in Canada, but also those who are physically present in Canada for work. Canadian payroll deductions are required in all circumstances unless the non-resident obtains a waiver of tax withholdings and the non-resident employee is generally required to file a Canadian tax return by April 30 of the following year.

In certain circumstances, the tax treaty between Canada and the United States may provide relief from Canadian tax deductions, but the non-resident employer and employee need to jointly apply for a waiver of tax withholdings. As soon as it is known that the employee will work in Canada, the employer and employee should apply for a waiver of tax withholdings, as retroactive waiver applications are generally not allowed. Waivers will be effective at the starting date of services provided by the employee in Canada or 60 days before the date of the application.

In the case of independent contractors, section 153 of the Tax Act and Regulation 105 provide that every person, resident or non-resident of Canada, paying a fee, commission or other amount in respect of services rendered in Canada must withhold and remit to Canadian tax authorities

15% of such payment. This includes payments for independent personal services and management fees, except remuneration from an office or employment, which is generally subject to the above Regulation 102 withholding. A Regulation 105 withholding is required for any payment made by the Canadian company to a non-resident person (individual or corporation) for services rendered in Canada, unless the non-resident provides a valid withholding tax waiver issued by the Canadian tax authorities or if the payments relate to a reasonable reimbursement of expenses incurred by the non-resident.

Again, the tax treaty between Canada and the United States may provide, in certain circumstances, an exemption from the Regulation 105 withholding, but the recipient needs to apply for a waiver. A non-resident may apply for a waiver under similar conditions to the Regulation 102 waiver. Otherwise, if the amount of tax withheld exceeds the actual Canadian tax liability, such excess may be recovered by the non-resident by filing a Canadian tax return and claiming a treaty exemption.

The Canadian company may also be required to withhold additional amounts on remuneration, fees, commission or other amounts, including taxable benefits, paid to a non-resident for employment or services rendered in the province of Québec.

In some circumstances, both a Regulation 102 and a Regulation 105 waiver may be needed (for example, where a United States corporation pays a United States worker). The Canada Revenue Agency has recently been reassessing taxpayers who fail to obtain waivers in advance. Reassessments in this area can be particularly harsh because those who pay a United States entity or United States employee are obligated to pay the prescribed withholding amount (plus penalties and interest) and the overpaid tax can only be reclaimed after the non-residents who received the payment file Canadian returns and are assessed. This can be a slow and expensive process and would often be done on behalf of workers who are no longer current employees.

CONCLUSION

Before a Canadian company hires a non-resident contractor to perform services in Canada or requests an employee from the United States, the company will need to consider what withholdings are required prior to making any payments and whether or not a waiver of tax withholdings is available. The waiver application should be made by the non-resident company or contractor as soon as it is known that work will be performed in Canada. If a waiver has not been applied for and approved, the Canadian company should withhold and remit Canadian tax pursuant to Regulation 102 or 105. As soon as Regulation 102 or 105 tax withholdings are required, the non-resident should file a Canadian tax return. In any case, if the amount of tax withheld exceeds the actual Canadian tax liability, such excess may be recovered by the non-resident by filing a Canadian tax return but this may result in a much longer waiting period.

Jean-Philippe Couture
Calgary
403.232.9596
jcouture@blg.com

THE RIGHT TO ASSOCIATE AND NEGOTIATE: THE SUPREME COURT'S RECENT PRONOUNCEMENT

In its long awaited *Fraser*[1] decision the Supreme Court has clarified the scope of protection that exists under the *Canadian Charter of Rights and Freedoms* (the *Charter*) for collective bargaining activities. The Court rejected arguments put forward by the union representing agricultural workers that a particular form of collective bargaining[2] is required for a labour relations scheme to be compliant with the *Charter*. In its ruling, the Court found that a differential labour relations scheme for the farm industry falling outside of the scope of the Ontario *Labour Relations Act* (*LRA*) is constitutional.

HISTORY OF FARM WORKERS' LABOUR RIGHTS IN ONTARIO

The current labour legislation for farm workers in Ontario has a long and litigious history. From 1943 to 1994 farm workers were excluded from the *LRA*. In 1994, an NDP dominated Ontario legislature extended union and collective bargaining rights to farm workers for the first time. A year later, the new conservative government re-legislated the exclusion of farm workers from the labour relations regime. This amending legislation was challenged in the Supreme Court decision of *Dunmore*[3] on the basis that it infringed the right of freedom of association under s. 2(d) of the *Charter.* The Supreme Court made the landmark ruling that collective bargaining is a fundamental right protected under the *Charter* by freedom of association, and that the amending legislation infringed this right by substantially preventing workers from collectively organizing themselves. The Supreme Court gave the legislature 18 months to make its legislation compliant with the *Charter.* The legislature responded with the *Agricultural Employees Protection Act, 2002* (*AEPA*).

The *AEPA* created a separate labour regime protecting the right of farm workers to form employee associations, to participate in their activities, to assemble, to make representations to their employers on the terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the

[1] *Ontario (Attorney General) v Fraser,* 2011 SCC 20.

[2] The form of collective bargaining being considered was the Wagner Model. The Wagner Model includes a statutory mechanism of resolving bargaining disputes and collective agreement interpretation as well as the concepts of exclusivity and majoritarianism.

[3] *Dunmore v Ontario (Attorney General),* 2001 SCC 94.

execution of their rights. Despite these protections, the United Food and Commercial Workers Union (the Union) claimed that the legislation failed to provide:

a) statutory protection for majoritarian exclusivity,

b) a statutory mechanism that would resolve bargaining disputes and interpret collective agreements, and

c) a statutory duty to bargain in good faith.

The Union claimed that these shortcomings in the legislation were a violation of s. 2(d) of the *Charter.* These perceived shortcomings were the central issues in *Fraser.*

THE *FRASER* DECISION

In *Fraser,* the Union relied on the 2007 Supreme Court decision of *Health Services and Support* (*Health Services*). In *Health Services*, the Supreme Court was asked to assess the effect of BC legislation which impacted current collective bargaining agreements through spending control measures in the health sector. The Supreme Court found that this substantially interfered with the s. 2(d) right of freedom of association. The Ontario Court of Appeal sided with the Union and interpreted the *Health Services* decision as supporting the position that failing to provide legislative protections for collective bargaining seriously impairs the capacity of farm workers to come together and meaningfully engage in the process of collective bargaining. According to Chief Justice Winkler, without the legislative protections alleged to be lacking, workers are unable to exercise their right to bargain collectively and this was an infringement under s. 2(d). At the Supreme Court of Canada, the Attorney General of Ontario and the Union were joined by the Attorney Generals of Québec, New Brunswick, British Columbia and Alberta as well as several other interveners, thereby demonstrating the importance of the issue to unions, employers and governments.

The Supreme Court's majority decision in *Fraser* takes issue with the Ontario Court of Appeal's interpretation of *Health Services.* The majority of the Court clarified that *Health Services* only ruled that s. 2(d) protects "a process of collective action to achieve workplace goals." This process requires the parties to meet and bargain in good faith. The Supreme Court strongly rejected the Court of Appeal's interpretation of *Health Services* as implying that the case constitutionalized a "full-blown Wagner model of collective bargaining." The key question is not the form of labour model but whether the impugned law or state action has the *effect* of making it impossible to act collectively to achieve workplace goals. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws) or by government action, then a limit has been placed under s. 2(d) of the *Charter.*

IMPACT OF *FRASER*

The *Fraser* decision seems to have narrowed the scope of *Charter* protection for collective bargaining activities. If the Supreme Court had ruled that the *AEPA* violated the *Charter,* there would have likely been a ripple effect across the country in which a variety of similar differential labour codes for particular industries would be challenged as several of these codes do not have the protections offered by the Wagner Model. By limiting the protection by section 2(d) (freedom of association) to include only a process of

collective action to achieve workplace goals and to include a duty to meet and bargain in good faith, the Supreme Court has set a fairly low standard for compliance. Industries that have differential labour codes throughout Canada, such as farm workers and construction labourers, are therefore likely to have these codes upheld should they be challenged.

What remains to be answered is whether the complete exclusion of certain classes of workers from labour relations codes would also be acceptable to the Supreme Court. The most obvious example of this is domestic labourers, which is a common exclusion from labour codes across Canada. Furthermore, the government must continue to be cautious when implementing legislation that has the *effect* of limiting collective bargaining activities. In particular, actions that would act to undo progress made in collective bargaining agreements would presumably not be upheld by the Supreme Court in light of both *Fraser* and *Health Services.*

Noëlle Caloren
Ottawa
613.787.3536
ncaloren@blg.com

LABOUR AND EMPLOYMENT LAW GROUP

Calgary

Sharon E. Borgland	403.232.9452
Duncan Marsden	403.232.9722
Brian D. Portas	403.232.9705
Laurie M. Robson	403.232.9482

Montréal

Thomas M. Davis	514.954.3133
François Longpré	514.954.2543
Katherine Poirier	514.954.3175
Jean-René Ranger	514.954.2548
André Royer	514.954.3124
Patrick Trent	514.954.3154
Philippe C. Vachon	514.954.3134

Ottawa

Noëlle Caloren	613.787.3536
Nadia Effendi	613.787.3562
Jacquie El-Chammas	613.369.4785
Morton G. Mitchnick	613.787.3568

Toronto

S. Margot Blight	416.367.6114
Lisa Cabel	416.367.6217
Naomi Calla	416.367.6129
Matthew L.O. Certosimo	416.367.6068
Jennifer M. Fantini	416.367.6726
Melany V. Franklin	416.367.6091
James Fu	416.367.6513
Adam Guy	416.367.6601
Michelle S. Henry	416.367.6626
Robert W. Kitchen	416.367.6023
Jeffrey P. Mitchell	416.367.6226
Morton G. Mitchnick	416.367.6413
Brian D. Mulroney	416.367.6009
Genny Na	416.367.6032
Eric M. Roher	416.367.6004
Susan E. Sorensen	416.367.6017
Sarah Stiner	416.367.6571
Melanie A. Warner	416.367.6679
Robert W. Weir	416.367.6248

Vancouver

Lisa Carlson	604.632.3521
Peter Eastwood	604.640.4046
Alka Kundi	604.632.3465
Shelley-Mae Mitchell	604.640.4160
Gabriel M. Somjen	604.640.4013
Steve M. Winder	604.640.4118

IMMIGRATION GROUP

Calgary

Brian D. Portas	403.232.9705

Montréal

Darren McGuire	514.954.3105
Katherine Poirier	514.954.3175

Ottawa

Mandy Moore	613.787.3500

Toronto

Victoria Cowling	416.367.6136
Brian Dingle	416.367.6189

Vancouver

Jeffrey Thomas	604.640.4203

BORDEN LADNER GERVAIS
LAWYERS | PATENT & TRADE-MARK AGENTS

Calgary
Centennial Place, East Tower
1900, 520 – 3rd Ave S W
Calgary, AB, Canada T2P 0R3
T 403.232.9500
F 403.266.1395
blg.com

Toronto
Scotia Plaza, 40 King St W
Toronto, ON, Canada M5H 3Y4
T 416.367.6000
F 416.367.6749
blg.com

Montréal
1000, De La Gauchetière St W
Suite 900
Montréal, QC, Canada H3B 5H4
T 514.879.1212
T 514.954.1905
blg.com

Vancouver
1200 Waterfront Centre
200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744
F 604.687.1415
blg.com

Ottawa
World Exchange Plaza
100 Queen St, Suite 1100
Ottawa, ON, Canada K1P 1J9
T 613.237.5160
F 613.230.8842 (Legal)
F 613.787.3558 (IP)
ipinfo@blg.com (IP)
blg.com

Waterloo Region
Waterloo City Centre
100 Regina St S, Suite 220
Waterloo, ON, Canada N2J 4P9
T 519.579.5600
F 519.579.2725
F 519.741.9149 (IP)
blg.com