NAA – Canada Report – 2020

The Canadian Labour Relations Committee

The Canadian Labour Relations Committee ("the Committee") was constituted by the President of the National Academy of Arbitrators in December 2020.

The members of the Committee are:
Susan L. Stewart, Co-Chair - NAA - Ontario
Christopher J. Albertyn, Co-Chair - NAA - Ontario
Augustus Richardson - NAA - Nova Scotia
James C. Oakley - NAA - Newfoundland
Jacquie de Aguayo - B.C. Chair BCLRB
Ginette Brazeau - Chair, Canada Industrial Relations Board
Mark Asbell – Arbitrator, Alberta
Michelle Flaherty – Arbitrator, Quebec & Ontario

The Mandate

Part of the mandate of the Committee is to describe and analyze "significant events in Canada - strikes, notable settlements, legislation, impactful awards, legislation, etc. during the calendar year".

What follows is a summary of the significant labour and arbitration law developments over 2020:

Report

The Report is arranged by subject matter, as follows:

The Supreme Court of Canada ("S.C.C.") issued some significant decisions for labour law and labour and employment arbitration in Canada. Those decisions are addressed under the subject headings.

The standard of review of arbitral decisions

In *Canada (Minister of Citizenship and Immigration) v. Vavilov* 2019 SCC 65, in which the National Academy of Arbitrators intervened, along with the Quebec and Ontario Labour Management Arbitrators' Associations, the S.C.C. reviewed the legal standard that applies to judicial review of administrative tribunal decisions, including those by arbitrators.

The *Vavilov* decision is intended to provide clarity with respect to the deference that the Courts must give to administrative tribunal decisions, including those of arbitrators.

While the cases on review did not involve labour relations matters, the decision of the S.C.C. will, like its previous decision in *Dunsmuir v New Brunswick* 2008 SCC 9 (CanLII), [2008] 1 SCR 190, apply to judicial review applications of labour arbitration awards. In general, labour arbitrators in Canada have been afforded considerable deference on judicial review, being required to meet only a broad standard of "reasonableness". As a consequence, hitherto, a very small percentage of arbitration awards have been set aside by the Courts.

The standard of "reasonableness" is confirmed in *Vavilov*, described as a rebuttable presumption. That presumption can be rebutted by an express legislative provision setting out a different standard, or by a specific statutory appeal mechanism. As well, the presumption that reasonableness is the standard of review is rebutted where the rule of law requires the application of the standard of correctness. Those instances would include constitutional questions, questions as to the jurisdictional boundaries between administrative bodies, and general questions of law of central importance to the legal system as a whole.

The Court confirmed that the "modern approach" to statutory interpretation, consistent with the text, context and purpose of the relevant statutory provision, must be employed.

The Court noted that the expertise of the decision maker remains a relevant consideration in conducting a reasonableness review. So, for labour arbitration cases, where the expertise of arbitrators in applying labour relations statutes has been recognized, issues of statutory interpretation will likely continue to be considered in judicial review applications.

While the Court noted that reasons are not required in all circumstances, it ruled that decisions are to be justified, intelligible and transparent. This may have an impact on the degree to which arbitral reasons are scrutinized on judicial review. In particular, it may impact the writing of interest arbitration decisions, which have historically been terse, with only the conclusions of the board of arbitration being given. It may be that some explanation for the award will need to be given to justify it.

The presumption of honest and good faith dealing in the conclusion of contracts

Two S.C.C. decisions asserted the proposition that those entering into binding contracts must do so honestly, and that provisions in contracts cannot be unconscionable. These two decisions, although not from a labour arbitration, are relevant to, and binding on, arbitrators with respect to contract interpretation.

The first involved arbitration clauses between Uber and its drivers. The question was whether the arbitration provisions of the standard Uber contract were enforceable.

In *Uber Technologies Inc. v Heller*, 2020 SCC 16 (CanLII), the S.C.C. ruled that the arbitration clause in Uber's standard form services agreement was unconscionable and therefore unenforceable. The case involved a food delivery driver who had entered into a service agreement with Uber and provided services via the Uber application. The agreement required disputes to be resolved by mediation or arbitration in the Netherlands, at an estimated initial cost to the driver of approximately $14,500 US. In 2017, the driver commenced a proposed class action against Uber for violations of the Ontario Employment Standards Act, 2000. The claim was that he was an employee, not a contractor.

One issue dealt with by the SCC was whether the International Commercial Arbitration Act, 2017, governing international commercial arbitrations applied, or whether the Arbitration Act,1991, governing domestic arbitration, applied. The Court concluded that employment disputes are not commercial disputes and that, accordingly, the latter statute applied.

Another issue dealt with by the Court was whether the arbitrator or the Court should determine the validity of the arbitration clause. The Court determined that where an issue of accessibility arises, this threshold issue should be determined by the Court. The Court concluded that the financial resources required to advance a claim in the Netherlands established an accessibility issue and thus this matter was properly to be determined by the Court.

On the issue of unconscionability, the Court concluded that the inequality of bargaining power was a significant matter, with the driver having only the option of accepting or rejecting a standard form contract. Reference was made to the "gulf of sophistication" between Uber and the driver. The fact that the costs of arbitration and mediation were not disclosed was given considerable weight in support of the conclusion that the agreement was unconscionable and hence unenforceable.

The Court declined to consider the question of whether the agreement was void on the basis that it purported to contract out of the Employment Standards Act, 2000.

In a similar vein, the S.C.C. addressed the scope of the good faith obligation in contract bargaining in *C.M. Callow Inc. v. Zollinger* 2020 SCC 45 CanLII. The case involved an individual employment contract, however the issue before the Court entailed the parameters of the good faith obligation in contract negotiation, a matter frequently considered by arbitrators. Callow provided maintenance services to a group of condominium corporations pursuant to a summer and winter contract. The winter contract contained a provision that it could be terminated on 10 days' notice. The group decided to terminate the winter contract over a year in advance but waited until the summer contract was completed before informing Callow of the termination.

The trial court found that the group had acted in bad faith by withholding the fact that it intended to terminate the winter contract. This was done to ensure that Callow performed the summer contract. The group falsely represented that the contract was not in danger. The trial court judge concluded that the condominium group was in breach of the "minimum standard of honesty". The Ontario Court of Appeal accepted that there had been active deception, however concluded that there was no breach of the duty of honest contractual performance.

The majority decision of the S.C.C. rejected the analysis of the Court of Appeal. The S.C.C. concluded that, while the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies, to or knowingly misleads, another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's own actions. This decision builds upon the Court's earlier decision in *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII) that contractual parties must act in good faith with each other when concluding their contract. These principles will most likely be raised in arbitration proceedings regarding conduct in bargaining and representations made in bargaining as part of the interpretation of the collective agreement.

The S.C.C. found that the duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith. Each of the specific legal doctrines rests on a requirement of justice that a contracting party must have appropriate regard to the legitimate contractual interests of their counterparty. Each party's rights and obligations must be exercised and performed honestly and reasonably, and not capriciously or arbitrarily. No contractual right can be exercised dishonestly. This includes the obligation to correct a misapprehension caused by one's own misleading conduct.

COVID-19

Some provincial governments passed emergency legislation in response to the COVID-19 pandemic.

In Ontario, the government passed Bill 195, the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020. The Act granted the provincial government broad powers to extend and modify certain emergency orders that were previously issued under the Emergency Management and Civil Protection Act, including various work deployment orders that suspended certain collective agreement provisions for front-line health care workers. Among the provisions enacted was that hospitals could assign employees to any area of work within their scope, despite collective agreement provisions restricting the hospitals' entitlement to re-assign employees.

The arbitration award in *Heritage Green Nursing Home v Service Employees International Union, Local 1*, 2020 CanLII 50475 (ON LA) (Herlich) held that the emergency legislation altered the provisions of a collective agreement only to the extent expressly stated in the emergency statute. Consequently, since issues of pay and payment were not addressed, additional hours worked under the emergency legislation were payable at the premium rates stipulated in the collective agreement.

The Courts also came to the aid of employees to protect their health and safety interests in *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII). The union was granted an interlocutory injunction that required four privately-owned long-term care homes that had experienced COVID-19 outbreaks to implement certain precautionary measures, as required by provincial health directives, including providing access to personal protective equipment (PPE), and allowing nurses to determine the PPE they required (including N95 masks) based on their point-of-care risk assessments. The homes were further required to implement administrative controls, such as isolating residents and staff.

Similarly, in *Participating Nursing Homes v. Ontario Nurses' Association*, 2020 CanLII 32055 (ON LA) (Stout), the arbitrator issued a number of orders regarding PPE and workplace organization to ensure the health and safety of the nurses working in the nursing homes.

Also, in *Inovata Foods Corp. v. A Director under the Occupational Health and Safety Act*, 2020 CanLII 49519 (ON LRB), the Ontario Labour Relations Board required the employer, a frozen foods manufacturer, to take "every reasonable precaution in the circumstances to protect workers from the hazard of COVID-19 exposure when unable to maintain 2 m, physical distancing," including requiring workers on the production line to wear masks.

An employee's failure to follow COVID-19 precautions was found to be sufficient just cause for dismissal: *Garda Security Screening Inc. v. IAM, District 140*, [2020] O.L.A.A. No. 162 (QL) (Keller).

A dispute arose regarding nurses' entitlement to compensation for absence from work on account of their being required to self-isolate because of exposure to COVID-19 at work. In *Participating Nursing Homes v. Ontario Nurses' Association*, 2020 CanLII 36663 (ON LA) (Stout), the arbitrator found that the provisions of the collective agreement regarding income protection applied. As a result, full-time nurses absent from work for legitimate personal illness were entitled to compensation, but not part-time nurses, who did not have the collective agreement protection.

Virtual hearings

Several cases arose in the early stages of the COVID-19 pandemic in which one party (typically the employer) wished to adjourn the hearing until an in-person hearing became safe, while the other party (typically the union) wished to have the hearing proceed by video-conference, virtually, on the principle that justice delayed is effectively justice denied.

A large number of arbitral decisions were issued on the subject, among them: *AMAPCEO v. Ontario (Attorney General)*, 2020 CanLII 32959 (ON GSB) (McLean), *Southampton Nursing Home v. Service Employees International Union, Local 1 Canada*, 2020 CanLII 26933 (ON LA) (Luborsky), *Toronto Transit Commission v Amalgamated Transit Union, Local 113*, 2020 CanLII 29745 (ON LA) (J. Johnston), *Toronto Transit Commission v Amalgamated Transit Union, Local 113*, 2020 CanLII 28646 (ON LA) (Goodfellow), Lakeridge Health Corporation v Ontario Nurses' Association, 2020 CanLII 31785 (ON LA) (Abramsky), *Highbury Canco Corporation v United Food and Commercial Workers Canada, Local 175*, 2020 CanLII 35579 (ON LA) (C. Johnston), Canadian Union of Public Employees, Air Canada Component v. Air Canada (Grievance No. CHQ-17-42), [2020] C.L.A.D. No. 56 (Can. Arb.) (Nyman) dated May 25, 2020, and *Regional Municipality of Peel (Peel Regional Paramedic Services) v Ontario Public Service Employees Union, Local 277*, 2020 CanLII 48565 (ON LA) (Waddingham) dated July 20, 2020; *Hamilton v Hamilton Ontario Water Employees Association (HOWEA)*, 2020 CanLII 59546 (ON LA) (Luborsky); *BCPSEA/SD No. 68 v BCTF/Nanaimo District Teachers' Association*, 2020 CanLII 89909 (BC LA) (Rogers); *Kennebecasis Firefighters Union, IAFF Local 3591 v Kennebecasis Regional Fire Department,* 2020 CanLII 46148 (NB LA) (Fillitier); and *Hamden v. Banque Nationale du Canada 2020 QCTA 437* (Cloutier)

From British Columbia, an arbitrator's decision in favour of a virtual hearing was upheld on review by the BC Labour Relations Board

under the Code: 2020 BCLRB 99 (CanLII) | British Columbia Public School Employers' Association / The Board Of School Trustees School District No. 39 (Vancouver) v British Columbia Teachers' Association (Vancouver Elementary School Teachers' Association) | CanLII

These decisions make clear that a decision on venue or forum for the hearing is within the arbitrator's discretion, to be made on a balance of the interests of the parties concerned. During the pandemic, the presumption is that health and safety considerations predominate, and virtual hearings are the presumed norm. The party wishing a different arrangement has the burden to establish why that should be.

The arbitrator will look at streamlining procedures, such as the use of willsays for evidence-in-chief, the provision of briefs before the hearing for interest arbitrations, and the pre-hearing electronic production of all arguably relevant documents, preferably in a bundle agreed by both parties.

The argument that arbitrators are less able to evaluate credibility in a video-conference hearing, as compared to an in-person hearing, was routinely rejected on the principle that credibility is determined not primarily by demeanour, but on the coherence, probability, and consistency of the evidence, having regard to all of the other relevant, credible evidence and documentation.

As a result of these decisions, video-conference hearings became the norm from April 2020 onwards for the continuing duration of the COVID-19 pandemic.

Free speech and professional misconduct

The Saskatchewan Court of Appeal had to decide the appropriate balance between an employee's right of free speech and her professional obligations as a nurse. In *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII), the Court reviewed the decision of a disciplinary committee that had found the nurse guilty of professional misconduct for her off-duty posting on Facebook of highly critical comments on the quality of her grandfather's care at a health facility. The Court found that the decision was an unjustified infringement on the nurse's right to freedom of expression under s. 2(b) of the Charter of Rights and Freedoms, and that the disciplinary committee had failed to balance the potential societal benefits of public discourse of the issues against the nurse's professional obligations under various statutes. The Court found that the discipline committee had failed to recognize that the comments were intended to contribute to public awareness and public discourse and that the committee failed to consider that its decision "would effectively preclude [nurses] from using their unique knowledge and professional credibility to publicly advance important issues relating to long-term care." The Court continued as follows:

> [T]he right to criticize public services is an essential aspect of the "linchpin" connection between freedom of expression and democracy. In Canada, public healthcare is both a source of pride and a political preoccupation. It is a frequent subject of public discourse, engaging the political class, journalists, medical professionals, academics, and the general public. Criticism of the healthcare system is manifestly in the public interest. Such criticism, even by those delivering those services, does not necessarily undermine public confidence in healthcare workers or the healthcare system. Indeed, it can enhance confidence by demonstrating that those with the greatest knowledge of this massive and opaque system, and who have the ability to effect change, are both prepared and permitted to speak and pursue positive change. In any event, the fact that public confidence in aspects of the healthcare system may suffer as a result of fair criticism can itself result in positive change. Such is the messy business of democracy.

Discrimination and equal treatment

The S.C.C. issued an important decision on the criteria for finding discrimination in violation of human rights legislation: *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII).

The facts concerned a claim by former female police officers of the Royal Canadian Mounted Police (the RCMP). When these officers needed to take care of their own children, they job-shared. For pension purposes the RCMP classified them as part-time during the period of the job-share. This diminished their pension contributions and entitlements. They claimed adverse impact discrimination for not being treated as full-time employees, with periods of time off, as male officers were. The S.C.C. resoundingly upheld their claim.

The S.C.C. found that female employees have disproportionate responsibility for childcare and face disadvantages in balancing professional and family responsibilities. The female employees were then penalized in their later pension entitlement for being obliged to enter into a job-sharing program, that was treated as making them part-time employees, to ensure the fulfilment of their childcare responsibilities.

The S.C.C. decision is replete with important references to how discrimination cases are to be analysed and addressed. The case gives new guidelines on the type of evidence required to establish adverse effect discrimination, making such claims less onerous on the claimants.

The S.C.C. found that the pension plan rules violated the female employees' entitlement to equal treatment under s. 15(1) of the Charter because the

government could not identify any pressing or substantial objective for why job-sharers should not be granted full-time pension credit for their service during the period of the job-share that would justify the breach under s.1 of the Charter.

The S.C.C. made clear that the objective of the Charter is to ensure substantive equality, not merely formal equality, between all employees.

Wage Restraint as interference in the right to collective bargaining

The Manitoba government passed legislation limiting wage increases in the public sector over a four-year period. In *Manitoba Federation of Labour et al v. The Government of Manitoba*, 2020 MBQB 92 (CanLII), the Court found that the legislation violated the Charter right to freedom of association because it was an unjustified interference in the right of collective bargaining. It set aside the limitations imposed on bargaining by the legislation.