WHAT'S NEW

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Where has the time gone? A few months have passed without the chance to check in on the ongoing happenings of the Board and the labour community. Clearly nothing interesting has been happening in labour relations in Alberta recently …

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NEWS FROM AROUND THE BOARD

Vice Chairs

On November 6, 2013, Gerald A. Lucas, Q.C. was reappointed as a Vice-Chair of the Board for a one year term to expire on November 15, 2014. Gerry has been a Vice-Chair of the Board since 1984, and continues to bring to the Board a wealth of experience on labour board matters. His re-appointment was expressly exempted by Cabinet from the term limits which otherwise apply to members of the Board, in order to maintain the efficient operation of the Board's hearings while new appointments were trained.

On that note, on November 20, 2013, Ian J. Smith was appointed as a Vice-Chair of the Board. Before joining the Board, Ian was a lawyer and partner with the Edmonton office of Miller Thomson LLP, focusing primarily on labour relations and human rights law. He has advised and represented employers on matters such as certification, revocation and unfair labour practice applications; union organizing campaigns, strikes and picketing; employment standards matters; workplace health and safety; and human rights issues. He has experience in negotiating and administering collective agreements and representing employers in grievance and interest arbitrations. Before entering law, Ian worked for many years as a manager and equity advisor at the University of British Columbia, and has significant experience in harassment, discrimination and disciplinary matters in the workplace, particularly in the College and University setting.

Practitioners appearing before the Board may have noticed Ian "ghosting" in resolution conferences and hearings for a short time. He is now hearing a full schedule, bringing the Board back to 3 full-time Vice-Chairs.

The Board also lost a part-time Vice-Chair when the term of James Casey, Q.C. expired on December 31, 2013. Jim had been with the Board as a part-time Vice-Chair since 1999, and the Board thanks him for his contribution and service to the Board and the labour relations community over that time.

Board Member Re-Appointments

On March 28, 2014, Board Members Bruce Moffatt, Cal Ploof, Rod Schenk and Derek Schreiber were re-appointed to the Board for additional terms of 3 years.

As always, copies of the biographies of all Board Members can be found at the Board website at www.alrb.gov.ab.ca, under "About Us" / "About the Board".

Board Caucus / Spring 2014

The Board held its Spring Caucus on March 11 and 12, 2014 in Calgary. The Caucus provides an opportunity for the Board Members to share emerging issues and trends from their diverse areas of labour relations expertise, and discuss issues of importance to the Board. Among the topics discussed were issues coming before the Board relating to the Rapid Site Access Program (RSAP) and the Canadian Model for a Safe Workplace, as well as a Legal Update on both *Charter* and privacy law issues. (I note that the Board Members proved remarkably resilient to my attempts to sedate them with several hours of slumber-inducing legal pontificating!)

Board Caucus also presents an opportunity for the Board to invite notable speakers of interest to the Alberta labour relations community to speak on topics of interest, and invite the community to join us for that event. This year, the Board and our stakeholders had the opportunity to hear from the Minister of Jobs, Skills, Training and Labour, the Hon. Thomas Lukaszuk. Minister Lukaszuk spoke about various issues facing the department, and took questions from the audience, and we again thank him for taking time out of his busy schedule to speak and to meet with us.

At Caucus, the Board Members also discussed changes to two policies which may be of interest to the labour relations community. Those policies are discussed below.

Board Policies

- Social Media and Electronic Devices in Board Hearings

Given the emergence of smartphones and social media sites such as Twitter, Caucus considered whether to change its policy towards the use of electronic devices during hearings. Caucus determined that the use of such devices remains a disruption to the Board's hearing processes; accordingly, changes to the Board's Information Bulletin #4 have been approved to clarify that electronic devices must be turned off and may not be used during hearings (with the exception of use by legal counsel or representatives of parties for the purpose of aiding their presentations to the Board).

The following wording has been approved:

> Persons cannot use any electronic device in the hearing room during hearings without the Board's consent, and electronic devices must be turned off and kept out of sight during the hearing. "Electronic device" means any device capable of

> transmitting and/or recording data or audio, including smartphones, cellular telephones, cameras, video cameras or television equipment, audio recorders, computers, laptops, tablets, notebooks, personal digital assistants or other such devices. Legal counsel, instructing representatives of parties and self-represented parties are permitted to utilize electronic devices for the purpose of assisting in the presentation of their case to the Board, so long as the device is in silent mode, is not disruptive to the hearing, and is not used to record or photograph the proceedings. *See: Section 12(2)(g)*.

Information Bulletin #4 will also be revised as follows to clarify the use of devices by excluded witnesses:

> Excluded witnesses must not discuss evidence amongst themselves or with others who have been present in the hearing. While excluded the witness must not seek out or obtain, via telephone, electronic device or otherwise, information about the hearing from any person or from media reports

- Masking of Party Names in Decisions

Caucus has also asked that the Board's Information Bulletin #18 (duty of fair representation matters) be clarified concerning the processes and appropriate circumstances where party names will be masked in the publication of Board decisions. The Board will be drafting proposed revisions, taking into account the Board's obligations under the *Freedom of Information and Protection of Privacy Act*, and bringing those back to the Members at a future Caucus.

- General Review of DFR Processes

Along with this change, the Board is also undertaking a review of its procedures for dealing with duty of fair representation complaints under the *Code*. The Board routinely reviews its procedures to seek an appropriate balance between efficient processing of files and ensuring an administratively fair process to all parties. As many of you are aware, the Board's current process in DFR complaints is for an administrative panel to conduct a preliminary documentary review of the file to assess whether the case has sufficient merit to proceed to a hearing. If not, the file may be summarily dismissed. The current wording of Information Bulletin #18 can be found at: http://www.alrb.gov.ab.ca/bulletins/18bulletin.html.

As the review begins, the Board invites any input the labour relations community may wish to provide into its processes for handling DFR complaints. Please feel free to e-mail submissions to my attention by May 31, 2014 at Jeremy.Schick@gov.ab.ca.

As always, one benefit of having Board Members representing a range of sectors of the labour relations community is for them to bring input from the community on the Board's policies and processes. We encourage stakeholders to reach out to our Board Members to address topics of concern to you about the Board's policies and processes on these and other matters.

INTERESTING DECISIONS FROM THE BOARD

Alberta Union of Provincial Employees v. Crown in Right of Alberta – Cite: [2013] Alta. L.R.B.R. LD-076 (*Hyperlink*: http://www.alrb.gov.ab.ca/decisions/GE_06681A.pdf)

In this letter decision, the Board considered a complaint by the Union that section 30(2) of PSERA, making certain matters non-arbitrable in compulsory interest arbitration under that act, violates section 2(d) of the *Charter*. The Board summarily dismisses the Union's *Charter* challenge. There had been no complaint in this application that the Government's alleged refusal to discuss the non-arbitrable violated PSERA. Following the Supreme Court of Canada's decision in *Fraser*, the Board finds there can have been no violation of the *Charter* where there had not been an attempt to make the statutory regime in question work. The Board had not been given the opportunity to determine whether the alleged conduct of the Government constituted a contravention of PSERA, and if so, to remedy for such breach.

Alberta Union of Provincial Employees v. Crown in Right of the Province of Alberta – Cite: [2014] Alta. L.R.B.R. 1
(*Hyperlink:* http://www.alrb.gov.ab.ca/decisions/GE_06762.pdf)

In this formal decision, the Board rejects an application by the Union for Notices to Attend and Produce for the Premier of Alberta and two cabinet ministers. The Board's power to order the attendance of witnesses under the *Code* is subject to the same limitations and rules concerning the compellability of witnesses as govern the courts in civil cases. This includes the parliamentary privileges of MLAs, including the parliamentary privilege of testimonial immunity, at a minimum while the Legislative Assembly is "in session". Having been advised by the Legislative Assembly that it is in session, the Board has no authority to issue a Notice to Attend and Produce to a Member of the Legislative Assembly.

UNIFOR Local 707, Certain Employees of P&H MinePro Services Canada Ltd., P&H MinePro Services Canada Ltd. and CEP Local Union No. 707 – Cite: [2014] Alta. L.R.B.R. LD-002 (*Hyperlink*: http://www.alrb.gov.ab.ca/decisions/RV_01175.pdf)

In this letter decision, the Board considers a revocation application. A previous revocation application had been brought within 90 days, but not withdrawn or dismissed. In such circumstances, the Board may consider the second application to be an abuse of process. However, in this case, the evidence did not show an intention to avoid the requirement for consent that would be applicable had the previous application been withdrawn, nor was there any evidence of disruption or prejudice to the parties.

The Board further considers the eligibility of certain employees to vote in the revocation vote. The Board's ability to consider evidence of agreement between the parties regarding the scope of the bargaining unit is not limited to solely cases involving mature bargaining relationships. In this case, the Union had told certain employees they were included in the bargaining unit, and would need to challenge their inclusion. Having done so, it is inappropriate for the Union to now pursue the exclusion of those employees for the purposes of the revocation vote.

Timothy Charles Anderson v. Health Sciences Association of Alberta – Cite: [2014] Alta. L.R.B.R. LD-007 (*Hyperlink:* http://www.alrb.gov.ab.ca/decisions/GE_06738.pdf)

In this letter decision, the Board discusses timeliness in the context of reconsideration applications. There is no statutory time limit for a reconsideration application and the Board has a broad discretion to consider the unique circumstances of each case. In some cases, the importance of certainty will bar reconsideration after a relatively short period, absent exceptional circumstances. In reconsiderations of duty of fair representation cases, the familiar 90 day period is a reasonable guideline, and a satisfactory reason will be necessary for greater delay.

Allan Ball v. Calgary Fire Fighters Association, Local 255 I.A.F.F. and The City of Calgary – Cite: [2014] Alta. L.R.B.R. LD-008
(*Hyperlink:* http://www.alrb.gov.ab.ca/decisions/GE_06752.pdf)

In this letter decision, the Board summarily dismissed a duty of unfair representation complaint as premature. The Union had chosen to pursue a group of grievances, including the Complainant's, by first advancing a test case. While this caused delay to the Complainant, the Union's strategy of advancing a test case was not arbitrary, discriminatory or wrongful. As the Complainant's grievance was still being pursued, the complaint was premature.

INTERESTING DECISIONS FROM OTHER JURISDICTIONS

Alberta (Information and Privacy Commissioner) v. UFCW, Local 401 – *Cite:* 2013 SCC 62

In this case, the Supreme Court of Canada finds the Alberta *Personal Information Protection Act* ("PIPA") unconstitutional in a case relating to picket line activity. The union was originally found to have breached PIPA by videotaping and photographing individuals crossing a picket line. The Supreme Court finds PIPA to be unconstitutional, in that it violates the union's right to freedom of expression by restricting collection of personal information for legitimate labour relations purposes. There is no express finding about the appropriateness of any of the specific conduct of the union in this case. However, the Court stresses the importance of expression in labour disputes, and finds that PIPA does not permit the important labour relations context of picket line expression to be balanced against the privacy interests of individuals. Accordingly, PIPA is declared invalid. However, the Court suspended the declaration of invalidity for 12 months to permit the Alberta Legislature to consider PIPA as a whole in deciding how to best make it constitutionally compliant.

Bernard v. Canada (Attorney General) – Cite: 2014 SCC 13

In this case, the Supreme Court of Canada considers issues of privacy and an order of the Public Service Labour Relations Board ("PSLRB") requiring the Employer (Government of Canada) to disclose employee home contract information to the Union on a quarterly basis.

In previous proceedings, the Federal Court of Canada had required the PSLRB to reconsider a consent order agreed to between the parties requiring the disclosure, and to take into account privacy issues. The PSLRB then essentially reconfirmed its order, with some additional provisions concerning privacy. An employee again challenged the PSLRB order as a violation of the federal *Privacy Act*, and further on s. 2(d) *Charter* grounds as violating her freedom not to associate with the Union.

The Supreme Court's decision confirms the provision of information in this case does not violate the federal *Privacy Act*, as it is a use of the information for a purpose "consistent with" the reason for its collection – that is, to contact employees about the terms and conditions of employment. Alberta's *Freedom of Information and Protection of Privacy Act* (governing public body employers) and *Personal Information Protection Act* (governing private employers) have similar sections permitting use and disclosure of information for purposes "consistent" with the reasons for its collection. The Supreme Court also confirms the provision of information to a Union in order to carry out its representational function does not violate any freedom under section 2(d) of the *Charter* to not associate with the Union.

Cadieux v. ATU, Local 1415 – Cite: 2014 FCA 61

In this case, the Federal Court of Appeal considers a judicial review of a decision of the Canadian Industrial Relations Board (the "Board") in a duty of fair representation case. The Court held in a circumstance where the Board had contradictory versions of events on an issue which it considered determinative on whether the duty had been breached, procedural fairness required an oral hearing. The Court further overturned the Board's determination the duty of fair representation had not been breached on the sole basis that the employee had not fully participated in the union's investigation and decision-making processes. While the employee's participation is a relevant factor in assessing the union's conduct, the mere fact of non-participation cannot, in and of itself, preclude the Board from finding the union breached its duty.