WHAT'S NEW

ISSUE 2 – July 2014

A few months have passed since the last update, and I hope a pleasant, sunny Alberta summer finds you all well. There have been a number of interesting decisions from the Board and the courts which may be worth a review – all of which I recommend reading on a patio with a cold drink in hand!

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NEWS FROM AROUND THE BOARD

Board Members

On May 28, 2014, the Board says goodbye to 3 long-serving board members in Tom Hesse of UFCW, Pam Kirkwood of the City of Edmonton, and Grace Thorstenson with UUMA. All three have served on the Board since 2002. We thank them all for their commitment, expertise and dedication to the Board and the labour relations community.

Year End Statistics

The Board saw a slight decrease in its number of applications received during the 2013/2014 fiscal period from the previous year, from 913 to 822. As discussed in a previous What's New, a substantial component of that decrease continues to be the effect of the Board no longer accepting duty of fair representation complaints against individuals acting on behalf of trade unions, which reduces the number of "duplicate" complaints.

The Board conducted 386 hearings in 2013/2014, down from 427 the previous year. 73% of applications were settled with Board involvement before reaching a formal hearing, which is an increase from 70% the previous year.

Comparing some major categories of applications year to year:

Category of Application	2012/2013	2013/2014
Bad Faith Bargaining	42	51
Certifications	132	90
Determinations	34	70
Duty of Fair Representation	92	44
Employer Unfair Labour Practice	370	331
Illegal Strike/Lockout and Picketing	11	21

Revocations	28	23
Supervised Strike / Lockout Votes	40	41
Union Unfair Labour Practices	23	20

The average number of days from the acceptance of an application to the date of first hearing dropped this year from 63 days to 58 days. 84% of decisions were rendered within 90 days of the completion of hearing, down just slightly from 85% last year.

Policy Review

As discussed in the last What's New, the Board continues to review its procedures for dealing with fair representation complaints under the Code. The Board's current procedures are described in Information Bulletin #18, which can be found on the Board's website at: http://www.alrb.gov.ab.ca/bulletins/18bulletin.html. The Board invites any input the labour relations community may wish to provide into these procedures. Please feel free to e-mail any submissions to my attention in by August 31, 2014 at Jeremy.Schick@gov.ab.ca.

INTERESTING DECISIONS FROM THE BOARD

Communications, Energy and Paperworkers Union of Canada, Local Union No. 52-A v. Edmonton Catholic School District No. 7 – Cite: [2014] Alta. L.R.B.R. LD-019 (*Hyperlink*: http://www.alrb.gov.ab.ca/decisions/GE_06518.pdf)

In this letter decision, the Board considered the Union's request for a determination whether early learning facilitators employed by the School District in various traditional and non-traditional classroom settings fell within the Union's bargaining unit of "support employees working in schools". The facilitators had greater independence than most educational assistants in the bargaining unit, and responsibility over family program planning.

In light of the expansive definition of "school" in the *School Act*, the Board found the bargaining certificate description of work "in schools" includes learning environments beyond the traditional schoolhouse. The increased level of responsibility and independence in the facilitator position was not inconsistent with the definition of "support" in the certificate. The duties of the facilitator could be regarded as another step in increasing responsibilities done by progressively higher levels of educational assistants within the unit. The prime function of the facilitator position and others in the bargaining unit is to provide non-teaching support to educational programs of the employer. The facilitator position was declared to be part of the Union's bargaining unit.

SAIT Academic Faculty Association v. The Board of Governors of the Southern Alberta Institute of Technology – Cite: [2014] Alta. L.R.B.R. LD-021

(*Hyperlink: http://www.alrb.gov.ab.ca/decisions/GE_06616.pdf*)

In this letter decision, the Board considered a summary dismissal application by SAIT, relating to the Faculty Association's application for a declaration that non-academic staff fee-for-service instructors were members of the Faculty Association and that its collective agreement with SAIT applied to those instructors. SAIT applied for summary dismissal on the basis the Faculty Association could not represent non-academic staff.

The Board considered the powers of a faculty association under the *Post-secondary Learning Act*, and found the Faculty Association cannot represent non-academic staff. A faculty association's powers are limited to those contained in that Act, which limits it to representing and negotiating on behalf of academic staff members.

Note: the Faculty Association filed a judicial review of this decision (Q.B. Action No. 1401-06177).

Alberta Union of Provincial Employees v. Supports for Artspace Independent Living Inc. – Cite: [2014] Alta. L.R.B.R. LD-022
(*Hyperlink*: http://www.alrb.gov.ab.ca/decisions/GE_06844A.pdf)

In this letter decision, the Board considered an application by the Union to declare an illegal lockout by the Employer. The Union's workers were on strike, but then gave one day's notice the employees would return to work, clearly contemplating future intermittent strike activity. The Employer did not permit the workers to return, stating they could return in 7 days. No lockout notice was provided. The Employer argued the subjective element of the definition of "lockout" in s. 1(p) of the *Code* was not met, stating its motivation was continuity of care, rather than to compel the employees to accept terms or conditions of employment.

The Board declared an illegal lockout had occurred. The delay contemplated by the Employer was so far beyond what would be reasonably necessary to transition care that it suggested the ulterior motive of preventing intermittent strike activity. The Employer's purpose of furthering its interests and undermining the union's position in the labour dispute meets the subjective element. An employer wishing to prevent intermittent strike activity can do so by legally locking out in accordance with the requirements of the *Code*.

Alberta Union of Provincial Employees v. Alberta Health Services, Calgary Laboratory Services and Health Sciences Association of Alberta – Cite: [2014] Alta. L.R.B.R. 8
(*Hyperlink: http://www.alrb.gov.ab.ca/decisions/GE_06612.pdf*)

In this formal decision, the Board considered a common employer application by AUPE dealing with Calgary Lab Services ("CLS"), a fully owned subsidiary of Alberta Health Services ("AHS"). There are two bargaining units of CLS employees represented by HSSA. AUPE argued the "valid labour relations purposes" justifying a common employer declaration were to obtain superior pension benefits for the employees, reduce fragmentation, and to serve the purpose of the *Regional Health Authority Collective Bargaining Regulation*.

The Board denied the common employer application, as no valid labour relations purpose was established. The *Regional Health Authority Collective Bargaining Regulation* is interpreted strictly to apply only to employees employed exclusively by a regional health authority. Applying the Regulation to CLS would risk undermining the vested statutory right of CLS and its employees to access the strike and lockout provisions of the Code, by mixing them in a bargaining unit with AHS and its employees who are prohibited from engaging in strike or lockout activity.

INTERESTING DECISIONS FROM THE COURTS

Government of Alberta v. AUPE – *Cite:* 2014 ABCA 197

In this case, the Alberta Court of Appeal considered the validity of a contempt order issued by the Court of Queen's Bench finding the Union in contempt for failing to comply with filed Directives of the Board. The Directives arose from a wildcat strike of employees at several correctional facilities.

The Court of Appeal upheld the finding of contempt, but struck various paragraphs of the contempt order as violating the Union's freedom of expression. These paragraphs had required the Union to remove any reference to support of the strike from its website and not publish any statements supporting the strike, required the Union leadership to publish on its website a statement encouraging an end to the strike, and prohibited the Union from publishing its version of news relating to the strike.

The paragraphs clearly affected the Union's expression, and would be permissible only if justified under section 1 of the *Charter*. In a contempt application, justification requires balancing the competing interests of the Union's freedom of expression and the proper administration of justice. The key questions are whether there were reasonably available alternatives to avoid the risk to the administration of justice, and whether the benefit of the order outweighed its negative effect on the Union's freedom of expression. The Court held there was no evidence to support the extent of the limitation, and that lesser measures were called for to ensure compliance with the Board's Directives than those imposed in the order.

UFCW, Local 503 v. Wal-Mart Canada Corp. – Cite: 2014 SCC 45

In this case, the Supreme Court of Canada found section 59 of the Quebec *Labour Code,* which imposes a statutory freeze on changes to conditions of employment during certification, can be violated by a total closure of the business.

Wal-Mart argued "change in conditions of employment" does not encompass termination of employment. The Court held that "condition of employment' is a flexible concept encompassing anything having to do with the employment relationship individually or collectively. The right to maintain employment is a basis for a condition of employment, subject to the proper exercise of management powers.

To show a breach of Quebec's section 59 statutory freeze, the union must show the alleged change is inconsistent with the "business as usual" test, or as the Court states, "normal management practice". Wal-Mart argued section 59 cannot include total closures because, as total closure is never "normal management practice", then any total closure would be a violation. The Court disagreed, holding "normal management practice" includes either: (a) the employer's past management practices, or (b) what would be consistent with the actions of a reasonable employer in the circumstances (so as to account for emerging business issues which had not been dealt with in past practice). Such changes would not violate the statutory freeze.

The Court held the arbitrator's finding of breach was reasonable. The Union had led evidence the store was doing well financially, and Wal-Mart adduced no evidence to show closing such a store was consistent with either its past practices or those of a reasonable employer.

Readers will note the Alberta *Code*'s certification freeze (s. 147(1)) and bargaining freeze (s. 147(2)) sections have similar wording, barring alteration of employment terms or conditions, rights or privileges, with an exception for "established custom or practice of the employer" (the Alberta *Code*'s version of the "business as usual" test). Consistent with the *Wal-Mart* decision, the Board has previously found terminations as a result of closures may breach s. 147 (see *Central Web Offset Ltd.*, [2008] Alta. L.R.B.R. 289). Of interest going forward is the Supreme Court's adoption of this particular analytical framework towards statutory freezes and "first time" or "single" events (such as a business closure).