KOSKIE MINSKY
JUSTICE MATTERS

Labour Law

A newsletter highlighting matters of interest to the labour relations community.

The Supreme Court of Canada Affirms Deference to Administrative Tribunals that Engage Charter Rights

In *Law Society of British Columbia v Trinity Western University*[1] and a companion appeal, *Trinity Western University v Law Society of Upper Canada*,[2] the majority of the Supreme Court of Canada affirmed the appropriate test for reviewing the decisions of administrative tribunals that engage rights found in the *Canadian Charter of Rights and Freedoms*. This is significant for those who practice labour law as it confirms that the courts will show deference to administrative decision makers that are called upon to consider Charter rights.

The Decision

Trinity Western University ("TWU") is an evangelical Christian university in Langley, British Columbia that planned to open a law school. In 2014, both the Law Society of British Columbia ("LSBC") and the Law Society of Upper Canada ("LSUC") declined to recognize TWU as an approved faculty of law. At the heart of both decisions was the proposed law school's covenant, which would have required students to sign a document agreeing not to engage in sexually intimate same-sex relationships while attending the school. On judicial review, the Supreme Court of British Columbia quashed the LSBC's decision and the British Columbia Court of Appeal dismissed the LSBC's appeal. In Ontario, both the Divisional Court and the Ontario Court of Appeal upheld the LSUC's decision.

The LSBC appealed to the Supreme Court of Canada, which reversed the decision of the BC Court of Appeal, endorsing the LSBC's decision not to approve the proposed TWU law school. TWU simultaneously appealed the Ontario Court of Appeal's decision. Both cases were heard together and a majority of the Supreme Court sided with the law societies, allowing the LSBC's appeal and dismissing TWU's appeal of the Ontario decision.

In its reasons, the majority of the Court affirmed the prevailing test for judicial review of administrative

decisions which engage the Charter, known as the *Doré/Loyola* framework. This was the framework used by the Ontario Labour Relations Board in its recent decision in *Govan Brown*, where it found that the date of application test in construction industry certification proceedings did not violate freedom of expression, as protected under s.2(b) of the *Charter*, nor freedom of association, as protected under s.2(d) of the *Charter*. You can find the details of this decision in the March 29th, 2018 edition of the KM Labour Law Blog.

The first step of the *Doré/Loyola* test is to determine whether a Charter right or value is engaged by the administrative decision. If it is, the court must then ask, considering the Charter interest at stake, the nature of the decision, and the factual and statutory context, whether the decision maker has proportionately balanced the Charter protections that are engaged.

The majority found the decisions of the LSBC and LSUC decisions to be reasonable because, despite the fact that both law societies had limited the Charter's protection of freedom of religion for students wishing to attend TWU's law school, the limitation proportionally balanced this Charter right with the statutory objectives that each is governed by; namely, to act in the public interest. The majority held that it was not in the public interest to accredit a law school which restricted access to LGBTQ students.

Implications for Labour Law

Significantly, the majority of the Court reinforced the principle that administrative decision makers, including arbitrators and labour relations boards, are experts at balancing Charter protections with the statutory objectives of their enabling statutes and are therefore in the best position to account for Charter protections in a given factual context. The Supreme Court's decision confirms that reviewing courts will continue to be deferential to labour tribunals that adjudicate Charter claims, provided that their decisions fall "within the range of possible, acceptable outcomes."

[1] 2018 SCC 32.

[2] 2018 SCC 33.

Authored by Adriana Zichy, Summer Student

Issues over Personal Emergency Leave and Personal Emergency Pay Resolved by Labour Board

As many readers are already aware, the new Personal Emergency Leave provisions in s. 50 of the *Employment Standards Act*, as well as the provisions in the Regulations that provide an exemption to construction employers allowing them to pay .8% of an employee's hourly rate or wages ("Personal Emergency Pay") in lieu of providing paid Personal Emergency Leave (O. Reg 285/01, s. 3.0.1), both of

which were ushered in through the *Fair Workplaces, Better Jobs Act* (better known as Bill 148), have been a source of confusion and controversy since they became effective on January 1, 2018. The source of the confusion with respect to both s. 50 and the regulation has been an ongoing ambiguity over the appropriate baseline to employ in making payments to employees. Should employees be paid their base rate, their full wage package (including vacation, benefits, etc.), or something in the middle? Should premium and overtime pay be included? How much discretion should construction employers have in determining whether to offer paid Personal Emergency Leave or Personal Emergency Pay? If employers pay their employees .8%, how far back do they have to go?

Koskie Minsky, on behalf of its clients the IBEW Electrical Power Council of Ontario and the Ontario Sheet Metal Workers' Conference, filed grievances against the Electrical Power Systems Construction Association (EPSCA), and together with EPSCA, put the most pressing questions affecting employers, unions and employees with respect to the operation of Personal Emergency Leave and Personal Emergency Pay before the Labour Relations Board for resolution. On July 6, 2018, Chair Bernard Fishbein issued a decision, available **here**, addressing seven questions agreed upon by the parties. The questions, and the Board's decision on each, are listed below.

1. Is it an unfair labour practice and/or a breach of the EPSCA Collective Agreement (in which EPSCA recognizes the Union as the exclusive bargaining agency for bargaining unit employees for employers bound to the collective agreement) and/or a breach of the EPSCA Agreement's Wages and Pay Procedure provisions to unilaterally pay bargaining unit members .8 percent Personal Emergency Pay pursuant to section 3.0.1 of O. Reg. 285/01 without the agreement of the trade union?

The Board held that EPSCA's employers did not violate the wage provisions or recognition provision of the EPSCA Collective Agreement by unilaterally deciding to pay bargaining unit members .8% Personal Emergency Pay without the agreement of the trade union. Employers would appear to be free to make this decision without the Union's input.

2. In order to fall within the exemption described in section 3.0.1 of O. Reg. 285/01, is .8 percent Personal Emergency Pay to be calculated on the base rate or the wage package or something else?

The Board held that .8% Personal Emergency Pay is not to be calculated on the full Wage Package (which would include all benefits) or the Base Rate; it is properly calculated on the Base Rate plus vacation & holiday pay plus any applicable premiums, such as overtime or shift premiums.

3. In order to fall within the exemption described in section 3.0.1 of O. Reg. 285/01, must .8 percent Personal Emergency Pay be paid on "hours worked" or "hours earned"?

In light of the Board's response to Question #2, employers who opt to pay .8% Personal Emergency Pay must calculate the payment on "hours earned," not "hours worked"; i.e. they must include vacation and holiday pay plus any applicable premiums, such as overtime or shift premiums.

4. In order to fall within the exemption described in section 3.0.1 of O. Reg. 285/01, must .8 percent Personal Emergency Pay be paid on all hours worked in a week (including overtime hours) or on a maximum of 40 hours per week (that is, the regular hours of work in the collective agreement)?

The Board held that .8% Personal Emergency Pay is paid on all hours worked in a week (including overtime hours) and is not limited to the number of hours in a regular work week.

5. In order to fall within the exemption described in section 3.0.1 of O. Reg. 285/01, must .8 percent Personal Emergency Pay be paid retroactively to January 1, 2018?

The Board held that, indeed, in order to fall within the exemption described in section 3.0.1 of O.Reg. 285/01, employers must pay Personal Emergency Pay for the entire calendar year. Hence, if employers begin to pay Personal Emergency Pay after January 1, they must pay it retroactively to January 1.

6. Where an employee has already received one paid Personal Emergency Leave day from a Contractor, may the employer decline to pay Personal Emergency Pay to that employee so that the employee would remain entitled to one further paid day of leave under section 50 of the Employment Standards Act prior to January 1, 2019?

The Board held that if an employee has already taken one paid Personal Emergency Leave day before an employer decides to pay.8% of wages to its employees, the employer may decline to pay .8% Personal Emergency Pay to that employee, and the employee is instead entitled to a second day of paid Personal Emergency Leave, which is to include the base rate plus vacation and holiday pay for all hours that the employee would have worked had the employee not taken the day off.

7. Regarding the employer's pay obligation when an employee takes a paid day of leave under section 50 of the Employment Standards Act, should the Employer be paying and remitting a day's pay based on the Wage Package or some other amount?

The Board held that employees who take Personal Emergency Leave days should be paid their base rate plus vacation and holiday pay for all hours that the employee would have worked had the employee not taken the day off. (Note that this provision applies to all non-construction employees as well as construction employees who do not receive .8% Personal Emergency Pay).

We feel that the Board's decision answers most of the outstanding questions that have confronted unions, employees and employers in Ontario regarding the implementation of Personal Emergency Leave pay and Personal Emergency Pay and is likely to be the guiding precedent on this issue moving forward.

US Supreme Court Rules Against Mandatory Public Sector Union Fees

> ". . . the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy . . . The First Amendment was meant for better things. It was not meant to undermine but to protect democratic governance – including over the role of public-sector unions."
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> – Justice Kagan, dissenting

On the last day of its term, the U.S. Supreme Court released *Janus v American Federation of State, County, and Municipal Employees, Council 31*, a much-anticipated ruling over public sector union fees.

In a 5-4 decision, the Court ruled that requiring public sector employees to pay mandatory agency fees violated the First Amendment's guarantee of freedom of speech. "Agency" or "fair share" fees refer to dues that unions use to further their activities in support of their members, such as collective bargaining and filing grievances.

Janus overturns the landmark 1977 decision *Abood v Board of Education*, in which the Supreme Court ruled that it was unconstitutional for public sector unions to use mandatory union dues for explicitly political purposes, such as supporting a political candidate. In *Abood*, the Court ruled that this particular use of mandatory fees violated the First Amendment by compelling employees to support political causes regardless of their own beliefs. Mandatory agency fees, on the other hand, were still permissible, the Court ruled, because they directly served and benefited those employees who paid them. After *Abood*, approximately 22 states allowed public unions to deduct mandatory agency fees, while twenty-eight states legislated to prohibit it.

One of the 22 states that permitted mandatory agency fees was Illinois, where the petitioner in this case, Mark Janus, worked for the government as a child support specialist. He objected to his union's bargaining positions, which he felt did not appreciate the current fiscal crises in Illinois, and he did not wish to support those positions through agency fees.

Justice Alito, writing for the majority of the Court, found in favour of Janus. The *Abood* decision, the majority held, does not adequately account for the fact that public sector bargaining is inherently political because of its potential to impact public budgets. The Court ruled that avoiding “free riders” – employees who would opt out of agency fees but still benefit from the union’s bargaining – is not an adequate justification for violating the First Amendment. Accordingly, Justice Alito wrote, “neither an agency fee nor any other form of payment to the public-sector union may be deducted from an employee, nor may any other attempt be made to collect such payment, unless the employee affirmatively consents to pay.”

As Justice Kagan wrote in her powerfully-worded dissent, the majority’s ruling represents one of the most significant departures from precedent in the history of the Supreme Court. As Justice Kagan noted, *Abood* is not a dusty decision fading from legal memory, but is embedded in the law and the labour relations of the United States.

Indeed, *Janus* introduces radical changes for public unions, which, in twenty-two states, are bracing themselves to take a big hit. Following Justice Alito’s ruling, a union member will not just have the choice to opt out of fees – she will by default not contribute unless she affirmatively opts in.

At the same time, private sector unions can be cautiously optimistic that the same fate is not in store for them. While the recent nomination of ultra-libertarian Brett Kavanaugh spells trouble for the labour movement more broadly, the *Janus* majority emphasized the differences between public- and private-sector bargaining in finding against the former.

Private and public sector American unions alike, however, have good reason to envy organizers to the north, where *Charter* rights offer extensive protections to labour unions. In 1991, the Supreme Court of Canada unanimously ruled in *Lavigne v OPSEU* that public sector unions can use mandatory fees for both bargaining and explicitly political lobbying. In more recent years, the Supreme Court of Canada has also held that strikes are a constitutionally protected form of freedom of association.

Still, Canadian organizers should be mindful of the international wave of conservatism that this decision represents, particularly in Ontario, where unions have four long years of Doug Ford to contend with.

Authored by Lily Hassall, Summer Student

OHRC Releases Annual Report

On June 30, 2018 the Ontario Human Rights Commission (the "OHRC") released its Annual Report, entitled *Impact today, investment for tomorrow.* The report tracks the steps taken by the OHRC from April 1, 2017 to March 31, 2018, to fulfil the commitments made in their 2017-2022 Strategic Plan. The report focuses on four main areas of commitment: reconciliation, the criminal justice system, poverty and education.

Reconciliation

The OHRC has taken initial steps towards reconciliation with Indigenous peoples by engaging in meaningful discussions about human rights issues. The OHRC is hopeful that these discussions will foster relationships with Indigenous communities, which will in turn help to create a human rights system that adequately accounts for Indigenous perspectives and experiences.

The report reveals that steps have also been taken towards ending overrepresentation of racialized children in the child welfare system. In 2016, the OHRC conducted a public interest inquiry which confirmed overrepresentation within many Ontario organizations. The OHRC has recommended that the government, along with child welfare organizations, be accountable for taking steps to address institutional and societal causes of racial disparities in this area.

Criminal Justice System

One of the OHRC's goals is to establish "accountability in the criminal justice system."

The OHRC has engaged in communal discussions to enhance its understanding of racial profiling, and to hear from those who have experienced the phenomenon firsthand. Recognizing the prevalence of racial profiling of black individuals in Toronto, the OHRC has initiated an inquiry into Toronto Police Services. The OHRC seeks to develop effective solutions through the inquiry and discussions with individuals and communities affected by racial profiling.

Steps are also being taken to address the discriminatory treatment of incarcerated persons with mental illnesses and disabilities. A human rights complaint was launched by the OHRC against the provincial government after reports indicated a continued reliance on solitary confinement for inmates with mental illnesses and disabilities, contrary to its *Jahn* settlement commitments. As a result, the government has been ordered to take certain steps to improve policy in this area.

The OHRC intervened in the human rights case, *The Estate of Kulmiye Ageneh v. Mental Health Centre Penetanguishene,* which arose from the death of Kulmiye Aganeh at Waypoint Centre for Mental Health Care. The OHRC raised human rights issues regarding the intersectionality of race, religion and mental health as well as the duty to accommodate. The settlement reached in that case requires the Centre to take various steps towards enhancing human rights protections moving forward.

The Commission played a role in including human rights protections in the *Correctional Services and Reintegration Act,*

the new act governing corrections, as well as the *Safer Ontario Act,* which governs police services.

The report reveals the Commission's commitment to ending the stigma faced by police officers who die as a result of mental health injuries incurred on the job.

Poverty

The report tracks the OHRC's efforts to learn more about the relationship between poverty and discrimination. The Commission has heard directly from individuals experiencing poverty to better understand the issues they face.

As part of its efforts to improve human rights protections for those living in poverty, the OHRC continues to advocate for the addition of poverty as a protected ground under the *Ontario Human Rights Code* (the "Code").

The OHRC intervened in a case that reached the Supreme Court of Canada, *British Columbia Human Rights Tribunal v. Schrenk*, which found that human rights protection in the employment context is not limited to protection against the actions of superiors. Rather, it protects against all discrimination and harassment linked to employment.

The OHRC urges the government to repeal the *Safe Streets Act,* which in effect punishes people living in poverty, who are often part of other Code-protected groups.

Education

The OHRC is critical about the effectiveness of the Code in terms of protecting against discrimination in education, and is focused on removing barriers in access to education for certain groups.

To address the educational barriers faced by students with disabilities, the OHRC has released policy statements entitled "The duty to accommodate", and "Don't confuse accommodating mental health with lowering standards." The Commission is working on completing an updated "Policy on accessible education for students with disabilities" which will provide guidance on how to reduce barriers to education for students with disabilities. To account for barriers distinct to First Nations students with disabilities, the OHRC sent a letter to the Minister of Education.

In April 2017, the OHRC released the report "With learning in mind: Inquiry report on the systemic barriers to academic accommodation for post-secondary students with mental health disabilities," which details the Commission's recommendations to addressing barriers specific to universities and colleges in Ontario, and the steps those institutions have taken in response.

The Commission voiced their concerns over a policy implemented by the University of Toronto that could have a disparate impact on students with mental illnesses and disabilities by unilaterally placing them on leave. In response, the policy has been suspended.

For those interested, the full report can be accessed online at:

http://www.ohrc.on.ca/en/impact-today-investment-tomorrow-annual-report-201718

Authored by Demi Cartwright, Articling Student

This edition of Talking Union was produced and edited by the following members of the Labour Law Group at Koskie Minsky LLP

Daniel Anisfeld, Associate

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