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# YOUR PARTNERS ARE NOT YOUR EMPLOYEES: SUPREME COURT OF CANADA CLARIFIES THE APPLICATION OF THE CONTROL/DEPENDENCY TEST

*— Dana Hooker and Jeff Bastien. © Dentons Canada LLP. Reproduced with permission.*

In 2009, John McCormick, an equity partner in the law firm Fasken Martineau DuMoulin LLP (the "Firm") filed a complaint with the British Columbia Human Rights Tribunal, alleging the Firm's requirement that equity partners retire from the partnership and divest their equity at age 65 was age discrimination in employment, contrary to section 13 of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "Code").

The Firm applied to have the complaint dismissed on the basis that the matter was not within the jurisdiction of the tribunal, and that there was no prospect that the complaint would succeed. The Firm's primary position was that because Mr. McCormick was an equity partner in the firm, there was no employment relationship that could be the subject of a complaint under section 13 of the Code. The Tribunal denied the Firm's application to dismiss however, and concluded that the relationship between Mr. McCormick and the Firm was one of "employment" for the purposes of the Code.

On judicial review, Justice Bruce of the Supreme Court of British Columbia agreed with the Tribunal, indicating that the application of the Code must be based on a conclusion that the complainant and the alleged offender are in an employment relationship in fact and in substance. In Mr. McCormick's case, many of the attributes of his relationship with the Firm were the same as those found in a traditional employer/employee relationship and therefore the Tribunal's decision to deny the Firm's application to dismiss was justified.

The Court of Appeal disagreed however, and held that despite the broad, liberal and purposive interpretation that must be given to the Code, it is a legal impossibility for a partner to be employed by the partnership of which he or she is a member. The fact that the Firm's management may exercise similar aspects of control over the partners as may be exercised by the management of a corporation over its employees does not change the relationship from one of partners running a business to one of employment by one group of partners over an individual partner. Accordingly, in a unanimous decision the Court of Appeal determined that there was no employment relationship, so the complaint should be dismissed. Mr. McCormick was subsequently granted leave to appeal this decision of the Court of Appeal to the Supreme Court of Canada.

On May 22, 2014 the Supreme Court of Canada released its highly anticipated decision dismissing Mr. McCormick's appeal. Unlike the Court of Appeal which held that as a rule, it was impossible for a partner to be employed by the partnership of which he or she

was a member, Madam Justice Abella, on behalf of a unanimous court, took a more contextual approach holding that the primary question was to examine the essential character of the relationship between Mr. McCormick and the Firm and the extent to which it was a dependent relationship. While Justice Abella agreed with the Court of Appeal that on the circumstances of this case, it was impossible for Mr. McCormick, an equity partner in the Firm, to be employed by the partnership, she refused to close the door on finding a partner could be an employee in other situations. The key, according to Justice Abella, was "examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker" (at para. 23).

In this case, the Supreme Court confirmed that the Code is quasi-constitutional legislation and that the definition of employment for the purposes of the Code must be approached "consistently with the generous, aspirational purposes set out in section 3 of the Code and understood in light of the protective nature of human rights legislation which 'is often the final refuge of the disadvantaged and the disenfranchised' and of 'the most vulnerable members of society'" (at para. 19, references omitted). Nevertheless, even considered in this philosophical framework, the Court found that the protections of the Code could not extend to Mr. McCormick.

Importantly, Justice Abella held that control and dependency are more than a function of whether a worker receives immediate direction from or is affected by the decisions of others, but whether the employee has the ability to influence decisions which critically affect his or her working life. In the case of Mr. McCormick, as an equity partner for some 30 years, he was part of a collective of individuals who had control over workplace conditions and remuneration — i.e. he was part of the collective employer and was not necessarily someone who was in a vulnerable position *vis-à-vis* that group. The Firm's management structure and administrative policies to which Mr. McCormick was subject were not viewed as limitations on his autonomy making him dependent on the Firm, but rather, were viewed as necessary incidents of its management. Furthermore, though his income was pooled with his colleagues, his remuneration was set in accordance with his contributions to the Firm, in accordance with policies he would have had a right to vote to implement, and he drew income from the Firm's profits and was liable for its debts and losses. Overall, the Court found that he was not working for the benefit of someone else, but to his own benefit.

Referring specifically to the decision of the Human Rights Tribunal, Justice Abella found that the Tribunal, in considering the control aspect of the relationship had given insufficient consideration to the underlying power dynamics of the relationship between Mr. McCormick and the Firm, and had focused unduly on the administrative policies which governed his activities within the Firm. In this case, where there was no genuine control over Mr. McCormick, an employment relationship could not be established for the purposes of the Code.

Justice Abella was careful not to close the door on other partners being found to be employees for the purposes of the Code in other circumstances. However, she was clear that such a situation would require normal partnership rights, powers and protections to be "greatly diminished" (at para. 46). The Court was also careful to point out in *obiter* that while Mr. McCormick might not be able to avail himself of the protections of the Code, partners alleging discrimination nevertheless could have recourse against their partners with respect to the duties of utmost fairness and good faith required by the *Partnership Act*. However, the Court was careful to avoid commenting on whether such recourse was available in this instance.

Also worth noting is the recent release of the United Kingdom Supreme Court decision in *Clyde & Co LLP and another v. Bates van Winkelhof*, [2014] UKSC 32. In that case, an equity partner in a law firm sought whistleblower protection granted to employees under the *Employment Rights Act 1996*. In this decision the Supreme Court came to the conclusion that the partner was a "worker" (as defined) for the purposes of that legislation. In that case, the Court was clear that there was no contract of employment between the partner and the firm in question, rather the decision turned on whether under the partnership agreement in question, the partner had undertaken "to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by that individual." In this case, whether or not the partner was a worker turned largely on interpretation of the applicable statute in conjunction with the applicable partnership legislation. However, the Court also reviewed the concept of "subordination" (a permutation of the control and dependency test) and held that because the partner could not market her services to anyone other than the firm with which she was employed, and because she was an integral part of her business, she fell within the definition of worker in that case. Notably, the partner in question, although an equity partner, was junior in the sense

that she received a fixed income and that there was a level of Senior Equity Partner above her, the antecedents to which appeared to fall more in line with the traditional benefits of partnership. Nevertheless, the Court in *Clyde & Co* did not necessarily focus on these factors in rendering its decision.

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# LEGISLATIVE UPDATE

## Federal *Economic Action Plan 2014 Act, No. 1* Receives Royal Assent

The *Economic Action Plan 2014 Act, No. 1*, SC 2014, c. 20 (formerly Bill C-31), has received Royal Assent. The large omnibus legislation will amend several federal statutes and regulations, many of which are related to labour and employment, including the *Canada Labour Code*, the *Old Age Security Act*, the *Immigration and Refugee Protection Act*, the *Insurable Earnings and Collection of Premiums Regulations*, and the *Canada Pension Plan Regulations*. In addition, it will enact the *Administrative Tribunals Support Service of Canada Act* and the *Apprentice Loan Act*.

Bill C-31 received first reading in the House of Commons on March 28, 2014, second reading on April 8, and third reading on June 12. It received first reading in the Senate on June 12, second reading on June 16, and third reading on June 18. It received Royal Assent on June 19. The majority of relevant amendments will come into force on a day or days fixed by order of the Governor in Council. A more detailed discussion of Bill 31 may be found in the *Ultimate HR Manual — Western Edition* newsletter no. 82, dated April 2014.

## Federal Government Enacts Electronic Document Regulations

On May 16, 2014, the *Electronic Documents and Electronic Information Regulations*, SOR/2014-117 (the "Regulations"), came into force under the *Department of Employment and Social Development Act* (the "Act"). Amendments made to the Act in 2012 and 2013 provided the Minister of Labour with the power to "administer or enforce electronically" the *Canada Labour Code*, and permitted the Minister of Employment and Social Development and the Canada Employment Insurance Commission to do the same with respect to the *Employment Insurance Act*. The Regulations supplement the Act by setting out a framework for the use of electronic documents and information within the context of sections 70.1–73 of the Act.

The Regulations deal with issues such as when electronic documents are deemed sent and received, the use and reliability of electronic signatures, and information regarding retention and destruction of electronic documents and information.

## Alberta's Minimum Wage Will Increase on September 1

The Government of Alberta has announced the following minimum wage increase, effective September 1, 2014:

- the general minimum wage rate will increase from $9.95 per hour to $10.20 per hour;
- the minimum rate for liquor servers will increase from $9.05 per hour to $9.20 per hour;
- the minimum rate for salespersons and land agents will increase from $397 per week to $406 per week; and
- the minimum rate for live-in domestic employees will increase from $1,893 per month to $1,937 per month.

## Alberta Bills 9 and 10 Referred to Standing Committee on Alberta's Economic Future

On April 16, 2014, the Alberta government introduced Bill 9, the *Public Sector Pension Plans Amendment Act, 2014* and Bill 10, the *Employment Pension (Private Sector) Plans Amendment Act, 2014*, which will amend the new *Employment Pension Plans Act*, which was passed in 2012 but is not yet in force.

The new *Employment Pension Plans Act* will bring target benefit plans into effect. Bill 10 makes some other notable changes:

*Purchase of life annuity on winding-up* — As part of the winding-up of a pension plan, the administrator must purchase for each person in receipt of a pension under the defined benefit component of a plan: (a) a life annuity that provides the same type of benefit and the same income that the retired member is receiving from the plan; or (b) in prescribed circumstances, a life annuity described in the regulations. When the administrator has purchased such an annuity, the administrator, a participating employer, a former participating employer, or another person who is or was required to make contributions to the plan is discharged from further liability to the person in respect of whose benefits the life annuity has been purchased.

*Conversion of Defined Benefit Plan to Target Benefit Plan* — If the plan text document contains a defined benefit provision, the plan text document may be amended to convert the defined benefit provision to a target benefit provision, which conversion may affect accrued benefits. This provision creates an exemption for plan text amendments from the general rule against amendments that reduce benefits where the amendment converts from a defined benefit plan to a target benefit plan.

*Electronic Documents* — A new provision has been added to allow the use of electronic communications.

Bill 9 deals with public sector pensions plans and would reform four large public sector pension plans. Noteworthy changes include the reduction of early retirement subsidies and the removal of guaranteed cost of living increases.

Bill 10 received third reading and Bill 9 second reading on May 5, 2014. However, on May 5, both Bills were referred to the Standing Committee on Alberta's Economic Future.

The Minister of Finance stated in his press release, dated May 6, 2014:

> That said, I'm hearing concerns from stakeholders about some of the provisions in these pieces of legislation. Upon reflection, I believe the right course of action is to briefly hit the pause button and refer Bills 9 and 10 to the all-party Standing Committee on Alberta's Economic Future for further consideration and comments.

## British Columbia's *Miscellaneous Statutes Amendment Act* Receives Royal Assent

Bill 17, the *Miscellaneous Statutes Amendment Act, 2014*, received Royal Assent on May 29, 2014. The amendments relate to several statutes, including the *Workers Compensation Act*.

The amendment to the *Workers Compensation Act*, which came into force on Royal Assent, restores heart disease in firefighters to the list of presumptive diseases recognized by WorkSafeBC. If a firefighter suffers from heart disease or a heart injury, including a heart attack, it will be presumed to be due to his or her work as a firefighter unless the contrary is proved. The presumptions apply if the claimant was employed as a firefighter at or immediately before the date of disablement from heart injury or disease. The presumption is available to local government firefighters as well as forest firefighters. Finally, the presumption applies to eligible firefighters who first become disabled from heart disease or heart injury on or after the day the amendment came into force. The amendments make British Columbia the only jurisdiction in Canada to have a presumption for heart disease embedded in its workers' compensation legislation.

## Manitoba's Minimum Wage Will Increase on October 1

The Government of Manitoba has announced that, effective October 1, 2014, its minimum wage will increase from the current rate of $10.45 per hour to $10.70 per hour.

## Manitoba Passes Legislation That Will Protect Temporary Workers

Bill 50, *The Protection for Temporary Help Workers Act*, will come into force on October 1, 2014. The Bill will require temporary help agencies to be licensed under *The Worker Recruitment and Protection Act*. It will also impose a number of prohibitions on temporary help agencies related to recruitment fees and employment restrictions.

Bill 50 received first reading on April 15, 2014, second reading on May 15, third reading on May 28, and Royal Assent on June 12. For a more detailed description of the Bill, please see *Ultimate HR Manual — Western Edition* newsletter no. 82, dated April 2014.

## Manitoba Amends *The Labour Relations Act*; Labour Board Required To Implement Timelines

Manitoba's Bill 54, *The Labour Relations Amendment Act (Time Lines for Labour Board Decisions and Hearings)*, has received Royal Assent and is now in force.

Bill 54 amends *The Labour Relations Act* to require the Labour Board (the "Board") to make regulations establishing timelines within which decisions on complaints, applications, or referrals must be rendered following the conclusion of a hearing. Another amendment requires the Board to make regulations respecting the time within which hearings on applications for certification and decertification must be held.

The Board is required to make these regulations within one year of Bill 54 receiving Royal Assent. Bill 54 received first reading on April 17, 2014, second reading on May 22, and third reading and Royal Assent on June 12. For more information about the amendments, please see *Ultimate HR Manual — Western Edition* newsletter no. 82, dated April 2014.

## Manitoba *Workers' Compensation Amendment Act* Receives Royal Assent

Bill 65, the *Workers' Compensation Amendment Act*, received Royal Assent on June 12, 2014. It will come into force on proclamation. This Bill amends *The Workers' Compensation Act*. The key changes are as follows:

- **Claims suppression**: Under the current Act, it is an offence for an employer to attempt to prevent a worker from making a claim for compensation. An employer also commits an offence if he or she takes discriminatory action against a person for reporting such an attempt to the Workers Compensation Board ("WCB"). This Bill broadens those offences by: prohibiting an employer from taking discriminatory action against a person who exercises any right or carries out any duty under the Act; and placing an onus on an employer who takes discriminatory action to prove that the action was unrelated to the worker making a claim or exercising a right or carrying out a duty under the Act.

- **Prevention of workplace injury and illness**: A prevention committee of the board of directors of the WCB is established and its duties are set out. As well, the WCB must undertake activities respecting the prevention of workplace injury and illness, and is required to maintain separate accounts of the costs of those activities.

- **Inspection authority**: The WCB is authorized to require documents to be produced, and to inspect workplaces, in connection with timely and safe return to work and to determine compliance with the Act generally.

- **Fines and administrative penalties**: Maximum fines for offences under the Act are increased to $5,000 (from $1,500) for workers and $50,000 (from $7,500) for employers. The maximum term of imprisonment for an offence would increase to six months (from three). The administrative penalty provisions are expanded to cover an employer's failure to produce documents required by the WCB to determine compliance with the Act; and the unauthorized disclosure of information by employees of the WCB and others who provide services under the Act.

- The establishment of an appeal process for administrative penalties.

# DID YOU KNOW . . .

## . . . That Manitoba Has Released a Draft of a New Standard Under *The Accessibility for Manitobans Act*?

The Government of Manitoba's Customer Service Standard Development Committee is seeking public feedback on a draft of a new accessibility standard under *The Accessibility for Manitobans Act*: the Customer Service Standard.

*The Accessibility for Manitobans Act* came into force on December 5, 2013. It enables the establishment of accessibility standards designed to prevent and remove barriers to accessibility in the areas of customer service, information and communication, transportation, employment, and the built environment.

The Customer Service Standard is the first standard to be developed. The initial draft includes requirements for:

- developing policies and procedures for delivering accessible customer service;
- allowing the use of service animals and support persons on an organization's premises;
- notifying the public when accessible services are temporarily unavailable;
- providing human rights and accessibility training for staff and volunteers;
- providing documents in accessible formats; and
- establishing processes to receive and respond to complaints.

The proposed standard would apply to all organizations that: (1) provide goods or services to the public or to other organizations in Manitoba; and (2) have at least one employee in Manitoba. If passed, the requirements would be phased in over a period of two years.

A discussion paper for the draft standard is available at: www.gov.mb.ca/dio. Members of the public are invited to submit comments to:

Disabilities Issues Office
630–240 Graham Avenue
Winnipeg, MB R3C 0J7
Email: access@gov.mb.ca
Phone: (204) 945-7613
Toll Free: 1-800-282-8069 (ext. 7613)

Submissions will be accepted until **July 15, 2014**.

Pursuant to *The Accessibility for Manitobans Act*, the government must consult with disabled persons, as well as representatives from the sector that would be subject to the proposed standard, during the development of an accessibility standard. In addition, a proposed standard must be posted for at least 60 days for public comment. Once established, an accessibility standard must be reviewed every five years.

# ON THE CASE

## Former Employee Was Wrongfully Dismissed and Was Entitled to Compensatory, Aggravated, and Special Damages

Supreme Court of British Columbia, February 24, 2014

Ogden was a financial advisor for the Canadian Imperial Bank of Commerce ("CIBC") for seven years, and her portfolio included a number of high net worth clients. She received positive performance reviews and was seen as an exceptional employee. CIBC reviewed Ogden's files and sent her a warning letter about document deficiencies on loan applications and the reduction of loan rates on personal lines of credit after funding. Ogden received another warning letter after approving an employee conversion of a staff loan to a mortgage. In that instance, Ogden did not know that the

employee input the data herself, which constituted a disallowed personal transaction. Ogden accepted two wire transfers from clients in China into her personal accounts, and directed those funds to be immediately transferred into her client's account. CIBC contended she contravened its Code of Conduct conflict of interest policy and terminated her for cause. Ogden brought a wrongful dismissal action.

The action was allowed. The initial warning letter involved actions that were systemic across CIBC, although Ogden was the only employee who was warned. The second warning letter did not involve a mistake by Ogden. Therefore, there was no reasonable basis for the warning letters. The Court relied on the wire transfer incident as the sole basis for Ogden's termination for cause. There was no plainly worded prohibition on receiving wire transfers into personal accounts and then transferring funds into client accounts. Ogden was confronted with the situation in the middle of the night, after an urgent phone call from her client, and was not able to consult with CIBC prior to making a decision. She was not disciplined immediately after CIBC discovered her actions, which indicated the matter was not such a violation of trust that a continuing employment relationship was impossible. There was no just cause to terminate Ogden, and her termination was disproportionately severe for an error in judgment. The actions of CIBC were "cavalier, insensitive, and reckless." Ogden was terminated for cause based on inaccurate and incomplete information in order for CIBC to retain her portfolio, even though she was seven months pregnant and had an ill husband. Ogden was unable to obtain another position as a financial advisor, did not receive outstanding commissions and compensation, and had to repay a bonus awarded to her. She was entitled to compensatory damages for CIBC's breach of the duty of good faith, including aggravated and special damages. Punitive damages were not ordered.

*Ogden v. Canadian Imperial Bank of Commerce*, 2014 CLLC ¶210-023

## Wrongfully Dismissed Former Employee Failed To Mitigate Her Damages

Supreme Court of British Columbia, February 28, 2014

Fredrickson was a registered dental technician assistant, and was employed by Newtech Dental Laboratory Inc. ("Newtech") for eight-and-a-half years. Fredrickson, who was experiencing stress from personal issues, took a medical leave of absence, and asked for a record of employment stating she was off work for illness in order to get Employment Insurance illness benefits. When she returned from leave, she was informed that she was being laid off for lack of work. Newtech recalled Fredrickson to work after she had consulted a lawyer. She refused the offer and brought a wrongful dismissal action. Newtech admitted that Fredrickson had been dismissed without cause or reasonable notice, although it alleged that, by not accepting the offer of re-employment, Fredrickson failed to mitigate her damages.

The action for wrongful dismissal was allowed. Fredrickson had worked well with the employees at Newtech for a number of years without any major incidents or disagreements. There was no suggestion that the working environment was poisoned in any way prior to the medical leave, and a reasonable person would have accepted that returning to the lab to work in the same job she had prior to this situation was reasonable. She would not have suffered any embarrassment or humiliation. Fredrickson failed to take reasonable steps to mitigate the damages resulting from her wrongful dismissal. She was entitled to damages only from the time she was laid off until the invitation to return to work was made.

*Fredrickson v. Newtech Dental Laboratory Inc.*, 2014 CLLC ¶210-024

## Court Upholds Restrictive Covenant that Required Employee To Pay Compensation To Her Former Employer

British Columbia Court of Appeal, March 12, 2014

After graduating from veterinary college, Rhebergen entered into a three-year agreement with the Creston Veterinary Clinic ("Creston"). A clause in the agreement stipulated that Rhebergen would pay Creston a designated amount if, within three years of the associate agreement being terminated, she set up a veterinary practice within a 25-mile radius of Creston's clinic. Fourteen months later, Rhebergen informed Creston that she wanted to terminate the agreement, and she was terminated for cause. Rhebergen wanted to set up a mobile dairy veterinary practice in the area, and brought an action to find the restrictive clause unenforceable. The trial judge found the clause constituted a restraint of trade clause, and that it was unreasonable and unenforceable based on its ambiguity and the penalty it

imposed. Creston appealed.

The appeal was allowed. The clause at issue was not a conventional non-competition clause since it contained no prohibition on setting up a veterinary practice; it simply required that Rhebergen pay money to Creston if she set up a veterinary practice. The clause effectively provided for no competition within a stipulated radius during a three-year period after the termination of the associate agreement without the required payment. The payment was a restraint, as it compromised the opportunity Rhebergen would otherwise have had to compete with the clinic, and was only enforceable if it was reasonable. The trial judge erred in finding that the money required to be paid under the agreement was a penalty. The amount set out to be paid was not extravagant and unconscionable in comparison to the costs to the clinic, as set out in the evidence. The trial judge also erred in finding that the words "setting up a veterinary practice" were ambiguous. On a fair reading of the clause, the only reasonable interpretation was that Rhebergen's intention to regularly provide veterinary services in the area triggered the compensation clause.

A dissent would have dismissed the appeal, finding that the clause restraining Rhebergen from "setting up a veterinary practice" was ambiguous and, therefore, unenforceable.

*Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 CLLC ¶210-026

## Operation of Alberta's *Public Service Salary Restraint Act* Stayed

Court of Queen's Bench of Alberta, February 14, 2014

The Alberta Union of Provincial Employees ("AUPE") represented employees working for Alberta in the Crown bargaining unit. The parties entered into collective bargaining in advance of the expiry of the collective agreement between Alberta and the AUPE on March 31, 2013. While agreement was reached on a number of non-monetary items, many issues remained unresolved, including pay. Mediation was unsuccessful, and the AUPE initiated arbitration. Alberta introduced legislation, the *Public Service Salary Restraint Act* ("PSSRA"). The PSSRA provided that if no collective agreement was entered into between Alberta and the AUPE by January 31, 2014 (since extended to March 31, 2014), the May 17, 2011 collective agreement would be "deemed in effect" from April 1, 2013 to March 31, 2017. In addition, pay for bargaining unit employees would be unchanged from April 2013 to March 2015, with one per cent increases taking effect in April 2015 and April 2016. AUPE filed an action, challenging the constitutional validity of the PSSRA, and brought an application for a stay of the operation of the PSSRA.

An injunction was granted, staying the operation of the PSSRA. An injunction allowing the arbitration process to continue would not "end the matter" in favour of the AUPE, since the province would still have the ability to control the terms of employment, including wage controls. The AUPE established an arguable case that its members experienced restrictions on their rights to access a collective agreement process, violating their right to freedom of association. The conduct of the province arguably represented bad faith negotiations with the AUPE. Therefore, the AUPE established it had a claim that was not frivolous or vexatious. The PSSRA would cause ongoing injury to the relationship between the AUPE and its membership, would affect the morale of AUPE members, and would impede future collective bargaining between Alberta and the AUPE. Therefore, the members of the AUPE in the Crown bargaining unit would experience irreparable harm if the proposed injunction was not granted. The PSSRA served an important public purpose of representing economic interests, although its effect was to freeze all monetary and non-monetary features of the relationship between the AUPE and Alberta. The cost to Alberta would be minimal, especially since the AUPE stated it would not accept any arbitrator-imposed wage increases. The PSSRA would potentially damage labour relations in the public and private sectors across the province, and the balance of convenience favoured granting the stay.

*Alberta Union of Provincial Employees v. Alberta*, 2014 CLLC ¶220-024

## Interim Award Declining To Stay Random Drug and Alcohol Testing Policy Pending Grievance Decision Upheld

British Columbia Labour Relations Board, February 12, 2014

Teck Coal Limited ("Teck") introduced a policy of random drug and alcohol testing for all of its employees. The United Steelworkers (the "union") filed a grievance and asked for a pre-hearing order staying implementation of Teck's policy

pending a decision on the union's grievance of the policy. The arbitrator declined to grant the order. The union applied for review of the interim award, and the Court of Appeal found it was without jurisdiction (see 2014 CLLC ¶220-001). The union applied to the Labour Relations Board (the "Board") for a review of the arbitrator's interim award.

The application for review was dismissed. The Board noted that the application did not involve an issue with respect to the arbitrator's jurisdiction to issue the interim order sought, and there was no allegation of a denial of a fair hearing. As a result, there was no basis to review the arbitrator's interim decision. In the alternative, the Board addressed the issues raised by the union with respect to the reasonableness of the arbitrator's decision. The arbitrator gave sufficient weight to the irreparable harm to employee interests if the stay was not granted, and he did not err in finding that Teck would suffer irreparable harm if the stay was granted. The arbitrator considered the union's position and provided a reasoned analysis for his decision, he did not misinterpret or misapply the *Labour Relations Code* or Code principles in declining to grant the stay, and he did not err in declining to reconsider his interim reward in light of the Supreme Court of Canada's subsequent decision in *Communications, Energy and Paperworkers Union of Canada Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 CLLC ¶220-037.

*Teck Coal v. United Steelworkers*, 2014 CLLC ¶220-025

## Construction Company Fined $275,000 For Worker's Death

Provincial Court of Alberta, December 18, 2013

The accused, Sureway Construction Ltd., a construction company, pleaded guilty to failing to comply with section 70 of the *Occupational Health and Safety Code, 2009* ("Code") which requires a tag line to be used where workers are in danger by the movement of a load being lowered by a lifting device. A worker was crushed by a concrete manhole barrel while installing a horizontal storm sewer pipe at the bottom of an open excavation. Sureway violated section 70 of the Code by having its workers directly in the bottom of the excavation to guide the barrel, rather than using tag lines from a safer distance. The parties jointly submitted that the appropriate fine was $275,000. Sureway requested the payment of the amount to a specified academic program, related to engineering safety and risk management, or a bursary or prize fund, rather than being assessed as a fine.

Sureway was sentenced to pay a $275,000 fine. Sureway was a long established company. It had no prior record of violating the *Occupational Health and Safety Act* or the Code and had accepted responsibility for the death of its worker. However, the circumstances underlined the importance of general deterrence. The worker's death arose from foreseeable risks at the worksite. Section 70 of the Code focuses on the very risk that resulted in the death of the worker. Sureway had made a strong response to the death of the worker and undertook a comprehensive safety review and revised policies. A high monetary penalty was necessary to achieve the principle of deterrence. The proposed quantum of $275,000 fell within the appropriate range. The request for an alternative to a fine payment was not appropriate. The worker's death did not arise due to deficient engineering education and programming, but because Sureway failed to comply with the provisions of the Code and Act. A fine was imposed to give full impact to the principle of deterrence.

*R. v. Sureway Construction Ltd.*, 2014 CSHG ¶95,960

# Q & A

## What Are the Basic Elements of an Effective Performance Review System?

These broad guidelines provide the general elements that can be applied to any number of review systems. Application of the following guidelines can be applied on a decentralized and flexible basis, allowing various employee groups to adapt performance reviews to their own special needs:

- **Objectives:** These need to be specific to the job and aligned with the overall organizational goals. To provide motivation, the specific goals should be attainable, but should also have a stretch element that forces the individual to grow his or her talents.

- **Measurable standards:** Work standards are usually expressed in terms of productivity, such as a set number of units produced in an hour. In higher-level jobs, the attainment of results might be substituted for work standards. For example, the attainment of a profit goal could be the goal for a business unit manager, whereas a specialist might be measured on the completion of a project within the budget and time frame agreed to.

- **Behaviour-based:** The system must have a way of describing the observable behaviours that demonstrate application of a desired skill. If suitable, the observations can be made by a group of people through a 360-degree feedback process to ensure the behaviours are being used in the right context and that the evaluation is based on the right focus.

- **Assessment interview:** Through interviews, the employee has an opportunity to participate in a dialogue. All mitigating factors are considered in assessing an employee's performance, which creates an opportunity for the manager to discover where the employee's interests are. It is important to document the standards used for assessment, the dialogue that occurs, and the objectives that are set. That way, expectations are clear, and participants may consistently focus on the agreed upon course of action.

- **Written guidelines:** Providing written guidelines for the performance review system helps to ensure consistency and compliance. Having written guidelines is a good way to communicate to employees what to expect and what is expected of them.

- **Training:** Managers and supervisors who conduct reviews should be trained on how to deliver effective feedback on performance. The ability to evaluate others and communicate that evaluation effectively is not necessarily intuitive, and evaluators should be provided with instructions in order to ensure consistency in how feedback is delivered company-wide and to increase the effectiveness of the feedback process.

- **Employee input:** It is essential that the process allows for employees to provide feedback to supervisors and, where appropriate, to challenge the assessment. In cases where there is no meeting of the minds, the system should allow for employee appeals to human resources or to a higher authority within the organization.

- **Efficiency:** The review system should not place unreasonable technical and time requirements on managers or other evaluators. Regardless of how comprehensive or elegantly designed, a performance review system that includes too many attributes to effectively evaluate, or takes an inordinate amount of time to complete, will be devalued by evaluators and will likely not be followed.

## NEW IN HUMAN RIGHTS

### Canadian Human Rights Commission Releases New Accommodation Guide

The Canadian Human Rights Commission recently launched a new interactive online resource: "Accommodation Works! — A user-friendly guide to working together on health issues in the workplace".

The guide provides step-by-step practical advice for those involved in the accommodation process, including employers, employees, unions, health care providers, and insurers. It covers topics such as identifying accommodation needs, developing accommodation plans, and implementing an employee's return to work.

The guide is available as an interactive web tool or as a downloadable PDF at: www.chrc-ccdp.gc.ca/fitness2work/index.html.

**ULTIMATE HR MANUAL — WESTERN EDITION**

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