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• *SUNCOR ENERGY INC.* — AN UPDATE ON RANDOM DRUG AND ALCOHOL TESTING •

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In a previous comment ("*Suncor Energy Inc.* — Arbitration Decision Prohibiting Random Drug and Alcohol Testing Overturned", ((2016) 26:4 E.L.L.R. 25), I reviewed the decision of the Alberta Court of Queen's Bench in *Suncor Energy Inc. v. Unifor Local 707A*, [2016] A.J. No. 530, 2016 ABQB 269, which was a judicial review of the arbitration award in *Unifor, Local 707A v. Suncor Energy Inc., Oil Sands (Random Testing Grievance)*, [2014] A.G.A.A. No. 6, 242 L.A.C. (4th) 1. In that case the Court, using the judicial review standard of "reasonableness" overturned the majority decision of an arbitration award on the basis that the majority had misapplied the legal test for drug and alcohol testing set out by the Supreme Court of Canada in *Communications, Energy & Paperworkers' Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] S.C.J. No. 34, 2013 SCC 34 (*Irving*). One of the Court's criticisms related to the majority's imposing an evidentiary limitation that it would only consider direct evidence demonstrating an alcohol and drug problem within the Unifor bargaining unit. The Court held that this was an inappropriate limitation and that the focus ought to have been on evidence taken from the broader context of the "workplace" as a whole. This decision was appealed by the Union.

In *Suncor Energy Inc. v. Unifor Local 707A*, [2017] A.J. No. 998, 2017 ABCA 313 (judgment rendered September 28, 2017), the Alberta Court of Appeal upheld the judgment of the lower court. On appeal, the Union argued that while the reviewing court below purported to apply the reasonableness standard it had erred by, in effect, applying a correctness standard in its assessment of the arbitration award. Among other things, the Union also argued that the court below

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had failed to defer to the majority's interpretation of the law arising out of the *Irving* decision; the majority of the arbitration panel articulated reasons that were justifiable on the evidence, intelligible and transparent; and that the majority of the Arbitration Board had not misdirected or ignored key evidence but rather had simply preferred some of the evidence, and in particular expert evidence, over other evidence. Suncor argued that the decision in the court below properly applied the principles of deference and focused upon certain elements of the Arbitration Board majority decision which it said were unreasonable.

THE COURT OF APPEAL'S ANALYSIS

The analytic portion of the Court's judgment commences with an acknowledgement of the pervasiveness of the resolution of disputes under collective agreements using arbitrators who the parties to collective agreements judge to be experts. In recognition of that fact, the judgment endorses the notion that arbitrators are entitled to deference from reviewing courts who ought to "tread lightly" when interfering with their findings and holdings.

The Court then notes that the Supreme Court of Canada has held that deference requires "not submission but a respectful attention to the reasons offered or which could be offered"[1] by an expert tribunal in support of its decision. It then goes on to comment:

> **37** This distinction between "submission" to the underlying decision and "a respectful attention" to reasons is important, because it means that courts can intervene when necessary to ensure that the processes functioned properly. Even expert decision makers sometimes err in ways that compromise the reasonableness of their decisions … . Courts act as an important check to ensure that panels receive the necessary guidance to resolve issues properly, and to ensure that the parties continue to have confidence in the institutions that resolve their disputes. The reasonableness standard did not preclude the reviewing justice from assessing the means by which the majority of the panel reached their decision.

The Court of Appeal then focused on one of the issues which was foremost in the mind of the reviewing court below; the fact that the arbitrator had imposed an evidentiary limitation focusing only on incidents occurring within the scope of the Union's bargaining unit rather than within the workplace as a whole. It noted that the reasons of the Court in *Irving* had canvassed whether there was evidence of a general problem of substance abuse "within a workplace".

Suncor took the position that it was appropriate to canvass incidents that involved drugs and alcohol in the workplace as a whole. However, that argument was rejected by the majority, which held that, since their jurisdiction derived from the collective agreement and would be binding only upon the Union's membership, it made logical sense for the evidence to be confined to incidents in this bargaining unit. They held that it must be the risk that this particular bargaining unit posed — and therefore the gain from testing this bargaining unit — that would frame the enquiry. They held that their jurisdiction was confined to reviewing the experience only of the Suncor employees and not the experience on the workplace broadly. The Court of Appeal rejected this approach holding:

> **46** It was unreasonable for the tribunal majority to insist upon "particularized" evidence specific to Suncor's unionized employees. This sets the evidentiary bar too high. *Irving* defined the balancing process in terms of workplace safety and workplace substance abuse problems — not bargaining unit safety and bargaining unit substance abuse problems. *Irving* calls for a more holistic enquiry into drug and alcohol problems within the workplace, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision.
>
> **47** A broader, workplace-focused analysis appears consistent with how both the Supreme Court and the arbitration panel in *Irving* approached the balancing process. In the *Irving* arbitration decision, the Arbitrator mentioned how some of the evidence did not distinguish between the "groups of employees" involved in alcohol related incidents, but also specifically considered evidence about alcohol testing within the overall workplace, including plant employees outside the bargaining unit … . Abella, J. noted the same worksite wide statistics in the majority judgment … .

In the result, on this issue, the Court of Appeal agreed with the reviewing court below that the majority of the arbitration board had inappropriately confined their considerations to evidence emanating only from the Union's bargaining unit.

The Court of Appeal also found that the majority's failure to explain its choice between competing expert opinions undermined the Court's ability to defer to the majority's reasoning based upon the limitation placed by the majority of the Arbitration Board on the evidence which was appropriate for consideration.

Finally, the Court of Appeal agreed with the reviewing court below that this was not a case where it ought to substitute its own decision on the merits and further affirmed the decision to remit the matter for a new arbitration to be heard by a fresh arbitration panel.

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[1] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 48.

• TOWN EMPLOYEES DID NOT HAVE A REASONABLE BASIS TO FEAR VIOLENCE FROM PROTESTER: "VIOLENCE IS NOT THE MERE ABSENCE OF CIVILITY", APPEAL COURT STATES •

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"The Town employees, both junior and senior, were alarmed, but they were alarmed too easily", the Ontario Court of Appeal has stated, in deciding that a protester outside of a town council meeting did not engage in "violence" (*Bracken v. Fort Erie (Town)*, [2017] O.J. No. 4655, 2017 ONCA 668). The decision shows that employees' subjective fear of bullying or violence are not always legally justified.

The man was protesting the town council's intention to permit a medical marijuana facility to be built across the street from his home. Several town staff members "expressed fear for their safety". The town's interim Chief Administrative Officer, whose duties included the obligation under the Ontario *Occupational Health and Safety Act* to maintain a workplace free from harassment or violence, issued a trespass notice and the police arrested the protester and placed him in handcuffs when he refused to leave. The trespass notice stated that the protester was not to enter three town properties for a year. The protester brought a court application challenging the validity of the trespass notice. He lost at the lower court, but won at the Court of Appeal.

The Appeal Court decided that the protester had not engaged in violence. Although town employees were frightened and felt that the protester was "bullying them", the evidence did not disclose any reasonable basis for their fear. The Court stated, "A protest does not cease to be peaceful simply because protesters are loud and angry". Here, there was no evidence that the protester physically obstructed anyone, or otherwise impaired anyone's ability to use public space. He paced back and forth with a megaphone. Those were not "erratic" actions. The court stated, "Violence is not the mere absence of civility."

The Court noted the insufficient basis for the town employees' fear of violence:

> The basis for [the town employees'] fear appears to be (1) one prior interaction in which Mr. Bracken was loud and "intimidating", but in which he was never violent or threatening; (2) Mr. Bracken's videotaping of a Council meeting; (3) Mr. Bracken's videos posted to Youtube, in which he is said to chase people down and question them; (4) his actions on the day of his protest. If anyone felt intimidated by him, other than Town employees who had never before witnessed a protest and doubted that protests in front of Town Hall were lawful, it was not because he was threatening anyone.

The Court held that the town's Workplace Violence Prevention Policy did not give the town authority to issue the trespass notice to the protester. The Court stated, "Although the OHSA imposes a duty on the Town to take reasonable precautions to protect workers, it does not confer any powers on the Town regarding the activities of someone who is not a co-worker … ." Further, the town staff could have talked to the protester and cautioned him about his activities, but they did not do so. The trespass notice violated the protester's right, under the *Canadian Charter of Rights and Freedoms*, to freedom of expression.

According to the Appeal Court, "The statutory obligation to promote workplace safety, and the 'safe space' policies enacted pursuant to them, cannot be used to swallow whole *Charter* rights."

In the end, the Appeal Court set aside the trespass notice and awarded the protester $4,000.00 for his costs of the appeal, and additional costs for the lower court proceeding.

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health and safety matters. Adrian is recognized by Best Lawyers in Canada as one of Canada's leading lawyers in the area of Labour and Employment Law, and is listed as "repeatedly recommended" in The Canadian Legal Lexpert Directory as one of Canada's leading lawyers in the area of Occupational Health and Safety. This article originally appeared in Dentons Canada LLP's Canadian Occupational Health & Safety Law blog: www.occupationalhealthandsafetylaw.com.]

• THROWING SHADES? NON-COMPETITION CLAUSE THAT PURPORTED TO PROHIBIT OPTOMETRIST FROM SELLING NON-PRESCRIPTION SUNGLASSES WAS OVERBROAD AND COULD NOT BE SAVED THROUGH SEVERANCE •

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When Dr. Hannah Park, an optometrist, returned to work with IRIS The Visual Group Western Canada Inc. ("IRIS") after a maternity leave, she was presented with a new optometric services agreement ("OSA"), which she signed. The new OSA characterized her as an independent contractor and set out similar terms and working conditions as the previous OSA that she had worked under prior to her leave. However, the new OSA also contained a significantly broader non-competition clause. The new restrictive covenant was as follows:

> The Optometrist hereby covenants and agrees that during the term of this Agreement and for a period of three (3) years from the date this Agreement is terminated the Optometrist will not, without first receiving the written consent of OpCo and IRIS do any of the following:
>
> (a) Compete either directly or in partnership or in conjunction with any person or persons, firm, association, syndicate, company or corporation, directly or indirectly carry on or be engaged in any part thereof or be employed by any such person or persons, company or corporation carrying on, engaged in, interested in or concerned with a business that competes with OpCo or IRIS within 5 km of the Location. For greater clarity, a "business that competes with OpCo or IRIS" is defined as any entity that dispenses performs [sic] any sort or [sic] prescription or non-prescription optical appliances including eye glasses or sunglasses, vision correcting lenses and contact lenses, or is an optical retail dispensary, optometry clinic, an ophthalmology clinic, or any laser eye surgery centre and/or any location that performs optical refractions and/or complete or partial eye examinations or eye health assessments,
>
> (b) disclose to any person, firm or corporation any information concerning the business or affairs of OpCo or IRIS at the Location, including, without limitation, the customer list for the Business.
>
> (c) solicit, interfere with or endeavor to entice away any customer, patient, company or organization that is in the habit of dealing with OpCo or IRIS or to interfere with or endeavour to entice away any of OpCo or IRIS's employees or optometrists.

Dr. Park eventually decided to strike out on her own and set up her own practice in Vernon, British Columbia. She sent a letter of resignation to IRIS in March 2016, and she asked to be released from the non-competition clause. IRIS refused. Dr. Park decided to press ahead anyway, and set up an optometry practice approximately 3.5 km from IRIS' Vernon location. IRIS responded by bringing an application against Dr. Park — seeking a declaration that the non-competition and non-solicitation provisions in the OSA were enforceable, and asking for an injunction restraining Dr. Park from soliciting IRIS' customers and from operating a competing practice within a five-kilometre radius of IRIS' clinic in Vernon.

BRITISH COLUMBIA SUPREME COURT

At trial,[1] Johnston J. of the Supreme Court of British Columbia determined that an advertisement that Dr. Park ran in local publications announcing the

launch of her new practice did not run afoul of the non-solicitation provisions in the OSA because the Court was "not persuaded that the advertisement complained of solicits or endeavours to entice away any IRIS patients."[2]

With respect to non-competition, the trial judge found the clause in question to be overbroad. He was prepared to accept that the three-year term of the clause and its five-kilometre geographic restriction were both reasonable. However, Johnston J. found that the prohibitions themselves were unreasonable in scope. He wrote:

> … Any connection between the employment relationship and the broad prohibition in this covenant is tenuous, as is the economic interest IRIS might wish to protect by a covenant this broad. In that last regard, one might accept that IRIS had a reasonable economic interest in its patients who required regular eye examinations and new prescription vision products, but the evidence falls short of persuading me that IRIS had a similar reasonable interest in protecting its ability to sell non-prescription reading glasses or sunglasses to its patient base. That makes the non-competition covenant unreasonable in the scope of employment activities it purports to prohibit.[3]

BRITISH COLUMBIA COURT OF APPEAL

On appeal, IRIS did not contest the trial judge's decision with respect to the non-solicitation clause, but it challenged the portion of his decision relating to the non-competition clause, arguing that Justice Johnston erred in finding the clause overbroad, and in the alternative, that he erred in deciding against severing the offending portion of the clause in order to render it enforceable.

In a decision rendered on August 21, 2017, the British Columbia Court of Appeal upheld the trial judge's decision and dismissed IRIS' appeal.[4] The Court's decision, authored by Hunter J.A., offers significant insight into the considerations that courts will take when assessing the validity of non-competition provisions in employment contracts.

With respect to the breadth of the non-competition clause, the Court of Appeal set out the applicable test:

> The test IRIS must meet is whether the restriction in the clause is no broader than is necessary to protect the legitimate interests of the company. As indicated earlier in these reasons, this question will normally have two elements. First, is a restriction on competition necessary at all or would less restrictive measures such as a non-solicitation covenant suffice? Second, if a non-competition clause is required, is the scope of that clause no broader than is necessary to protect the asserted interest?[5]

According to the Court of Appeal, the non-competition clause in the OSA was unreasonable in two ways:

(1) it was ambiguous; and
(2) "it goes well beyond what is necessary to protect IRIS's interests."

In terms of ambiguity, the Court of Appeal focused on two elements in the clause — the words "in conjunction with" and "concerned with". For the Court of Appeal, the lack of clarity regarding the "nature of the connection required to compete 'in conjunction with' another person" and the imprecision of the words "concerned with" in relation to a business that competes with IRIS were problematic.

Moreover, according to the Court of Appeal, even if the clause was sufficiently clear, its scope still extended well beyond what would have been necessary to protect IRIS' interests. Like the trial judge, the Court of Appeal was concerned with the portion of the clause that prohibited seeking any kind of employment with a business that sells non-prescription reading glasses or sunglasses and which is located within a five-kilometre radius of IRIS' Vernon location for a period of three years. According to the Court of Appeal, "[s]uch a restriction would prevent Dr. Park from engaging in a wide range of work, including work that had nothing to do with the practice of optometry. This cannot be described as 'no wider than reasonably required in order to afford adequate protection' to IRIS's existing trade connections."[6]

After determining that the non-competition clause, as written, was overbroad, the Court of Appeal went on to consider whether the offending portions of the clause could be read down using the doctrine of

severance. Specifically, IRIS sought to excise the words "or non-prescription".

As stated by the Supreme Court of Canada (the "SCC"), severance can take two forms: (1) "notional" severance, which refers to reading down a provision in a contract to make it both legal and enforceable; and (2) "blue-pencil" severance, which involves removing a part of a provision. According to the SCC, notional severance is "not an appropriate mechanism to cure a defective restrictive covenant".[7] As for blue-pencil severance, Justice Rothstein, writing for a unanimous SCC, noted:

> I am of the opinion that blue-pencil severance may be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. However, the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable.[8]

Following the SCC's guidance, the Court of Appeal determined that there were two issues that prohibited using severance on the words "or non-prescription". Firstly, the Court was dubious as to whether the words in question were actually trivial. It noted that the intent of the expanded clause in the OSA was to expand the scope of activities to include those that would not have been caught by the earlier restrictive covenant. The Court determined that "IRIS clearly intended to prevent Dr. Park from competing with it in any way, however remotely. It would not be appropriate to rewrite the contract to create a more moderate restriction that does not reflect the intention of either party."[9] Secondly, the Court pointed out that, even if the words "or non-prescription" were excised from the restrictive covenant, thereby removing the most glaring issue with the clause, the ambiguity issues identified above would still remain.

CONCLUSION

At paragraph 76 of its decision in *IRIS The Visual Group Western Canada Inc. v. Park*, the British Columbia Court of Appeal summarized the law and its application to the facts at issue, and in so doing, provided an important kernel of guidance to employers seeking to protect their interests through the device of a non-competition clause. It wrote:

> If an employer or a business in a position comparable to an employer wishes to protect its trade connections by restricting competition, **it is essential that the scope of the restriction be clear as well as reasonable**. I agree with the trial judge that this is not one of those rare cases where the court will assist one of the parties by re-writing an overbroad clause so that it can meet the test of reasonableness.
>
> [Emphasis added.]

Clarity, like reasonableness, is clearly a critical element if a non-competition clause in an employment contract is to be found enforceable.

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1 *IRIS The Visual Group Western Canada Inc. v. Park*, [2016] B.C.J. No. 2307, 2016 BCSC 2059.

2 *Ibid*., at para 46.

3 *Ibid*., at para. 29.

4 *IRIS The Visual Group Western Canada Inc. v. Park*, [2017] B.C.J. No. 1634, 2017 BCCA 301 ("*IRIS* CA").

5 *Ibid*., at para. 54.

6 *Ibid*., at para. 66.

7 *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6, [2009] 1 S.C.R. 157, at para. 2.

8 *Ibid*., at para. 36.

9 *Iris* CA, at para. 75.