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TAB 1

The Six-Minute Labour Lawyer 2016

Federal Labour Law 2016: Back to the Future

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May 26, 2016

cpd Continuing Professional Development

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Table of Contents

I. Introduction

Pending federal legislation (Bill C-4) will change some, but not all, of the significant amendments made to the *Canada Labour Code* (*Code*) over the last 18 months.

This paper will examine the new landscape if Bill C-4 passes. As of this paper's submission date, Bill C-4 had passed second reading and been sent to Committee[1].

This paper will also consider recent decisions regarding, *inter alia*, i) the awarding of legal costs; ii) jurisdiction over First Nations' activities; and iii) when Part II of the *Code* applies to harassment complaints.

A final chapter will highlight that different federal tribunals occasionally deal with the same statutory language and legal issues. Case preparation may extend beyond just one tribunal's jurisprudence.

II. Pending Amendments to the Code: Bill C-4[2]

The *Code* has undergone a series of amendments in recent years, as reviewed in past papers prepared for the Law Society's Six-Minute Labour Lawyer conference[3]. Some of those recent *Code* amendments will disappear under Bill C-4, but not all of them.

[1] On May 12, 2015, the Committee Reported the Bill without Amendment in the House of Commons.
[2] *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*
[3] A summary of the recent Code changes can be found in this Six-Minute Labour Lawyer 2015 paper.

Bill C-4 will also delete certain trade union disclosure obligations currently required under the *Income Tax Act*[4].

The Current Code

Effective October 31, 2014, a previous Bill C-4[5] changed legal definitions and various procedures in Part II of the *Code*'s Occupational Health and Safety (OHS) regime. For example, the definition of "danger" changed, in part by the addition of the phrase "imminent or serious threat".

The work refusal process also changed, *inter alia*, by requiring the production of written reports at various stages.

The current Bill C-4 does not change the existing OHS regime.

Effective June 16, 2015, Bill C-525[6] introduced mandatory representation votes to the *Code*, both for certification and revocation applications. It also removed longstanding protections in the *Code* for bargaining agents when negotiating a first collective agreement and after attaining the right to strike.

Bill C-4 Changes

The upcoming changes to the *Code* reinstate the card-based certification regime the CIRB had applied for decades. In addition, changes to the revocation process will protect bargaining agents during two specific vulnerable periods.

[4] Bill C-377, An Act to Amend the Income Tax Act (requirements for labour organizations), S.C. 2015, c. 41, required trade unions to provide financial information to the Minister for public disclosure.
[5] Economic Action Plan 2013 Act, No. 2, S.C. 2013, c. 40
[6] Employees' Voting Rights Act, S.C. 2014, c. 40

Certification

Bill C-4's amended section 28[7] allows the Board to certify a trade union based on membership card evidence. The new section 28 also reinstates the Board's previous discretion to modify the date at which it evaluates that membership evidence.

Section 28, as of the second reading of Bill C-4, reads as follows:

> *28 The Board shall, subject to this Part, certify a trade union as the bargaining agent for a bargaining unit if the Board*
>
> *(a) has received from the trade union an application for certification as the bargaining agent for a unit;*
>
> *(b) has determined the unit that constitutes a unit appropriate for collective bargaining; and*
>
> *(c) is satisfied that, as of the date of the filing of the application or of any other date that the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent.*

Bill C-4 will amend section 29(1) to allow the Board to hold a representation vote in any case it considers necessary. Additionally, for section 29(2), the support required to obtain a representation vote in a certification application will return to 35% from the current 40%.

The amended sections 29(1) and (2)[8] as of Bill C-4's second reading state:

> *29 (1) The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.*
>
> *(2) If a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than 35% and not more than 50% of the employees in the unit are members of*

[7] The wording of some of the proposed provisions is similar, but not identical, to the *Code*'s wording which existed prior to Bill C-525.
[8] Section 29(1.1) remains unchanged.

> *the trade union, the Board shall order that a representation vote be taken among the employees in the unit.*

In certification (raid) applications, where one trade union seeks to displace another, as well as for revocation applications, the Board has traditionally held a representation vote, even if the applicant has demonstrated majority support. The Board explained its rationale for this practice in *Rooley*[9]:

> *[65] The nature of a certification application similarly explains why the Board does not hold a representation vote if an applicant has demonstrated majority support. In the usual certification application, there is only one entity, the applicant trade union, seeking to represent a bargaining unit.*
>
> *[66] There is no other competing entity arguing that it too has majority employee support.*
>
> *[67] This differs from the situation in revocation and displacement (raid) applications. For those applications, there is an incumbent trade union, which previously demonstrated majority support. There is also a competing entity claiming to have majority employee support, be it another trade union or a group of employees asking the Board to remove the incumbent trade union's certification.*

Revocation

Bill C-4 amends sections 38 and 39 of the *Code* which deal with revocation requirements. The employee support required before the Board will consider a revocation application will increase from the current 40% to the traditional majority support level of 50% plus 1.

The amended section 39(2), as it did in the past, will provide increased protection against revocation for bargaining agents negotiating a first collective agreement. The same protection will be available for bargaining agents who have acquired the right to strike.

The proposed section 39(2) reads:

> *(2) If no collective agreement applicable to a bargaining unit is in force, an order shall not be made under paragraph (1)(a) in relation to the bargaining agent for the*

[9] 2015 CIRB 759

> *bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.*

In *Genge*[10], the Board summarized its traditional analysis when applying section 39(2):

> *[29] In summary, a bargaining agent can seek the protection available under section 39(2) of the Code if:*
>
> *1. it is negotiating a first collective agreement* ***or*** *if the parties have acquired the right to strike or lockout;*
>
> *2. it has made a reasonable effort to enter into a collective agreement with the employer; and*
>
> *3. subject to the nuances in the Board's case law, it has consulted with and kept members of the bargaining unit informed about the progress of the negotiations.*

In *Butt*[11], the Board concluded that, despite the applicant's dissatisfaction, a trade union had satisfied the requirements of s. 39(2) as it negotiated a first collective agreement.

Transitional Provisions

Bill C-525, which came into force on June 16, 2015, did not contain any transitional provisions. This led to the inevitable question of which *Code* provisions applied to applications filed before the Bill came into force. In *Skookum Jim Friendship Centre*[12], the Board concluded that the previous *Code* continued to apply to all cases filed before June 16, 2015:

> *[28] It is the Board's view that the legislative changes that took effect on June 16, 2015 were more than purely and exclusively procedural and that the potential impact of the changes should not interfere with any substantive rights or produce an unjust result for the parties. In this case, the legislative changes had the effect of altering the legal significance of the facts and the evidence provided in support of the application and processed by the Board. Although the public generally was aware of the legislative changes, there was no indication or clarity provided on how the changes would apply to or affect existing applications. To now apply the new provisions to cases filed prior*

[10] 2007 CIRB 395
[11] 2012 CIRB 621
[12] 2015 CIRB 784

> *to the coming into force of the changes would lead to an unjust result for the parties who relied on the facts and the membership evidence at the time of filing.*

Section 14 in Bill C-4 contains a transitional provision which should eliminate the costs associated with having to argue about which *Code* provisions apply:

> *14 If the Canada Industrial Relations Board has, during the period beginning on June 16, 2015 and ending immediately before the day on which section 1 comes into force, received an application for certification referred to in paragraph 28(2)(a) of the Canada Labour Code or an application for an order made under subsection 38(1) or (3) of that Act, and the application has not been finally disposed of before that coming into force, that application is to be dealt with and disposed of in accordance with that Act as it read immediately before that coming into force.*

Bill C-4 only applies to applications which are filed after it has come into force. Any certification applications filed before that date will continue to be covered by the current mandatory representation vote regime.

Section 17 indicates that Bill C-4 will come into force 3 days after it receives Royal Assent:

> *17 This Act, other than sections 12 and 13, comes into force on the third day after the day on which it receives royal assent*[13].

Pleading Implications

Experienced counsel will be familiar with Bill C-4's changes. The card-based certification regime will return, as well as traditional protections for bargaining agents against certain specific types of revocation applications.

However, the transitional provisions might impact how the Board operates, as well as parties' strategies.

Unlike Bill C-525, which gave the Board a six-month period to prepare itself for the new mandatory vote regime, Bill C-4 comes into force just three (3) days after it receives Royal

[13] Sections 12 and 13 repeal two provisions in the *Income Tax Act*.

Assent. This means the Board will have to be ready to follow its traditional certification processes at the latest three days following Royal Assent. The Board will then have to operate both regimes simultaneously, at least for a certain period.

The Board's *Regulations*[14] impose certain temporal requirements for the signing of membership evidence. Section 31(1) refers to a six-month period:

> *31(1) In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person*
>
> *(a) has signed an application for membership in the trade union; and*
>
> *(b) has paid at least five dollars to the trade union* ***for or within the six-month period immediately before the date on which the application was filed****.*
>
> *(Emphasis added)*

The possibility of stale membership evidence makes it important to monitor the progress of Bill C-4[15].

III. Legal Costs

In labour law, each side usually bears its own legal costs. However, exceptions to this principle exist.

Ontario

The Ontario Labour Relations Board (OLRB) does not award legal costs if they are akin to costs being awarded to a successful party in a civil litigation matter. The OLRB does not want to be involved in assessing a law firm's fees.

The OLRB explained its position in *National Grocers Co. Ltd*[16]:

[14] Canada Industrial Relations Board Regulations, 2012, SOR/2001-520
[15] This webpage provides Bill C-4's progress.
[16] 2003 CanLII 45939

> *20. For the reasons set out in Bellai Brothers Ltd. (supra) the Board has no jurisdiction to award legal costs. Even if it does have the jurisdiction, it should not do so. If the Board were to make such an award it would have to be prepared to embark on a determination of whether the time and disbursements counsel claims to have expended on the file were reasonable. That would add a whole new area of contentious litigation that would be inconsistent with the Board's primary objective of fostering labour relations harmony in the Province. The cost assessment exercise is not one to which the Board's processes are well suited. Awarding legal costs would add an expensive and acrimonious layer of litigation. It brands a winner and a loser, which is counterproductive as much in this inter-union dispute as within an industrial relations relationship. Awarding costs has a punitive connotation, which is inappropriate in the context of labour relations remedies. Finally, the Board's refusal to award costs is well understood by the labour relations community and forms part of its legitimate expectations of the results of litigation before the Board.*

However, legal expenses incurred as a result of a party violating the *Labour Relations Act, 1995*[17] (*LRA, 1995*) may be treated differently. In *Percon Construction Inc*.[18], the OLRB explained how damages, including legal fees, differed from the traditional concept of legal costs:

> *62. The same is not true of legal costs incurred in the bringing of the application for certification, and all legal work (other than the interim order application) up until February 1, 2010. The Labourers were entitled to bring the application. They were entitled to be able to exercise their right to seek to represent those employees. A violation of the Act is not a possible, inevitable or reasonably foreseeable outcome of exercising that right. All of its costs associated with the organizing, including legal costs, are costs thrown away because the outcome was thwarted by the unlawful behaviour of Percon, not because of the results of the litigation within the parameters set by the Act. There is no reason not to include those costs along with organizers' salaries and expenses. The facts and the distinction between the two types of costs are much closer to the facts in the two Suzanne Hebert-Valliant decisions than in the Kimberly-Clark Corp. decision.*

[17] SO 1995, c 1, Sch A
[18] 2014 CanLII 80538

> *63. Such an award does not raise the issues that the Board was concerned with in Kimberley-Clark and National Grocer, above. There is no need to assess the reasonableness of legal costs in the way that an assessment master applies the tariff under the Rules of Practice. In this decision, the Board is ordering Percon to reimburse the Labourers for all the monies they paid to their lawyers four or more years ago. There could be no better indicator of the reasonableness of an invoice than what a purchaser of services was prepared to pay for services rendered when it was not expecting at the time ever to recoup those expenses. It does not really brand a winner and a loser in an ongoing relationship. The results of this decision are decidedly mixed (the application for certification must, after all be dismissed). The costs are not punitive, but precisely and narrowly compensatory. It is also the result of an unusual situation that is unlikely to disturb any sort of legitimate expectation on the labour relations community.*

Quebec

In Quebec, the newly established Tribunal administrative du travail (TAT), has the power under section 47.5 of Quebec's *Labour Code*[19] to issue broad remedial relief. In *Castonguay v. Métallurgistes unis d'Amerique, section locale 9414*[20], the TAT's predecessor confirmed its authority to award legal costs in a duty of fair representation (DFR) case. While *Castonquay* awarded essentially full solicitor and client costs, the TAT does not necessarily order full indemnification.

A practice appears to have developed in Quebec to award a $1500.00 legal indemnity per day of hearing, along with a number of preparation days at the same rate[21].

[19] CQLR c C-27

[20] 2005 QCCRT 0204, upheld on judicial review.

[21] Guindon c. Corporation de sécurité Garda World, 2009 QCCRT 50. In this case, the TAT's predecessor was deciding a statutory wrongful dismissal complaint in a context very similar to the unjust dismissal remedy available under s. 240 of the *Code*.

CIRB Practice on Costs

Both the Canada Labour Relations Board (CLRB) and the CIRB have a long history of ordering legal costs in successful DFR cases. Only exceptionally will the Board do so for non-DFR cases[22]. In one exceptional DFR case[23], the CLRB ordered legal costs exceeding $200,000.

The Federal Court of Appeal (FCA) upheld that costs award[24]:

> *As for the remedy ordered by the Board, with respect to which the same standard of review is applicable, we see no more reason to intervene. On the one hand, the award of costs was rationally connected to the section 37 breach and its consequences within the meaning of subsection 99(2). On the other hand, a potential award of damages, provided it be established as having a direct causal link to the breach, is not in itself insupportable under the broad remedial discretion conferred by subsection 99(2) as it is not punitive in nature, does not infringe the Canadian Charter of Rights and Freedoms, and does not contradict the purposes of the Code (cf. Royal Oak Mines Inc. v. Canada (Labour Relations Board), 1996 CanLII 220 (SCC), [1996] 1 S.C.R. 369).*

In *Scott*[25], the Board described its process for calculating a contribution towards legal costs, having regard to the specifics of the case:

> *[169] These actions led to the Complainants engaging the services of legal counsel to represent them. A contribution to those costs is rationally connected to that breach.*
>
> *[170] Rather than making this process more formal than should be the case in labour relations matters, and in order to avoid any further expense to the parties, the Board will simply fix the amount of this contribution. It is not intended to be an award of costs on either a party and party or solicitor and his/her own client basis. It is merely a contribution towards costs.*
>
> *[171] Other processes exist to deal with the specifics of any legal fees actually invoiced to the Complainants.*
>
> *[172] In arriving at the amount of the compensation to be ordered, the Board considered certain factors linked directly to the oral hearing in this case such as:*

[22] See, for example, Monarch Transport Inc. and Dempsey Freight Systems Ltd., 2004 CIRB 301.
[23] Eamor (1998), 107 di 103
[24] Canadian Air Line Pilots Association v. Eamor, 1997 CanLII 5281
[25] 2014 CIRB 710

> *i. the complexity of the matter;*
>
> *ii. the efficiency with which the case was pleaded;*
>
> *iii. the length of the hearing*
>
> *iv. delays and*
>
> *v. the result.*
>
> *[173] The Board accordingly fixes the amount of the IAMAW's contribution to the Complainants' costs at a lump sum of $15,000.*

In *Mallet*[26], the Board applied the concept of proportionality when determining a successful DFR complainant's legal costs:

> *[39] Just as in the civil courts, the concept of proportionality impacts an award of costs. While the Board appreciates that laypeople may have no ability to enforce their Code rights without the assistance of individuals like Messrs Murphy, Barron and Ms. Salmon, there must still be proportionality between the requested fees and the case.*
>
> *[40] In this case, the Board agrees with Unifor that it ought not to be responsible for all the fees incurred by these three individuals, two lawyers and a labour relations expert. The case was relatively simple from a labour relations perspective.*

The Board calculated the costs based on the overall context of the case:

> *[48] The Board has determined, based on the pleadings, the pre-hearing processes and the oral hearing that a per diem of $2,000.00 is appropriate for the services Mr. Mallet received. The Board awards four (4) per dia for the actual oral hearing. While final argument on day four (4) only took half a day, it is evident that representatives had to prepare for oral argument.*
>
> *[49] The Board further awards four (4) per dia to cover mediation with Board staff, as well as the preparation of the pleadings and for the hearings.*
>
> *[50] The total amount due for eight days of per dia for Mr. Mallet's case therefore comes to $16,000.00. The Board has decided that BTLR will be entitled to three (3) of those days, while Mr. Murphy will be entitled to five (5). Unifor will pay, on Mr. Mallet's behalf, those respective amounts directly to BTLR and Mr. Murphy.*
>
> *[51] The Board further orders that Unifor pay on account of certain disbursements the amount of $1,500.00 for BTLR and $1,500.00 for Mr. Murphy.*

[26] 2015 CIRB 800

Similar to the situation at other labour boards, the number of successful DFR complaints at the CIRB remains miniscule. Complainants succeed in only a handful of cases, though DFR complaints make up a significant percentage of all CIRB unfair labour practice complaints.

Pleading Implications

What implications flow from the possibility the Board may award costs in successful DFR complaints?

The Board's DFR process contains several distinct steps. Progression through the various steps may raise potential red flags.

The first DFR step involves the Board deciding whether the complainant has established a prima facie case. Only if a prima facie case exists will the Board ask the trade union, and the employer to a lesser extent, to respond to the complaint. The Board's goal is to reduce the resources respondents used to expend when they had to respond to every single complaint[27].

The second DFR step does *not* examine whether the complainant has made out a prima facie case. The Board has already decided that issue.

Instead, the second step provides the trade union with an opportunity to describe the process it followed, coupled with supporting documentation, in arriving at its conclusions[28]. The trade union's process often, but not always, involves a decision whether to go to arbitration.

If the trade union's particularized response, and the complainant's reply, provide sufficient context, then the Board will often decide a complaint at the second step of the DFR process.

However, if the matter remains unclear then, as a third DFR step, the Board may either request the parties to provide further information or issue an oral hearing notice.

[27] The Board has described its prima facie process in many cases, including *Reid*, 2013 CIRB 693.
[28] See Heitzmann, 2014 CIRB 747, for a good example of a trade union's detailed response to a DFR complaint.

If the Board schedules an oral hearing, then its practice regarding legal costs may rise in importance. The Board's decision to hold an oral hearing does not mean the complaint will succeed. But it indicates that the Board wants to hear about certain issues which cannot be resolved by the pleadings alone.

At the oral hearing, the parties might want to consider mediation, with the assistance of the panel hearing the complaint[29].

Ultimately, if the Board upholds a DFR complaint, then its remedy may include the reimbursement of certain legal costs and expenses. A trade union may also be held responsible for paying the reasonable costs of independent counsel to plead the complainant's case at arbitration.

IV. Religious Exemption from Dues and Union Membership

A longstanding *Code* provision allows a bargaining unit member to request an exemption from union membership and/or paying union dues. Ontario has a similar provision, but a difference in statutory language creates a more limited remedy.

OLRB v. CIRB: Differences for Religious Exemptions

OLRB (s. 52 *LRA, 1995*)

Under section 52 of the *LRA, 1995,* a religious exemption is only available within a certain time frame and for a limited duration:

[29] Section 15.1(1) of the *Code* allows one or three-person Board panels to mediate and/or decide a case on its merits.

> *52. (1) Where the Board is satisfied that an employee because of his or her religious conviction or belief,*
>
> *(a) objects to joining a trade union; or*
>
> *(b) objects to the paying of dues or other assessments to a trade union,*
>
> *the Board may order that the provisions of a collective agreement of the type mentioned in clause 51 (1) (a) do not apply to the employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to a charitable organization registered as a charitable organization in Canada under Part I of the Income Tax Act (Canada) that may be designated by the Board.*
>
> *(2)* ***Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement****, and does not apply to employees whose employment commences after the entering into of the collective agreement.*
>
> *(Emphasis added)*

Recent OLRB decisions have referenced Charter questions being raised about section 52, but the board has yet to address the issue on the merits[30]. The Charter has also been mentioned in passing in certain decisions involving the CIRB.

CIRB (*Code* s. 70(2)-(4))

The *Code*'s religious exemption contains no temporal limitation. If the CIRB grants an exemption, then the employee is entitled to continue in employment indefinitely and pay his/her dues to a designated registered charity:

> *70(2) Where the Board is satisfied that an employee, because of their religious conviction or beliefs, objects to joining a trade union or to paying regular union dues*

[30] See, for example, Dorion v Ontario Nurses' Association, 2015 CanLII 41333 and Lennon v. Service Employees International Union Local 1, 2012 CanLII 57403

> *to a trade union, the Board may order that the provision in a collective agreement requiring, as a condition of employment, membership in a trade union or requiring the payment of regular union dues to a trade union does not apply to that employee so long as an amount equal to the amount of the regular union dues is paid by the employee, either directly or by way of deduction from their wages, to a registered charity mutually agreed on by the employee and the trade union.*
>
> *(3) Where an employee and the trade union are unable to agree on a registered charity for the purposes of subsection (2), the Board may designate any such charity as the charity to which payment should be made.*
>
> *(4) In this section,*
>
> *registered charity has the meaning assigned to that expression by the Income Tax Act; (organisme de bienfaisance enregistré)*
>
> *regular union dues means, in respect of*
>
> *(a) an employee who is a member of a trade union, the dues uniformly and regularly paid by a member of the union in accordance with the constitution and by-laws of the union, and*
>
> *(b) an employee who is not a member of a trade union, the dues referred to in paragraph (a), other than any amount that is for payment of pension, superannuation, sickness insurance or any other benefit available only to members of the union.*

CIRB Practice for Religious Exemption Requests

Despite the Legislator adding the religious exemption provision to the Code in 1984, there have not been a large number of applications.

As section 70(2) illustrates, two distinct exemptions exist. One deals with the payment of union dues, while the second concerns an obligation to become a member of the union. The two types of exemptions exist, since dues are a characteristic of every collective agreement, unlike "closed shop" provisions.

In *Bradford*[31], the Board described its traditional 5-step analysis for religious exemption requests:

> *[27] In interpreting this section of the Code, the Board has set out five criteria that should be applied. The first four criteria were established in Barker (1986), 66 di 91; 13 CLRBR (NS) 28; and 86 CLLC 16,031 (CLRB no. 576), while the fifth was subsequently added in Wiebe (1987), 70 di 89; and 18 CLRBR (NS) 241; and 87 CLLC 16,032 (CLRB no. 632). They are:*
>
> *1.The applicant must object to all trade unions and not one particular union.*
>
> *2.The applicant does not have to rely on a specific tenet of a particular religion or church.*
>
> *3.The Board must make an objective inquiry into the nature of the applicant's beliefs to determine whether they relate to the Divine, or man's perceived relationship to the Divine, as opposed to man-made institutions.*
>
> *4.The applicant must convince the Board that he is sincere and has not rationalized his objections to the union on religious grounds after he was made aware of the provisions of the Code.*
>
> *5.The Board must assess the probable consequences to the applicant if the application is not granted, including whether the applicant would be placed in such a conflict position if the application was denied that he would no longer be able to continue in his employment.*

The Board in *Bradford* refused to grant the exemption, since it concluded the applicant, who had been a long time union member, had rationalized his position and was in reality contesting his union's position on abortion:

[31] 2013 CIRB 696

> *[41] In the present case, for the reasons expressed above, the Board has similar doubts about the true foundation of the applicant's desire to opt out of union membership and payment of union dues. The Board has not been satisfied that his reasons do not remain grounded in his objection, first to the CAW's public stance on the abortion issue and its commitment of resources toward the pro-choice movement, and then more generally to the prospect of continuing to pay dues to an organization that can, does and likely will continue to take public stances on social, political and moral issues that may conflict with his own.* ***Realizing that this reasoning alone may not get him the exemption he was seeking, the applicant rationalized his religious views in an effort to meet the Board's criteria.*** *Accordingly, the Board is not convinced that the applicant has met the requisite criteria or should exercise its discretion to grant an exemption in this case. However, as noted in Lavigne, supra (page 281), payment of union dues does not inhibit a union member from expressing contrary views to those expressed by the union, and the expression of any views by the union is not "the voice of one and all in the bargaining unit."*
>
> *(Emphasis added)*

A reconsideration panel[32] did not interfere with the original panel's decision.

On judicial review, the FCA did not find the Board's reconsideration decision unreasonable[33].

The FCA emphasized that its decision examined only the Board's traditional 5-step test. The applicant had not contested that test on Charter grounds during the original hearing:

> *[2] Before turning to the factual background and the issues before us, it is important to keep in mind what is not in issue in this application. Indeed, although the sincerity of the applicant's religious beliefs was a factual issue to be assessed by the panel which initially heard his application regarding whether an exemption should be granted (the Original Panel of the Board), the applicant did not argue that there was a violation of section 2(a) of the Canadian Charter of Rights and Freedoms (the Charter), which protects freedom of religion. This was made very clear to us at the hearing. Nor is this application about the validity of the test to be applied in determining whether to grant an exemption under subsection 70(2) of the Code.*
>
> *…*
>
> *[35] It may be that the applicant can file a new application on more limited grounds, in which case he could challenge the Barker/Wiebe test and raise other*

[32] Bradford, 2014 CIRB 716

[33] Bradford v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-CANADA), 2015 FCA 84

> *constitutional arguments if he so wished. But this cannot be done at this stage of the process: judicial review is to be conducted on the basis of the record that was before the administrative decision-maker.*
>
> *…*
>
> *[49] Finally, the applicant says that although he did not rely on Doré before the Reconsideration Panel, this Court should conclude that the decision is unreasonable because the Reconsideration Panel did not apply Doré. The applicant says that he did not need to invoke the Doré approach because the Reconsideration Panel was obligated on its own to follow it.*
>
> *[50] I disagree. Both panels concluded that the exemption should be denied for failure to establish on a balance of probabilities the factual matter of the sincerity of the beliefs put forth as the basis for the applicant's objection. As a result, no Charter value was engaged. In other words, the Doré framework cannot apply if, on the facts of the case, there is no religious value to be balanced against other considerations.*

In *Farrell*[34], the Board again considered how to apply its traditional test for religious exemption applications. Unlike the situation in *Bradford,* where the applicant had been a long time union member, Ms. Farrell had consistently refused to join the union. However, she paid dues which had been automatically deducted from her wages. The collective agreement made both the payment of dues and union membership mandatory for all bargaining unit employees.

The Board in *Farrell* examined the Code's balancing of two fundamental Charter freedoms, the freedom of religion and the freedom of association. It then applied the longstanding religious exemption test to Ms. Farrell's situation.

The Board concluded that Ms. Farrell had not satisfied the fifth criterion of the test regarding the possible consequences to her if no exemption were granted.

For the payment of dues, Ms. Farrell had been candid that she would not quit her employment over this issue:

[34] 2015 CIRB 794

> *[76] Ms. Farrell described the payment of dues in her pleadings as a "kickback" and a "necessary evil", but she was candid with the Board that the payment of dues would not prevent her from continuing in her employment.*
>
> *…*
>
> *[78] The Board is satisfied that Ms. Farrell's continuing obligation to pay dues will not place her in such a situation of conflict that she would not be able to continue in her employment. Ms. Farrell did not satisfy the requirements of this guideline.*

On the issue of compulsory union membership, the Board noted that, as of the date of the hearing, Ms. Farrell's union had never taken steps to attempt to compel her to become a member:

> *[81] The fifth guideline obliges the Board to consider whether the failure to grant an exemption may place the applicant in an untenable position and place her employment in jeopardy. In the instant case, that type of compelling necessity does not exist. There was no evidence that Ms. Farrell's continued employment would be in jeopardy if the Board did not grant her an exemption.*
>
> *[82] Indeed, whether knowingly or not, it appears that CUPW may already be accommodating Ms. Farrell's religious views by not insisting on the signing of a membership card. This situation of peaceful co-existence is not the type of acute conflict to which section 70(2) was designed to apply.*
>
> *[83] The Board, therefore, at this specific time and on these specific facts, is not prepared to exercise its discretion to grant Ms. Farrell an exemption from being a CUPW member. She has never had to join CUPW since being hired by CPC in 2005 and there was no evidence she would be compelled to do so in the future.*

There must be serious pending consequences for an individual or else the Board will not grant an exemption. In *Farrell*, those consequences did not exist, other than theoretically. The Board did note that if the facts changed, Ms. Farrell could file a new application.

Pleading Implications

Since the development of the CIRB's test in the 1980's, the Supreme Court of Canada (SCC) has issued several key decisions about both the freedom of religion and the freedom of association.

The CIRB may be called upon at some point to determine what impact, if any, those cases have on its longstanding religious exemption test under s. 70(2) of the Code.

In Ontario, the same Charter issues could also arise. Unlike the situation federally, once an exemption "expires" in Ontario, the person seemingly would either have to leave his/her employment or fulfill his/her mandatory obligations as a bargaining unit member[35].

V. Jurisdiction Over First Nations

For the longest time, most labour lawyers assumed that matters involving First Nations fell within the CIRB's jurisdiction. However, as a result both of SCC decisions, as well as First Nations' expanding economic activities, the analysis has become more challenging. The SCC's analysis, however legally valid, seems to have created a degree of instability in First Nations' labour relations.

Recent Cases

The Board has recently considered its jurisdiction over a First Nations Band's commercial fishing activities, as well as over a police services board. The FCA intervened in the latter case.

Waycobah First Nation[36], (Waycobah)

In *Waycobah*, the UFCW applied to represent a unit of fishers who worked off the reserve. Waycobah objected to the certification application on the basis that those particular activities fell under provincial jurisdiction.

[35] See Allan v. International Brotherhood of Electrical Workers, Local 586, 2005 CanLII 21432, at paragraph 21.
[36] 2015 CIRB 792

A somewhat unique element in the case arose from the fact that the Waycobah Band itself, rather than a separate entity, operated the fishery.

This led the UFCW to argue*, inter alia*, that any employed fishers fell within federal jurisdiction, since Waycobah was a federal undertaking:

> *[65] In its supplemental submissions filed in April, 2015, the UFCW reiterated that the Board must apply the functional test to Waycobah as a whole when deciding the jurisdictional question. In its view, it would be wrong to focus solely on an internal department or activity.*
>
> *[66] Instead, since a Band Council is a federal undertaking, the UFCW argued that all employees directly engaged by Waycobah fell within federal jurisdiction. This occurred due to Waycobah exercising its rights, as conferred by the Indian Act, when dealing with its own employees, be they fishers or administrative employees.*
>
> *[67] It was this direct employment relationship between Waycobah and the fishers, something which did not exist in other recent cases analyzing the extent of federal jurisdiction over First Nations' labour relations, infra, which distinguished the current scenario.*
>
> *[68] The UFCW reminded the Board that the Fishery was not a discrete unit at Waycobah, but was instead fully integrated in several ways: i) Waycobah owned the fishing vessels and licences; ii) Waycobah's finance department handled the Fishery's budget and insurance; iii) fishing revenues were used for Waycobah's social programs and housing; iv) the Fishery's offices were located in the main Band building; and v) Chief and Counsel were ultimately responsible for all key decisions impacting the Fishery, including which Band members would be hired and designated for fishing positions.*

Waycobah, on the other hand, urged the Board to focus on the activities being carried out, rather than on its status as the fishers' employer:

> *[79] In its supplemental April, 2015 submission, Waycobah argued that what is in essence a commercial fishery cannot fall within this Board's jurisdiction. It noted that the fishers, who include both native and non-natives, work in a commercial fishery whose activities all occur off the reserve and Indian lands. The Fishery itself is subject to the same laws and uses the exact same equipment as any other commercial fishery. Waycobah's Fishery constituted a "for-profit" enterprise and often operated in partnership with non-native commercial fishing businesses.*

After reviewing the key decisions, the Board summarized its understanding of the legal principles it had to apply:

> *[109] The applicable legal principles arising from the above case law review may be summarized as follows:*
>
> *i) The determination of jurisdiction over any entity's labour relations, including for cases involving First Nations, is subject to the same two-step test: i) the functional test and, if necessary, ii) the core impairment test (NIL/TU,O);*
>
> *ii) A Band's governance activities constitute a federal undertaking; the Code applies to employees working for a Band who carry out tasks associated with that federal undertaking (Francis; Munsee; White Bear);*
>
> *iii) In cases involving a First Nations Band, the functional test focuses on the activity being conducted, rather than on the Band Council's overall operations (Fox Lake);*
>
> *iv) Not everything a Band carries out itself constitutes a federal work, undertaking or business; a Band's Negotiations Office does nothing identifiably federal which would oust the presumption in favour of provincial labour relations (Fox Lake); and*
>
> *v) A casino business, even if operated directly by a Band, would be subject to provincial jurisdiction, since that particular activity did not arise from any delegated authority in the Indian Act (SIGA).*

In applying those principles to the facts of the case, the Board concluded it did not have jurisdiction over a First Nations' direct operation of a commercial fishery:

> *[117] The Board accepts that the fishers' activities may provide some economic benefit to Waycobah, as would the sums obtained for contracting out fishing licences and vessels. Waycobah would be able to use those additional funds for helpful social purposes on the reserve.*
>
> *[118] But the fact that a commercial activity, such as a fishery, a casino or a gas station/general store, might provide a Band with additional resources to better the lives of its members is not conclusive for purposes of the functional test.*
>
> *[119] The Board must instead examine the Fishery's essential operational nature, habitual activities and daily operations in order to decide whether it is a federal undertaking. This analysis when conducted in this case shows that the Fishery's habitual activities are to fish commercially off the reserve, in essentially the same way that any commercial fishing business would operate.*

> *[120] When examining the Fishery from this perspective, the Board could not find a link to Waycobah's governance functions. This distinguishes the facts in this case from those in Munsee, where the employee worked directly in the Band's administration.*

Nishnawbe-Aski Police Services Board[37], (Nishnawbe)

In *Nishnawbe*, the Board examined whether its 2005 certification remained valid given subsequent decisions[38] from the SCC regarding First Nations' labour relations.

The Board concluded it continued to have jurisdiction, since policing formed part of a First Nations' governance:

> *[39] In NIL/TU,O, the essential nature of the NIL/TU,O Child and Family Services Society was to provide child and family services, a matter that is within provincial jurisdiction. Social services are regulated exclusively by the province and the Society's employees' delegated authorities came exclusively from the province. The identity of the designated beneficiaries was held not to change the essential nature of the Society's operations. In that case, the functional test was conclusive and an inquiry into the "core of Indianess" was not required.*
>
> *[40] In this case, the essential nature of the NAPS is policing, a matter that is not clearly within the exclusive jurisdiction of either the federal or provincial government. The authority for NAPS' existence is found in a federal statute, the Indian Act. Members of the NAPS first qualify as First Nations Constables, and then receive delegated authority to enforce provincial laws as a consequence of an administrative arrangement with the OPP. The fact that the NAPS officers then have jurisdiction over both aboriginal and non-aboriginal persons does not change the essential nature of its operations, which is to police Indians and lands reserved for the Indians. The application of the PSA to the NAPS for the limited purpose of authorizing its officers to enforce provincial laws within NAN territory does not automatically attract provincial regulation over the labour relations of the NAPS.*

[37] 2013 CIRB 701

[38] See, for example, NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45 and Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto, 2010 SCC 46.

[41] As noted earlier, policing is an aspect of governance. The basis for the existence of the NAPS is found in the Indian Act, federal legislation enacted pursuant to Parliament's exclusive jurisdiction over Indians and lands reserved for the Indians. Consequently, with respect to aboriginal policing generally, and police services created pursuant to the OFNPA specifically, the Board concludes that the operations of the NAPS are a matter of federal jurisdiction pursuant to section 91(24) of the Constitution Act, 1867.

Nishnawbe-Aski Police Service Board v. Public Service Alliance of Canada (FCA)[39]

On judicial review, the FCA did not dispute the Board's summary of the applicable legal principles. However, it did take issue with the Board's application of the law to the facts:

[29] The CIRB correctly noted that the Supreme Court reaffirmed in NIL/TU,O that labour relations are presumptively provincially regulated. In order to determine whether that presumption is rebutted, a two-step inquiry must be followed.

[30] First, the CIRB stated that it must follow a functional test to examine the nature, operations and habitual activities of the entity to determine whether it constitutes a federal undertaking. If the CIRB were inconclusive on that, it would have to proceed to the second step.

[31] The CIRB stated that under the second step, it must ask whether provincial regulation of the entity's labour relations would impair the "core" of the federal head of power.

[32] Having charged itself correctly as to the applicable law, in my view the CIRB then proceeded not to follow it.

The FCA started its analysis by considering the presumption that labour relations are provincial:

[64] With the guidance of these cases front of mind, I start with the presumption that the Nishnawbe-Aski Police Service's labour relations are provincially regulated. In considering whether that presumption is rebutted, I must first examine the essential nature and function of the Nishnawbe-Aski Police Service. I find that its essential nature and function is to provide policing services just like other provincial and municipal

[39] 2015 FCA 211

> *police forces in Ontario, a matter within the provincial sphere. The presumption that its labour relations are provincial has not been rebutted.*

The Court noted that the fact the police services board helped promote Aboriginal self-government did not change its constitutional characterization:

> *[71] It is true that Nishnawbe-Aski police officers enforce, among other things, bylaws passed by Bands, though this constitutes only a small part of the officers' task: Nishnawbe-Aski Police Services Board Annual Report 2011-2012 (only 0.6% of total incidents in the operational year). It is true that the enforcement of Band bylaws might assist the Nishnawbe-Aski Nation in its governance of Nishnawbe-Aski areas. It is true that an important objective of the Nishnawbe-Aski Police Service is to further and assist Aboriginal self-governance. But these things have nothing to do with the factual character of what the Nishnawbe-Aski Police Service actually does. Like the child welfare agencies in issue in NIL/TU,O and Native Child, the functions and activities of the Nishnawbe-Aski Police Service can only be characterized on this record as provincial in nature, tailored to serve its particular community, nothing more.*
>
> *…*
>
> *[73] As a result of the foregoing, the labour relations of the Nishnawbe-Aski Police Service are provincially regulated, not federally regulated. Therefore, the CIRB did not have the authority to make the orders it did, certifying the Public Service Alliance of Canada as the bargaining agent for two bargaining units of employees employed by the Nishnawbe-Aski Police Services Board. The CIRB should have granted the application of the Nishnawbe-Aski Police Services Board to set aside the certification orders.*

The SCC denied leave to appeal on April 7, 2016[40].

Pleading Implications

The presumption in favour of provincial jurisdiction weighs heavily when considering the CIRB's jurisdiction. In order to determine if the evidence rebuts the presumption, the parties and the tribunal must examine the essential function of the entity/activity in question[41].

[40] Public Service Alliance of Canada v. Nishnawbe-Aski Police Services Board.
[41] The "core impairment" test may, in certain cases, be required as well.

Federal jurisdiction may follow if the activity forms part of a First Nations' Band's governance functions. The *Code* clearly governs employees who assist the Band in carrying out its governance responsibilities.

But the further an activity moves away from Band governance, even if the Band carries it out directly, the Board's jurisdiction becomes more problematic. While the commercial fishing in *Waycobah* resulted from a massive infusion of federal funding and purchased equipment, the activity fell outside the Band's governance functions.

Some activities, like a casino, will be simple to evaluate in terms of jurisdiction. But the analysis of what falls within governance functions may still present challenges, especially when the Band itself carries out the activities.

VI. Harassment Complaints and the CIRB's Jurisdiction Over Reprisals

Harassment and Reprisals in Ontario/Quebec

When does discipline following the filing of a harassment complaint fall within a labour board's reprisal complaint jurisdiction? Can a harassment complaint filed under an employer's internal harassment policy give a labour board jurisdiction to examine subsequent discipline?

Various statutes, including the *Code*, prohibit reprisals arising from an employee's exercise of his/her statutory rights. For example, in human rights matters, both the *Canadian Human Rights Act*[42], and Quebec's *Charter of Human Rights and Freedoms*[43], prohibit reprisals for complaints alleging discrimination on prohibited grounds[44].

[42] R.S.C., 1985, c. H-6
[43] CQLR c C-12
[44] See sections 14.1 and 82 in each statute

Quebec further deals with the concept of "psychological harassment" in *An Act Respecting Labour Standards*[45], and prohibits reprisals[46]. These provisions are deemed to form part of all collective agreements.

Ontario's *Occupational Health and Safety Act*[47] (*OHSA*) distinguishes workplace harassment from workplace violence[48]. The provisions regarding workplace violence currently contain more substance than the procedural provisions for workplace harassment. This difference raised the question whether the OLRB had jurisdiction over reprisal complaints arising from allegations of workplace harassment.

In *Ljuboja v. Aim Group Inc.*[49], the OLRB concluded that it also had jurisdiction over those types of reprisals:

> *49. Accepting, as I do, that the Act requires employers to have an internal process for addressing instances and complaints of workplace harassment, it would entirely undermine that process if an employer is free to terminate a worker because he or she brought forward a complaint of workplace harassment in compliance with that process. An interpretation of the Act that finds employers are obligated to create and maintain a policy by which workers may bring forward complaints of harassment but are nevertheless free to terminate, or otherwise penalize or retaliate against, any worker for having actually made a complaint under that policy is, in my view, untenable. To interpret the Act in this manner would be to strip the employer's obligation to have a program to implement their workplace harassment policy through which workers may make a complaint of any meaning. Surely the Legislature did not intend in subsection 32.06(2) to spell out the obligation on employers to include measures and procedures for workers to report incidents of harassment at their own peril? Surely the Legislature did not envision that, in requiring employers to describe how they will "deal with" complaints of workplace harassment in subsection 32.02(2)(b), employers would be free to terminate the complainant merely because he or she had the temerity to complain about a course of unwelcome and vexatious comment or conduct?*

[45] CQLR c N-1.1 at sections 81.18 to 81.20
[46] See section 122
[47] R.S.O. 1990, Chapter O.1
[48] Another presenter at today's conference, Sonia Regenbogen, will examine Bill 132's *OHSA* amendments which will add further obligations for workplace harassment.
[49] 2013 CanLII 76529

The Legislators in Quebec and in Ontario have provided relatively explicit guidance in the area of harassment and reprisals. By comparison, Part II of the *Code* has remained essentially silent.

Harassment and Reprisals Under the *Code*

The Code's Silence on Harassment

Part II of the *Code* does not contain the term "harassment". Unlike in Ontario and Quebec, neither are there any explicit provisions dealing with employers' obligations when it comes to harassment.

However, this lack of specifics does not prevent the *Code*'s OHS regime from applying to harassment allegations.

Part II of the *Code* requires employers to protect employees against violence in the workplace[50]. Moreover, Part XX of the *Canada Occupational Health and Safety Regulations*[51] entitled "Violence Prevention in the Work Place" (*Part XX*), contains a broad definition for work place violence:

> *20.2. In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.*

In *Public Service Alliance of Canada v. Canada*[52], the Federal Court overturned a decision of the Occupational Health and Safety Tribunal of Canada (OHSTC) and concluded that harassment could constitute "work place violence" for the purposes of *Part XX*:

[50] See, for example, section 125(1)(z.16)
[51] SOR/86-304
[52] 2014 FC 1066

> *[25] In my opinion, harassment may constitute work place violence, depending on the circumstances present in a given case. The Respondent argues that the definition of work place violence set out in section 20.2 of Part XX of the Regulations is intended to address situations where an employee is in fear of being "harmed, injured or made ill", due to contact of another individual in the work place. The Respondent states that those situations do not apply to this case, where the complaint relates to the employee's harassment of being humiliated and disrespected by the behaviour of the employee's supervisor.*
>
> *…*
>
> *[29] Therefore harassment of the kind inflicted upon the employee in this case may constitute work place violence, if after a proper investigation by a competent person it is determined that the harassment includes actions, conduct or gestures that can reasonably be expected to cause harm or illness to the employee. In my opinion, psychological bullying can be one of the worst forms of harm that can be inflicted on a person over time.*

In *Canada (Attorney General) v. Public Service Alliance of Canada*[53], the FCA confirmed that harassment could constitute work place violence under the *Code*:

> *[22] As previously mentioned, the crucial issue in the case at bar is whether the Appeals Officer's conclusion that employers may screen out complaints they consider unrelated to work place violence is reasonable. Indeed, there was no dispute before this Court and the Court below that work place violence may encompass harassment, and that psychological harassment can reasonably be expected to cause harm or illness in some circumstances. On the other hand, counsel for the Respondent conceded at the hearing that a competent person could reasonably have concluded that the actions, conduct or gestures complained of by the employee were not serious enough to fall within the definition of work place violence used in section 20.2 of the Regulations. The limited question to be decided, therefore, is whether the employer could take it upon itself to conclude that the employee's complaint did not trigger the obligation to have it investigated by a competent person.*

The situation can become confusing, however, if it is not clear that the employee brought his/her complaint under *Part XX*:

> *[24] **Some of the confusion in the present case may have originated from the fact that the employee did not explicitly characterize his allegations as being work place violence in his initial written complaint**. This may well explain why the employer*

[53] 2015 FCA 273

> *tasked one of his regional directors to undertake a "fact-finding" process with respect to the "harassment complaint". **As noted by the Appeals Officer, however, such a characterization by the employee is not conclusive and cannot be taken to rule out the possibility that the alleged conduct qualifies as work place violence**. This is especially true where the employee, as was the case here, subsequently notifies his employer (following the cancellation of a meeting to discuss possible resolution of his complaint) that he will be filing a complaint under Part XX of the Regulations, which he did on February 9, 2012.*
>
> *(Emphasis added)*

The FCA also confirmed that an employer in certain limited circumstances can determine that a particular situation does not constitute work place violence provided it is "plain and obvious":

> *[33] **That being said, I agree with the Appeals Officer that it could not have been the intent of the Regulations to require employers to appoint a competent person to investigate each and every complaint, so long as the employee characterizes them as being work place violence.** This would no doubt trivialize the important rights and obligations enshrined in Part XX of the Regulations. In fact, I do not understand counsel for the Respondent to go that far. Even if there is no express authority under the Regulations for employers to undertake their own investigations before appointing a "competent person", they can certainly review a complaint with a view to determine whether, on its face, it falls within the definition of work place violence as found in section 20.2 of the Regulations.*
>
> *[34] **I agree with the application judge that the threshold should be quite low, and that an employer has a duty to appoint a competent person to investigate the complaint if the matter is unresolved, unless it is plain and obvious that the allegations do not relate to work place violence even if accepted as true.** The employer has very little discretion in this respect. If the employer chooses to conduct a preliminary review of a complaint (or a so-called fact-finding process), it will therefore have to be within these strict confines and with a view to resolving the matter informally with the complainant. Any full-fledged investigation must be left to a competent person agreed to by the parties and with knowledge, training and experience in these matters.*
>
> *(Emphasis added)*

The Federal Court's and FCA's decisions are important given the OHS jurisdiction the *Code* gives the CIRB under Part II.

The CIRB's Jurisdiction Over Harassment Complaints

Part II of the *Code* restricts the Board's role to the determination of reprisal complaints. The CIRB does not police allegations of a Part II contravention[54]. In situations not involving the exercise of the right to refuse dangerous work[55], the Board conducts a three-part analysis for reprisal complaints, as described in *Paquet*[56] *(Paquet):*

> *[60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a Code violation.*
>
> *1. Did Air Canada impose, or threaten to impose, discipline?*
>
> *2.* ***Were the employees participating in a Part II Process?***
>
> *3. Did a nexus exist between the Part II Process and Air Canada's discipline?*
>
> *(Emphasis added)*

In *Paquet*, the Board found that meetings of a statutorily-required health and safety Policy Committee satisfied the requirement for an employee's participation in a Part II process.

In many situations, there may be no real dispute that an employee is involved in a Part II process. However, in a couple of recent cases, the Board has had to decide whether a harassment complaint filed under an employer's *internal* policy could nonetheless constitute participation in a Part II process for the purposes of the *Paquet* analysis.

The Board foresaw in *Perron-Martin*[57] that a complaint filed pursuant to an employer's internal harassment policy might conceivably fall within *Part XX,* depending on the circumstances[58]. But the facts did not support such a conclusion in that case:

---

[54] Rathgeber, 2010 CIRB 536
[55] See *Court*, 2010 CIRB 498 for a slightly different three-part analysis for work refusal cases.
[56] 2013 CIRB 691
[57] 2014 CIRB 719
[58] See paragraph 45

> *[50] In the Board's view, Ms. Perron-Martin was involved in harassment complaints filed pursuant to Symcor's anti-harassment policy. Symcor investigated internally in some cases and hired outside specialists to investigate in others.*
>
> *[51] The onus was on Ms. Perron-Martin to demonstrate that she had participated in a Part II process. She did not meet that onus with her reference to harassment complaints filed under Symcor's anti-harassment policy.*

In *Roy*[59], the Board revisited the issue. The Federal Court and the FCA had issued their important decisions after the Board's decision in *Perron-Martin*.

In *Roy*, the complainant had been terminated two days after filing a harassment complaint under an internal employer policy. Because of the termination, the employer did not investigate the complaint.

Ms. Roy satisfied the Board, based on the content of her complaint, that the situation fell within the parameters of *Part XX* of the Code. Since the employer had not investigated her harassment complaint, no evidence existed to the contrary[60].

However, the Board examined the entire labour relations context surrounding Ms. Roy's termination, including the fact that an arbitrator had already dismissed her termination grievance. The employer had also demonstrated that, prior to the filing of the harassment complaint, Ms. Roy knew her employment was ending.

The Board was satisfied that the Part II process was not, in whole or in part, the reason for Ms. Roy's termination.

Pleading Implications

The *Code*'s lack of specifics, including a definition for work place harassment, may raise certain challenges in future cases.

[59] 2016 CCRI 822. As of this paper's submission date, the French reasons for decision in *Roy* had not yet been translated in English. No live link was therefore available.
[60] The Federal Court and FCA decisions had not been issued at the time the events in *Roy* occurred.

For example, given the importance of a Part II process to the Board's jurisdiction, does an employee have to be correct that his/her harassment complaint meets the definition of work place violence in *Part XX*?

For reprisal complaints arising from the exercise of the right to refuse dangerous work, an employee does not have to be correct. The Legislator made it clear in the *Code* that an employee only needed to have a "reasonable cause to believe"[61] that danger existed[62].

Similarly, does the Board have to determine the correctness of any initial employer decision that it was "plain and obvious" the situation did not involve work place violence? What if another tribunal is already seized with that question?

These challenges are not insurmountable, but the *Code*'s silence adds some complexity to these types of cases.

VII. Final Comments

Different Federal Tribunals; Same Legislation

In the federal jurisdiction, two separate tribunals may apply some of the same *Code* provisions or consider similar, if not identical, legal issues. The relevance of any resulting decision may extend beyond the immediate interest of the community that particular tribunal serves.

For example, the Public Service Labour Relations and Employment Board (PSLREB) has *almost* the same jurisdiction as the CIRB for Part II reprisal complaints. Section 240 of the *Public Service Labour Relations Act*[63] (*PSLRA*) provides the PSLREB with this authority:

[61] S.128(1)
[62] *Court*, supra, at paragraph 107
[63] S.C. 2003, c. 22, s. 2

> *240* ***Part II of the Canada Labour Code applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or business referred to in that Part except that, for the purpose of that application****,*
>
> *(a) any reference in that Part to*
>
> *(i) "arbitration" is to be read as a reference to adjudication under Part 2,*
>
> *(ii****) the "Board" is to be read as a reference to the Public Service Labour Relations and Employment Board****,*
>
> *(iii) a "collective agreement" is to be read as a reference to a collective agreement within the meaning of subsection 2(1),*
>
> *(iv) "employee" is to be read as a reference to a person employed in the public service, and*
>
> *(v) a "trade union" is to be read as a reference to an employee organization within the meaning of subsection 2(1);*
>
> *(b)* ***section 156 of that Act does not apply in respect of the Public Service Labour Relations and Employment Board****; and*
>
> *(c) the provisions of this Act apply, with any necessary modifications, in respect of matters brought before the Public Service Labour Relations and Employment Board.*
>
> *(Emphasis added)*

Curiously, while s. 156 allows the CIRB to exercise certain powers from Part I of the Code for its Part II OHS cases, section 240(b) of the *PSLRA* prevents the PSLREB from exercising those same powers. Section 156 states:

> *156 (1) Despite subsection 14(1), the Chairperson or a Vice-Chairperson of the Board, or a member of the Board appointed under paragraph 9(2)(e), may dispose of any complaint made to the Board under this Part and, in relation to any complaint so made, that person*
>
> *(a) has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and*
>
> *(b) is subject to all the obligations and limitations that are imposed on the Board by this Act.*

> *(2) The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.*

In practice, this can lead to the anomaly of the CIRB having the power to extend the time limit for the filing of an OHS reprisal complaint[64], whereas the PSLREB cannot[65].

Two recent cases indicate how one federal board's jurisprudence may be of interest to those pleading a case at a different board.

Can a civil servant file a reprisal complaint for discipline arising from duties he performed under Part II of the Code?

In *Grundie v. Treasury Board*[66] (*Grundie),* the complainant, who was a health and safety officer at the material times, alleged that his employer took reprisals against him due to the investigation and statutory decisions he had made under Part II.

Was Mr. Grundie, when performing his job as a health and safety officer, acting in accordance with Part II of the Code? Treasury Board, Mr. Grundie's employer, suggested that Part II was never meant to apply to employer discipline related to a public servant's performance or conduct.

The PSLREB determined that an employee carrying out his/her functions under Part II of the Code could file a reprisal complaint. It further concluded that Treasury Board had violated Part II of the Code when it disciplined Mr. Grundie.

[64] See, for example, *Perron-Martin*, at paragraphs 24-27.
[65] Laroque v. Treasury Board, 2010 PSLRB 94
[66] 2015 PSLREB 95. As of this paper's submission date, the decision in *Grundie* had not yet been translated into French and therefore had no live link available.

When will a labour board agree to issue a consent order which settles a duty of fair representation case?

In *Public Service Alliance of Canada v. Canada*[67], the FCA described the background to a case in which a complainant and her union agreed to a consent order to resolve a DFR complaint. The order would send a grievance to arbitration; it would also impact a non-party, the employer:

> *[3] Proceedings before the Board with regard to Ms. Bufford's complaints commenced on January 28, 2013. They were adjourned after five days, and scheduled to resume in May 2013. Settlement negotiations between Ms. Bufford and PSAC ensued, and an agreement was reached. However, the proceedings before the Board remain outstanding.*
>
> *[4] This settlement led to the applications to the Board for the consent orders at issue. In essence, those orders provided that:*
>
> *a) PSAC acknowledged its unfair labour practice;*
>
> *b) the complaint against the Named Individuals was dropped;*
>
> *c) Ms. Bufford would be permitted to proceed with the grievances against the CRA, notwithstanding that they had not yet been filed; and*
>
> *d) the grievances were deemed to have met all applicable time limits.*
>
> *[5] In effect, the consent orders would grant Ms. Bufford an extension of time to file her grievances without having to resort to the specific provisions of the Act and the Public Service Labour Relations Regulations, S.O.R./2005-79 (the Regulations) and meet the requirements thereunder.*

The PSLREB had refused to grant the consent order in the absence of any determination that a DFR violation had occurred, an important condition precedent to its remedial jurisdiction:

> *[6] The Board declined to grant the orders for the following reasons:*
>
> *a) it had not determined that the complaints were well founded, which is a precondition to issuing a remedy under subsection 192(1) of the Act;*

[67] 2016 FCA 8

> *b) the orders were against the CRA's interests and the Board's power under subsection 192(1) of the Act only extends to issuing orders against a party complained of (here, PSAC and the Named Individuals); and*
>
> *c) it could not rely upon its power to make "incidental" orders under section 36 of the Act to grant the extension of time and refer the grievances to adjudication because the power to extend timelines is codified in section 61 of the Regulations.*

The FCA did not consider the PSLREB's reasoning unreasonable:

> *[11] We agree that the proposed consent orders would directly, and not incidentally, impact the CRA and that the Board reasonably concluded that the effect of the proposed consent orders would be as against the CRA, which is not a party complained of, for the purposes of subsection 192(1) of the Act.*
>
> *[12] Despite counsel's various and forceful arguments, we are not persuaded that the decision of the Board was unreasonable. The decision is amply supported by the reasons that are referred to above and we see no reason to interfere with it.*

The CIRB has historically limited the ability of an employer in a DFR complaint to plead and participate on the merits. The matter concerns the trade union and the member.

But the Board grants an employer full standing to comment on the issue of remedy. Exceptionally, however, if there is a possibility of collusion, then the employer may be permitted take a more active role on the merits of a DFR complaint, as noted in *Canada Post Corporation*[68]:

> *[20] The Board may grant an employer limited standing on the merits of a DFR complaint if there is an allegation that the complainant and the trade union have collaborated to use the Board to send an untimely grievance to arbitration - Mireille Desrosiers, 2001 CIRB 124:*
>
> *[40] The employer, although impleaded, may appear, but its right to intervene in the proceeding is, in principle, limited and restricted. It might, however, be granted leave to raise objections of jurisdiction, limitation, and even participate actively in the inquiry should there be a risk of collusion between the employee and the union: Brenda Haley (1980), 41 di 295; [1980] 3 Can LRBR 501; and 81 CLC 16,070 (CLRB no. 271).*

[68] 2010 CIRB 558

> *[21] Other than in these exceptional situations, however, an employer's usual role is limited to making submissions on the issue of remedy. This arises because its potential liability can be directly impacted by having an otherwise untimely grievance proceed to arbitration.*

A consent order resolving a DFR complaint and sending a matter to arbitration will likely not succeed if the employer has not consented and the tribunal has made no finding of liability.

Parties frequently examine decisions from other tribunals to find support for their arguments. Of even greater assistance, perhaps, the above decisions demonstrate how one federal tribunal may interpret the exact same legislation as another, and the reviewing court may be the same for both.

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Graham J. Clarke, a CIRB Vice-Chair from 2007-2016, is a bilingual arbitrator-mediator and member of the Bars of Ontario and Quebec. For over 25 years, he has written and continuously updated the loose-leaf texts Canada Labour Relations Board: An Annotated Guide, followed by Clarke's Canada Industrial Relations Board. Further papers on federal labour law can be found on his website.