Another busy March on the labour and employment front.

This *Legal Alert* continues with my efforts to provide you with monthly updates on cases and developments over the past 30 days, and there have been a number of them (as there always seem to be).

As we come to terms with Bill 148 and the amendments to the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995*, I thought I would focus on one of these changes that is of particular relevance to non-unionized employers who will have to adapt to new and different union organizing tactics. The change relates to requests for a list of employees under section 6.1 of the *LRA* and has flown under the radar a little.

Other developments relate to constructive dismissal, damages principles in actions for wrongful dismissal cases (specifically relating to bonuses), just cause for termination and the jurisdiction of labour arbitrators.

I hope you find something in these pages that is of relevance to you and your work.

Mike

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Bonuses and Employment Law the Saga Continues

Last month's *Legal Alert* contained an article *Court of Appeal Clarifies Bonus Eligibility on Termination* in which I discussed the decision in Bain v. UBS Securities Canada Inc., 2018 ONCA 190 (CanLII). My former partner, Justice Benjamin Glustein considered *Bain* in Chambers v. Global Traffic Technologies Canada Inc., 2018 ONSC 2000 (CanLII).

Chambers was employed by Global for 2.5 years as its General Manager which was the most senior employee. He was paid a combination of base salary, bonus (with a target of $90,000), benefits and other perquisites. The plaintiffs' employment was terminated on August 15, 2017, without just cause. He was about 55 years of age at the time of the termination.

The plaintiff brought a motion for summary judgement and sought damages equal to 12 months salary, RRSP contributions, car allowance, and benefits. In addition, he sought payment of a bonus for the period January 1, 2017 to August 15, 2017 as well as a bonus through the common law period of reasonable notice based on a full target bonus of $90,000.

The Court fixed the period of common law reasonable notice at 9 months. In doing so, it considered a variety of factors including that the employer did not provide the plaintiff with a reference letter, his age, position and remuneration.

In terms of the bonus, the bonus plan provided that, to be eligible for a bonus, the employee "must be employed on the date the bonus is paid". The employer argued that Chambers was not entitled to any bonus payment for 2017 or during the period of reasonable notice as he was not an "active" employee. The Court considered the law on this point including the leading case from the Court of Appeal of Lin v. Ontario Teachers' Pension Plan, 2016 ONCA 619 (CanLII) where the Court stated:

> I reject the appellant's assertion that these terms restrict Lin's entitlement to compensation for lost bonuses in the event of wrongful dismissal. The wording does not unambiguously alter or remove the respondent's common law right to damages, which include compensation for the bonuses he would have received while employed and during the period of reasonable notice. A provision that no bonus is payable where employment is terminated by the employer prior to the payout of the bonus is, in effect, the same as a requirement of "active employment" at the date of bonus payout. Without more, such wording is insufficient to deprive a terminated employee of the bonus he or she would have earned during the period of reasonable notice, as a component of damages for wrongful dismissal….

Justice Glustein referred to what I call the "default" damages principle in these cases:

> … in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 (CanLII) ("Paquette"), the court reached the same conclusion as in *Lin*, relying on "the basic principle" upon wrongful dismissal that an employee is entitled to compensation for all losses arising from the employer's breach of contract in failing to give proper notice, in order to place the employee in the same financial position as if such notice had been given, including the lost opportunity to earn a bonus, even if discretionary.
>
> In the present case, the "active employee" requirement in the Incentive Plan, as in Lin, does not unambiguously provide that Chambers would not be entitled to a bonus even if wrongfully dismissed. Consequently, he is entitled to remuneration for a bonus for the period from January 2017 to his termination in August 2017, as well as for the period of reasonable notice.

> Bonuses which were earned during the period prior to termination or would have been earned in the reasonable notice period are payable upon termination, even if payment of the bonus would have been outside the notice period (Bain v. UBS Securities Canada Inc., 2018 ONCA 190 (CanLII), at paras. 14-15).

In determining the amount of bonus, the Court considered the "fairest way to estimate the bonus amount is by using an average of the bonuses paid in previous years" (see: Glagau v. Brink's Canada Limited, 2017 ONSC 4811 (CanLII), at para. 2; Nelson v. Champion Feed Services Inc., 2010 ABQB 409 (CanLII), at para. 126).

On this last point, it is important to note that this "averaging" method of looking at past years as a predictor of likely bonus during the period of reasonable notice is not universally applicable. It is only valid where the past is a reasonable predictor of the future. This is often the case, but not always.

Conclusion

What do your bonus plans say about bonus eligibility on termination? Do they clearly and unambiguously "alter or remove the respondent's common law right to damages" to a bonus either on a pro rata basis or through the common period of reasonable notice? Has the bonus plan been agreed to by the employee?

There are ways of dealing with bonuses but it is not, without more, through words like "active employment" or "discretionary".

Just Cause is Still the Capital Punishment of Employment Law

Another former partner, the late Mr. Justice R.S. Echlin in the case of Tong v. Home Depot of Canada Inc., 2004 CanLII 18228 stated, simply, that just cause is "the capital punishment crime of employment law" and, indeed, it is.

Why is this? In Reference Re Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC) Chief Justice Dickson wrote (in dissent) that:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This paragraph has been quoted in countless employment law cases and in a variety of contexts. More recently, in Wallace v. United Grain Growers Ltd., 1997 CanLII 332 (SCC) the Supreme Court of Canada recognized that "the manner in which employment can be terminated is equally important to an individual's identity as the work itself." There is a vulnerability in the employer and employee relationship and an inequality of bargaining power that must be protected by the Court.

A really good summary of the law of just cause is found in Johar v Best Buy Canada, 2016 ONSC 5287:

> Firing or terminating an employee for cause is the "capital punishment" of employment law. The onus is on the employer to establish just cause for the dismissal. Not every incident or misconduct justifies termination for cause. Dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. Whether or not termination for cause was justified requires a factual inquiry into the context and circumstances of the misconduct.

More fundamentally, when an employee is terminated for just cause, he or she is not entitled to damages on account of reasonable notice at common law. This is a harsh result and one that the Courts are careful to find in clear cases.

The law of just cause in employment cases continues to evolve since the seminal case of McKinley v. BC Tel, [2001] 2 SCR 161 which introduced the "contextual" approach which involves a two (2) step process:

Step one: has the evidence established the employee's misconduct on a balance of probabilities?

Step two: If so, did the nature and degree of the misconduct warrant dismissal?

Once just cause has been proven, on a balance of probabilities, the punishment must fit the crime.

Most recently, the Court considered the *McKinley* approach in Edmond v. Algonquin College, 2018 ONSC 1898 and summarized the relevant principles as follows:

(a) determining whether just cause exists involves an analytical framework that examines each case on its own facts and circumstances, considers the nature and seriousness of the dishonesty in order to assess whether it's reconcilable with sustaining the employment relationship;

(b) dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause;

(c) whether an employer is justified in dismissing an employee on the grounds of this conduct requires an assessment of the context of the alleged misconduct. The test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship, whether the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the working relationship or is fundamentally or directly inconsistent with the employee's obligation to the employer;

(d) the seriousness of the misconduct requires careful consideration and balancing of the facts. A contextual approach is to be used in assessing whether an employee's dishonesty provides just cause for dismissal, such as cases of proven theft, misappropriation or serious fraud;

(e) there can be lesser sanctions for less serious types of misconduct. The principle of proportionality is applicable in determining the appropriate level of sanction. This requires the effect of balancing between the severity of the employees' misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals derive from their employment;

(f) the Court recognized the integral nature of work to the lives, identity and well-being of employees.

(g) employment relationships are typically characterized by unequal bargaining power placing the employee in a vulnerable position, particularly at the time of dismissal;

(h) the judge or jury must determine whether the evidence establishes the employees' misconduct on a balance of probabilities and if so whether the nature and degree of the misconduct warranted dismissal without notice; and

(i) there is no rule that an employer is entitled to dismiss an employee for just cause for a single act of dishonesty.

As can be seen, not only must the conduct be proven and amount to a just cause in the sense that it is inconsistent or irreconcilable with the employment relationship, but the discipline selected by the employer (i.e. termination) must be proportionate with the infraction in all of the circumstances. In other words, before jumping to termination, the employer must consider whether other disciplinary responses are more appropriate and proportionate.

In *Algonquin* the Court considered that the alternatives to the "capital punishment" dismissal for cause discipline imposed included at least the following:

(a) a disciplinary meeting, reprimand and record on her employment file;

(b) suspension with pay;
(c) suspension without pay;
(d) dismissal from employment with notice; or
(e) a period of suspension without pay followed by dismissal with notice.

> There is no evidence that Algonquin considered or determine that any or all of the above alternatives were inappropriate. Algonquin instead accepted the Report which misstated some of the relevant facts and the apparent ill-considered conclusion that dismissal for cause was the only resulting appropriate and proportionate level of discipline.

As I wrote last month, and as this recent case confirms, it's important to understand that maintaining a termination for just cause isn't easy. We must go through the contextual analysis discussed in *McKinley* and look at the surrounding circumstances before jumping to termination, no matter how serious the misconduct. Things like long service, a clean disciplinary record, a frank acknowledgment of wrongdoing and a prompt acceptance of responsibility will go a long way in mitigating the penalty of termination, so don't jump to conclusions.

That is not to say that termination is the wrong decision - it may well be the right decision because the employer feels that the employment relationship isn't salvageable. But, that doesn't mean that the termination can be defended on the basis that just cause or that termination is the appropriate penalty.

Constructive Dismissal Cases Remain Tough for Employees

I've written many times about constructive dismissal, most recently in the March 2018 Legal Alert in an article entitled *Constructive Dismissal Based on Poisoned Workplace* and I commend you to that article for a review of the legal principles applicable to constructive dismissal cases as laid out by the Supreme Court of Canada in Potter v. New Brunswick Legal Aid Services Commission, [2015] 1 SCR 500.

The Ontario Superior Court of Justice Quigley v. Greyfair Flooring Inc. [2018] O.J. No. 1776 recently considered, in a rather unusual case, considered the issue of constructive dismissal of a long service employee. The Court said "in many ways, this case is a mess", not words that engender confidence in the litigants.

The plaintiff was about 61 years old at the time of the events in issue and has a grade 12 education. He started with Greyfair in 1982, he left voluntarily in 1988, returned in September 1993 and his last day worked was August 13, 2016. When Quigley returned to Greyfair in 1993, he was hired as an independent contractor (not an employee) and, in 1999, a Contract for Services was entered into. Quigley continued as an independent contractor until 2000 his status changed from an independent contractor to an employee at the request of Greyfair because, the court said, of certain "government legislation". Save for the change in status, things continued.

The plaintiff worked as a salesman, was paid 100% commission and he was paid a draw of $1200 a week at the time his employment ended. His annual gross income in 2015 was $62,400.

There was a dispute about the plaintiff's length of service. He argued that he had been employed for 23 years, whereas the employer said he'd been employed for 16 years. The Court sided with Mr. Quigley on this point.

The dispute that gave rise to a deterioration in the relationship between the parties and the eventual litigation started in or about the spring of 2016. The Court put it this way:

> According to Quigley, he started to become concerned about the accuracy of his pay when it came time to do his taxes in the Spring of 2016. He could not understand why his pay seemed to be going down even though his sales were strong. He eventually spoke with the bookkeeper. She told him that he had not been

> paid for underpad (which goes underneath flooring products). That surprised him, as he thought that he had. He always believed that his deal with Greyfair included being paid commission on underpad sales.
>
> Later, Quigley discovered that, in fact, he had been paid for underpad sales between 2000 and 2008. Ony, in his testimony, agreed with that, except that Ony was adamant in saying that Quigley was never intended to be paid for underpad sales.
>
> It turns out that both Quigley and Ony are mistaken about Quigley having actually been paid anything for underpad sales, ever.

The Court decided that Greyfair was "more correct" and held that Quiqley was not paid commissions on underpad sales. Quigley's gross annual income was always calculated on the bases of his draws, bonuses and vacation pay and this was confirmed by his T4s which, the Court stated, "one cursory look at any T4 over the many years would have clearly shown any reasonable reader that the employee was getting paid without any regard for actual gross sales in any given year."

As noted above, the relationship, which had previously been good, began to deteriorate. Greyfair's lawyer wrote a letter to Quigley which, Quigley argued, resulted in a constructive dismissal. He relied on three (3) aspects of the letter:

1. He was to be paid 3% (rather than 6.5%) commission on underpad sales;
2. He was to be paid nothing for sales of accessories (which, presumably, would include things like sealers, mortar, and floor registers for heating, as examples); and
3. In the event that his employment was terminated, his seniority would be taken at 16 years (not 23 years).

The Court found that, in all the circumstances, that the plaintiff had not been constructively dismissed. The plaintiff had never been paid any commissions on underpad sales. Arguably, he was not paid commissions on accessory sales (though for some period he was, incorrectly, paid on such sales).

On the issue of length of service, the Court found that the letter from the lawyer "fundamentally changed Quigley's seniority from 23 to 16 years. That was a marked reduction. A significant reduction" and a "substantial change" in the words of the Supreme Court of Canada in *Potter*. The Court in *Quigley* made the following comments about "service":

> Besides money, few if any things in the context of an employment relationship are more essential, more important, than the worker's seniority. Length of service is a badge of honour in many workplaces. It is perceived, and often is in fact, relevant to other aspects of employment like pay, responsibilities, decision-making authority, preferences for vacation time, amount of vacation time, and so on. It is also relevant to most workers on a more personal level in that it can contribute to a sense of self-worth and accomplishment.
>
> We see this across various jobs/professions. We all know of workers who have received gifts or formal recognition for their length of service, as an example. We all know of professions where seniority is recognized in even the smallest of ways, such as how the list of names is organized on the page when a memo comes out from headquarters.
>
> Most important, however, seniority is directly linked to what a worker can reasonably expect to receive in notice or pay in lieu of notice in the event of dismissal. In that sense, seniority is inextricably linked with job security. It is only common sense that, all other things equal, an employer will be less willing to dismiss a more senior employee than a more junior one because the former is very likely a more expensive proposition.

It's not clear how many of these comments were based on evidence presented at trial and how much was based on the judge's experience, what is clear is that seniority and length of service is a factor (one of increased importance if we consider recent case law) to be taken into account in determining the period of common law reasonable notice based on *Bardal.*

The problem for the plaintiff in this case, however, is that the Court concluded that the change, albeit fundamental and substantial was not unilateral. For a constructive dismissal to take place, the change must be both substantial and unilateral (i.e. imposed by the employer and not agreed to expressly or implicitly by the employee).

The Court looked at the correspondence between the lawyers for both parties and specifically the issue of length of service. It quoted from the employer's letter:

> Greyfair will not be changing the existing terms of Mr. Quigley's employment to pay him an hourly wage or provide him with the use of a company vehicle. Effective July 2, 2016, Greyfair has implemented the terms of employment described in my June 20, 2016 letter to Mr. Quigley (with the exception that no commission will be payable on LVT sales to Barry's Construction – we are advised that Mr. Quigley has already agreed to this). If Mr. Quigley is suggesting that any of those terms are less generous than the existing unwritten terms of his employment immediately prior to July 2, 2016, please let us know. Your letter suggested that Mr. Quigley was hired in 1993 and not in 2000. This is contrary to what Mr. Quigley told our client during a meeting several weeks ago. Specifically, he told them that he became an employee in 2000 and prior to 2000 he had been an independent contractor. Our client is currently looking for records to confirm the exact date on which he became an employee. Of course, Mr. Quigley's income tax returns should clarify when he began receiving T4 income from Greyfair – could you please provide us with this information because his tenure as an employee will obviously determine his entitlement to notice in the event that his employment is terminated without cause in the future.

The issue of length of service was "left open" to further discussion. Instead, what happened was that the plaintiff "continued to work for Greyfair for a while, went off on sick leave in August 2016, and then resigned in January 2017."

Although the Court dismissed the claim, had it found that the plaintiff was correct, it would have determined that he was entitled to a period of reasonable notice at common law of 23 months, less mitigation income.

Take Aways

This is, yet another constructive dismissal case where the employee came away with nothing. This time because, the court found, the change was not unilateral. The issue that could have founded a constructive dismissal claim, was left open for further discussion, which didn't happen. It is disheartening to see a long-service, loyal and good employee walk away with "nothing" but the law is a blunt instrument and sometimes harsh results follow.

An important issue here is that there are two (2) things that must be found before a constructive dismissal is found - the change must be substantial and it must be unilateral. Another matter that this case highlights is that the first step in deciding whether a constructive dismissal has occurred is to figure out what are the "original" terms of employment. Those set the baseline of the changes that are made, and will determined the "delta" or significance of the changes that are made because of the imposition of new terms of employment.

In this case, the parties were at odds over what those original terms of employment were, although the Court eventually sided with the employer on the commission points.

Unionized Employers and Civil Claims - a Helpful Reminder

When the Supreme Court of Canada released its decision Weber v. Ontario Hydro, [1995] 2 SCR 929 those of us practicing in this area gave a muted, though collective, gasp. Why? Because the Supreme Court of Canada endorsed an expansion of the jurisdiction of the types of cases that labour arbitrators appointed under collective agreements could hear.

It did so by establishing a test that gave labour arbitrators exclusive jurisdiction where the issue in question, viewed in its essential character, can be said to arise either directly or inferentially from the collective agreement.

The issue is important an arises where a unionized employee sues their employer and the employer brings a motion to the Court arguing, on the basis *Weber* and the many cases that have followed it, that the Court has no jurisdiction to hear the claim because the arbitrator has the exclusive jurisdiction over the matter.

Although we saw a lot of cases in the time immediately after *Weber,* the number of cases on this issue has declined considerably as we came to terms with the scope of the test. Courts will assume jurisdiction in limited circumstances where the issues arise out of the employment of a unionized employee. They have taken an expansive, though reasoned, approach to the "essential character" analysis and have dismissed a variety of claims brought by unionized employees. That is not to say that there are "no" claims over which the court will assume jurisdiction where a unionized employee is the plaintiff.

The most recent case is Giuggio v. Agropur Cooperative, 2018 ONSC 1966 (CanLII). The plaintiff worked as a "dependent contractor" driver and was, at all material times, represented by the Teamsters, Local 647 and subject to a collective agreement negotiated between the union and Agropur. He was also a signatory to a distribution agreement that ran until December 4, 2015. The collective agreement provided that in the case of a "direct conflict between the collective agreement and commercial agreement", the collective agreement prevails.

On November 9, 2014, Giuggio was given twenty (20) weeks' notice that his relationship with Agropur would be terminated on April 11, 2015, without cause, due to the elimination of his route.

The plaintiff sued Agropur and argued that he was entitled to wrongful dismissal damages and that the distribution agreement that ran until December 4, 2015 was not superseded by the collective agreement. The defendant took the position that *Weber* applied and clothed the arbitrator with exclusive jurisdiction over the subject matter of the claim.

The Court agreed and dismissed the action. The motion's judge held:

> If, upon examining the provisions of the collective agreement, this court determines that the collective agreement contemplates the factual situation disclosed in the claim, the court will lack jurisdiction to determine the dispute: Regina Police Assn v Regina (City) Police Commissioners, 2000 SCC 14 (CanLII), [2000] 1 S.C.R. 360, at para. 25; Allen v. Alberta, 2003 SCC 13 (CanLII), [2003] 1 S.C.R. 128, at paras. 14-16.

In conducting the analysis of the collective agreement and letter of understanding, the Court held that:

> These are disputes that clearly arise under the collective agreement – termination of services, route eliminations and termination payments – and are subject to the final and binding settlement procedures outlined in the collective agreement.

The Court then considered *Weber* and the argument about whether the distribution agreement was not superseded by the collective agreement and dismissed that argument. The plaintiff argued that the collective agreement referred to a

"commercial agreement" whereas he was party to a "distributor agreement". The Court held that, if the collective agreement is ambiguous, that resolving this ambiguity is a matter that falls squarely into the jurisdiction of the arbitrator.

Take Aways

If you are a unionized employer you know that the union is the exclusive bargaining agent for all employees in the bargaining unit and that the collective agreement is the governing contract for all those employees. With *Weber* we see that Courts will defer to the exclusive jurisdiction of arbitrators in most cases involving unionized employees. Although there are a limited number of circumstances in which a unionized employee can sue their employer, these are few and far between and it is important to remain alive to these issues.

Requests for Employee Lists Under the *Labour Relations Act, 1995*

If you are a non-union employer you need to be aware of the changed rules of union organizing that have come into force with the passage of Bill 148, Fair Workplaces, Better Jobs Act, 2017. These are new provisions, but, as we are seeing through the handful of cases decided since the coming into force of the Bill 148 amendments, unions are certainly coming to terms with the changes and how they can be used to assist them in their organizing efforts.

The specific provision I want to discuss relates to a union's ability to file an Application for a List of Employees under section 6.1 of the *Labour Relations Act, 1995* which provides:

> Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees are not bound by a collective agreement, a trade union may apply to the Board for an order directing the employer to provide to the trade union a list of employees of the employer.

This is a fairly mechanical exercise and there are really a couple of things that the employer can dispute. It can disagree with the description of the proposed bargaining unit suggested by the union and/or it can disagree with the estimate of the number of individuals in the bargaining unit proposed by the union in their application.

If the OLRB determines that the description of the bargaining unit included in the application could not be appropriate for collective bargaining, the OLRB will dismiss the application. If, on the other hand, the OLRB determines that the description of the bargaining unit included in the application could be appropriate for collective bargaining, then it will use that description in deciding the union's entitlement to the list under section 6.1.

Specifically, the OLRB will look at the information filed by the union and employer and determine whether 20 per cent or more of the individuals in the bargaining unit proposed in the application appear to be members of the union at the time the application was filed. If it so determined, the OLRB will direct the employer to provide the list to the trade union.

There are two (2) possible parts to the list - a mandatory part and a discretionary part.

The mandatory element of the list requires that the employer provide the union, when ordered to do so, with:

(a) the name of each employee in the proposed bargaining unit; and
(b) a phone number and personal email for each employee in the proposed bargaining unit, if the employee has provided that information to the employer.

In terms of the discretionary aspect of the list, if, in the opinion of the OLRB, it is equitable to do so in the circumstances, the Board may order that the list also include:

(a) other information relating to the employee, including the employee's job title and business address; and

(b) any other means of contact that the employee has provided to the employer, other than a home address.

I am not, as of the date of this writing, aware of any cases to consider the circumstances under which the OLRB will determine that it is "equitable" to order production of the discretionary elements of the list.

Employers, certainly in the past, would consistently reject these sorts of requests from an organizing trade union on the basis that they have no legal right to the information and citing privacy and confidentiality, among other things. Where the Board orders the production of a list under section 6.1 of the *Labour Relations Act, 1995,* there are certain protections surrounding the list:

- the employer shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list, including protecting its security and confidentiality during its creation, compilation, storage, handling, transportation, transfer and transmission;
- if a list of employees of an employer is provided to a trade union in compliance with a direction made by the Board under the *Act* the use of that list is subject to the following conditions and limits:
    - The list must only be used by the trade union for the purpose of a campaign to establish bargaining rights.
    - The list must be kept confidential and must not be disclosed to anyone other than the appropriate officials of the trade union.
    - The trade union shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list and to prevent unauthorized access to the list.
    - If the trade union makes an application for certification in respect of the employer and employees on the list and the application for certification is dismissed less than one year after the Board's direction to provide the list, the list must be destroyed on or before the day the application is dismissed.
    - If the list is not destroyed in accordance with the above, it must be destroyed on or before the day that is one year after the Board's direction to provide the list was made.
    - The list must be destroyed in such a way that it cannot be reconstructed or retrieved.

The OLRB has published an Information Bulletin No. 37 that is of assistance. This is a quick process.

Take Aways

Bill 148 certainly facilitates unionization and section 6.1 of the *Act* changes the rules of union organizing.

At least one employer at least raised the possibility of a *Charter of Rights and Freedoms* challenge to section 6.1 of the *Labour Relations Act, 1995* and reserved its right to do so. The case is The Original Cakerie Ltd., 2018 CanLII 28457 (ON LRB) and was decided by the Chair of the OLRB Bernie Fishbein who expressed some concern with "reserving" rights to file a *Charter* challenge. He said:

> This is not a question of "reserving" rights. *Charter* challenges are not frivolous questions and ought not to be raised or made lightly. Either the responding party is challenging the legislation or it is not. As the Board has already observed in the early section 6.1 applications, the process is intended to be expeditious and that the Board is not required to hold a hearing or consult with the parties. See University Health Network – Toronto Western Hospital 2018 CanLII 1295 (ON LRB); University of Ontario Institute of Technology, OLRB File No. 3454-17-R (March 27, 2018). Accordingly if the responding party actually wishes to pursue such a challenge, it must file the required Notice and the basis of such a challenge no later than April 9, 2018 together with its submissions in support of this challenge. The Board is not requiring the responding party to file a full factum (that may come later) but the basis of the challenge should be set out in some detail with some of the legal authority upon which the responding party relies. If the responding party does so the

> Board will issue further directions at that time. Otherwise the responding party shall provide the list as otherwise directed above by no later than April 9, 2018.

As of the date of writing, it is not clear whether this challenge has been pursued or will be pursued, but I will keep an eye on the issue.

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