# Family Day added to list of public holidays in Ontario

On October 12, 2007, the re-elected government of Ontario filed a regulation adding the third Monday in February to the list of public holidays under the *Employment Standards Act, 2000* (ESA). The new holiday, Family Day, is the ninth such public holiday in Ontario and will be in effect next February. The question arises as to how employers will be affected.

First, it should be noted that the provisions of the ESA do not apply across the board to all Ontario employees. Most notable among those to whom the Act does not apply are employees whose workplaces are under federal jurisdiction, such as airlines, banks, the federal civil service, post offices, radio and television stations and most railways. As well, the public holiday provisions of the ESA do not apply to employees of the provincial government or provincial Crown agencies.

There are also some groups of employees who may be required to work on public holidays. These include employees working in:

- hotels, motels and tourist resorts
- restaurants and taverns
- hospitals and nursing homes, and
- continuous operations (operations or parts of operations that do not shut down or close down more than once a week, such as oil refineries or alarm monitoring companies).

These employees can be required to work on a public holiday without their agreement when the public holiday falls on a day they would normally work, and they are not on vacation.

## AGREEMENT TO WORK ON PUBLIC HOLIDAY

Most employees have a right to refuse to work on a public holiday, and to take the day off with pay. However, if an employee, who qualifies, agrees in writing to work on the holiday, there are two options:

- the employee is entitled to wages at his or her regular rate for all hours worked on the public holiday plus another regular working day off with public holiday pay (this substitute day off must be scheduled for no later than three months after the public holiday or, if the employee has agreed in writing, up to 12 months after the public holiday), or

- if the employee agrees in writing, he or she is entitled to public holiday pay for the public holiday plus premium pay (1½ times the employee's regular rate) for all hours worked on the public holiday. In this case, the employee is not given a substitute day off.

## GREATER BENEFIT PROVIDED UNDER CONTRACT

Further, the effect of section 5(2) of the Act must be considered. That provision reads as follows:

> 5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

This provision would appear to mean that where an employment contract, including a collective agreement, provides more than nine paid holidays, the current number under the ESA, the employer may not have to recognize Family Day. Such an interpretation has been upheld in arbitration awards and in adjudications under the ESA.

In this connection, regard must be given to the employer's total public holiday package, not just to the number of holidays. For example, if the number of holidays provided is less than nine, but the rate of holiday pay is higher than that required under the ESA, the employment contract may still provide a greater benefit. Another issue to be considered when comparing contractual terms with the employment standard is whether there are qualifying conditions for entitlement to a paid holiday, such as length of service (there is no length of service requirement under the ESA) or the requirement to work the day before and the day after the public holiday (the entitlement under the ESA is lost if a worker fails to work on either of these days without reasonable cause).

However, even where the contract contains a greater benefit, the contract should be reviewed to determine whether there are other provisions, such as language obliging the employer to recognize any new public holiday, that would oblige the employer to add Family Day to its list of holiday entitlements. Those employers currently engaged in bargaining should consider whether, if the addition of the new holiday will surpass the level of comparable benefits they provide, or if contract language currently obliges them to recognize all public holidays, to propose alternatives should they determine it is in their interests to do so.

For example, some employers may find it preferable to provide a greater, but more flexible benefit than that provided by the addition of Family Day at a fixed time of the year. It is important to bear in mind when making such an offer that benefits which do not relate directly to holiday entitlements (e.g., vacation benefits) would likely not be seen as comparable to the statutory holiday entitlement, and could not be used as a means of contracting out of Family Day through the use of the greater right or benefit argument

Another area requiring caution involves the use of float days as a benefit in place of public holidays. While some arbitrators have used such float days in making a comparison, others have not, noting conditions on the float days such as the requirement that they be mutually agreed to by the employee and employer, or that the entitlement is lost if not used by the end of the year.

Employers who determine that the current agreement does provide a greater holiday benefit even when Family Day is factored in, and who are not otherwise obliged to recognize the new holiday, will have to consider carefully whether to raise the issue during bargaining. Raising the matter would risk adding an unwanted item to the agenda. Remaining silent risks an adverse reaction from employees after bargaining is concluded and the employer has advised employees that they are not entitled to the new holiday. It may also lead to an arbitration which may be avoidable if the issue is addressed at negotiations. As a practical matter, it may prove difficult to resist pressure to recognize the new holiday, even for those employers not strictly bound to do so.

## "Eyes wide open": Court of Appeal holds release is binding on terminated lawyer

Readers of *FOCUS* Alerts may recall that in some extreme instances, courts will decline to uphold the terms of employment-related contracts where it appears from those terms that the employee was being victimized by the employer. The legal doctrine under which such contracts are invalidated by courts is known as unconscionability, and was recently considered by the Ontario Court of Appeal in *Titus v. William F. Cooke Enterprises, Inc.* (August 22, 2007).

The plaintiff, Douglas Titus, was employed as in-house corporate counsel by the employer for eighteen months. Titus had been employed in a variety of legal positions beginning in 1978, including two previous stints with the employer in the 1980's and 1990's. Titus commenced working for the employer for the third time on March 28, 2000. He performed effectively.

However, eighteen months later, on Friday, September 28, 2001, the employer called Titus into his office and told him that he was being terminated due to business downsizing. They offered him a settlement package, provided he signed a release under which he was to receive three months' salary in lieu of notice plus a letter of reference, in exchange for which Titus released the employer from all claims against the employer. If Titus did not sign, the employer would offer only the statutory minimum of two weeks' termination pay.

Titus accepted the offer and signed the release on the spot. Shortly afterwards, he sued the employer, claiming that the settlement and release were unconscionable. Titus was successful at trial, and was awarded reasonable notice of ten months' salary. The employer appealed, arguing that the trial judge had erred in setting aside the release that Titus had signed.

### THE "HIGH HURDLE" OF UNCONSCIONABILITY

The Court allowed the employer's appeal. It noted that the trial judge had not responded to Titus' submissions in respect of unconscionability, but had instead errroneously applied the law of bad faith dismissal set out in *Wallace v. United Grain Growers Ltd.* The Court then considered whether Titus could succeed in his claim that the release was unconscionable, noting that this is not an easy task:

> "A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party."

Four elements are necessary for unconscionability, and Titus could not prove any of them, the Court stated. These are:

- *a grossly unfair and improvident transaction*

  The Court noted that the fact that the trial judge had determined that reasonable notice was ten months did not make the offer of three months grossly unfair. If Titus accepted the offer, he would receive the money immediately, he would have an opportunity to mitigate his damages by seeking new employment and he would avoid the delay, costs and uncertainty of litigation. Nor was there anything grossly unfair about linking the settlement offer to a release.

- *victim's lack of independent legal advice or other suitable advice*

  The fact that Titus was a senior lawyer with extensive experience in contract and employment law obviously meant that the second factor did not apply, the Court stated.

- *an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability*

  Titus had asserted that the death of his father three weeks before his termination and his high debt load had made him vulnerable to being pressured into signing the release. In the Court's view, however, these factors did not create on overwhelming imbalance of bargaining power in this case.

- *the other party's knowingly taking advantage of this vulnerability*

  The Court stated that the evidence was that the employer acted in a polite, professional manner at all times, strongly advising Titus to take time to consider the offer.

In allowing the appeal, the Court provided this description of the transaction between Titus and the employer:

> "[Titus], with legal knowledge and experience − in short, with eyes wide open − chose [to accept the severance and release and to seek new employment]. There was nothing unconscionable in the [employer's] conduct towards [Titus] and, therefore, [Titus] cannot resile from the choice he made, including the money he accepted before commencing litigation."

## In Our View

The Court did state that the linking of the letter of reference to acceptance of the settlement offer was potentially problematic. While there is no legal obligation on an employer to provide a letter of reference, a threat by the employer to withhold such a letter as part of a negotiation/litigation strategy may, in some situations, support a claim that a release was unconscionable and should not be enforced. However, in this particular context, the reference letter played a very small part in the negotiation over the release, and Titus did not seek to negotiate on this issue and it appears that he did not request a reference letter as he sought new employment.

## Class action claim: an emerging threat for employers

What do Alison Corless and Dara Fresco have in common? Both are "representative plaintiffs" in class action lawsuits commenced against two major Canadian employers, the multinational accounting firm KPMG LLP and the Canadian Imperial Bank of Commerce. Corless, a technician in KPMG's U.S. corporate tax group, and Fresco, a teller and personal banking associate, are each claiming millions of dollars in unpaid overtime on behalf of the class or current and former employees they are seeking to represent.

The plaintiff in KPMG is alleging that management directed its employees to charge the firm's clients for 50 to 60 hours per week, and that management was aware that in order to charge for that amount of hours, it was necessary for employees to work between 65 and 90 hours per week. She alleges that when she complained about this practice to the employer, she was advised that she was not entitled to overtime pay, as this was included in her salary. She is bringing her action on behalf of a proposed class that includes lawyers, non-chartered accountant staff and other employees who work over 44 hours per week without overtime pay and are not exempt from the overtime rules in the *Employment Standards Act, 2000*.

In the case against CIBC, the plaintiff alleges that, over the course of her nearly ten years of employment, she has been required to work between two to five hours of unpaid overtime per week. She claims that even though she fills out time sheets, management discourages her from logging the extra time she works.

Together, these actions represent a dramatic expansion of the use of class actions by Canadian litigants in employment-related actions. As the common theme is unpaid overtime (also the major issue in U.S. class actions by employees against employers), these developments should serve as reminders to non-unionized employers of the importance of observing the requirements of the *Employment Standards Act, 2000* (see "Ontario Bill 63 amends *ESA* to limit 60-hour work week" on our Publications page) and, for federally-regulated businesses, the *Canada Labour Code*. The alternative is to risk complex and expensive litigation and, potentially, hefty damages awards for unpaid overtime. If there is any doubt as to the specific requirements of the overtime regimes of the provincial and federal legislation, employers are advised to seek legal advice on their obligations.

### CERTIFICATION HEARING – THE CORE OF A CLASS ACTION

A class action is a lawsuit in which a representative plaintiff sues on behalf of a number of other plaintiffs alleging a common cause of action against the defendant. Most Canadian jurisdictions have legislation setting out the framework for class action

proceedings, and for the most part the differences between provincial legislation are not significant.

Before a class action can proceed, the court must certify the plaintiff's lawsuit as a class action. The certification hearing is thus a pivotal point in the process, determining whether the plaintiff can pursue the claim on behalf of others. Neither the CIBC nor the KPMG actions have yet been certified.

The courts have articulated five factors that must be present in order for a class action to be certified:

- *The statement of claim must disclose a reasonable cause of action* – The court will not examine the merits of the case on the basis of the evidence, but rather ask whether it is plain and obvious that the action could succeed.

- *There must be an identifiable class of more than one person* – While not every member of the class must be identifiable, membership in the class must be determinable by objective criteria.

- *The claims of the class must raise common issues* – Even if there remain unresolved individual issues of class members, this factor will be met if resolution of the common issues will advance the class members' claims to a significant extent.

- *There must be a representative plaintiff* – The representative plaintiff does not have to be either typical of the class, or the best representative, but he or she must have a tenable claim common to the other class members, must not have a conflict of interest with other class members on the common issues, and must be able to properly pursue the action. Generally, but not always, the test for the ability to pursue the action involves demonstrating the ability to pay the costs of the litigation through some type of funding arrangement.

- *The class action must be the preferable procedure for resolving the issues* – Here, courts will look both at whether class proceedings are a fair and efficient way of resolving the issues and whether they are preferable to other available means for doing so. Courts will accept that class proceedings are preferable if the other procedures:
    - are not available to the entire class;
    - provide no right to legal representation;
    - are presided over by decision makers who are linked to the defendant; or
    - are conditional on non-certification by the court.

Clearly, one example of where courts are likely to find against certifying a class action because of the availability of other procedures is in where the alternative of grievance arbitration exists. This was the result in the recent decision of the Supreme Court of Canada in *Bisaillon v. Concordia University*, in which certification was denied despite

the fact that the dispute involved the funding of a pension plan with over 4,000 members, of whom only 80 per cent were unionized under nine different collective agreements.

As well, the court will not find class proceedings to be preferable if the plaintiff has an inadequate plan for advancing the proceedings on behalf of the entire class and notifying the class.

If the class action is certified, the successful representative plaintiff will generally be required to notify the proposed class of the certification by way of advertisements in the media. Depending on the jurisdiction, class members will be able to opt in or opt out of the class action, and those who opt out will not be bound by, or benefit from, the resolution of the common issues in the action.

Because of the substantial costs in money, time and, possibly, adverse publicity, associated with class actions, it is often advisable to consider settling the dispute. As such settlements must generally be approved by the court, it will be necessary to persuade the court that the settlement is fair and reasonable to the class as a whole, and not just to the representative plaintiff and its counsel. Defendants will want to be careful to obtain a broad release as part of the settlement and to bind as many members of the class as possible.

Of course litigation avoidance is always the best strategy. For example, employers should take a careful look at their compensation practices to ensure they are complying with relevant employment standards legislation. In some cases, non-union employers in particular take the position that a failure to pay overtime or for all hours worked, for example, can be dealt with quietly if and when an employee complains or threatens to complain to the relevant Ministry of Labour. This risk management strategy will no longer work if class proceedings, like the KPMG or CIBC cases, succeed or yield large settlements.

## Supreme Court of Canada extends *Charter* protection to collective bargaining

By a 6-1 majority, the Supreme Court of Canada has overruled 20 years of its own jurisprudence and held that the procedural right of collective bargaining is protected by the *Canadian Charter of Rights and Freedoms.* In a trilogy of decisions rendered in the 1980's (the Trilogy), the Court had held that the right of free association guaranteed by section 2(d) of the *Charter* was limited, in the labour relations context, to the right of individuals to join trade unions. With the decision issued in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (June 8, 2007) the Court has moved decisively away from that position and extended the constitutional protection to a significant range of collectively-exercised rights.

### BILL 29

The case arose out of Bill 29, the *Health and Social Services Delivery Improvement Act*, legislation introduced by the B.C. government in 2002 to reorganize the health care sector in that province. Introduced with only minimal consultation with affected unions, Part 2 of the Act gave health care employers greater flexibility to organize their relations with their employees as they see fit, in ways that would not always have been permissible under existing collective agreements and without adhering to notice and consultation requirements in these agreements. It introduced changes to transfers and multi-worksite assignment rights (sections 4 and 5), contracting out (section 6), the status of employees under contracting-out arrangements (section 6) and layoffs and bumping rights (section 9).

The Act invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. Both employees and employers were prohibited from contracting out of Part 2 or relying on a collective agreement inconsistent with Part 2.

The unions' attempt to challenge the Act was unsuccessful, with both the B.C. Supreme Court and the B.C. Court of Appeal dismissing the claim, citing the Trilogy jurisprudence. The plaintiffs then appealed to the Supreme Court of Canada.

The majority of the Court held in favour of the unions, in the process explicitly overruling the approach it had take in the 1980's cases and concluding that "s. 2(*d*) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues."

## COLLECTIVE BARGAINING RIGHTS PROTECTED BY *CHARTER*

The Court pointed to four bases for reversing its approach to the protections afforded to collective bargaining rights under s. 2(d):

1. The Court held that the reasons evoked in the Trilogy cases for holding that the guarantee of freedom of association does not extend to collective bargaining could no longer stand. The Trilogy cases had erred in holding that the rights to strike and to bargain collectively were "modern rights" created by legislation, and not "fundamental freedoms", and were too deferential to the legislature in matters concerning labour relations. They also erred in ruling that freedom of association applied only to rights exercised by individuals and not to groups and in overlooking the importance of collective bargaining as an element of freedom of association.

2. Collective bargaining rights do fall within the ambit section 2(d) of the *Charter*. The Court concluded that collective bargaining, despite early discouragement from the common law, had long been recognized in Canada and was the most significant collective activity through which freedom of association is expressed in the labour context. These supported the view that the concept of freedom of association under s. 2(d) of the *Charter* includes the procedural right to collective bargaining.

3. Collective bargaining is an integral component of freedom of association in international law, which influences the interpretation of *Charter* rights. The Court held that international conventions binding Canada recognize the right of the union members to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(*d*) of the *Charter* should be interpreted as recognizing at least the same level of protection.

4. Interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values. The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over their work, which is a major aspect of their lives.

## A RIGHT TO A PROCESS, NOT TO AN OUTCOME

The Court stated that the activity protected by section 2(d) could be described as employees banding together to achieve particular work-related objectives, but not the objectives themselves. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals, without "substantial interference" in this activity. Where the employer is the government, the right requires both employer and

employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

Given that the right to collectively bargain is a right to a process, not to an outcome, for a *Charter* action to succeed, the interference with the right must be so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

## ASSESSING SUBSTANTIAL INTERFERENCE

The Court stated that determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves asking two questions: 1) how important is the affected matter to the process of collective bargaining, and to the capacity of the union members to pursue collective goals in concert and 2) in what manner does the state's action impact on the collective right to good faith negotiation and consultation.

The duty to negotiate in good faith, the Court stated, is central to the determination of whether a state action constitutes substantial interference. In considering whether the state action infringes the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding these actions. However, the Court stated, the bottom line is that such actions must preserve the process of good faith consultation fundamental to collective bargaining.

## APPLICATION OF THE PRINCIPLES TO THIS CASE

Based on the approach outlined above, the Court held that three of the Act's provisions violated section 2(d) of the *Charter*, but several others did not. Two of the non-offending provisions, sections 4 and 5, altered the provisions of the prior collective agreements for transfer and reassignment. While they deleted some important provisions in the agreements, the Court held, under other regulations, protections similar in part to the deleted provisions were preserved. Accordingly, the Court held that the impact on the prior collective agreements was not sufficiently substantial to meet the first leg of the test.

The three offending provisions, sections 6(2), 6(4) and 9 dealt with contracting out, layoffs and bumping. These were considered by the Court to have central importance to unions, thus passing the first test. The Court then considered whether they preserved the process of collective bargaining and found they did not. The Court stated that the provisions constituted a "virtual denial" of the right to a process of good faith bargaining and consultation and nullified requirements to consult with the union before contracting out or laying off.

Accordingly, the Court held that these three provisions constituted a significant interference in the right to bargain collectively and therefore violated section 2(d) of the *Charter*. The Court suspended the effect of its ruling for 12 months to allow the

provincial government to determine how to address the impact of the decision striking down the offending provisions.

## In Our View

Obviously, this decision will have a significant impact, but the extent of that impact remains to be seen. It should also be noted that the right to strike was not considered in this decision.

Private sector employers should note that this ruling does not affect their actions vis-à-vis their unions. However, while only governmental employers are affected in terms of their actions, private sector employers may be affected if legislation limiting the right to bargain collectively is ruled unconstitutional.