BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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In this Issue

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Standard of Review Clarified – Vavilov and the Supreme Court's Decision

The long-awaited decision of *Canada v. Vavilov,* 2019 SCC 65 was recently released. The decision dealt with a case of a young man, born in Toronto, who had his citizenship put into question because he had Russian spies as parents. While it is an interesting case and certainly deserves a read, of more importance (depending on who you ask) is the Supreme Court's commentary on the changes to the standard of review applicable to administrative tribunals and arbitrators.

The Supreme Court decided that there will be a presumption that the reasonableness standard should be applied to all administrative tribunal decisions except in limited circumstances. With this decision, the Supreme Court has signalled an even higher level of deference will be afforded to specialized tribunals in most cases. The Supreme Court has rejected the contextual approach to the reasonableness standard and has ruled that only the following limited circumstances would attract a standard of correctness:

- Where there is clear statutory language that prescribes the applicable standard of review, or provides for statutory appeal;
- Where constitutional questions need to be decided, including the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under the *Constitution Act, 1982*;
- Where there are general questions of law of central importance to the legal system as a whole;
- Where there are questions regarding the jurisdictional boundaries between two or more administrative bodies; and
- A future category should the circumstances arise, where it is exceptional in nature and consistent with

> the framework and the overarching principles set out in the decision.

In adopting these limited criteria where the correctness standard will apply, the Supreme Court has also determined that "true questions of jurisdiction" will no longer attract a standard of correctness. The Court indicated that while there had been arguments for maintaining the category, specifically the concern that a delegated decision-maker should not be free to determine the scope of its own authority, that such an issue could be addressed by applying the framework for conducting a reasonableness review. In other words, it remains open to a party to challenge a decision-maker on the grounds that it acted beyond its jurisdiction if the decision is unreasonable.

With respect to the reasonableness standard of review, the Supreme Court clarified the standard slightly and provided some in-depth guidance. The reasonableness standard is meant to limit judicial interference unless it is absolutely necessary to do so to safeguard the legality, rationality and fairness of the administrative process. A reasonable decision and in particular the underlying rationale for a decision must be transparent, intelligible and justifiable. A failure to provide logical and rational reasoning may provide a basis for judicial intervention and require that a decision be set aside. Employers should be aware that a decision from an administrative tribunal is, from a practical perspective, often the final decision-maker and that in the absence of clear and obvious errors by the administrative tribunal, the Court will not intervene.

Practical Limitations: How far must an Employer go in order to protect Workers under the *Canada Labour Code*?

The Supreme Court of Canada recently heard the appeal of *Canada Post Corp. v. Canadian Union of Postal Workers* 2019 SCC 67 dealing with section 125(1)(z.12) of the *Canada Labour Code*. Section 125(1)(z.12) of the *Canada Labour Code* requires that the work place committee or the health and safety representative inspects all or part of the work place each month, so that every part of the work place is inspected at least once each year.

The Union in this case argued that letter carrier routes and points of call should be included in work place safety inspections. Canada Post argued that it was not in control of that part of the workplace. The Court examined the question of whether or not an employer had "control" over the letter carrier routes such that they were required to comply with the health and safety obligations set out in Part II of the *Canada Labour Code*.

The conclusion made by the appeals officer of the Occupational Health and Safety Tribunal indicated that s.125(1)(z.12) can only apply to work places over which the employer has control "*because the purpose of the workplace inspection obligation is to permit the identification of hazards and the opportunity to fix them or to have them fixed. Control over the workplace is necessary to do so*". As Canada Post had no control over letter carrier routes and points of call, the obligation that the workplace be inspected by the Committee could not apply to those locations. After applying the clarified standard of reasonableness (which requires a significant amount of deference to the decision-maker and focus on the reasons for the decisions) found in *Canada v. Vavilov*, the Supreme Court decided that the original decision from the appeals officer was reasonable. Indeed, the majority of the Supreme Court held that the appeals officer's reasoning demonstrated an in-depth understanding of the ways in which an employer fulfills the purposes of the *Code*, bearing in mind the practical limitations of the workplace.

Limiting Language for Bonus and Stock Option Clauses – The Court of Appeal weighs in

A recent decision from the Ontario Court of Appeal, *O'Reilly v. IMAX Corp.,* considered whether a wrongfully dismissed employee is entitled to exercise stock options, receive bonuses or other aspects of a compensation package, such as profit-sharing, during a reasonable notice period.

This case dealt with an employee who had been employed for 22 years with IMAX Corporation when he was dismissed without cause. His compensation included base salary, commissions, group benefits, and participation in a long-term incentive plan which included stock options. During the motion for Summary Judgment, the motion judge determined that the employee was entitled to damages based on 24 months' reasonable notice, together with all commissions. As part of the decision, the motion judge determined that the employee was also entitled to the loss of the right to exercise stock options that would have vested during the reasonable notice period.

The language pertaining to the restricted share units (RSUs) provided as follows:

> In the event that the Participant's employment with the Company terminates for any reason other than death, Disability or for Cause, the RSUs shall cease to vest and any unvested RSUs shall be cancelled immediately without consideration as of the date of such termination.

A wrongfully dismissed employee is generally entitled to compensation for the loss of contractual benefits that they would have earned during a reasonable notice period, including the loss of pension benefits, bonuses, stock options and other incentives such as profit-sharing plans. That said, the Court has also confirmed that the terms of the contract can limit or eliminate this common law entitlement. The Court offered a very useful summary of the applicable legal principles:

1. A wrongfully dismissed employee is entitled to damages for all wages, salary and any other benefits that would have been earning during the reasonable notice period.
2. This principle applies to stock options, bonuses or incentives that are an integral component of the employee's compensation.
3. The Court will undertake a two-step analysis to determine if the loss is recoverable:
    a. First, whether there was a breach of contract and therefore, any entitlement to common law damages. Was the bonus or profit-sharing an integral component of the employee's compensation?
    b. Second, whether the terms of the contract unambiguously alter or remove the employee's common law entitlement.

The Court of Appeal noted that in order to be successful in displacing the common law entitlement:

1. The plan must establish that an employee terminated without cause would have no entitlement to exercise any option rights; and
2. The plan must specify a clear date at which point this will occur.

The Court of Appeal has clearly left the door open to have contractual language which limits an employee's entitlement to a bonus or any other form of compensation during a reasonable notice period. However, in this case, the Court determined that the language was not sufficiently clear or unambiguous. The reason was that the clauses did not specify at which point the termination occurred – the words "terminate" or "termination" could refer to the date notice was given or to the end of the reasonable notice period.

While IMAX was ultimately unsuccessful, the takeaway for employers is that a provision in a contract may limit an

employee's entitlement to stock options, bonuses or profit sharing entitlements at the time of termination, but the language must be very clear and specific. We would be pleased to review your current employment agreements, bonus, stock and/or profit-sharing plans to ensure that there are enforceable and clear limitations at the time of termination.

Rule Changes to Small Claims Court and Simplified Procedure in Ontario

Effective January 1, 2020, the monetary jurisdiction of Small Claims Court has increased from $25,000 to $35,000. This is an important change for employment law as many wrongful dismissal cases will fall within this jurisdiction. Small Claims Court has streamlined procedures and often moves significantly faster than other levels of the Court.

In addition, the monetary jurisdiction for Simplified Procedure (which has several procedural differences from the "regular procedure" such as time limits on discovery and length of trial) increases from $100,000 to $200,000. Most employment cases will fall within either the Small Claims Court or Simplified Procedure.

Along with the increase in the monetary jurisdiction for Small Claims Court and Simplified Procedure, there have been other significant changes to amounts that can be awarded for costs, if successful. Under Rule 76.12.1 no party to an action under this Rule may recover costs exceeding $50,000.00 or disbursements exceeding $25,000.00, excluding HST. These cost limitations do not apply to actions commenced before January 1, 2020, although the other changes set out below will impact ongoing cases, such as:

- The parties must agree to a Trial Management Plan at least 30 days before a pre-trial conference which includes a list of every witness, a detailed time allocation for opening statements, witnesses, cross-examination, re-examination and closing arguments;
- Trials are capped at five (5) days;
- No Jury Trials in Simplified Procedure, unless it is for slander, libel, malicious arrest, malicious prosecution or false imprisonment;
- Each party will have up to three (3) hours for Examinations for Discovery (an increase from two (2) hours); and
- The procedure for a trial of an action under the Simplified Rules has been outlined.

An increase in the monetary amount for Simplified Procedure and a cap on costs provides some certainty regarding costs. At the same time, the cap will lead counsel to consider the cost consequences of going to Trial and forces the parties take proactive steps to manage the trial process. The changes represent an attempt by the Ontario Government to streamline the system, reduce the amount of trial time required and to create additional efficiencies in an effort to address a backlogged civil court system. Only time will tell if these changes are successful in accomplishing that motive.

Supreme Court of Canada to decide on *Uber* Appeal – Is an Arbitration Clause Unenforceable in an Employment Agreement?

During our spring newsletter last year, we noted that the Court of Appeal of Ontario had decided in *Heller v. Uber Technologies Inc.,* [2019] O.J. No. 1, that the arbitration clause found in the independent contractors' agreements was void if the contractors were considered to be employees. The reasoning from the Court of Appeal was that such a clause would infringe the *Employment Standards Act, 2000 (ESA)*, and was unconscionable at common law.

The matter was appealed to the Supreme Court of Canada, and was heard on November 6, 2019. In argument, Uber advanced the position that the *ESA* does not specifically limit a party's ability to use an arbitration clause and argued that the legislature did not intend to oust arbitration of *ESA* claims. They also argued that the Arbitration is not unconscionable based on the current test and that the Court of Appeal erred when it failed to apply the correct test for unconscionability found in Ontario.

Depending on the outcome of this case, there is a possibility that Arbitration clauses within Ontario employment contracts are no longer valid. As the date of the hearing was on November 6, 2019, it will likely take some time for the Supreme Court to render a decision. We will keep you up to date with respect to any final decision on the matter.