

A NEW WAVE OF CLASS ACTION LITIGATION – UNPAID OVERTIME LAWSUITS

As businesses in BC strive to compete in today’s global economy, the work demands facing employees are growing. Many industries no longer adhere to a “traditional” 9:00 A.M. – 5:00 P.M. work day. Employees today may often work through their lunch hour and on evenings and weekends.

Are you aware whether your organization has non-unionized employees who regularly work more than 8 hours in a day or 40 hours in a week?

Under the BC *Employment Standards Act* and the Federal *Canada Labour Code* employees are entitled to be paid overtime (1 ½ times the employee’s regular wage for time worked over 8 hours in a day or 40 hours in a week and under the BC *Employment Standards Act*, 2 times the employee’s regular wage for time worked over 12 hours) unless the employee’s position is excluded by the applicable regulations. Most commonly, employees do not receive overtime pay on the basis that they hold a managerial position and thus, are excluded by the regulations.

Recently, in Ontario two separate unpaid overtime class action lawsuits have been filed against two large employers pursuant to Ontario’s *Class Proceedings Act – Dara Fresco v. Canadian Imperial Bank of Commerce*; and *Alison Corless v. KPMG LLP* (BC also has a *Class Proceedings Act* that is modelled on the Ontario statute). The central allegation to both actions is that employees have worked more than 8 hours in a day or 40 hours in a week (under Ontario’s *Employment Standards Act* overtime pay is triggered after an employee works 44 hours in a week), were not paid overtime, and were not exempt under the applicable regulations.

(Continued on Page 2)

LEGISLATION UPDATE – BC HUMAN RIGHTS CODE: THE END OF MANDATORY RETIREMENT

On **January 1, 2008**, Bill 31 – *2007 Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007* (the “Act”) will come into force in BC. The Act has the effect of amending the definition of “age” in the *Human Rights Code* such that it means “an age of 19 years or more”. Previously, “age” under the *Human Rights Code* meant “an age of 19 years or more and less than 65 years”. Accordingly, once the Act comes into force on January 1, 2008 it will be discriminatory to deny employment to a person who is 65 or older. Further, mandatory retirement policies will become discriminatory practices under the *Human Rights Code* unless they qualify as a bona fide occupational requirement.

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IN THIS ISSUE

A New Wave of Class Action Litigation – Unpaid Overtime Lawsuits 1

Legislation Update- BC Human Rights Code: The End of Mandatory Retirement 1

Expedited Process for Hiring Foreign Workers in Western Canada..... 2

Tortious Activity on Picket Line Sufficient to Ground Finding of Civil Contempt..... 3

Union Organizing Activities in Parkade are not Protected as “Petty Trespass” Under the *Labour Relations Code*..... 3

Res Judicata: the Obligation to Bring Forward the Whole Case in the First Instance..... 4

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In the *CIBC* action, the plaintiff seeks an award of \$500 million in general damages, while in the *KPMG* action the plaintiff seeks \$20 million in general damages.

These unpaid overtime class action lawsuits follow on the heels of a spate of similar litigation in the U.S., most notably against Wal-Mart which has been forced to pay tens of millions of dollars arising from unpaid overtime class action lawsuits.

The lawsuit against CIBC was the first to be filed, on June 5, 2007, and potentially covers thousands of employees working across Canada. A press release issued by the law firms acting on behalf of the representative plaintiff, Dara Fresco summarizes the allegations against CIBC:

The statement of claim alleges that class members are assigned heavier work loads than can be completed within their standard working hours. They are required or permitted to work overtime to meet the demands of their jobs and CIBC fails to pay for the overtime work in direct contravention of the *Canadian Labour Code* under which they are regulated.

Before a class action lawsuit can proceed to trial (both in Ontario and here in BC) it first must be certified by the Court. The certification hearing for the *CIBC* action is scheduled for December 2008. The *KPMG* action was filed more recently, September 6, 2007, and the certification hearing has yet to be scheduled.

Considering the significant potential liability flowing from unpaid overtime, it is important to be aware of the hours that employees are working for your organization. For example, under the BC *Employment Standards Act*, employers must pay an employee overtime wages if they require or directly or indirectly allow the employee to work more than 8 hours a day or 40 hours in a week. As such, it is essential that employee work loads are monitored, and procedures are in place to track overtime hours worked by employees. If your organization does not pay overtime to certain employees on the basis that they are a manager, we recommend that you ensure that their duties and responsibilities meet the definition of a “manager” under the applicable employment standards statute.

For instance, under the *BC Employment Standards Act*, a manager is defined as:

- (a) a person whose principal employment duties consist of supervising or directing, or both supervising and directing, human or other resources, or

- (b) a person employed in an executive capacity

For more information about this article or any other aspect of labour and employment law, please contact any member of our practice group.

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EXPEDITED PROCESS FOR HIRING FOREIGN WORKERS IN WESTERN CANADA

Employers in Western Canada, specifically those involved in construction and tourism/hospitality trades, have long been urging the Federal government to address the significant backlog in applications for Labour Market Opinions, the first step in hiring a foreign worker. Current processing time stands at over 6 months in British Columbia. In response, this fall, the Minister of Human Resources and Social Development for Canada announced a pilot project (the “E-LMO”) in Alberta and British Columbia to expedite the processing of Labour Market Opinions for the following occupations:

Dental Technicians	Pharmacists
Registered Nurses	Ski and Snowboard Instructors
Journeyman/Woman Crane Operators	Journeyman/Woman Carpenters
Hotel and Hospitality Room Attendants	Tour and Travel Guides
Hotel Front Desk Clerk	Retail Salespersons and Sales Clerks
Food Counter Attendants	Food and Beverage Servers

This pilot project is a two-part application initiated by the employer. If accepted, their applications for Labour Market Opinions will be processed within 3 to 5 business days. Should you believe that you qualify to use the E-LMO Pilot Project and require further assistance, we invite you to contact us with any questions you may have.

For more information about this article or any other area of labour and employment law, please contact any member of our practice group.

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TORTIOUS ACTIVITY ON PICKET LINE SUFFICIENT TO GROUND FINDING OF CIVIL CONTEMPT

Picketing has long been a staple of labour disputes in British Columbia and throughout Canada. In *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, the Supreme Court of Canada (SCC) elevated picketing to Charter-protected status as a form of expressive activity that could only be restrained by way of injunction if it involved unlawful, tortious or criminal conduct.

Recently, our Court of Appeal had occasion to consider the effect of the SCC's decision in *Pepsi*, supra, on civil contempt proceedings arising from an alleged breach of a court order in the labour context - *TELUS Communications Inc. v. Telecommunications Workers Union*, [2007] B.C.J. No. 1788 (C.A.). The case before the Court of Appeal arose out of the work stoppage in the 2005 TELUS labour dispute. TELUS had sought and was granted injunctive relief against the Telecommunications Workers Union (TWU) and other persons unknown from, among other things, intimidation, threatening and interfering with TELUS' employees (the "Injunctions Order"). Subsequently, TELUS successfully brought civil contempt proceedings against a number of individuals for the breach of the Injunctions Order.

Three contemnors relying on *Pepsi*, supra, appealed their civil contempt convictions arguing that the trial judge erred in finding that it was not necessary to prove all of the elements of a tort or a crime in order to convict a person for civil contempt of an order prohibiting intimidation, threatening and interfering during picketing. The Court of Appeal rejected this argument and dismissed the appeals finding that a completed tort was not necessary and that the activity of intimidation, threatening or interfering was sufficient for a finding of civil contempt. Low. J.A. writing for the Court found:

"... [I]t is clear that what is required in a contempt application is proof of tortious (or criminal) conduct, not also proof of achievement of tortious intent or proof of actual damage to either the employer or to third parties, in this case the two non-union employees." (para. 28)

The TWU is currently seeking leave to appeal this decision to the SCC. Should leave be granted, we can expect the SCC to provide an analysis of what activities a court can enjoin in the labour context and what elements of proof are necessary to find contempt in circumstances similar to those that arose in these cases.

For more information about this article or any other area of labour and employment law, please contact any member of our practice group.

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UNION ORGANIZING ACTIVITIES IN PARKADE ARE NOT PROTECTED AS "PETTY TRESPASS" UNDER THE LABOUR RELATIONS CODE

In 2006, the Casino sought an interlocutory injunction to stop the Union from conducting an organizing drive in its parkade. The Union opposed the Casino's application on the basis that the organizing activities were permitted by section 66(a) of the *BC Labour Relations Code*.

Section 66(a) provides:

No action or proceeding may be brought for

(a) petty trespass to land to which a member of the public ordinarily has access,

...

arising out of...attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace.

The Casino disputed that the organizing activities at issue amounted to a "petty trespass" and maintained that, in any event, the Casino parkade constituted a part of the employer's workplace. The subsequent series of court cases ultimately prohibited the Union organizers from organizing in the Casino's parkade, and provides a better understanding of section 66(a) and the limitations on a union's ability to conduct organizing drives on employer property.

In *Gateway Casinos LP v. British Columbia Government and Service Employees Union, Local 304*, [2006] B.C.J. No. 3338 (S.C.), Mr. Justice Leask dismissed the Casino's injunction application, holding that "petty trespass" was the same as any ordinary trespass. The Court further held that the Casino's workplace did not include the parkade which was only incidental or ancillary to it, despite the presence of security and staff working there.

Mr. Justice Leask's decision regarding the interpretation of petty trespass was overturned in *Gateway Casinos LP v. British Columbia Government*

and *Service and Employees Union*, [2007] B.C.J. No. 534 (C.A.). Reviewing the history of trespass, the Court concluded that section 66(a) was not intended to provide a broad protection for all trespasses, and that petty meant “...minor, inconsiderable, or of little moment” (para. 19). The Court ordered that the Casino’s injunction application be reheard.

In the rehearing, *Gateway Casinos LP v. British Columbia Government and Service Employees Union*, [2007] B.C.J. No. 1720 (S.C.), Bauman J. granted the injunction and ordered the Union members off the Casino’s parkade. Addressing the petty trespass issue, Bauman J. applied the Court of Appeal’s definition - minor, inconsiderable, or of little moment - and held that the intrusion in question was beyond petty. The Union’s members were not momentarily stepping onto the property, but were placing themselves in numbers in the heart of the property for considerable periods of times in areas where the Casino regularly performed duties. Turning to the issue of what constitutes the employer’s workplace, Bauman J. disagreed with Leask J., finding that the governing regulatory scheme for the Casino imposed duties in controlling its surrounding grounds, making them integral parts of the workplace.

The Union is currently seeking leave to appeal the decision of Bauman J. However, as they stand, these decisions establish that unions will not be able to rely on section 66(a) to justify organizing activities on employer property except where their incursions are of a minor and trifling nature. Further, they demonstrate that the Court will take into account all of the areas within the employer’s property where it performs duties when determining what constitutes the employer’s workplace for the purposes of section 66.

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RES JUDICATA: THE OBLIGATION TO BRING FORWARD THE WHOLE CASE IN THE FIRST INSTANCE

The doctrine of res judicata prevents a party from rearguing a legal matter that has already been decided. However, there is a second important aspect to the doctrine: it also prevents a party from litigating a matter which ought to have

been brought up in an earlier proceeding, but was not. Therefore, res judicata can prevent a party from raising a claim, although that claim has not previously been ruled upon.

In *Telecommunications Workers Union v. TELUS Communications Inc.*, [2007] B.C.J. No. 2123 (S.C.), the Court affirmed that this aspect of the doctrine applies to labour arbitrations. The matter arose from a decision of Arbitrator John McConchie acting as a labour arbitrator under the *Canada Labour Code*. The Union grieved an aspect of the Employer’s lockout notice, which it alleged was unlawful. The Employer argued that res judicata barred the claim, as the Union ought to have raised the matter in previous litigation between the parties before the Canada Industrial Relations Board (CIRB). Arbitrator McConchie agreed, applying the second aspect of the res judicata doctrine noted above.

The Union sought judicial review. In *Telecommunications Workers Union*, supra, Edwards J. dismissed that application, affirming the application of this doctrine to labour arbitration cases.

The following key principles apply:

- a. The doctrine applies to bar “every point which *properly belonged to the subject of litigation* and which the parties, exercising reasonable diligence, might have brought forward at the time”. [*Lim v. Lim*, [1999] B.C.J. No. 2317 (C.A.) leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 576]
- b. The British Columbia Labour Relations Board has said the doctrine bars matters that “arise out of the same set of facts and [that] are inextricably linked” to the first action, where the facts had all occurred at the time the first matter was adjudicated [*Re Duhaime*, BCLRB No. B55/2001 at para. 143]

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Farris is a leading Canadian law firm based in Vancouver, British Columbia. The Labour and Employment group is one of its cornerstones. Our lawyers represent a wide range of employers including governmental bodies, educational institutions, and businesses in many different industries. A number of our practitioners are acknowledged in the Canadian Legal Lexpert Directory and many are ranked in the top 500 leading lawyers in Canada.

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