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LABOUR, EMPLOYMENT & HUMAN RIGHTS: ODDS AND ENDS

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I. INTRODUCTION

There were various labour, employment and human rights cases and new legislation this past year that impact local governments as employers. Local governments are also experiencing changes to the workplace caused by the increased demand and ability to work remotely. The cases discussed below cover a wide area including union representation rights, employee privacy rights, whether an individual is an employee or independent contractor, and discrimination on the basis of family status and colour. We also discuss obligations and issues to consider with remote working arrangements and a local government's obligations under the *Accessible British Columbia Act* and the *Accessible British Columbia Regulation* which came into effect this year.

II. LABOUR LAW MATTERS

A. An Employee's Right to Union Representation in Meetings with Their Employer

In British Columbia, the nature and scope of an employee's right to union representation when meeting with their employer are determined by the language of the collective agreement: *British Columbia (Public Service Employee Relations Commission)* v. *BCGEU*, [1995] BCLRB No. 230/96. The *Labour Relations Code*, RSBC 1996, c. 244 (the "*LRC*") does not provide a statutory right to union representation for employees meeting with their employer.

The following statement of Arbitrator Picher has been held by arbitrators to be a "classic statement" of the role and purpose of union representation:

> Union representation in disciplinary interviews, now widely accepted, serves a number of purposes. At the most basic level, the employee has the benefit of a third person who can serve as a witness to the exchange between the employee and the employer.
>
> The right to union representation also gives to the employee several other benefits. Firstly, the union officer who attends may gain a more immediate understanding of a dispute between the employer and the employee, and thereby be better informed to handle a subsequent grievance. Additionally, a union representative may provide assistance to the employee in the form of objective and considered advice during the course of the interview. Union representation can also, at times, permit the input of an experienced person whose thoughts or suggestions, whether they relate to issues of fact or the interpretation of the collective agreement, may give the employer pause, and assist in ultimately sorting out the question under investigation in a manner that

> is mutually satisfactory. Also, the presence of a union representative may safeguard against the making of concessions or agreed interpretations of the collective agreement or practices in the workplace which go beyond the individual employee's case, and which could adversely affect the larger interests of the union and its membership. These are but the most obvious consequences of representation by a union in a disciplinary interview conducted under the terms of contemporary collective agreements.
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> *Canadian National Railway Co.* and *Brotherhood of Locomotive Engineers* (1993), 35 LAC (4th) 88 (M.G. Picher) at p. 101

Arbitrator Saunders, in a decision this year, considered the scope of the union representation rights of the City of Vancouver's firefighters under their collective agreement: *Vancouver (City) Fire and Rescue Services v. Vancouver Firefighters' Union, Local 18 (Representation Rights Grievance)*, [2022] BCCAAA No. 85 (QL), 2022 CanLII 91094 (BC LA). Although that case is centred on the particular collective agreement language at issue, it also contains some lessons for local governments generally.

The collective agreement contained the following clause regarding union representation:

> 13.7 Discipline, Suspension and Discharge
>
> Where the Employer calls a meeting with an employee for the express purpose of investigating their conduct or issuing them written discipline, suspension or dismissal, the employee may elect to have a Union representative(s) present. The Employer agrees to contact the Union and provide a minimum of three (3) hours' notice so the Union can contact the employee and provide the Union representative(s) if the employee so wishes. Where the employee elects not to have a Union representative(s) present or a Union representative(s) is not available for the meeting within the three (3) hour notice period, the absence of a Union representative(s) shall not affect the Employer's right to discipline, suspend or dismiss. Nothing in this provision shall prevent the Employer from taking immediate action to remove an employee from the workplace to address serious workplace concerns.

Arbitrator Saunders held that that language was the primary source for determining the extent of an employee's union representation right. He also considered it appropriate to consider the purpose of the language with due regard to the important role of union representation in the arbitral jurisprudence. In his view, the extent to which a particular interpretation generated consequences inconsistent with the purpose, or which advanced the purpose, was also a relevant factor. The Arbitrator considered that approach to give effect to the parties' mutual intention in selecting the words of the union representation provision, while recognizing that the Article was intended to convey a practical, substantive benefit to employees who are subject to investigation and the administration of discipline.

With respect to the issue of when the right to union representation was triggered under the collective agreement, Arbitrator Saunders held that it arose when the City intended to call a meeting with an employee for the express purpose of investigating that employee's conduct for disciplinary purposes or to issue discipline. The union was entitled to notice of the meeting once that express purpose was within the City's reasonable contemplation. The Arbitrator held that a meeting convened to interview an employee for fact-finding or with no reasonable contemplation of discipline (such as an interview with a witness) did not meet the test. In that case, the City would not be required to notify the union of the meeting. The Arbitrator rejected the union's argument that an employee's reasonable belief that attending the meeting may expose them to discipline was sufficient to trigger union representation rights. Instead, the City's purpose for convening the meeting was critical to the determination of whether notice and union representation rights were required. In the Arbitrator's view, in light of the existing language of Article 13.7, finding a right to union representation based on an employee's reasonable belief concerning the purpose of the meeting would constitute a material addition to the Article, and such a result was contrary to the established principles of collective agreement interpretation.

The Arbitrator did acknowledge, however, that the purpose of a meeting that the City called for mere fact finding, could change during the course of the meeting so that it assumed a disciplinary component concerning the employee being interviewed. Arbitrator Saunders held that at the very moment an interview becomes aimed at investigating an employee's conduct for a disciplinary purpose, Article 13.7 required the City to notify the union so that the employee could seek union representation.

Arbitrator Saunders was also clear that the requirement of notice and union representation rights would not only arise when the City said it did. Instead, the question of whether the City was meeting with an employee for the express purpose of investigating their conduct or issuing discipline was to be resolved based on an evaluation of the objective circumstances. The union had the right to notice, and an employee's right to union representation would arise once discipline was within the City's reasonable contemplation.

With respect to the scope of a union representative's role in an investigation, Arbitrator Saunders held that the following was a useful non-exhaustive description of the role played by a union representative in the context of a meeting held pursuant to Article 13.7:

- Giving the employee advice and support;
- Assisting the employee in explaining the circumstances surrounding the incident; and,
- Pleading on behalf of the employee that either an employment offence did not occur, or if it did occur, arguing for a minimal quantum of discipline.

Arbitrator Saunders considered union representation rights to serve a constructive and useful purpose to both parties in furthering a harmonious relationship between an employer and a union. The Arbitrator also held that the role of a union representative is akin to that of a lawyer's role, stating:

> **33** Arbitral jurisprudence is replete with descriptions of the union representative's role to support an employee by acting as an observer, an advocate, a spokesperson and as an advisor. I find each of these roles consistent with the plain meaning of the word "representation" as it appears in Article 13.7. Moreover, the parties are presumed to be aware of the weight of arbitral authority about what it means to "...provide a Union representative(s)..." at a meeting under Article 13.7. Absent collective agreement language to the contrary, the extent to which a representative chooses to discharge their representative role is a matter to be decided by the Union representative--within the bounds of reasonableness and the general law. The Union representative ultimately acts for the Union and acts in a relationship of equals with Employer. They are not literally the employee's "lawyer" although they act in a similar capacity.

The Arbitrator also clarified that a union representative's role does not extend to giving evidence in place of the employee they are representing, or to impeding the City's right to investigate.

In our view, the Arbitrator's comments about the role of a union representative in an investigation or disciplinary meeting would likely apply in respect of most collective agreement union representation provisions.

Arbitrator Saunders also considered the role of a union representative at non-disciplinary meetings with the City, such as when a union representative accompanies an employee who is interviewed about their own harassment complaint. He held that it is a well-established principle that the collective agreement governs an employee's right to union representation in individual communications with their employer regarding matters concerning the day-to-day management of the workplace. Such an entitlement does not arise under the law and policy of the *LRC*. The collective agreement at issue did not grant a right to union representation for complainants at meeting to discuss their complaints. As a result, the Arbitrator concluded that there was no contractual or statutory basis for a complainant's right to union representation at such meetings with the City. It was also the Arbitrator's view that any invitation by the City to a complainant to have a union representative present to support them at such meetings was a management initiative, and that any constraints that the City might impose on a union representative's role in that context would be subject to arbitral review against a standard of reasonableness.

The Arbitrator also addressed the issue of what notice to the union pursuant to Article 13.7 entailed. The Arbitrator was of the view that the union was entitled to notice of what events the City was investigating, when the events happened, where they happened, and who was involved. Arbitrator Saunders considered those categories of information to be essential elements to enable the union and the employee to understand the matters the employer intended to address at a meeting. In our view, other collective agreements requiring advance notice to the union or an employee of a disciplinary investigation meeting would also likely be held to require disclosure of the same information.

In light of this case, local governments should consider the union representation provisions of their collective agreements carefully to ensure that they are meeting any notice requirements. Local governments should also recognize the legitimate role that a union representative plays in employer investigation and discipline meetings, and that their role is not just limited to witnessing the meeting. Local governments should also take care to meet an employee's union representation rights in meetings that start out as having a non-disciplinary purpose, but then become disciplinary part way through.

III. EMPLOYMENT LAW MATTERS

Two employment issues that continue to cause challenges for local governments are the extent to which employees have privacy rights in the workplace, and whether an individual who provides services to a local government will be found to be an independent contractor or an employee.

A. Ontario Court of Appeal Rules on Employee Privacy Rights

The Court of Appeal for Ontario (the "ONCA") found that two teachers' right to privacy had been breached when their school's principal read and documented the teachers' personal log of concerns about the school, which had been left open on a school laptop (*Elementary Teachers Federation of Ontario v. York Region District School Board*). This log was stored in the cloud and not on a School Board device. In reaching its decision, the ONCA outlined how to determine where a reasonable expectation of privacy exists, and how that expectation applies in an employment context.

Two Grade 2 teachers (the "Grievors") had concerns over perceived preferential treatment received by another Grade 2 teacher, and the potential for this to impact their own performance reviews. One of the Grievors contacted the union for advice, and was advised to keep notes about her concerns. The Grievor began keeping a log of her concerns on her personal Gmail account, and authorized the second Grievor to access it. School administration was made aware of the possibility of this log, and had IT search the school's online files, hard drives, and google drives for files shared between the Grievors, which turned up nothing. Later, the school principal found the Grievors' log open on a work laptop after school. The principal photographed the entire log – consisting of approximately 100 entries – with his phone. The School Board issued letters of discipline to the Grievors in relation to the log, and placed

written reprimands on their file for three years. The union grieved this discipline, and sought damages against the School Board for breach of the Grievors' privacy rights.

The Arbitrator held that the Grievor's reasonable expectation of privacy had not been breached, finding that the Grievors had a diminished expectation of privacy concerning information accessible on their work laptops, and that the principal's duty to ensure a safe school environment authorized reasonable searches and seizures without prior judicial authorization. The Arbitrator's decision was upheld by the Ontario Divisional Court, which further noted that "unlike in a criminal context, in a workplace environment, an employee does not have a s. 8 [of the *Charter of Rights and Freedoms*] right to be secure against unreasonable search and seizure". The union appealed the Divisional Court decision to the ONCA.

The ONCA allowed the appeal, finding that the Grievors' reasonable expectation of privacy had been violated, and that the School Board's actions constituted an unreasonable search under section 8 of the *Charter*. The Divisional Court erred in asserting that section 8 rights are relegated to a criminal context, and could not apply to employees in a workplace environment. The ONCA outlined the application of the *Charter* to the School Board, noting that while there is some uncertainty as to how far the *Charter* applies over School Board activity, it was "enough to say that s. 8 applies to the actions of the principal and the school board" in this instance.

The ONCA notes that whether a reasonable expectation of privacy exists in a given circumstance must be determined in light of the "totality of the circumstances", and in consideration of the following:

- The subject matter of the search;
- Whether the claimant had a direct interest in the subject matter;
- Whether the claimant had a subjective expectation of privacy in the subject matter; and,
- If so, whether that expectation was objectively reasonable.

The subject matter of the search was the Grievors' personal messages, which were stored in the cloud, not on School Board devices. The Grievors clearly had a direct interest in the information, as they both contributed to this personal log, which was used as grounds to discipline them. The Grievors also had a subjective expectation of privacy to the contents of their personal message. The ONCA disagreed with the prior finding that leaving the log open on a work laptop resulted in a diminished expectation of privacy. Leaving the log open was at most a momentary careless oversight – the Grievors generally took great care to ensure their conversation was, and would remain, private. The Grievors' expectation of privacy was objectively reasonable, as it was an electronic record of their private conversation.

The ONCA noted that whether personal information was revealed through access to the log was immaterial, as it is the *potential* for personal information to be revealed that is relevant to assessing the expectation of privacy. There was great potential for personal information to be revealed through access to private conversation between the Grievors. The ONCA further held that nothing in the facts justified this search and seizure of the Grievors' log. While the Arbitrator had found that the principal was justified in reading and documenting the log in consideration of the need to ensure a safe school environment, the ONCA noted that:

> This was not a case in which the principal stumbled across a dangerous situation that required urgent action. He had not discovered anything dangerous at all. What he had discovered was the private conversations of the grievors. It was a record of thoughts he was not entitled to know.

The ONCA found that the Arbitrator had unduly focused on the "judgmental" nature of the log. The Grievors, however, were entitled to be judgmental of the school in their private conversations, and doing so did not lessen their reasonable expectation to privacy.

B. Employee or Independent Contractor?

The issue of whether a person is an employee or an independent contractor is an important one. The answer determines a person's rights under provincial legislation such as the *Employment Standards Act* (the "*ESA*"), the *Labour Relations Code,* and the *Workers Compensation Act* (the "*WCA*"), and under federal legislation such as the *Income Tax Act*, , the *Canada Pension Plan*, and the *Employment Insurance Act* (the "*EI Act*"). This year, a number of our clients considered the issue of whether the municipal election workers they hired were employees for the purposes of the *ESA*.

Overall, the issue to be decided in determining whether someone is an employee or an independent contractor is whether the person who is doing the work is in business for themselves. A person in business on their own account is an independent contractor, and not an employee. The employment status question must be answered based on the definitions and provisions of the particular legislation under which the question arises. It is possible for a person to be an employee for the purposes of one piece of legislation, but not an employee under another. However, that does not occur very frequently as the administrative bodies and the courts tasked with deciding the issue tend to apply the same factors in making their decisions. Those factors include:

- The level of direction and control that the person or organization paying for the work exerts over the worker: for example, who defines what the job is and how and when it is done;
- Who sets the rate the worker will be paid;
- Whether the worker provides their own tools and equipment to perform their duties;

- Whether there is a chance of profit and risk of loss;
- Whether the worker can subcontract the work or hire assistants;
- Whether the worker has a number of clients, or works solely for the person paying for the work;
- The degree of responsibility for investment and management the worker holds; and,
- Any other relevant factors, such as the terms of written contracts.

The list of applicable factors is a non-exhaustive list and not all factors will be relevant in a particular case. The decision-maker will determine the weight to be given to the various factors based on the legislative regime they are applying and the facts of the case before them.

1. Employment Status Under the ESA

The *ESA* contains a number of definitions that are relevant to the issue of whether a worker is an independent contractor, or an employee entitled to the rights and protections of that *Act*.

"employee" includes

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

(c) a person being trained by an employer for the employer's business,

(d) a person on leave from an employer, and

(e) a person who has a right of recall;

"employer" includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee;

> **"wages"** includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> …
>
> **"work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

With respect to the test for determining whether an individual is an employee or an independent contractor under the *ESA*, the BC Employment Standards Branch, and the Employment Standards Tribunal (the "ES Tribunal") have adopted and applied the following statement of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, ("*Sagaz*"):

> **47** Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that …[t]he central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
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> **48** It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

The *Sagaz* decision did not involve employment status under employment standards legislation, but rather whether an individual was an employee such that their employer could be vicariously liable for their actions.

In a case that has been ongoing for the past few years, the question of whether some taxi drivers driving Black Top & Checker Cabs in Vancouver are employees under the *ESA* or independent contractors has been considered by the Employment Standards Branch, the ES Tribunal, the BC Supreme Court, and the BC Court of Appeal (the "BCCA"): *Beach Place Ventures Ltd. (Re)* (the "Original Decision"), upheld on reconsideration (the "Reconsideration Decision"), upheld on judicial review *Beach Place Ventures Ltd. v. British Columbia (Employment Standards Tribunal)* (the "JR Decision"), upheld on appeal (the "Appeal Decision"). An appeal of the BCCA's

decision was filed with the Supreme Court of Canada in June, 2022. At the time this paper was written, the Supreme Court of Canada had not yet decided whether it will hear the case.

The facts of the case are not particularly relevant for local government employers. However, there are some lessons that local governments can learn from the various decisions in the case.

(a) The Determination

The initial decision of the Delegate of the Director of Employment Standards in the case is not available for review (the "Determination"). However, the decision was described in detail in the other decisions in the case.

The Delegate determined that three complainants were the employees of Black Top Cabs Ltd. ("Black Top") and its subsidiary Beach Place Ventures ("Beach Place") pursuant to the *ESA* and that they were owed wages and interest as a result. In the Delegate's view, the proper approach was to determine whether the relationship of employer and employee can be found based on the relevant provisions and purposes of the *ESA*. The Delegate set out in the Determination the definitions of "employee", "employer" and "work" from Section 1 of the *ESA*, and noted that they were to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the *ESA*, the object of the *ESA* and the intention of the legislators. The Delegate also noted that a number of factors can be considered to determine whether an employment relationship within the meaning of the *ESA* exists, and paraphrased the above statement of the Supreme Court of Canada in *Sagaz*.

The Delegate concluded that the three complainants were employees who performed work for two employers, namely Black Top and Beach Place who together carried on business as "Black Top and Checker Cabs". In reaching that conclusion, the Delegate considered the following factors:

- Control and direction;
- Equipment, tools and supplies;
- Financial investment and risk;
- Opportunity for profit;
- The absence of GST and WorkSafeBC filings;
- Personal tax filings of the complainants;
- Permanency of the relationship; and,
- Status of the shareholders of Black Top.

(b) The Original Decision

The ES Tribunal in the Original Decision (the "Original Panel") considered an appeal of the Delegate's decision by Black Top and Beach Place on the ground that the Delegate had made an error of law among other arguments. The Original Panel upheld the decision of the Delegate that the complainants were employees.

With respect to the applicable legal test for determining whether an employer-employee relationship exists under the *ESA*, the Original Panel held that the Delegate had engaged in the appropriate analysis of the relevant legal factors.

The following key points can be taken from the Original Decision:

- The test under the *ESA* is not the same as the common law tests for employment which were created chiefly for the purpose of determining whether an employer could be held vicariously liable for a worker's conduct, and not for the purpose of determining whether an employee is entitled to the minimum protections of the *ESA*.

- The Tribunal has repeatedly said that the question of the status of a person under the *Act* is determined in the context of the definitions of the terms "employee", "employer" and "work".

- With respect to the relevant factors, the factor of control and direction is particularly important, as reflected in the reference to it in the Section 1 definition of "employer" as a person "who has or had control or direction of an employee".

- In evaluating the degree of control exercised by one party over another, it is imperative to review not only whether one party controls what work is to be done, but also how it is to be done. The issue of control also examines who has the ability to select, discipline and terminate the relationship, and the method of remuneration.

- The subjective intention of the parties may have greater relevance in other legislative contexts, but it generally has little relevance in the employment standards context because of the unequal bargaining power between employees and employers, and because the parties cannot contract out of the minimum protections provided by the *ESA*.

- The *ESA* is remedial and benefits-conferring legislation, and is in general to be given a broad and liberal interpretation, as are the definitions contained within it.

The Original Panel concluded that the Delegate had analysed the issue before him and made a determination in accordance with, and for the purposes of the *ESA*. The Original Panel held that Black Top and Beach Place had not shown an error of law in the Delegate's analysis. The Original Panel considered their arguments to effectively have done no more than dispute the Delegate's factual findings and conclusions. Disagreement with findings of fact and inference drawn therefrom were not grounds for appeal under the *ESA*.

The Original Panel also addressed the fact that after the submissions in the case had closed, Black Top and Beach Place had sent a further unsolicited submission enclosing a decision by the Tax Court of Canada in which a judge had held that one of the complainants in the case before the Original Panel was not an employee of Beach Place for the purposes of federal taxation and benefit entitlement statutes (the "Tax Court Decision"). The Original Panel held that the fact that the Tax Court had come to a different conclusion under different legislation than the Delegate did not mean the Delegate's conclusion was incorrect. The Original Panel held that:

> **99** … The context of employment standards legislation is distinguishable from other legislative contexts with respect to the issue of employee status. As explained by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, employment standards legislation is remedial in nature, and the "harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers" (para. 31).
>
> **100** Accordingly, the Court stated in *Machtinger*, "an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not" (para. 32). This interpretative approach to employment standards legislation distinguishes it from other legislative contexts in which the issue of employee status arises. For this reason, an individual may be found to be an "employee" for purposes of labour relations or employment standards legislation, for example, but not for taxation purposes. This does not mean either finding is wrong in its statutory context; the variety of legislative circumstances in which the issue of employee status can arise is one of the reasons the test is so flexible, contextual, and fact-driven.

The Original Panel also rejected Black Top and Beach Place's argument that the Delegate had had not considered the subjective intention of the parties not to create an employment relationship, and had thus erred in law.

In the result, the ES Tribunal upheld the Delegate's finding that the complainants were employees for the purposes of the *ESA* and dismissed the appeal on that issue.

(c) The Reconsideration Decision

Black Top and Beach Place applied to the ES Tribunal for reconsideration of the Original Decision. The ES Tribunal in the Reconsideration Decision (the "Reconsideration Panel") dismissed the application for reconsideration.

In respect of the factors considered by the Delegate, the Reconsideration Panel held that they included factors that are commonly considered in answering the question of employee status under the *ESA*, namely control and direction; equipment, tools and supplies; financial investment and risk; opportunity for profit; and permanency of the relationship. The Reconsideration Panel approved of the Delegate's analysis of the issue, stating,

> **23** Most of the factors considered by the Delegate in this case are ones that have been expressly identified as potentially relevant factors in *Sagaz* or other common law authorities. Consistent with the approach outlined in *Sagaz*, the Delegate selected the factors he found to be relevant based on the facts and circumstances before him. He also then considered the totality of the evidence before him concerning the relationship between the Complainants and the Applicants, as suggested in *Sagaz* (para. 46).

The Reconsideration Panel also confirmed that subjective intention of the parties is a potentially relevant factor. However, the Reconsideration Panel held that the ES Tribunal has in the past made it clear that the intention of the parties is only one factor that may be considered, and that it does not trump the reality of the nature of the relationship as revealed by other relevant factors. The ES Tribunal has held that generally, form will not triumph over substance, and that parties to a relationship cannot exclude the application of the *ESA* simply by making a contractual declaration that a worker is an independent contractor. The Reconsideration Panel found no error in the Delegate's analysis on that issue. The Reconsideration Panel also confirmed the statements in the Original Decision that the subjective intention of the parties generally has little weight under the *ESA*.

The Reconsideration Panel further rejected Black Top and Beach Place's argument that the Tax Court Decision was binding on the parties in respect of the issue of employment status under the *ESA*. In the Reconsideration Panel's view, the preconditions for such a result did not exist as the parties to the two decisions were not the same, among other reasons for dismissing the argument.

In the result, the Reconsideration Panel held that the Original Panel had not erred in upholding the Delegate's decision, and rejected Black Top and Beach Place's application for reconsideration.

(d) The Judicial Review Decision

Black Top and Beach Place applied to the BC Supreme Court for judicial review of the Original Decision and the Reconsideration Decision. The Court held that only the Reconsideration Decision could be the subject of judicial review, and not the Original Decision or the Determination. However, the latter two decisions could be considered for context. The Court also held that in the judicial review, the Reconsideration Decision could only be set aside if it was patently unreasonable.

The Court rejected Black Top and Beach Place's argument that since the Reconsideration Panel refused to apply the Tax Court's finding to the case, the Reconsideration Decision was patently unreasonable. The Court held that it was not unreasonable or patently unreasonable for the Reconsideration Panel to distinguish the Tax Court Decision on the basis that it was made under a different legislative context than the case before them. Both the Original Panel and the Reconsideration Panel had focused on the fact that the *ESA* has a remedial purpose of protecting workers from abuse or exploitation by those that benefit from their work. The Court noted that that focus had led the Original Panel and the Reconsideration Panel to place greater emphasis on those factors drawn from the common law tests that address control over and vulnerability of the worker. The Court held that different factors were emphasized in the income tax, employment insurance, and Canada Pension Plan contexts, such as the worker's tax filings, the flow of revenue and the allocation of profit.

The Court also rejected Black Top and Beach Place's argument that in refusing to follow the Tax Court Decision, the ES Tribunal had failed to follow its own precedent. The Court additionally found no reversible error in the Reconsideration Panel's conclusion that the Tax Court Decision should not be followed because there were different parties in the two cases.

The BC Supreme Court also rejected Black Top and Beach Place's argument that the Reconsideration Panel erred in its application of the test for determining employment status. With respect to the argument that the statutory definitions in Section 1 of the *ESA* had not been considered, the Court held that the Delegate had set out the statutory definitions in the Determination before analyzing the issues, and it was not unreasonable for the Reconsideration Panel to conclude that the statutory definitions were met by the Delegate's finding that the complainants did "work" that benefited Black Top and Beach Place in an indirect way.

In response to Black Top and Beach Place's argument that the Original and Reconsideration Decisions had failed to apply the common law test for employment relationships consistently and harmoniously with the statutory definitions and the purposes of the *ESA*, the Court accepted that the decisions articulated a preference for an interpretative approach yielding a broad and expansive conception of employment, but did not find that to be problematic. Instead, the Court held that the analysis was grounded in principles drawn from the Supreme Court of Canada's decisions in *Rizzo & Rizzo Shoes Ltd* and *Machtinger v. HOJ Industries Ltd.* to the effect that as employment standards legislation is remedial benefits-conferring legislation

with the purpose of protecting employees, it is to be interpreted in a broad and generous manner to achieve those purposes. The Court held in that regard:

> **100** In particular, the Delegate was looking for, and found in this case, a relationship of economic dependency, giving rise to a power imbalance with the attendant opportunity for abuse and exploitation. That was seen to be more important in the context of this case than the fact that the Complainants had previously filed their tax returns for a period of time on the basis that they were independent contractors, or that they could keep most of their profit, for example.

The Court held that it was not unreasonable, let alone patently unreasonable, for the Reconsideration Panel to affirm the Delegate's analysis on the basis that the Delegate had properly emphasized those factors drawn from the common law test that were seen to be especially pertinent in the context of the *ESA* in general, and in this case in particular.

(e) The Appeal Decision

Black Top and Beach Place appealed the Judicial Review Decision to the BCCA. The BCCA dismissed the appeal, finding that the Reconsideration Decision was not patently unreasonable.

On appeal, Black Top and Beach Place argued that the BC Supreme Court on judicial review had applied the wrong standard of review to the issue of whether the Tax Court Decision was binding on the ES Tribunal, and erred in not finding that the ES Tribunal's failure to apply the Tax Court Decision was incorrect. They also argued that the BC Supreme Court erred in failing to find that the Reconsideration Panel's interpretation of the term "employee" in the *ESA* was patently unreasonable. They further argued that the Reconsideration Decision was internally incoherent and therefore patently unreasonable.

The BCCA held that the standard of review for the issue of whether the Tax Court Decision was binding on the parties was that of patent unreasonableness.

With respect to the issue of whether the Reconsideration Panel was patently unreasonable in deciding that it was not bound by the Tax Court Decision, the BCCA held that the distinction that the Reconsideration Panel drew between the *ESA* as a remedial statute whose policy focuses on protecting employees, as opposed to the statutes over which the Tax Court has jurisdiction was well supported. The BCCA noted that the ES Tribunal had in the past held that the fact that the Canada Revenue Agency or the Workers Compensation Board may treat a person as an employee or an independent contractor for the purposes of their governing enactments is not determinative of whether or not that same person is an employee for the purposes of the *ESA*. The BCCA also referenced a decision of the Supreme Court of Canada which held that that the term "employee" can mean two different things in two different statutory contexts: *McCormick v. Fasken Martineau Dumoulin LLP*. The BCCA concluded that there was no merit to the Tax Court Decision issue and dismissed that ground of appeal.

The BCCA also rejected the argument that the Reconsideration Panel's interpretation of the term "employee" was patently unreasonable. In that regard, the BCCA rejected the notion that the Reconsideration Decision was required to reflect a clear and coherent conception of employer-employee relationships, stating:

> **42** The appellants' insistence on the need for a general "conception" of who is an employee is difficult to understand. That insistence contemplates some concise, consistent and fixed expression of what constitutes an employee in different circumstances. It pre-supposes a monolithic "conception" of employment within which there is significant consistency between the common law, other statutory schemes and the *ESA*.
>
> **43** However, throughout these proceedings, the various statutory decision-makers, in accordance with established jurisprudence, have relied on a context-specific and fact-specific framework when deciding whether the complainants were employees for the purposes of the *ESA*.
>
> …
>
> **49** What constitutes an employee under the *ESA* is necessarily framed by the statutory definitions in the *ESA*, the *ESA* itself and relevant jurisprudence. Beyond that, however, further insistence on the need for conceptual rigour is at odds with the recognition in *Sagaz* that "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor" (at para. 46) and that the "relative weight of each [factor] will depend on the particular facts and circumstances of the case" (at para. 48).
>
> **50** In my view, the unwillingness of the Reconsideration Panel to formalize a "conception" of "employee" for the purposes of the *ESA* was not patently unreasonable.

The BCCA indicated that the Reconsideration Panel was reasonable to rely on the Supreme Court of Canada's decision in *Sagaz* in reaching its decision. The BCCA also considered the overlap between the factors applied by the Delegate, and the factors identified in *Sagaz* to be obvious.

The BCCA rejected Black Top and Beach Place's argument that the Reconsideration Decision erroneously reflected a principle that there is presumption of employment status under the *ESA*. The BCCA noted that the Reconsideration Panel had confirmed that neither *Rizzo* nor *Machtinger* allow a decision-maker under the *ESA* to start their analysis with the presumption that an individual is an "employee" for the purposes of the *ESA*. The BCCA also noted that the Reconsideration Decision made it quite clear that the question of whether an individual is an

employee for the purposes of the *ESA* is to be determined contextually and on the basis of the numerous context-specific factors identified in *Sagaz*.

The BCCA also rejected the argument that the Delegate and the Reconsideration Panel had applied a presumption of employment status. The BCCA held instead that the Delegate had considered the evidence in respect of numerous contextual factors and concluded that the complainants had established they were in an employment relationship with the appellants. The BCCA also noted that the Reconsideration Panel was satisfied that that analysis had been undertaken properly.

In the result, the BCCA concluded that there was no merit to the assertion that the Reconsideration Decision was patently unreasonable, and dismissed the appeal.

As noted above, Black Top and Beach Place have applied to appeal the BCCA's decision to the Supreme Court of Canada. At the time of writing, it is not yet known whether the Supreme Court of Canada will hear the case.

(f) Key Takeaways

A key principle for local governments to take away from the *Beach Place* cases is that there is no presumption of employment status under the *ESA*. Instead, the existence of an employment relationship is to be judged based on the definitions of employee, employer and work in the *ESA*, and on the factors relevant to the case. The most important factor is that of control and direction. Other relevant factors will usually include whether the worker provides their own equipment, tools and supplies, whether the worker can hire their own helpers or subcontract their work, the degree of financial risk taken by the worker, the degree of responsibility for investment or management held by the worker, and the worker's opportunity for profit in their work. The list of relevant factors is non-exhaustive, so that other factors may be relevant in a particular case. Generally, the subjective intent of the parties will not have much weight in the analysis, given the inherent power imbalance between employers and employees, and as form will not be permitted to trump substance. Finally, the fact that a person has been determined to be an independent contractor under another statutory regime does not mean that they cannot be found to be an employee under the *ESA*.

2. Employment Status Under the WCA

WorkSafeBC also considers the employment status of individuals in determining whether they are "workers" for the purposes of the *WCA* and entitled to coverage paid for by the organization for which they perform work, or whether they are entitled to register as an independent business and receive Personal Optional Protection coverage. In making that determination, WorkSafeBC applies the definitions in the *WCA* and its policies.

Section 1 of the *WCA* defines "worker" as including:

> a person who has entered into or works under a contract of service or apprenticeship, whether the contract is written or oral, express or implied, and whether by way of manual labour or otherwise.
>
> …

An "employer" is defined in the *WCA* as including

> every person having in their service under a contract of hiring or apprenticeship, whether the contract is written or oral, express or implied, a person engaged in work in or about an industry;

Section 4(2) of the *WCA* permits WorkSafeBC to treat an "independent operator who is neither an employer nor a worker" as if they were a worker. Policy Item AP1-1-1, Coverage under Act – Description of Terms in the WorkSafeBC Assessment Manual defines "independent operator" as follows:

> An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an "independent firm".

The term "independent firm" is defined in the same policy as follows:

> The Board has created the term "independent firm" to identify those persons who are either required by the *Act* to register with the Board as employers of workers, or from whom, as unincorporated employers or independent operators, the Board will accept a registration through the purchase of Personal Optional Protection for themselves. An independent firm performs work under a contract, but has a business existence under the contract independent of the person or entity for whom that work is performed. An independent firm may be an individual, a corporation or another type of legal entity. A worker cannot be an "independent firm". …

WorkSafeBC Policy Item AP1-1-3, Coverage under Act – Distinguishing Between Employment Relationships and Relationships Between Independent Firms ("Policy Item AP1-1-3"), provides guidance on the analysis of employment status under the *WCA*. It discusses the test that WorkSafeBC applies for determining whether a party is a worker or an independent operator as follows:

> In distinguishing an employment relationship from one between independent firms, there is no single test that can be consistently applied. The factors considered include:
>
> - whether the services to be performed are essentially services of labour;
> - the degree of control exercised over the individual doing the work by the person or entity for whom the work is done;
> - whether the individual doing the work might make a profit or loss;
> - whether the individual doing the work or the person or entity for whom the work is done provides the major equipment;
> - if the business enterprise is subject to regulatory licensing, who is the licensee;
> - whether the terms of the contract are normal or expected for a contract between independent contractors;
> - who is best able to fulfill the prevention and other obligations of an employer under the Act;
> - whether the individual doing the work engages continually and indefinitely for one person or works intermittently and for different persons; and
> - whether the individual doing the work is able or required to hire other persons.
>
> The major test, which largely encompasses these factors, is whether the individual doing the work exists as a business enterprise independently of the person or entity for whom the work is done.

Policy Item AP1-1-3 also states:

> No business organization is completely independent of all others. It is a question of degree whether a party to a contract has a sufficient amount of independence to warrant registration as an employer. Many small parties may only contract with one or two large firms over a period of time. Yet they are often independent of the person with whom they are contracting in significant respects. For example, they must seek out and bid for their own contracts, keep their own books and records, make income tax, unemployment insurance and Canada Pension Plan deductions. They also retain the right to hire and fire their own workers and exercise control over the work performed by their workers. These factors must be considered.

Policy Item AP1-1-4, Coverage under the Act – Employers, states that proprietors and partners of unincorporated businesses are employers if the business has workers, and are independent operators if the business does not have workers. The latter such persons do not have coverage under the *WCA* unless they have purchased Personal Optional Protection coverage.

The Workers' Compensation Appeal Tribunal (the "WCAT") recently considered the status under the *WCA* of an individual who provided services to a local government, and concluded that the individual was a worker who was entitled to coverage paid for by the local government: WCAT Decision Number A1903291 (September 26, 2022). In that case, the individual in question had been engaged by the local government for several years to provide education services to residents of the local government regarding the value of composting. For the 13 or 14 years before 2019, the individual was paid an hourly rate by the local government to perform those services on its premises. In April, 2019, the parties executed a new contract which set a term for the relationship of February 1, 2019 to November 30, 2020 with an option to renew. The contract also provided that the individual would be paid a monthly flat rate for her services, and that the individual would be responsible for remitting all statutory payments to the federal tax authority. The contract also stated that she was an independent contractor and not a servant, employee or agent of the local government. The contract further indicated that the individual had the ability to subcontract her work to another party, but the local government retained the right to approve the subcontractor. Under the contract, either party could terminate the agreement on 30 days notice, but the local government also had the right to terminate the contract without notice if it determined that the individual was not performing the work to the local government's satisfaction. The individual was a sole proprietor, which meant that she operated as an individual person and did not operate through a separate legal entity like a corporation or a limited partnership. One hundred percent of her revenue was generated through the on-site composting education for the local government. The contract required the individual to work five hour shifts four weekdays, and on one Saturday or Sunday every month April through October. While the individual could set her schedule within those parameters, the schedule had to be approved by the local government.

The issue of the individual's status under the *WCA* arose when, at the request of the local government, she applied to WorkSafeBC for registration as an independent business to obtain Personal Optional Protection coverage. WorkSafeBC determined the individual was not entitled to such coverage as she was a worker of the local government. The local government challenged that decision by applying for review by the WorkSafeBC Review Division, but was unsuccessful in that application. The local government then appealed to the WCAT.

The WCAT considered the factors set out in Policy Item AP1-1-3 and concluded that the individual was a worker for the purposes of the *WCA*. It held that the services the individual provided were only services of her labour and that that supported a finding of an employment relationship. The WCAT also considered that the individual did not make any investments in respect of the work she performed for the local government, and that she did not have an opportunity for profit or a risk of loss. Those factors again supported the finding of an employment relationship. The fact that the individual did not provide any major equipment in order to perform her duties also supported an employment relationship.

The WCAT next considered whether the terms of the contract were those that would normally be included in a contract between independent businesses. The WCAT indicated that the requirement under the contract that the individual make all of her own tax deductions would be expected in a relationship between independent businesses. So would the requirement that the individual repair or replace any property of the local government which was damaged as a result of her provision of services. On the other hand, the contract required the individual to adhere to certain performance standards which were described in detail in the contract. The WCAT considered that to be a level of control which was greater than what would typically be associated with a relationship between independent businesses. Overall, the WCAT determined that the terms of the contract factor was neutral, as a number of the contract's terms were typical of a relationship between independent businesses, but some of the terms such as the hours of work, details of the work, and the monthly salary were typically associated with an employment relationship.

In respect of the factor of who was best able to fulfill the prevention obligations of an employer and other obligations under the *WCA*, the WCAT considered that all of the education services provided by the individual were provided at facilities controlled and operated by the local government, and were subject to the oversight of the local government. The WCAT also considered that the contract required the individual to adhere to all of the relevant safety standards imposed by the local government. In light of those circumstances, the WCAT concluded that the local government was in the best position to ensure that the health and safety obligations were met on its sites.

The WCAT also considered the nature of the individual's engagement to support the finding of an employment relationship. Prior to the contract, the individual had worked on a continuous basis for the local government for a number of years. While the contract set a term for two years, with an option to renew, which could be a term of engagement between independent businesses, it could also be a term of engagement between employers and employees.

The WCAT further considered the individual's ability to hire other persons to support a relationship between independent businesses. The individual did not have any employees or subcontractors. However, the contract allowed her to hire such persons to perform her services to the local government, subject to the approval of the local government. In the WCAT's view, as the services were education services and were being provided to members of the public on the local government's premises, with the implied endorsement of the local government, it was reasonable for the local government to have the right to ensure that the persons providing the services met certain qualifications.

Finally, the WCAT considered the local government's level of control over the individual in her performance of the work to be the type of control that an employer exerted over an employee. The local government had control over the facility in which the individual was to provide her services. The individual only had limited leeway to set her work schedule as she had to work four five-hour weekday shifts, and one Saturday or Sunday every month, and the schedule she selected was subject to approval by the local government. The WCAT also noted that the contract contained an appendix which set out in detail the scope of the work and the individual's extensive obligations, which indicated that the local government exerted a considerable amount of control over her work duties and tasks. Further, while both parties could terminate the agreement on 30 days' notice, the local government had the right to terminate the agreement if the work was not performed to its satisfaction, which in the WCAT's view is a hallmark of an employment relationship.

After considering all of the factors together, the WCAT concluded that the relationship between the individual and the local government was an employment relationship, and not a relationship between independent businesses. The individual was therefore not entitled to Personal Optional Protection coverage, and was instead entitled to coverage as a "worker" under the *WCA*.

C. Working from Home

One of the major changes in the workplace in the last few years is the desire and ability for employees to work remotely. While many positions in local governments must be performed in person, there are others that can be performed remotely either on a full time or hybrid basis. Local government employers who want to attract and retain qualified employees may want to consider allowing those employees to work remotely.

Working remotely can cause challenges and employers need to ensure that they consider the parameters of working remotely and that they are meeting their Employment Standards, WorkSafe, and collective agreement obligations. It is important that a local government develop a comprehensive remote working policy that addresses issues such as:

- Eligibility criteria;
- Performance expectations;

- Hours of work and breaks;
- Employee availability;
- Record keeping and tracking hours;
- When attendance at the workplace is required;
- Calling in sick;
- Responsibility for purchasing and maintaining equipment and internet;
- Expectations of a suitable workspace;
- Limitations of where remote work can be undertaken;
- Confidentiality, privacy and security; and,
- Health and safety obligations.

It is important that the policy contain the criteria that will be applied by the employer when assessing the effectiveness of a remote working arrangement, and state that the employer has the ability to change or cancel any remote work arrangement in its sole discretion. Ideally, there would also be a written agreement between the parties outlining the terms of remote work, including the right of the employer to change or cancel the remote work arrangement. Otherwise, an employer risks a claim of constructive dismissal if it unilaterally changes or cancels an agreed upon remote work arrangement.

Employers also need to ensure that any remote working arrangement complies with the collective agreement, and any remote work policy applicable to unionized employees must also be reasonable. Therefore, we recommend that employers consult with the union before implementing a remote work policy.

Employers also need to consider health and safety considerations associated with remote work. This includes ensuring the employee has an appropriate workspace that meets ergonomic requirements. The Canadian Centre of Occupation Health and Safety recommends that the following items be included in a home office safety check list:

- Fire protection;
- Emergency procedures; and,
- Electrical safety (https://www.ccohs.ca/oshanswers/hsprograms/telework.html).

WorkSafe has also developed an information guide about keeping remote workers safe and healthy. Employers should ensure any remote work policy requires employees to assess their workspace and report any potential hazards to the employer. WorkSafe also recommends that the following information be included in any remote work policy:

- Protocols for evacuating from the employee's home to a safe location;
- How to contact the employer in case of emergency;
- Safe work practices;
- How to report any work-related accidents or injuries;
- Communication protocols and procedures for check-ins if a worker is working alone or in isolation;
- Requirements for education and training; and,
- Ergonomic considerations.

A carefully thought out and comprehensive remote work policy will help ensure that employees understand the expectations, limits and requirements of a remote work arrangement. It will also mitigate any legal risks that can arise from remote working arrangements such as breaches of the *Employment Standards Act* and WorkSafe obligations.

IV. HUMAN RIGHTS LAW

Two human rights cases, one by the BC Human Rights Tribunal and the other by the BC Supreme Court, were issued this year that provide guidance to local governments on its obligations under section 13 of the *Human Rights Code*. As well, local governments were designated as organizations that must comply with the *Accessible British Columbia Act*. Therefore, local governments must comply with the requirements of this legislation by September 1, 2023.

A. Applications to Dismiss before the Hearing

There have not been many decisions of the Human Rights Tribunal (the "HR Tribunal") involving local governments as employers since our conference last year. One case of interest involves an allegation of discrimination in employment based on colour, contrary to Section 13 of the *Human Rights Code* (the "*Code*"): *Clarke v. Vancouver (City)*. The complaint was filed against both the City and the complainant's coworker who was alleged to have discriminated against him. In the decision, the HR Tribunal rejected the respondents' application pursuant to Section 27(1)(c) of the *Code* to dismiss the case in its entirety without a hearing, on the ground that the case had no reasonable prospect of success. The HR Tribunal also rejected their application to

dismiss the complaint against the coworker on the ground that proceeding against him would not further the purposes of the *Code*.

1. Legal Principles in Applications to Dismiss

Section 27(1) of the *Code* provides that the HR Tribunal may dismiss all or part of a complaint with or without a hearing if it determines that any one of a list of circumstances exist. Those circumstances include that:

- The complaint or part of a complaint is not within the jurisdiction of the HR Tribunal;
- The acts or omissions alleged in the complaint or that part of the complaint do not contravene the *Code*;
- There is no reasonable prospect that the complaint will succeed;
- Proceeding with the complaint or that part of the complaint would not
  - Benefit the person, group or class alleged to have been discriminated against, or
  - Further the purposes of the *Code*;
- The complaint or that part of the complaint was filed for improper motives or made in bad faith;
- The substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
- The contravention alleged in the complaint or that part of the complaint occurred more than one year before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

Section 22(3) of the *Code* permits the Tribunal to accept all or part of a complaint filed after the expiration of the one-year time limit.

(a) Section 27(1)(c) – No Reasonable Prospect that the Complaint Will Succeed

Section 27(1)(c) of the *Code* allows the HR Tribunal to dismiss complaints that do not warrant the time and expense of a hearing. To succeed in a Section 27(1)(c) application, the respondent to a complaint has the burden to persuade the HR Tribunal that the complaint has no reasonable prospect of success at a hearing. The complainant does not have to prove the facts of their complaint in response to a Section 27(1)(c) application, but must point to some evidence capable of taking the complaint out of the realm of conjecture. The HR Tribunal has

held that the threshold that a complainant must meet to advance a complaint to a hearing is low. On an application to dismiss under Section 27(1)(c), the HR Tribunal does not make findings of fact or credibility, but it does assess all of the information and evidence submitted by the parties, including the respondent's explanation for their alleged conduct. In deciding a Section 27(1)(c) application, the HR Tribunal only considers the information before it, and does not consider what evidence might be given at a hearing. It is up to the parties to give the HR Tribunal all the information necessary for it to make its decision.

(b) Section 27(1)(d)(ii) – Proceeding with the Complaint Will Not Further the Purposes of the Code

The HR Tribunal has held in respect of the Section 27(1)(d)(ii) ground of dismissal that in certain circumstances it would not further the purposes of the *Code* for a complaint to proceed against an individual respondent when their institutional employer has also been named in the complaint. The purposes of the *Code* are set out in Section 3 and include:

- To foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- To promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- To prevent discrimination prohibited by this Code;
- To identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code; and,
- To provide a means of redress for those persons who are discriminated against contrary to this Code.

The HR Tribunal has recognized that there are policy reasons against naming individuals as respondents in a complaint in addition to their employers: *Daley v. British Columbia (Ministry of Health)*. The HR Tribunal's experience has showed that naming individual respondents has a marked tendency to complicate and delay the voluntary resolution of complaints, the HR Tribunal's pre-hearing processes, and eventual hearings. That is due to the multiplicity of parties, some of whom may be unrepresented, and the personal animosity which may exist and be further exacerbated between complainants and individual respondents. Also, individuals named as respondents, who may not ultimately be found liable of discrimination often experience significant personal distress as a result of being named. That could make voluntary resolution of the complaint more difficult, as the individual respondent may feel a strong need to be publicly vindicated. In the HR Tribunal's view, none of those circumstances assist in achieving the efficient resolution of complaints or in furthering the broader remedial purposes of the *Code*. Further, the employer or institutional respondent would most likely be able in a practical and financial sense to satisfy the remedial orders the HR Tribunal may make.

Employers are generally liable for the actions of their employees. Therefore, it would not usually be necessary to hold individual respondents liable in order to provide effective remedies to complainants.

The HR Tribunal has also held that there are "strong policy reasons that favour complaints against individual respondents", holding that:

> **63** … As the Supreme Court of Canada has acknowledged, "the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions": *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 56. This is particularly true where allegations of discrimination are such that there is a high degree of personal culpability. The usual example is in cases of sexual or racial harassment*: Daley v. British Columbia (Ministry of Health)*, 2006 BCHRT 341 at para. 53.
>
> *Goondiwala* v. British *Columbia Ferry Services Inc. and others (No. 3)*

In deciding whether to dismiss a complaint against an individual named respondent pursuant to Section 27(1)(d)(ii), the HR Tribunal considers the following factors:

- Whether the complaint names an institutional employer as a respondent and that respondent has the capacity to fulfill any remedies that the Tribunal might order;
- Whether the institutional respondent has acknowledged the acts and omissions of the individual as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and,
- The nature of the conduct alleged against the individual, including whether:
  - Their conduct took place within the regular course of their employment;
  - The person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and
  - The conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.

Daley at paras. 60-62

2. The Clarke Decision

The *Clarke* decision involved an application to dismiss under Section 27(1)(c) and 27(1)(d)(ii) of the *Code*. In that case, the complainant asserted that he was the only Black man in his department of approximately 300 employees. He alleged that his colour was a factor in three instances of poor treatment by a fellow coworker. As part of the background to the complaint, the complainant alleged that he had been subjected to a number of discriminatory comments over the years referencing his colour in the workplace, and that the City had not adequately responded to his reports of the discrimination. He had previously filed a human rights complaint about those prior comments, but it had been dismissed on the basis that it was filed outside the time limit for filing a complaint.

The three instances of allegedly discriminatory conduct included the coworker yelling at the complainant about some asphalt remaining in a dump truck after the complainant had cleaned the truck in June, 2018; the coworker yelling at and verballing harassing the complainant when the complainant was asked to work overtime when other dump truck drivers were told to go home for the day in the late summer of 2018; and the coworker accelerating in a truck towards the complainant and another employee who were crossing on foot at a stop sign in the parking lot and revving his engine at them, at the beginning of November, 2018. When the complainant allegedly later spoke to the coworker about the last incident the coworker allegedly swore at him and said "you people should be buried". The complainant had understood the comment "you people" to refer to Black people. Near the end of November, 2018, the complainant raised his concerns about the three alleged incidents with the City's Superintendent of Equipment. The complainant was later injured and went on a leave of absence after reporting the incidents to the Superintendent. When the complainant returned to work the coworker had left employment with the City.

In the application to dismiss, the coworker denied interacting with the complainant at all about the asphalt in the dump truck after it was cleaned, and denied interacting with the complainant in relation to the complainant's overtime work. The City's records suggested that the coworker and the complainant had not worked any shifts together on the project during which the complainant claimed the overtime incident occurred. In respect of the parking lot incident, the coworker said he was driving slowly and stopped at the stop sign but did drive close to the complainant and the other employee, but did not try to run them down. He also denied making the comments alleged by the complainant. He said that he apologized to the other employee the next day but not the complainant as the complainant was angry and trying to antagonize him. He said that he apologized to the complainant the following week for coming close to the complainant with his truck. The complainant contended that the apology only came after he reported the parking lot incident to the Superintendent, and that the apology was insincere and forced.

The Superintendent stated in the application to dismiss that the complainant told him that the coworker had already apologized for the parking lot incident, and that the complainant did not mention the complainant's belief that the events were connected to his colour. The Superintendent investigated the incidents and the other employee with the complainant in the parking lot corroborated that the coworker had revved his truck engine and that the coworker had apologized to the other employee.

In the Section 27(1)(c) application, the respondents argued that the complainant had not experienced an adverse impact in his employment, and that even if he had there was no reasonable prospect that he could establish that his colour was a factor in the treatment. In respect of the truck cleaning incident, the respondents said that even if the coworker did yell at the complainant, the complainant did not view the incident as sufficiently serious to report it immediately and when he did, he did not connect the incident to his colour. They submitted that there was no basis to conclude that colour was a factor in the interaction, and it was just a disagreement between coworkers. With respect to the overtime incident, the respondents argued that the City's records showed that the complainant and the worker did not work together on that project, and it was therefore not possible for the worker to have yelled at the complainant as alleged. In regard to the parking lot incident the respondents denied the coworker made the comment alleged and said that the complainant did not connect the incident to his colour when he reported the matter to the Superintendent.

In deciding not to dismiss the complaint pursuant to Section 27(1)(c), the HR Tribunal held that the time lapse between the alleged incidents and the complainant's reporting of them to the Superintendent were not sufficient to refute his evidence about how the incidents had impacted him. The complainant had in his email to the Superintendent to set up a meeting indicated that he was finally ready to speak about the incidents. The HR Tribunal held that the fact that he may have taken time to bring the matters forward did not necessarily mean that his evidence was less credible. Further, the fact that the complainant had not advised the Superintendent of his belief that the incidents were related to his colour did not undermine his evidence about the effect the incidents had had on his comfort in the workplace.

The HR Tribunal accepted as a general principle that the complainant's belief that the incidents were related to his colour was not enough to establish discrimination. However, the HR Tribunal held it was not persuaded that there was no reasonable prospect that the complaint could succeed. It held that the connection between the protected characteristic colour and conduct will often have to be inferred in cases alleging racial discrimination because it is often subtle in nature. The HR Tribunal held that even without the overtime incident, if the complainant could prove his version of events about the remainder of his allegations, the HR Tribunal could draw an inference from his evidence about being continually singled out as the only Black man in the workplace, that his colour was a factor in the coworker's conduct towards him.

The HR Tribunal also held that it was not reasonably certain that the respondents would establish a non-discriminatory explanation for the conduct. The fact that the respondents had provided other explanations for the conduct was not a sufficient basis on which to dismiss the complainant as having no reasonable prospect of success. The coworker's denials were not sufficient to persuade the HR Tribunal that it was reasonably certain that his explanations would be accepted over the complainant's evidence. The disputes in the evidence would require findings of credibility to resolve, and that was beyond the scope of an application to dismiss.

The HR Tribunal therefore dismissed the application to dismiss pursuant to Section 27(1)(c) of the *Code*.

Another issue in the case was the respondents' argument that the coworker alleged to have engaged in the discriminatory conduct should be removed as a named respondent in the case pursuant to Section 27(1)(d)(ii) of the *Code*, as proceeding would not further the purposes of the *Code*. In deciding not to dismiss the complaint against the individual coworker, the HR Tribunal considered factors, including that the City said that it accepted full responsibility for the coworker's actions and had the capacity to fulfill any remedies ordered by the Tribunal. There was also no dispute as to whether the conduct occurred in the course of the coworker's employment. However, the alleged conduct involved a measure of individual culpability as it was discriminatory harassment. It was the HR Tribunal's view that the nature of the alleged conduct in the parking lot incident and the coworker's alleged statement "you people should be buried" were exactly the kind of conduct that cut "to the heart of the *Code*". In the result, the HR Tribunal was not persuaded that it would not further the purposes of the *Code* to proceed against the worker as an individual respondent in the case.

B. Is an Employee Entitled to Accommodation of Their Child Care Needs?

The case law on discrimination on the basis of family status due to child care obligations under section 13 of the *Code* continues to evolve in BC. In 2020, the BC Human Rights Tribunal issued a decision involving a claim of discrimination on the basis of family status in relation to childcare (*Harvey v. Gibraltar Mines Ltd. (No. 2)*). The Tribunal dismissed the employer's preliminary application to dismiss this claim and the employer appealed this decision to the BC Supreme Court (*Gibraltar Mines Ltd. v. Harvey*).

In this case, two employees, who were parents, worked the same 12 hour shift at their employer located in a small community. Working these same 12 hours shifts made finding childcare difficult for them and they requested an accommodation. The employer and these employees were not able to come to a mutually agreeable solution and the complainant filed a complaint with the Tribunal. The employer then filed an application to dismiss this complaint.

The complainant alleged the following:

- She made all possible efforts to find adequate childcare and was not successful;

- The hours of the only daycare at which she could obtain a spot for her child were not long enough to allow her or her spouse to pick up and drop off their child; and,

- She or her spouse had to take vacation time or family leave to care for their child or take their child to daycare.

In 2004, the BC Court of Appeal established the following test in order to prove a *prima facie* case of discrimination on the basis of family status under the *Code* due to child care (*Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*):

- There must be a change in a term or condition of employment; and,

- That change results in a serious interference with a substantial parental or other family duty or obligation of the employee.

In 2019, the BCCA confirmed the above test is still good law (*Envirocon Environmental Services, ULC v. Suen*). Therefore, it is generally accepted in BC that general childcare duties do not fall within the scope of "family status" under the *Human Rights Code*. This means that employers in BC are not required to accommodate employees who have regular childcare obligations.

The Tribunal in *Harvey* accepted that a parent must establish they experienced a substantial interference with a parental or family duty or obligation in order to make a successful claim of discrimination under the *Code*. However, the Tribunal determined that there does not need to be a change in a term or condition of employment.

The Tribunal determined that the facts in this case, if proven, may establish a substantial interference with a parental obligation. Therefore, the Tribunal found that it could not conclude at this preliminary stage whether the employer had met its duty to accommodate and denied the employer's application to dismiss this complaint.

The sole issue in the appeal to the Court was whether the Tribunal erred in its interpretation of the legal test that applies to determine whether an individual has a *prima facie* case of discrimination based on family status under section 13 of the *Code*. The employer argued that in order to have a claim of discrimination on the basis of family status, an employee must first show that there is a change in the terms or conditions of employment. If there is no change in the terms or conditions of employment, then an employee would not meet the above test. This interpretation would limit the scope of family status discrimination based on child care and the requirement of employers to accommodate on this basis.

The Court in *Gibraltar* agreed with the employer because of previous case law decided by the BCCA regarding the applicability of the above test. It is interesting to note, however, the Court's statement that absent this previous BCCA case authority, it "… may well have shared the Tribunal's view that *Campbell River* does not stand for the proposition that a change in a term or condition of employment is necessary to establish *prima facie* family status discrimination" (at para. 105).

We understand that this case is being appealed. For now, however, the Tribunal is required to apply the more restrictive test set out above. That means employers do not have a duty to accommodate employees who have child care issues where there is no change in a term or condition of employment.

C. Accessible British Columbia Legislation

On June 17, 2021, the provincial government gave royal assent to the *Accessible British Columbia Act* (the "*Act*"). Under that *Act*, prescribed organizations have obligations to decrease barriers to persons with impairments, in relation to their involvement in and interactions with the organizations. The *Accessible British Columbia Regulation* (the "*Regulation*") came into effect on April 14, 2022, prescribing the organizations to which the *Act* applies. Under the *Regulation*, municipalities, municipal police departments, and regional districts are prescribed organizations effective September 1, 2023. That means that local governments must comply with the requirements of the *Act* discussed below by September 1, 2023.

Section 9 of the *Act* requires a local government to establish an accessibility committee to assist the local government to identify barriers to individuals in or interacting with the local government, and to advise the local government on how to remove and prevent barriers to such individuals. The term "barrier" is defined in Section 2 of the *Act* as "anything that hinders the full and equal participation in society of a person with an impairment". An "impairment" includes a physical, sensory, mental, intellectual or cognitive impairment, whether permanent, temporary or episodic. Section 2 of the *Act* also specifies that barriers can be caused by environments, attitudes, practices, policies, information, communications, or technologies, and can be affected by intersecting forms of discrimination.

A local government's accessibility committee must to the extent possible (a) have at least half of its members be persons with disabilities, or individuals who support, or are from organizations that support, persons with disabilities; (b) have members that reflect the diversity of persons with disabilities in British Columbia; (c) have at least one member be an Indigenous Person; and (d) have members that reflect the diversity of persons in British Columbia (Section 9(2)).

Section 11 of the *Act* requires a local government to develop an accessibility plan to identify, remove, and prevent barriers to individuals in or interacting with the local government. A local government must consult with its accessibility committee in developing its accessibility plan. A local government is also required to review and update its accessibility plan at least once every

three years. Section 11 also requires a local government to consider the principle of inclusion, adaptability, diversity, collaboration, self-determination, and universal design in developing and updating its accessibility plan. When updating its accessibility plan, a local government must consult with its accessibility committee, and consider any public comments that it received on its accessibility plan.

Section 12 of the *Act* requires a local government to establish a process for receiving comments from the public on its accessibility plan, and on barriers to individuals in or interacting with the local government.

Part 5 of the *Act* pertains to compliance with and enforcement of the *Act*. It is not yet in force. Section 21 of the *Act*, once in force, will permit the Minister of Social Development and Poverty Reduction (the "Minister") to appoint a Director for the purposes of the *Act*. Once appointed, the Director will have the power to designate inspectors who will have the authority to enter premises to inspect, analyze, measure, sample or test anything, and to examine or take copies of records, among other powers (Section 22). A person subject to inspection will be prohibited from providing false or misleading information or records to an inspector. Section 23 of the *Act* will provide that the Director can impose a monetary penalty of up to $250,000 on a person if the person contravenes the accessibility committee, accessibility plan, public feedback, and inspection provisions of the *Act*, among others. The Director will also be able to enter into compliance agreements with persons on whom monetary penalties have been imposed.

Additional regulations establishing an accessibility standard to be met by prescribed organizations may be coming in the future. Section 13 of the *Act* provides that the Lieutenant Governor in Council may make regulations respecting the identification, removal or prevention of barriers, and has the express power to make such regulations in relation to employment, the delivery of services, the built environment, information and communications, transportation, health, education, and procurement.

The *Act* also addresses the development of an accessibility standard to be adopted by the Lieutenant Governor in Council as a regulation. Section 14 of the *Act* provides for the establishment of a provincial accessibility committee which is to consist of up to 11 members appointed by the Minister in accordance with the same principles as Section 9(2) of the *Act* applies to a local government's accessibility committee. If directed by the Minister, the provincial accessibility committee must develop a proposed accessibility standard, which would be aimed at identifying, removing and preventing barriers to accessibility and inclusion (Section 14).

The provincial accessibility committee in developing the proposed accessibility standard must consult with persons with disabilities, individuals and organizations that support persons with disabilities, Indigenous peoples, organizations that might be affected by the standard, and ministries of the government that might be affected by the standard. Section 17 of the *Act* also requires that in developing the proposed accessibility standard, the provincial accessibility committee take into account the same principles that a local government's accessibility

committee must consider pursuant to Section 11 in developing a local government's accessibility plan. In addition, the provincial accessibility committee must also consider the laws of British Columbia, any standards enacted or proposed in other jurisdictions, the United Nations Convention on the Rights of Persons with Disabilities, the rights of Indigenous Peoples recognized and affirmed by Section 35 of the *Constitution Act, 1982*, and the United Nations Declaration on the Rights of Indigenous Peoples.

Once a proposed accessibility standard is prepared by the provincial accessibility committee, the Minister must publish it, and after making any changes the Minister considers necessary or advisable, recommend to the Lieutenant Governor in Council that a regulation based on the standard be enacted under Section 13.

Accessibility standards have not yet been adopted by the Lieutenant Governor in Council. The provincial government's website indicates that is will be developing the accessibility standards two at a time in a phased approach, and that as implementation begins for one standard, work will begin on developing the next one.

Local governments should now start appointing their accessibility committees, and begin the work necessary to develop their accessibility plans and their public feedback processes, to ensure that they meet the requirements of the *Act* by the September 1, 2023 deadline.

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