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2021, The Year in Review: Labour Relations

**Labour, Employment and Human
Rights Group**

November 23, 2021

2021, The Year in Review: Labour Relations



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November 23, 2021
Fasken's 2021 Year in Review Webinar Series

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Agenda

- Review of Legislative Changes
- Review of Important Court & Arbitration Decisions
- Labour Relations in a Virtual World
 - Trends in Union Organizing
 - Arbitrations – Virtual Hearings
- Managing the Risks Posed By COVID-19
- Pandemic Recovery – What to Expect in the Year to Come

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Legislative Changes

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Legislative Changes - Quebec

- Bill 96 - *An Act respecting French, the official & common language of Québec*
 - Language of communication:
 - Written communications with employees and unions during and after employment must be in French.
 - Unions must communicate verbally and in writing with its members in French.
 - Language of arbitration decisions:
 - Arbitration decisions rendered in English must be accompanied by a certified French translation – costs are shared by parties.
 - Arbitration decisions rendered in French must be translated to English if it is requested by one of the parties – the party that requests the translation pays the cost.
 - Fasken Bulletin on Bill 96:
[En français, s'il vous plaît: Imminent Reform of the Charter of the French Language \(Bill 101\) | Knowledge | Fasken](#)

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BC's Labour Code & Predicted Legislative Amendments

- 2019 amendments to *Labour Relations Code* re-apply “meet or exceed” requirement with BC *Employment Standards Act*
- *ESA* to be amended effective January 1, 2022 providing for minimum paid sick leave
 - 3 – 10 Days?
 - How does this affect collective agreements with Short Term Disability Plans?

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Important Decisions

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▼ B.C. Decisions

- *BC Labour Relations Code* amended May, 2019.
 - Interpretation of amendments delayed
- Key Amendments:
 - Employer Speech / Unfair Labour Practices
 - Labour Relations Board reverts to *Cardinal Transportation* test for “protected speech”
 - Remedial Certifications
 - *Salade Etc!*, 2020 BCLRB 139
 - Successorship provisions s. 35 (2.2)
 - *Everclean*, 2021 BCLRB 143; *GDI*, 2021 BCLRB 53

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▼ B.C. Decisions

- Consultation During a Pandemic

West Coast Medical Imaging Inc v Health Sciences Association of British Columbia, 2021 BCLRB 80

- Labour Relations Code (s. 54) consultation provisions do not apply in circumstances where Employer lays-off, or amends terms and conditions of employment for significant number of employees when “compelled” to do so as a result of (non-financial) outside forces, such as a global pandemic.

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▴ Quebec Decisions

- Application for certification – timing

Syndicat canadien de la fonction publique, section locale 5454 c. Société québécoise du cannabis, 2021 QCCA 1686

- The union filed an application for certification to represent all the employees of the SQDC establishment in Chicoutimi before it opened.
- An opposing union contested the application because it was premature.
- At the time of the application, all the employees were hired, had successfully completed the required training, their work was common and known, the managerial staff had been hired and the physical workplace was almost complete.
- The context indicated that there was a certifiable business even if it had not yet started operating.

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▴ Quebec Decisions

- Freedom of association

Procureur général du Québec v. Les avocats et notaires de l'État québécois, 2021 QCCA 559

- The Superior Court found that the Act forcing employees to return to work, thereby ending the strike, and establishing a dispute settlement mechanism that would lead to a new collective agreement, even if the parties did not agree, was unconstitutional
- However, the Superior Court did not impose a dispute settlement mechanism as requested by the union
- The Quebec Court of Appeal confirmed the decision and the motion for leave to appeal to the Supreme Court was denied.

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▼ *Northern Regional Health Authority v. Horrocks, 2021 SCC 42*


- Case looked at whether labour arbitrators have exclusive jurisdiction to adjudicate human rights dispute arising from collective agreement
- SCC found that absent clear statutory authority providing another statutory tribunal with the right to intervene, arbitrators have exclusive jurisdiction

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▼ *Northern Regional Health Authority v. Horrocks, 2021 SCC 42 – cont'd*

- Decision provides employer with ability to challenge ability for employees to bring complaints in other forum (ex. human rights tribunal)
- Application may differ from province to province, based on statutory powers granted to human rights tribunals

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Labour Relations in a Virtual World

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Trends in Union Organizing

- Rules of the game have fundamentally changed
- Union finding news ways to access and interact with employees
- Challenges and anxiety posed by return to the office to fuel employee unrest and increased risk of certification

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▼ Trends in Union Organizing

- Changes to Certification & Voting Process
- Move to remote work means that need to turn attention to bargaining unit descriptions, both new and existing

▼ Strikes and lockouts - Quebec

- Anti-strikebreaker legislation and the notion of « establishment » in Quebec
 - The anti-strikebreakers provisions have been developed and interpreted around the notion of the physical establishment of the employer.
 - *Syndicat canadien de la fonction publique, section locale 1450 v. Journal de Québec*, 2011 QCCA 1638
 - *Les avocats et notaires de l'État québécois (LANEQ) v. Tribunal administratif du travail*, 2017 QCCS 5226

▼ Strikes and lockouts – British Columbia

Olympic Motors (WC) 1 Corporation v International Association of Machinists and Aerospace Workers, Automotive Lodge No. 1857, 2021 BCLRB 97

- Following certification, parties engaged Labour Relations Board for mediation of first collective bargaining
- Parties declared impasse
- Employer sought ability to engage in strike / lock out
- Union argued that allowing for lock out would be “catastrophic” to Employer’s business in light of the impacts of COVID-19 on automotive industry
- Labour Board refuses to allow Employer to lock out. Orders further mediation and/or interest arbitration.

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▼ Arbitrations & Arbitration Hearings

- Virtual hearings are here to stay
- Principles governing when in-person hearings can be demanded beginning to emerge
 - arbitrator dependant – choose wisely
 - circumstance/location dependant
 - extent to which credibility of witnesses at issue a key factor

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▼ Arbitrations & Arbitration Hearings (cont'd)

- Virtual hearings have lead to changes in traditional arbitration practices

▼ Managing the Risks Posed by COVID-19

▼ Breaches of COVID Protocols

- Arbitrators largely sympathetic to employers forced to discipline employees for clear breaches of safety protocols (i.e. showing up to work while awaiting test results)
- Public Health, Occupational Health & Safety Authorities have proven to be more difficult to deal with

▼ Safety Protocol Decisions - Quebec

- ***Teamsters Québec, local 1999 and Exceldor Coopérative, usine de St-Bruno-de-Montarville (Guerda Eximat), 2020 QCTA 632***
 - The employee was terminated for making false declarations in the COVID-19 questionnaire
 - Context:
 - The events occurred in early April 2020
 - The employer's business was considered to be an essential service and although it could continue operating, it had to reduce its operation by half due to the pandemic. It was impossible to maintain a 2-meter distance between employees
 - The employer had a COVID-19 safety protocol which included a questionnaire
In the circumstances, the protocol was legitimate and necessary
 - The grievance was dismissed.

▼ Safety Protocol Decisions - BC

- ***Vancouver Board of Education of School District No. 39 v. Canadian Union of Public Employees, Local 407 [2021]***
B.C.C.A.A.A. No. 68
 - Employee deliberately coughed on while making “jokes” about potential for COVID transmission
 - Employee had recently self-isolated as a result of COVID 19 symptoms
 - Conduct was in violation of COVID safety protocols and safety rules
 - 10 day suspension upheld
 - Arbitrator opines: “This is a serious matter and the grievor is lucky that the employer did not terminate him.”

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▼ Vaccination Policy Decisions – Quebec

- ***Lachance c. Procureur général, 2021 QCCS 4721***
 - Quebec Government ordered that all healthcare workers show proof of vaccination and if not, would be suspended without pay
 - Group of healthcare workers contested the order and filed an application for stay of the order
 - The Court confirmed that there is no such thing as the right to refuse to be vaccinated – the *Public Health Act* allows the government to force vaccination, but that is not what it did in this case, it ordered proof of vaccination
 - The Court rejected the application because the applicants failed to demonstrate serious and irreparable harm and to meet the balance of inconvenience criteria

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▼ Vaccination Policy Decisions – Quebec (cont'd)

- ***Union des employés et employées de service, section locale 800 et Services ménagers Roy Itée, 2021 QCTA 570***

- An employer can request proof of vaccination when it is required by a client
- Requiring proof of vaccination infringes on employees' right to privacy but is a justified infringement
- The confidential information relating to the vaccination status must only be collected by HR and specific information cannot be communicated to clients
- Pursuant to the existing mechanism in the collective agreement, employers must transfer unvaccinated employees to another client who does not require proof of vaccination

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▼ Vaccination Policy Decisions - Ontario

UFCW Local 333 v. Paragon Protection – Arb. von Veh

- Union represented 4,400 security guards working at 450 different client sites
- Employer policy required all employees to be fully vaccinated by Oct 31/21, unless employee qualified for limited exemption
- Union challenged on grounds that policy was unreasonable exercise of management rights and that it violated Ontario's *Human Rights Code*

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▼ Vaccination Policy Decisions – Ontario (cont'd)

UFCW Local 333 v. Paragon Protection – Arb. von Veh

- In his decision, arbitrator concluded:
 - unilateral introduction of the vaccination policy was a reasonable exercise of management rights
 - allowing for exemptions on medical/religious grounds made policy compliant with *Human Rights Code* and that employees' personal subjective perceptions of the COVID-19 vaccine "cannot override and displace available scientific considerations"
 - Conclusion supported by employer's obligation under s. 25(2)(h) of OHSA to "take every precaution reasonable in the circumstances for the protection of a worker"

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▼ Vaccination Policy Decisions – Ontario (cont'd)

UFCW Local 333 v. Paragon Protection – Arb. von Veh

- In his ruling, arbitrator distinguished prior case law dealing with mandatory flu shot policies
- It is important to note that collective agreement at issue included clause (which had been introduced pre-pandemic) requiring employees to be vaccinated if assigned to work at a client site where vaccination/inoculations were required at that location.

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▼ Vaccination Policy Decisions – Ontario (cont'd)

Electrical Safety Authority & PWU - Arb. John Stout

- ESA introduced policy that made vaccination mandatory for employees, with failure to do so resulting in discipline or discharge
- Union challenged on grounds that unreasonable exercise of management rights, violated collective agreement as well as employees' privacy rights and right to bodily integrity

▼ Vaccination Policy Decisions – Ontario (cont'd)

Electrical Safety Authority & PWU - Arb. John Stout

- Arbitrator Stout found certain aspects of the policy to be unreasonable, after applying KVP principles, because:
 - there had been no workplace outbreaks
 - ESA's prior voluntary disclosure and testing policy had worked just fine
 - lack of evidence that serious operational issues posed by unvaccinated employees
- Conclusion influenced by nature of operations (i.e. not health care or long-term care) and lack of supporting language in CBA

▼ Vaccination Policy Decisions – Ontario (cont'd)

Ontario Power Generation v. PWU – Arb. John Murray

- OPG implemented a vaccinate or test policy that required employees to either be fully vaccinated or undergo testing either once or twice per week; failure to comply result in 6 weeks of unpaid leave & then dismissal
- Unvaccinated employees required to pay \$25/week to cover cost of test or secure their own test kits; time spent testing to be unpaid
- Union challenged on grounds that employer could not make employees pay for testing or put those that did not comply on unpaid leave.

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▼ Vaccination Policy Decisions – Ontario (cont'd)

Ontario Power Generation v. PWU – Arb. John Murray

- Arbitrator Murray decided:
 - Testing the unvaccinated was reasonable
 - Not reasonable to require employees to pay for the cost of their own testing.
 - Employees are not entitled to be paid for time spent testing at home
 - Refusing employees could be suspended without pay
 - Prohibiting gym access to unvaccinated employees was reasonable
 - Termination for cause might be upheld

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▼ Vaccination Policy Decisions – Ontario (cont'd)

Ontario Power Generation v. PWU – Arb. John Murray

- On the issue of what might happen to those that refuse to change their minds after 6 weeks of unpaid leave, Arbitrator Murray wrote:

“I think it is important for them to understand that, in my preliminary view, in the context presented by this global pandemic, when lives of co-workers are at risk, unvaccinated individuals who refuse to participate in reasonable testing are, in effect, refusing of their own volition to present as fit for work and reduce the potential risk they present to their co-workers. The Company has made it clear that termination of employment at the end of the 6-week period will typically occur. It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of employment upheld at arbitration. Effectively, employees who refuse testing will likely will have made a decision to end their career with this Company.”

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▼ Vaccination Policy Decisions – Ontario (cont'd)

ATU, Local 113 v TTC & NOWU v Sinai Health System – Nov 20, 2021 - Ontario Superior Court

- Involved joint ruling on 2 cases where unions sought injunction to restrain employers from being able to take disciplinary measures against their members, pending outcome of grievances filed under collective agreements
- Court refused to grant injunctions in both cases; clear message that, in unionized workplaces, vaccination policies are an issue to be addressed through arbitration, not in the courts; irreparable harm not established

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▼ Vaccination Policy Decisions – Ontario (cont'd)

ATU, Local 113 v TTC & NOWU v Sinai Health System – Nov 20, 2021 - Ontario Superior Court

- This decision also cites previous injunction application initiated by group of employees at University Health Network in October, *Blake v. University Health Network*, 2021 ONSC 7139, where similar request for injunctive relief refused on grounds unionized employees did not have standing to bring application on their own behalf; was determined that such a request had to be initiated by their union

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▼ Vaccination Policy Decisions – Ontario (cont'd)

Levergne-Poitras v. Attorney General for Canada & PMG Technologies Inc. – Federal Court (Trial Division) – Nov 13, 2021

- Employee of PMG Technologies filed challenge to Federal Government mandate requiring personnel of third party suppliers to be fully vaccinated in order to access federal gov't workplaces
- Application dismissed due to the fact: (i) evidence tendered did not establish that applicant had been deprived of his right to liberty or security of the person under s. 7 of the *Charter* ; (ii) irreparable harm not established; and (iii) balance of convenience did not favour suspension of the policy.

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▼ Vaccination Decisions – Western Canada

- ***Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, [2006] B.C.C.A.A.A. No. 167**
 - Decision regarding influenza vaccine for health care workers
 - Union argued that “mandatory vaccine” policy violated collective agreement and Charter of Rights and Freedoms
 - Grievance dismissed:
 - Policy was reasonable
 - Employees had choice as to whether to be vaccinated
 - No disciplinary consequences, only “holding out of work” during influenza outbreaks

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▼ Pandemic Recovery – What to Expect in the Year to Come

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Trends in Collective Bargaining

- attracting & retaining staff becoming more challenging in many sectors
 - Wage Rate Adjustments
 - Early Re-Opening of Collective Agreements
- remote worker rights & entitlements



Questions?



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Biographies



Areas of Expertise

Labour Relations and Collective Bargaining | Labour, Employment & Human Rights | Employment Advice and Litigation | Human Rights

Education

2002, LLB, University of Toronto

1998, BSc (Hons), Life Sciences, Queen's University

Jurisdiction

Ontario, 2003

Language

English

Ian has a diverse labour, employment and human rights practice, representing unionized employers in labour arbitrations and matters before federal and provincial labour and human rights tribunals, as well as providing strategic advice on business planning, re-organizations and collective agreement negotiations. He also advises on all manner of employment law related matters, including wrongful dismissal and restrictive covenant related litigation as well as advising regarding mergers, acquisitions or other business transactions.

Ian regularly participates in collective agreement negotiations, usually acting in the role of chief spokesperson for the employer.

Ian is known for providing practical advice that helps clients achieve their strategic objectives.

Ian has developed a particular expertise in the federal sector and regularly advises national clients on all manner of issues relating to interpretation and application of the *Canada Labour Code*.

Ian summered and articulated with the firm before joining the Labour, Employment and Human Rights Practice Group in 2003.

Rankings and Awards

- *Acritas Star Independently Rated Lawyers* 2021 Recognized as an Acritas Star™ lawyer

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- *Lexpert* 2019-2021 Recognized in the Canadian Legal Lexpert Directory in Employment Law
- *Lexpert* 2020 Recognized in the Canadian Legal Lexpert Directory in Labour Relations
- *The Legal 500 Canada* 2018-2019 For Labour and Employment Law





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Areas of Expertise

Labour Relations and Collective Bargaining | Labour, Employment & Human Rights | Employment Advice and Litigation | Human Rights & Discrimination | Pay Equity | ESG and Sustainability | Federal Sector

Education

2009, BCL / LLB, McGill University
2004, BA, History and Spanish, Dalhousie University

Jurisdiction

Quebec, 2010

Languages

French | English | Spanish

Emilie Paquin-Holmested is a member of the Labour, Employment & Human Rights practice group. Her practice is primarily focused on federal and provincial labour relations, employment law, human rights law and pay equity. In addition to providing strategic and preventative advice, she represents clients in litigious matters before the civil courts and administrative and arbitration tribunals and guides them during collective bargaining.

A member of the Quebec Bar, the Bar of Montreal and the Canadian Bar Association, Emilie Paquin-Holmested speaks French, English and Spanish.

Rankings and Awards

- *The Best Lawyers in Canada* 2022 Recognized in Labour and Employment Law in Montreal



Areas of Expertise

Labour, Employment & Human Rights | Federal Sector

Education

2011, JD, University of British Columbia

2005, BA, Wilfrid Laurier University

Jurisdiction


British Columbia, 2012

Language

English

Andrew Woodhouse is a Partner in Fasken's Labour, Employment, and Human Rights group. He regularly advises and represents management before labour arbitration boards, BC's Labour Relations Board, BC's Human Rights Tribunal and superior Courts.

Andrew is experienced advising and advocating about issues arising out of complex, multi-union environments, and is experienced in collective bargaining in the public and private sectors.



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