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EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact John Hagg by phone at (780) 930-3648or email at jhagg@stillmanllp.com

HEADS UP

Amendments to the Fair Trading Act Regarding Arbitration

By Shannon Kinsella, Associate Lawyer at Stillman LLP

Bill 31 is being promoted as a way that the Alberta government can increase protections for consumers by making substantive amendments to the *Fair Trading Act*. One of the changes that has been claimed to increase consumer protection, is making mandatory arbitration clauses in consumer transactions unenforceable.

Arbitration is a form of alternative dispute resolution, designed to settle matters outside of court. There is an arbitrator, that most often has considerable experience in the subject matter of the dispute, that will decide the matter instead of a judge, and the decision by the arbitrator is usually binding. A mandatory arbitration clause in a contract forces parties to go to arbitration, instead of through the traditional court system. Without this clause, a plaintiff has a choice in deciding how to bring their claim.

The Bill 31 amendments are geared towards contracts that are entered into between a consumer and a supplier. The most obvious example of a contract that tends to include mandatory arbitration clauses are new home build contracts, including new home warranty issues.

Bill 31 has replaced section 16 of the Fair *Trading Act*, which allowed mandatory arbitration clauses in consumer transactions, so long as the consumer agreed to it in writing. The new section 16 now says:

> 16(1) Subject to subsection (3), a supplier shall not enforce an arbitration clause in a consumer transaction or an arbitration agreement with a consumer.
> (2) Subject to subsection (3), an arbitration clause in a consumer transaction or an arbitration agreement with a consumer is void and unenforceable.
> (3) Subsections (1) and (2) do not apply in respect of
> (a) an arbitration agreement voluntarily entered into between a supplier and a consumer after a dispute has arisen, or
> (b) an arbitration agreement or an arbitration clause in a consumer transaction if the agreement or clause allows the consumer to decide, after a dispute has arises, whether the consumer will use arbitration or an action in court to resolve the dispute.

Many provinces in Canada have already made mandatory arbitration clauses unenfoceable through similar types of legislation. One of the reasons given for this change is to give consumers an expanded right to sue if they have been wronged by a supplier. The new *Act* gives consumers the right to choose whether to go through the court system or to arbitration, even if they have previously agreed to a mandatory arbitration clause in their contract. However, the question then becomes: is this really more fair to the consumer?

Alberta is in the midst of a crisis when it comes to access to justice issues. In order to move a case to trial in Provincial Court

(also known as Small Claims Court), parties have to wait more than on year in most instances. In Queen's Bench, it is a minimum of two years. Most cases do not see a trial date for five years or more. Part of the reason for the long wait times is the backlog present in the courts, which this change to legislation can only serve to exacerbate.

There are also increased costs associated with court versus arbitration. Prior to obtaining a trial date at Queen's Bench, documents must be exchanged, questioning has to be done and there are any number of other interim applications and steps to be completed.

In order to combat these issues, the courts have been promoting alternative dispute resolutions - including pre-trial conferences, mediations and arbitrations. Making mandatory arbitration clauses unenforceable is going to move a number of these cases that are currently outside of the court system back in, contributing to the backlog. Arbitrations also do not have the same disclosure and discovery processes, and tend to be less expensive for both parties.

Another benefit of arbitration comes from the expertise of the adjudicator. Judges come from many backgrounds. At trial, you may receive a judge that has practiced primarily in family law that is now deciding your case that is about new home construction. Arbitrators on the other hand, are chosen by the parties and will have expertise in the area that is being adjudicated.

This is only one of the changes that has come into force with Bill 31 and will change the landscape for consumer transactions. Whether you are a supplier that needs to re-write a contract or a consumer looking to bring an action and would like more information on the best way to do so, the lawyers at Stillman LLP are available to assist in navigating the new regulatory framework and requirements and to answer any questions that you may have.

EDITOR'S NOTE

Stillman LLP is pleased to welcome to our team Agnes Koryczan and Cathy Charles who will be working as a Legal Assistants in our litigation department. We also welcome Patricia (Trish) Woods back from maternity leave who will be working in our real estate conveyancing department.

We are also sad to say goodbye to Susan Then who has moved on to other opportunities, and we wish her the best of luck with her future endeavors.

AS WE SEE IT

Bill C45 and Ramifications for Employment Policies in Alberta

By Christopher Younker, Associate Lawyer at Stillman LLP

Bill C45, the *Cannabis Act,* was introduced into Parliament in April 13, 2017. The Bill passed 3rd Reading in the Senate on June 7, 2018 and now appears to be on its way to be enacted in the second half of 2018.

According to Parliament, the objectives of the Act are "to prevent young persons from accessing cannabis, to protect public health and public safety by establishing a strict product safety and product quality requirements and to deter criminal activity by proposing serious criminal penalties for those operating outside the legal framework." The Act is also intended to reduce the burden on the Criminal Justice System in relation to cannabis.

When introduced, the *Cannabis Act* will have far-reaching repercussions for Canadians at large and potentially for employers as well. The Act will amend the *Controlled Drugs and Substances Act*, the *Criminal Code*, as well as the *Non-Smokers Health Act* and *Tobacco Act*. The amendments to the *Criminal Code* will allow individual Canadians to possess up to 30gs of marijuana and to consume it for recreational purposes. Amendments to the *Non-Smokers Health Act* will align smoking of marijuana with that of tobacco so that smoking of marijuana will be prohibited in the same federally regulated places that tobacco is currently prohibited in. Although the *Cannabis Act* would only directly affect other federal legislation it specifically mentions, it is almost certain to have an impact on Provincial and Municipal regulation as well as Common Law as Judges start to tackle an increasing amount of cases involving the use of recreational cannabis in the workplace.

The upcoming *Cannabis Act* may also affect Provincial legislation such as the *Alberta Human Rights Act* and cases heard under the Act before the Human Rights Commission. Specifically, sections 7(1) of the *Alberta Human Rights Act* states no employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term of condition of employment,. Because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person. (3)(1) does not apply with respect to a refusal, limitation, specification, or preference based on a *bona fide* occupational requirement.

Previous decisions by the Human Rights Commission have established that drug addiction is a disability that must be accommodated by an employer up until the point of undue hardship unless there is a *bona fide* workplace requirement (such as workplace safety in dangerous work environments such as the oil sands).

In the case of *Halter v. Ceda-Reactor Limited* the Human Rights Commission looked at the circumstances surrounding the

dismissal of an employee, Mr. Halter after testing positive for marijuana in his system after a random drug test. At the time, the employer Ceda had a substance abuse policy in place which allowed for testing of an employee when a supervisor had a reasonable suspicion that employee was under the influence of an illicit substance. However, instead of Ceda testing only Mr. Halter it elected to test all 14 individuals in Mr. Halter's work-group and these instructions were given from Ceda's head office. However, the random test was administered on the premise that all members of the division were perceived to be potential substance abusers. Under the Human Rights Act perceived drug abusers are also deserving of protection and suffering from disability. Ultimately, the Human Rights Panel found that Ceda perceived Mr. Halter to be disabled when they administered the random blanket drug test. After testing positive, Mr. Halter was further perceived to be a substance abuser and was terminated on the assumption that he was likely to be impaired on the job and not fit or work. As perceived disabilities are forms of disabilities within the meaning of the Act, the Panel found that the Complainant did face discrimination by Ceda as a result of testing positive on a random blanket drug test. The testing in itself was discriminatory.

The Supreme Court of Canada has established that the duty to accommodate to the point of undue hardship is an extremely high threshold for an employer to meet. There is a 3 part test the Courts use to determine whether or not an employer has failed to accommodate an employee with a disability:

1. There is a rational connection between the adoption of the Employment Standard and the performance of the job, considering:

    - What is the standard bona fide occupational requirement that has been adopted?
    - Is the standard justified?

2. That the employer adopting the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work related purpose, and

3. That it is impossible to accommodate an employee sharing the characteristic of the Claimant without imposing undue hardship.

After the second testing which Mr. Halter was over the acceptable limit no offer of assistance was made. Rather, he was told that he could return to work after he passed another drug test which would be at his own expense. This led the Human Rights Panel to conclude that Ceda had failed to accommodate Mr. Halter to the point of undue hardship.

The takeaway from the above case study is that employers considering new drug and alcohol policies to address the coming implementation of Bill C-45 need to be very careful. Pre-screening or blanket testing for marijuana is bad policy. Most employers looking to put drug testing in place for marijuana use should be careful that there is both reasonable suspicion for the employees intoxication but also that the employees job duties justify the infringement on the individuals privacy rights. If both criteria are not met then another approach, such as progressive discipline may be a better course of action. Poorly thought out policies can create more liability than they help to avoid.

CAUSE CÉLÈBRES

Prohibiting Age Discrimination in Accommodation: Recent Amendments to the Alberta Human Rights Act

By Katie Kenny, Associate Lawyer at Stillman LLP

On January 1, 2018, changes to the *Alberta Human Rights Act* came into effect, adding "age" as a prohibited ground for discrimination in relation to providing accommodations to the public, among other matters. Practically speaking, these amendments prohibit adult-only apartment and condominium buildings, mobile home sites and co-operatives.

There are exceptions to the age discrimination ban. First, seniors-only buildings will be allowed, with age limits of 55 years or higher being permitted. Second, existing adult-only condominium buildings, mobile home sites and co-operatives will be given a 15 year transition period before they must either remove age restrictions or change to seniors-only. Third, age restrictions associated with an ameliorative program designed to benefit disadvantaged groups will be allowed to continue.

Effective January 1, 2018, owners, landlords and managers of rental apartment buildings that claim to be "adult-only" must immediately change their policy, or they risk being subjected to human rights complaints, and hearings before the Alberta Human Rights Commission. Human rights legislation involves the balancing of rights between members of the population and, as such, there winners and losers. The amendment benefits tenant families who will have an expanded selection of rental accommodation to choose from. However, the amendment may be perceived as a disadvantage to tenants who have chosen adult-only buildings in order to avoid the noise often associated with minor neighbours.

The change also benefits tenants of adult-only buildings who may find themselves parents or guardians of minors at a time when they may not be in a position to move to another rental building. While it is unclear whether becoming a parent or guardian could be a valid basis for eviction from an adult-only building prior to this amendment, it is clear that under the new legislation, building managers and landlords may not evict tenants on that basis.

Condominium units, mobile home sites and co-operatives have until December 31, 2023 to comply with the amendment. It is likely due to the more permanent nature of these forms of residence that they are granted a 15 year transition period. Despite the transition period, the amendment will significantly impact condominium unit owners, board members and developers, as well as residents of mobile home site and co-operatives in the coming years. Residents of adult-only accommodations may have chosen their unit in part because there would be no minors allowed in the building. These residents will need to decide before the deadline whether to put up with the coming change or sell their units (or in the case of mobile home sites, relocate or sell their mobile home). Existing adult-only condominiums may change to seniors-only during the transition period, even though there may still be residents who do not meet the new age restriction.

The legislative amendment will require condo bylaw amendments for many adult-only condominium buildings, necessitating legal work for condo boards (however, regardless of this amendment to the *Alberta Human Rights Act,* updating condo bylaws is advisable in light of recent substantive changes to the *Condominium Property Act.*) Additionally, developers may need to reconsider marketing plans, amenities and building designs in light of the fact that children must be permitted as residents.

Regarding the third exception – permitting ameliorative programs to discriminate based on age – this could apply to youth-only or seniors-only accommodations. The exception may include youth shelters, charity funded seniors homes, and other facilities.

This change to the *Alberta Human Rights Act* was triggered by a court application made by a elder advocate, Ruth Maria Adria. Ms. Adria alleged that the previous version of the Act, which listed a number of other grounds for which discrimination was not permitted in relation to accommodation, but left out "age", violated the *Canadian Charter of Rights and Freedoms*. The Charter is part of the Canadian Constitution and deemed to overrule provincial legislation where there is a conflict. Her application was not opposed by the Alberta Government. This resulted in a court order requiring the Alberta Government to amend the legislation within one year.

If you require assistance complying with these changes to the Alberta Human Rights Act, or would like advice regarding the sale or purchase of real estate property, please contact your lawyer at Stillman LLP.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various jurisdictions in France, Ireland the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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