Litigation Tips & Traps - "Southren" Style

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The tips and traps we have presented so far in this column have focused mainly on general civil litigation matters that would proceed in the normal course before the Ontario Superior Court of Justice; however, as the following article demonstrates, general civil litigation is not the only field of litigation that gives rise to traps into which an unwary litigator may fall.

In fact, there are a variety of different fields of litigation that either pertain to specialized subject matter or are litigated before specialized tribunals, each of which boast a remarkable number of hazards that easily could ensnare any litigator who did not have a significant amount of experience in the field.

The author of this month's column is Erin R. Kuzz. Erin is a partner at Sherrard Kuzz LLP, a firm that specializes in representing management in labour and employment matters. She has put together a two-part series to educate us on some of the more perilous traps that one may encounter litigating in the field of labour law. The second part of the series will appear in the November issue of "The Advocates' Brief."

LABOUR LAW BASICS FOR THE NON-LABOUR PRACTITIONER: PART I
By Erin R. Kuzz, Sherrard Kuzz LLP

Unlike most civil litigation matters, many of the proceedings faced by management labour lawyers have extremely tight time limits. Failure to comply can result in employers forfeiting their rights in very serious matters.

Below are just three of the situations that require employer counsel to think and act quickly in order to preserve and protect their client's rights.

Applications for Certification

An Application for Certification is generally the most time-sensitive matter that comes across a labour lawyer's desk. A trade union seeking to represent a group of employees must serve a copy of the Application on a representative of the employer (usually a senior manager or officer of the company).

The Application does not have to be served personally on an individual, but instead may be delivered by courier or by fax. This means that it simply may be left sitting at a reception desk or on a fax machine. An employer has two business days to file its Response. In the Response the employer is required to set out its positions concerning the appropriate group of employees to participate in the vote, the appropriate date, time and location for the vote, and a number of other matters, including whether another trade union may already represent some or all of the employees involved.

The employer is bound by the positions it takes in its Response and if it fails to file a Response it is likely that the employer will not be permitted to participate in the proceedings further. This means that crucial matters, such as which employees are permitted to vote, are determined based only on the positions of the trade union. The Ontario Labour Relations Board (the "Board") rarely permits an extension of the time limits for filing the Response, and reasons such as "it sat on the fax machine," "the person to whom it was addressed was on vacation," and "we didn't pick up the mail" will not be enough to justify filing a late Response.

If a client calls after receiving an Application for Certification, time is of the essence. The first thing to establish is the date on which it was delivered to the employer; this will determine the date on which the Response is due. The client immediately must start compiling a list of employees, and counsel must begin strategizing with the client about positions to take in the Response.

Construction Grievances

In Ontario, the majority of construction industry grievances that go to arbitration are litigated before the Board. When a trade union refers a grievance to the Board for arbitration, the Board will send a confirmation notice to the parties, including the employer. In order to preserve its right to participate in the arbitration, the employer must serve a Notice of Intent to Defend on all of the parties, and file a copy with the Board (along with the $200 filing fee) within five business days. Under the Ontario *Labour Relations Act* (the "Act"), if the employer fails to file its Notice, the Board is expressly permitted to decide the outcome of the grievance, including both liability and quantum of damages, based only on the material submitted to the Board by the Union. A hearing may not necessarily be scheduled and, if one is necessary for whatever reason, the employer may not be permitted to participate or to raise a defence.

Erin R. Kuzz

Expedited Arbitrations

Outside the construction industry, parties wishing to arbitrate grievances generally go to private arbitration. Scheduling such matters -- done in accordance with the calendars of the arbitrator, the parties and counsel -- can take many months or more; however, under the Act, if either the employer or the trade union wishes to expedite the arbitration it may do so by making a request to the Minister of Labour. Once a request is made, by statute a hearing is scheduled to commence 21 calendar days later. That hearing may be moved only on consent of both parties or by order of the arbitrator appointed to hear the matter. Generally, an arbitrator will not move the hearing date due to unavailability of counsel.

These are just three examples of labour matters requiring immediate attention. Keep your eyes and your ears open and, if in doubt, call a specialist for backup.■