School Board Update

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ARBITRATOR PROVIDES HELPFUL AWARD IN ONTARIO'S FIRST TPA DISCHARGE ARBITRATION

By: Hicks Morley

The recent decision of a Board of Arbitration chaired by Pamela Picher in *Toronto District School Board v. OSSTF (Gusita)* is significant as it is the first decision dealing with the merits of a teacher termination under the Teacher Performance Appraisal ("TPA") provisions of the *Education Act* and Regulation 99/02 (the "Regulation"). It endorses many propositions of importance to school board managers and suggests methods by which the results of a TPA process may be rendered highly resistant to arbitral intervention.

Mr. Gusita was a teacher at Harbord Collegiate Institute. In 2002, Gusita's performance came under scrutiny. Attendance in his classes was very poor relative to other similar classes and anecdotal reports from students and parents were consistently negative. When asked, Gusita placed the blame on his students who, he claimed, were unusually disinterested in learning. He refused to accept that this perception, if true, might at least in part be attributable to his teaching methods. In response to these factors, his principal decided to invoke the "out-of-cycle" TPA provisions available under the Regulation, to be implemented for the 2002-2003 school year.

Well prior to Gusita's 2002 performance appraisals, the OSSTF and the TDSB had agreed to a bilateral protocol that expanded upon the steps set out in the *Education Act* and the Regulation for teacher appraisals. In particular, the protocol stated that a Superintendent of Education would act as the evaluator for the third TPA cycle, but would also be involved in the process leading up to the last performance cycle. The parties also agreed upon 133 "look for's" – itemized bench marks of teacher conduct designed to flesh out the sixteen teaching competencies expressly referenced in the Regulation.

Gusita proceeded through the TPA process and was ultimately terminated by the TDSB in June, 2004, following his third consecutive rating of "unsatisfactory". The Federation grieved the termination, arguing that Gusita's "failure" under the TPA process did not automatically justify termination. Rather, it argued that the Collective Agreement's "just cause" clause still governed the situation and provided the standard of review to be applied.

In advancing this argument, the OSSTF did not address Gusita's actual performance in the classroom, but rather dwelt on more than a dozen criticisms of the appraisal process followed by the TDSB. These complaints ranged from concerns over the inexperience of the principal who had conducted the first two evaluations to the discussions held between the principal

and the Superintendent of Education prior to the third review to the fact that the Superintendent had recorded her observations in a notebook rather than on the form setting out the 133 negotiated “look for’s”.

The TDSB argued that the termination was effected pursuant to the TPA process and consequently that it was not obliged to establish “just cause” in the sense contemplated by the Collective Agreement since this was not a discharge due to culpable conduct.

In her decision, Arbitrator Picher held that a teacher terminated under the TPA process after receiving three consecutive “unsatisfactory” ratings is nevertheless entitled to the protection of a negotiated “just cause” standard of review. However, in assessing “just cause” in the particular context before her, Arbitrator Picher held that it was inappropriate to deviate from the TPA process as embellished by the TDSB/OSSTF protocol. Essentially, her test for determining whether “just cause” existed was based almost entirely upon her assessment of the TDSB’s conformity to the appraisal process itself.

Arbitrator Picher stated that to determine just cause, it was necessary to look at whether the *essential* elements of the TDSB TPA process were followed. She noted that a minor irregularity or flaw would not cause the entire appraisal process to be undermined. The analysis involved determining whether the numerous steps and criteria for the teacher appraisal process were followed, whether the elements of fairness that were built into the process were observed and whether the process was carried out without discrimination, arbitrariness or bad faith.

In focusing on the TPA process as defined by the Act, the Regulation and the bilateral protocol, Ms. Picher repeatedly rejected OSSTF arguments that addressed factors that found no place in any of those sources (e.g. how notes were kept) as well as arguments that took issue with allegedly “unfair” aspects of the process that had been agreed to in the protocol or were legislatively authorized (e.g. communications between successive evaluators). The Arbitrator took note of the highly regulated framework of the TPA process, stating that “a just cause standard of review must reflect respect for this highly controlled scheme.”

In terms of the assessments themselves, Ms. Picher showed no interest in second-guessing the opinions of TDSB witnesses whom she believed to be both professionally competent and truthful. She found that the TDSB evaluators had carried out the TPA process in good faith, devoid of any arbitrariness, bias, manipulation or unfairness. It was of particular significance that Gusita was given many useful suggestions as to how his teaching styles might be altered in order to promote success in the TPA process.

Ms. Picher held that the ultimate issue in determining whether just cause existed was whether the three “unsatisfactory” ratings were reasonable and based on credible supporting facts. Given the TDSB’s adherence to the statutory/negotiated process and the competence and good faith of its appraisers, the Board was found to have established “just cause” to terminate Gusita.

The *Gusita* award exceeds 200 pages, reflecting an arbitration that took in excess of thirty hearing days. While this process is hardly desirable, school boards should realize that most of this time was spent pursuing OSSTF issues that Arbitrator Picher ultimately found to be irrelevant to the outcome. In future cases, one hopes that arbitrators will follow her ultimate analysis and narrow the scope of the inquiry significantly. As importantly, boards can point to this case in negotiating resolutions to TPA terminations, confident that they are dealing from a position of strength. Finally, the case demonstrates the value in agreeing upon a bilateral protocol for the implementation of the statutory process prior to a disputed case arising.

DIVISIONAL COURT RE-AFFIRMS THE IMPORTANCE OF TIME LIMITS

By: Hicks Morley

School boards (and employers generally) have been accustomed to losing preliminary objections relating to a union’s failure to follow the time limits set out in a collective agreement for the processing of a grievance. In *Greater Essex District School Board v. United Association of Journeymen,* 2011 ONSC 5554 (CanLII), the Ontario Divisional Court has stated that

arbitrators should be less sympathetic in the future towards grievances that are clearly out of time. The decision confirms that arbitrators must interpret collective agreement time limits in accordance with the plain meaning of the words, and that respect must be given to the actual intent of the parties in any interpretation.

The case involved the judicial review of a decision of the Ontario Labour Relations Board acting in its role as arbitrator in a "construction sector" grievance. In this particular situation, the collective agreement required referral to arbitration within 14 days of the filing of the grievance, failing which the matter was to be deemed settled. Despite this clear language, the Union waited four and a half months after filing the original grievance before referring it to arbitration.

OLRB Vice-chair McKee determined that although the grievance was technically out of time, the timelines could be extended and the matter was actually arbitrable. The Vice-chair agreed with the School Board that the terms of the collective agreement governing the filing and processing of grievances were established separately from those dealing with referral of a grievance to arbitration. He reviewed the 1997 *Leisureworld* [1] decision (which limits the ability of arbitrators to extend time limits under s.48(16) of the Ontario *Labour Relations Act* to the *processing* of grievances) and again agreed with the School Board that he had no power under s.48(16) to extend the time limits for referral to arbitration.

However, while agreeing that s. 48(16) was not applicable, the Vice-chair found that unlike in *Leisureworld*, the "mandatory" language in the Greater Essex article only related to steps in the grievance procedure. He determined that the "referral to arbitration" provisions were actually "directory" only, i.e., were simply guidelines. As a consequence, he could exercise his discretion to extend the time for referring the grievance to arbitration. In the alternative, he concluded that the arbitration and grievance processes were linked in the collective agreement, so that he could extend the time limits under s. 48(16) of the Act. The Vice-chair went on to consider the grievance, finding that the School Board had breached its obligations under the collective agreement and holding it liable for damages payable to the Union in excess of $400,000.

In quashing the OLRB decision, the Divisional Court made a number of significant findings. The Court first stated that the plain meaning of the collective agreement language was that the grievance must be referred to arbitration no later than 14 days after it arose. Next, the Court stated that the Vice-chair's finding that the language of the article was merely "directory" rather than mandatory was incorrect – the collective agreement contained the clear consequence of "deemed settlement" in the event the negotiated 14 day time limit was exceeded, commonly held by arbitrators to be a clear indicator of a mandatory grievance provision. The Court found that in suggesting otherwise, the Vice-chair "unreasonably misinterprets and makes categorical the principle that mandatory language may become directory." This attempt at interpretive revisionism was considered unreasonable.

The Court instead found that whether or not a time limit is mandatory or directory will turn on the particular interpretation of each agreement. In this case, the Court found that based on the clear language of the article in question, the clause was actually mandatory, and that the Vice-chair's findings suggesting otherwise were unreasonable. In the result, the OLRB was held by the Court to have had no jurisdiction to consider the merits of the case, and the Award was quashed.

PAY EQUITY REMAINS A PRIORITY LEGAL ISSUE FOR SCHOOL BOARDS

By: Carolyn L. Kay

There has been significant activity on the pay equity front for school boards in the last couple of years.

On the positive side, Review Officers have confirmed that the obligation to maintain pay equity does not require a joint process with the union. While keeping the union informed of maintenance events is certainly prudent, a joint committee structure is not legislatively required by the *Pay Equity Act*.

On the negative side, in the judicial review of the *Brant Haldimand Norfolk* decision of the Tribunal [2], the Divisional Court confirmed that for purposes of making pay equity adjustments to incumbents paid below the "job rate" (i.e. the top rate) for a job class, equal dollar adjustments are to be made to each step on the grid or to each incumbent. It is not permissible to

make adjustments to such sub-maximal rates that are proportionate to the relation of those rates to the job rate. This conclusion was upheld notwithstanding the fact that the Tribunal had allowed the same Board, in an earlier decision, to maintain the relative structure of the salary grid by applying the same percentage differentials to the pay equity adjustment owing at the maximum step.

A troubling "tie" occurred in *Hamilton Wentworth DSB v. OSSTF* [3], a long-awaited decision of the Tribunal which dealt with the issue of how parties were to calculate the job rate for a male comparator where the male job class worked 12 months of the school year with a graduated vacation entitlement based on years of service while the comparable female job class only worked 194 school days.

The Hamilton Wentworth DSB and OSSTF were both disappointed when, after proceeding through the Pay Equity Commission and looking for an answer to the question that continues to challenge many school boards, both were told by the Tribunal that their respective methodologies were wrong and were sent away with the direction to discuss the issue further. One might have hoped that the parties' inability to negotiate a resolution would have led to a more definitive response from the Tribunal.

An upcoming judicial review application will deal with the relationship between the Pay Equity Hearings Tribunal and the *Human Rights Code* as it relates to differences that exist between the compensation structure of male comparator job classes and the respective female job classes to which they are tied. In both *Lakeridge Health Corporation v. CUPE* [4] *and in York Catholic DSB v. CUPE* [5] , the Tribunal has ruled that the *Pay Equity Act* only requires 1) the equalization of job rates (i.e. the maximum rates for job classes) and 2) the "dollar adjustments" to sub-maximal rates described above. It has stated that there is no legislative requirement for the *pay structure* of the involved female job class to mirror that of its male comparator. In other words, so long as the top rates are in line and the sub-maximal dollar adjustments are made, it is permissible for the female job class to have a lower start rate, more steps below the top rate and for it to take longer to progress to the top rate.

Do these "inequalities" offend the *Pay Equity Act* and/or the *Human Rights Code*? If so, is the Pay Equity Hearings Tribunal required to address *Human Rights Code* inequities? CUPE's challenge to the Tribunal rulings in both *Lakeridge Health Care and York Catholic DSB* will put these issues squarely in front of the courts. The outcomes may have profound implications for school boards (and indeed all employers) across Ontario.

ACCOMMODATING SCENT SENSITIVITIES IN THE WORKPLACE

By: Thomas W. Agnew

In The *Corporation of Quinte West* and *CUPE, Local 759*, released on October 21, 2011, Arbitrator Paula Knopf considered whether an employer has an obligation to accommodate an employee who suffers from allergies that are caused, at least in part, by scented products in the workplace. The employer in this case is a city, but Arbitrator Knopf's finding that the employer had a duty to accommodate is significant for employers across Ontario.

Arbitrator Knopf found that the grievor, who was a long-service employee, suffered from severe allergies and experienced symptoms of a medically disabling nature that seemed to be triggered by exposure to scented products. The employer had an existing Scent Sensitivity Program in place prior to the grievance being filed.

The Arbitrator held that the grievor's condition was disabling and that she should be accommodated through proper enforcement of the Scent Sensitivity Program. Significantly, she also held that the union shared in the accommodation process and was therefore required to work cooperatively with the employer to ensure that bargaining unit members complied with the Scent Sensitivity Program.

Ms. Knopf ordered that the grievor's future accommodation would consist of the following:

- the grievor is to remain assigned to two offices on a rotational basis and any change in the rotation is to be done on

reasonable notice and with consultation with the union;
- the grievor is to be given access to one particular washroom that is to be monitored to ensure that no scented products are allowed therein;
- a portable air filter is to be placed as close as possible to the grievor's workplaces in both offices;
- if the grievor detects or is affected by a co-worker or manager wearing a scent, she is to report it and the employer's Health, Safety and Employee Services Officer is to investigate and, if necessary, enforce the Scent Sensitivity Program. Enforcement may include suspension of the person who is non-compliant; and
- in the event the grievor experiences symptoms that are temporarily disabling in the workplace, she is to be given the opportunity to take a short break to refresh and relieve herself from the symptoms.

In addition to the foregoing, Arbitrator Knopf ordered the union to meet with its members to explain the purpose and importance of compliance with the Scent Sensitivity Program, as well as the consequences of non-compliance.

This award confirms that the duty to accommodate under the *Human Rights Code* may extend to allergic reactions that can be caused by scented products in the workplace. It is significant because Arbitrator Knopf recognized that both the employer and the union have an obligation to work together to ensure suitable working accommodations are provided to employees who are negatively affected by scented products.

The issue of scent sensitivities in the workplace has been raised by employees with increasing frequency in recent years. Arbitrator Knopf's decision confirms that this issue is something employers should now be thinking about as they organize their workplaces.

ONTARIO HUMAN RIGHTS TRIBUNAL ENDORSES EMPLOYER CONTROL OVER ACCOMMODATION PROCESS

By: Hicks Morley

We often remind our clients not to rush to the conclusion that they must accommodate every disability presented by an employee. In an important decision, the Human Rights Tribunal of Ontario ("HRTO") has emphasized that accommodation is only required where discrimination is first established. The Tribunal has also reaffirmed the requirements placed on employers and employees within the accommodation process and has provided excellent guidance for school boards in dealing with very specific accommodation requests from teachers.

In *Baber v. York Region District School Board* 2011 HRTO 213, the applicant Rozana Baber claimed that the York Region District School Board failed to accommodate her disability by not granting her a teaching assignment as a teacher/librarian and by refusing to exempt her from a Teacher Performance Appraisal ("TPA"). Ms. Baber was diagnosed in June 2007 with anxiety disorder and depressive disorder, along with chronic lymphocytic leukemia.

At the start of the 2008/2009 school year, Ms. Baber was assigned two periods of a Grade 11 computer programming course and one Grade 9 information technology course. A superintendent also informed Ms. Baber that she would be scheduled for a TPA during the 2008/2009 school year due to concerns about her performance during the previous year. On October 29, 2008, Ms. Baber asked her principal to defer her TPA based on the Board's policy of postponing TPAs in the event of illness or pregnancy. Ms. Baber claimed that she was incapable of participating in the TPA process due to illness, stating simply "[i]t will kill me".

The medical documentation available to the Principal at the time stated that Ms. Baber suffered from illness but nevertheless was capable of performing the regular duties of a teacher, and so she decided that Ms. Baber would undergo the TPA. However, she did allow Ms. Baber to substantiate her claim that she was too ill to perform the TPA. After suffering an anxiety attack at home, Ms. Barber decided she was too ill to return to the workplace.

While away from work, Ms. Baber asked the Principal for accommodation by changing her teaching assignment to teacher/librarian. The Principal responded by requesting medical information to support the need for this accommodation. In response, Ms. Baber sent two doctor's notes simply stating that she could return to work and that "due to health issues" she should be allowed to be a teacher-librarian. The School Board did not accept these notes as establishing a need for the requested changes and directed Ms. Baber (who was still absent) either to apply for LTD, to allow the Board's occupational nurse to contact her doctor, or to submit to an independent medical examination ("IME"). Ms. Baber did not consent to any of these options, stating that she could in fact return to work if only she were accommodated in the teacher/librarian position.

Over the next several months, the School Board continued to write and meet with Ms. Baber in order to elicit medical information which showed the nature of her disability as well as the need for her requested accommodation. Ms. Baber refused to provide further justification for her absence, claiming that the Board had all the information it needed in order to act on her requests. As a consequence of her failure to provide medical support for her absence, the Board terminated Ms. Baber's employment in October 2009.

Ms. Baber brought an application before the HRTO, claiming that the Board had breached its duty to accommodate her disability by failing to exempt her from the TPA process during the 2008/2009 school year, by failing to change her teaching assignment to that of a teacher/librarian and by terminating her employment. After engaging in a thorough review of the evidence and the law, the Tribunal dismissed all of the applicant's claims.

The Tribunal started its analysis by addressing the misconception that there is a freestanding duty to accommodate a person with a disability under the *Human Rights Code*. Rather, the duty to accommodate only arises once an individual has established that he or she has been disadvantaged by a workplace rule or requirement because of his or her disability. Where any disadvantage experienced by the employee is not demonstrably caused by his or her disability, no "discrimination" exists and no duty to accommodate arises.

Even where a causal connection between a proven disadvantage and a proven disability has been established, the employer may still avoid liability under the *Code* by showing that the rule or requirement giving rise to the disadvantage is reasonable and bona fide and that the individual's disability-related needs could not be accommodated without undue hardship. It is only at this point that the duty to accommodate is engaged.

The Tribunal went on to articulate and apply a number of other important propositions that are helpful to employers in managing such claims:

- Once the duty to accommodate arises, both the employer and the employee have roles to play:
    - The employer must take steps to determine the disability-related needs and restrictions of the employee and consider making the necessary modifications to the workplace.
    - The employee must provide a reasonable amount of medical information that shows the nature of his or her disability-related needs and restrictions.
    - It is the employer, not the employee or his or her doctor, who decides how the employee's disability-related needs and restrictions are to be accommodated. An employer does not have to accept a doctor's conclusion that a employee should be given a specific job in order to be accommodated.
    - An employer is not required to act on medical information setting out "recommendations" or proposals that would "assist" or "benefit" the employee. The duty of accommodation is focussed on responding to actual medical needs.
    - An employer does not have to tolerate an employee's continued refusal to provide the reasonable medical information necessary to establish a need for accommodation and what the accommodation should be.
    - On the other hand, an employer may not unreasonably restrict the type of medical information it will accept as proof of a disability-related need or restriction (e.g. insisting on an IME prematurely where additional information might be obtained from the employee's own health care givers).

In applying these principles to the applicant's case, the Tribunal found that she had not presented enough evidence to

support her claim that she was medically *unable*, due to a disability, to undergo a TPA evaluation or to perform her regular teaching assignment. While there were doctors' notes which *recommended* that the applicant be assigned duties as a teacher/librarian, they did not state that the applicant had disability-related *needs* that *prevented* her from participating in the TPA process or from fulfilling her regular teaching assignment. The connection between a proven disability and a proven disadvantage had not been established. In other words, there was no evidence of "discrimination" and consequently the duty to accommodate was not engaged.

Further, the Tribunal found that even if it accepted that the applicant was adversely affected by her disability, the School Board had fulfilled its duty to accommodate by requesting medical documentation that clarified her disability-related restrictions. Because the applicant failed in her reciprocal duty to provide this information, the Board could not realistically consider making any accommodative changes that might have been necessary. The accommodation process foundered due to the applicant's refusal to provide medical documentation and not because of any proven medical need for the Board to exempt her from the TPA or change her teaching assignment.

The Tribunal also rejected the applicant's claim that the Board should have accommodated her by letting her remain off work instead of terminating her employment. The Tribunal stated that the duty to accommodate does not require employers to tolerate an employee's ongoing unsubstantiated absence.

The *Baber* case is unusual in that most employees seeking accommodation are more forthcoming with the medical information necessary to support their requests. Nevertheless, the case reinforces management's abilities to control the accommodation process by requiring employees (and their doctors) to focus on the medical aspects of the case while leaving the employer in charge of determining any resulting accommodations.

INTEGRATED ACCESSIBILITY STANDARDS UNDER THE *AODA*

By: Paul E. Broad

On July 1, 2011, the Integrated Accessibility Standards came into force. The Standards are the second set to have been passed under the authority of the Accessibility for *Ontarians with Disabilities Act*, 2005 ("*AODA*"), the first set being the Accessibility Standards for Customer Service which began to apply to school boards on January 1, 2010.

The Integrated Accessibility Standards combine accessibility standards in three areas – information and communication, employment and transportation. While the Standards came into force on July 1, 2011, they are generally scheduled to begin to apply to school boards over the next several years. However, notwithstanding the phased implementation of the Integrated Accessibility Standards, three specific sections apply to school boards at an earlier date.

Beginning January 1, 2012, the following obligations will begin to apply to school boards:

- the development and provision of individualized workplace emergency response information to employees who have a disability, if the disability is such that the individualized information is necessary and the employer is aware of the need for accommodation due to the employee's disability; and
- if a school board prepares emergency procedures, plans or public safety information and makes the information available to the public, the school board will need to be able to provide the information in an accessible format or with appropriate communication supports, as soon as practicable, upon request.

With respect to the provision of transportation services for students, the Integrated Accessibility Standards contain specific requirements. As of July 1, 2011, all school boards were obligated to ensure that they provided transportation services that either: (a) functioned as integrated accessible school transportation services; or (b) incorporated appropriate alternative accessible transportation services where an integrated service was either not possible or not the best option for a student based on the nature of the disability or safety concerns. This obligation reflects what most school boards already offer with respect to student transportation; hence the minimal compliance time line.

On January 1, 2014, additional standards relating to student transportation services will come into force, including the requirement to:

- each year, identify students with disabilities based on their specific needs;
- develop individual school transportation plans for each student with a disability; and
- identify and communicate the appropriate roles and responsibilities of each person or party involved in transporting the student with a disability to and from school.

As detailed in our June 9, 2011 *FTR Now*, "Ontario Government Releases Final Integrated Accessibility Standards Regulation Under The *AODA*", which is available on our firm's website, the requirements of the Integrated Accessibility Standards are far-reaching. School boards would be well-advised to begin now in their preparations for compliance in a timely fashion.

OMERS OMISSIONS – OTCFT EMPLOYEES

By: Hicks Morley

It is not as uncommon as you might think for a human resources manager to find a long-term employee sitting across from her, asking about how much pension they'll receive at retirement, only to discover that the employee is not a member of OMERS. Often employers who participate in large public sector plans such as OMERS are under the impression that they have limited liability related to the administration of that plan. However, one of a participating employer's primary responsibilities is to enrol employees who are eligible to join under the terms of the plan. Failure to satisfy this obligation can lead to very substantial liabilities.

While enrolling full-time employees tends to be relatively straightforward, the treatment of what OMERS has coined "other-than-continuous-full-time" ("OTCFT") employees can be confusing and therefore a source of error. School boards have been held liable for substantial contributions to OMERS for their non-teaching staff where OTCFT employees were not offered enrolment correctly at the right time. Even where an OTCFT employee might have been offered enrolment many years ago, that event may be forgotten over time. The school board may find that it lacks the evidence to prove an offer was made, either because record-keeping and enrolment procedures of the day were not consistent or adequate, or because the persons who performed that task have retired or have even passed away.

Where a failure to enrol is established and the employer cannot prove that an offer to enrol was declined, the OMERS Omission Period policy will require the OTCFT employee to pay to the plan the contributions he or she would have made had he or she been a member. The school board will be required to pay its own contributions, plus interest on not only its contributions but the employee's as well. Where the omission period stretches back 20 or 30 years, this can add up to a significant amount of money.

The past may be the past, but these errors can still occur today if solid procedures are not in place to avoid them. School boards can ensure that they have a robust system to monitor the hours and earnings thresholds, to ensure that OTCFT employees are offered enrolment when eligible and to record that such offers were made. Under current practices, eligibility should be monitored annually and offers should be made in writing. In the event an employee declines, there should be a written record to that effect, signed by the employee, and the waiver should be kept on file in case it is needed in the future. A vigorous follow-up system should also be implemented so that offers are not simply ignored.

If an employee has more than one non-full-time position in your school board, be certain that you are tracking the hours or treating the position correctly, as this can be another source of confusion. Remember, what you might consider to be a contract or temporary position, and therefore not "full-time", might in fact be considered by OMERS to be a full-time position, and enrolment may therefore be mandatory.

If you have any questions regarding these decisions, please contact either the author or your regular Hicks Morley lawyer.

[1] (1997), 99 O.A.C. 196 (Div. Ct.)

[2] [2011], O.J. No. 1399

[3] [2009] O.P.E.D. No. 36

[4] [2010] CanLII 46187 (Ont. P.E.H.T.)

[5] [2011] CanLII 42915 (Ont. P.E.H.T.)

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