

## Case In Point

# Divisional Court Upholds Jan Wong's Obligation to Repay Settlement Funds for Breach of Confidentiality

**Date:** November 5, 2014

The [Ontario Divisional Court](#) has unanimously upheld Arbitrator Louisa Davie's decision that Jan Wong breached her confidentiality obligations under a settlement with her former employer, The Globe and Mail (the "Globe") and is bound by the repayment obligation she agreed to as part of the settlement. The Court held that Ms Wong lacked standing to advance a judicial review application in the circumstances and dismissed all of Ms Wong's challenges to Arbitrator Davie's July 2013 decision.

In 2008, the Globe, Ms Wong and her Union entered into a Memorandum of Agreement ("MOA") that resolved grievances relating to Ms Wong's termination of employment with the Globe and denial of sick leave benefits. Among other terms of settlement, the Globe agreed to pay Ms Wong two years' salary as a lump sum and Ms Wong agreed to keep the terms of settlement confidential. In the MOA, the Globe, the Union and Ms Wong agreed that if Ms Wong breached confidentiality, Arbitrator Davie would decide whether a breach had occurred and, if it had, Ms Wong would be required to repay the two years of salary to the Globe.

Ms Wong subsequently wrote and self-published a book in which she used multiple phrases that disclosed that the Globe made a financial payment to her as part of the 2008 settlement.

In her July 2013 decision, Arbitrator Davie agreed with the Globe's position that Ms Wong had breached her confidentiality obligations and was required to repay to the Globe the lump sum salary payment that she had received.

Ms Wong brought an application for judicial review of Arbitrator Davie's decision, arguing (among other issues) that the decision violated procedural fairness and principles of natural justice on the basis that the Union failed to properly represent her interests and advance the arguments she wished to make, Arbitrator Davie was biased based on her involvement in mediating the 2008 settlement, and the arbitrator applied the wrong analytical framework in deciding whether the repayment clause was enforceable.

The Divisional Court agreed with the respondents that Ms Wong lacked standing to challenge Arbitrator Davie's decision. As a general principle, only an employer and the union have standing in court to challenge an arbitrator's decision and none of the exceptions to that general principle applied on the facts. Ms Wong's argument that her union representation was so deficient that she should be granted standing to bring the judicial review did not "find any traction in the evidence." There was "little basis" upon which Union counsel could be "fairly and rationally criticized" and the litigation strategy decisions about which arguments to advance were Union counsel's decisions to make. The Court found that Union counsel did his best to protect Ms Wong's interests even when she was not protecting her own interests. The significant impact of Arbitrator Davie's decision on Ms Wong was not a deciding factor in terms of her standing.

Despite Ms Wong's lack of standing, the Divisional Court went on to decide the merits of the application. The Court found that there was no evidence of a breach of natural justice in the arbitration proceeding or any reasonable apprehension of bias by Arbitrator Davie. The Court agreed with the characterization by the Globe's counsel during oral argument that this was "basically a simple case" about enforcing a settlement arising out of a labour grievance. In the Court's view, Ms Wong was trying to greatly complicate the matter in a fundamentally flawed way by raising the Globe's alleged actions outside the MOA.

The Court held that Arbitrator Davie correctly and reasonably concluded that Ms Wong had breached the MOA and commented that it was hard to see how Arbitrator Davie could have concluded otherwise, given the MOA and the statements

in Ms Wong's book.

On the issue of equitable relief from the MOA's repayment obligation, the Court found that Arbitrator Davie applied the proper legal analysis in concluding that the repayment provision was not unconscionable. Although Arbitrator Davie did not refer to a particular decision that Ms Wong sought to rely on, the Court was satisfied that Arbitrator Davie applied the same considerations, applied the proper legal test and applied a decision that referred to the case in question. The Court noted that an arbitrator is entitled to latitude in applying the law to a particular context and is not required to use the same language or engage in the same analysis as a judge would use in deciding the same issue.

The Court dismissed Ms Wong's argument that the MOA's repayment provision was unenforceable. There was no inequality of bargaining power in this case: the terms of the MOA had been the subject of significant negotiation and Ms Wong was represented throughout by experienced counsel, both Union counsel and her own personal counsel. The Court also held that there was no inherent unfairness in requiring Ms Wong to repay the monies that she agreed to repay if she breached the MOA. The repayment provision was the mechanism by which the confidentiality clause sought by the Globe could be enforced: "The deal under the MOA was clear. The Globe and Mail was to pay the applicant a large lump sum and the applicant was to stay quiet about the payment. It was an entirely reasonable enforcement mechanism... ."

Ms Wong was ordered to pay costs of \$15,000 to each of the respondents.

The Divisional Court's decision reinforces many of the fundamental principles of our labour relations system, including the exclusive union representation model, the deference granted to arbitrators in deciding cases within the applicable labour relations context and the enforceability of settlements. At the end of the day, this case illustrates the simple proposition that a deal is a deal.

The Globe and Mail was represented by Hicks Morley's [Stephen Shamie](#) and [Jodi Gallagher Healy](#).