

DENTONS

The future of labour relations in a hybrid world

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Labour Spotlight Series

Grow | Protect | Operate | Finance

Speakers



Adrian Elmslie
Partner, Edmonton
D +1 780 904 4183
adrian.elmslie@dentons.com



Larysa Workewych
Associate, Toronto
D +1 416 863 4613
larysa.workewych@dentons.com

Moderator



Emily Kroboth
Associate, Toronto
D +1 416 361 2378
emily.kroboth@dentons.com

The background of the slide is a close-up photograph of fossilized insect wings embedded in a light-colored, textured rock matrix. The wings are dark and show distinct venation patterns. A large, solid purple shape is overlaid on the left side of the image, containing the title and author's name.

Remote work and the future of collective bargaining

Larysa Workewych

Let's start with the basics

- Organizing work and directing operations is at the core of an employer's management right and responsibility to manage its workplace
 - This right is not unfettered – provisions of a collective agreement will serve to limit the extent to which employers can exercise this right
- Remote/hybrid work is not itself a new concept, but the COVID-19 pandemic brought it into prominence in many workplaces
 - Remote/hybrid work as a way to organize the workplace
 - Remote/hybrid work as a form of accommodation

Work from home as an emerging issue in collective bargaining

- Hybrid work was a major strike issue in summer 2023 during negotiations between the Treasury Board of Canada and their union
- Requests to incorporate remote work language into collective agreements are becoming more common in collective bargaining
 - More guidance is being published online by union's regarding remote work

Provisions that acknowledge work from home

- Recognition clause:

“The Parties recognize remote work as a work option that permits employees to perform all or a significant portion of their job responsibilities at a location other than the Employer’s premises.”
- Acknowledgements of employer’s discretion to allow remote work:

“Remote work shall only be permitted where approved by the Employer.”

Provisions that specify when remote work is permissible

- Clauses limiting remote work entitlements:

“Employees shall be permitted to work one (1) day a week from a location other than the Employer’s premises.”
- Clauses limiting which functions can be performed remotely:

“Employees participating in the Employer’s remote work program shall only perform the following functions while working from home...”

Provisions that specify when remote work is permissible [cont'd]

- Provisions particularizing the factors to be considered when deciding whether an employee can work from home:
 - “Employees shall be permitted to participate in the Employer’s work from home program on a voluntary basis. To participate, employees must submit a written request to Human Resources. Factors to be considered by the Employer in deciding to approve an employee’s participation include the following...”

Provisions setting out the parameters around working remotely

- Language regarding scheduling:

“Work hours shall be established in accordance with this section of the Collective Agreement. Employees participating in the Employer’s hybrid work program are required to work a minimum of two (2) days per week from the Employer’s offices.”

- Language regarding attendance at meetings:

“Employees participating in the Employer’s hybrid work program are required to attend at the Employer’s offices for meetings or training as requested by the Employer. The Employer shall provide employees with at least two (2) working days’ notice of any in-person meetings or trainings.”

Provisions setting out the parameters around working remotely [cont'd]

- Language regarding hours of work:

“Employees participating in the Employer’s hybrid work program are required to be online and readily available between the hours of 8:00 a.m. and 4:00 p.m.”

Provisions addressing disruptions in work

- Language regarding what to do in the event of a work disruption:

“If a situation occurs that prevents an employee participating in the Employer’s hybrid work program from operating normally, the employee shall contact their supervisor/manager as quickly as possible.”
- Language confirming no loss of wages:

“Employees shall not incur any loss of wages if the employee is prevented from working due to circumstances outside of their control.”

Provisions regarding health and safety

- Language regarding health and safety requirements when working from home:
“Employees working remotely as part of the Employer’s hybrid work program shall be considered to be at work as if they were working at the Employer’s offices for all purposes, including but not limited to workers’ compensation purposes. Employees are required to take all reasonable measures to ensure their safety when working remotely, in accordance with the Employer’s policies and practices, and in accordance with occupational health and safety laws.”

Provisions regarding termination of remote work arrangements

- General process for ending remote work arrangements:

“Participation in the Employer’s hybrid work program is voluntary and may be terminated by either the Employee or the Employer upon the provision of thirty (30) days written notice, with a copy of such notice being forwarded to the Union. The Employer and Union may also terminate an Employee’s participation in the Employer’s hybrid work program upon mutual agreement.”

Provisions outlining termination of remote work arrangements [cont'd]

- Language limiting when remote work arrangements can be ended:
 - “The Employer can only terminate or revisit an Employee’s participation in the hybrid work program if the following occurs:
 - the employee moves to another position;
 - the employee is affected by another employee exercising their bumping rights; or
 - the employee and their manager cannot resolve issues related to the employee’s performance.

Contracting out provisions

- Instead of addressing remote work for current employees, remote work may also come up during collective bargaining through negotiation of a contracting out provision
- Contracting out language may prevent an employer from employing employees remotely in different jurisdictions

The impact of remote work language on labour relations

- Limitation on managerial right to organize and direct operations
 - Either directly or indirectly through negotiated language
- Increased risk of grievances if remote / hybrid work arrangements are denied or varied
 - Will depend on the language that has been negotiated – is it a right or does the employer still have discretion?
- May necessitate changes in how the workplace is organized:
 - How will employees be directed?
 - How will time be tracked?
 - How will employees be supervised?

A close-up photograph of a fossilized insect, likely a fly or similar insect, embedded in a light-colored, textured rock surface. The insect's body is dark and appears to be preserved in a natural position, with its legs and wings visible. The rock has a mottled appearance with various shades of beige and light brown.

Regulating picketing in a remote work environment

Adrian Elmslie

BioWare v. UFCW, Local 401

Introduction

- 2023 decision from the Alberta Labour Relation Board
- First case in Canada to consider picketing by workers employed in a remote work environment
- Provides insight on how labour relations disputes involving remote workers may be handled in the future

BioWare v. UFCW, Local 401

Background

- The employer, Keywords Studios B.C. Inc. (“Keywords”), provides services to clients in the video game industry.
 - Head office located in Vancouver, British Columbia
 - No offices or physical workspace in Alberta
- Keywords employees in Edmonton were assigned to provide development support testing services to BioWare, under the terms of a Master Services Agreement with Keywords
- BioWare’s studio occupied three floors in the EPCOR Tower in downtown Edmonton
- All Keywords employees in Alberta worked from home

BioWare v. UFCW, Local 401

Background

- Keyword employees reported to Keywords managers located in Vancouver but received day-to-day direction from employees of BioWare
- To perform their work, Keyword employees used either a personal computer or, in some cases, a computer provided by BioWare, and logged in remotely to BioWare's virtual private network, or "VPN", which was physically located in Edmonton
- Keywords employees did not physically attend BioWare's Office to perform work (one Keywords employee attended BioWare's Office for approximately one hour on October 1, 2020)
- On some occasions some Keywords employees would have to go to BioWare's Office to pick up specialized equipment needed to perform the work

BioWare v. UFCW, Local 401

Labour dispute

- In April 2022, Keywords employees were mistakenly notified that they would need to start working in person at BioWare's Office in May 2022
- Union filed a certification application on behalf of Keywords employees in April 2022
- September 2023, Keywords stopped providing services to BioWare in Alberta and Keywords employees working on the BioWare project were informed that their employment would be terminated effective September 27, 2023.
- Terminated employees were initially told to return equipment to BioWare's offices in the EPCOR Tower (BioWare later decided to send someone to pick up the equipment).

BioWare v. UFCW, Local 401

Labour dispute

- On October 2, 2023, the Union filed a bad faith bargaining and unfair labour practice complaint against Keywords based on allegations pertaining to collective bargaining and the termination of the bargaining unit employees in September 2023
- On October 24, 2023, the Union served Keywords with notice that it would be commencing a strike on October 27, 2023
- In the strike notice, the Union advised that the initial location of the strike would be at BioWare's office at the EPCOR Tower in downtown Edmonton

BioWare v. UFCW, Local 401

Picketing activities

- Picketers, including a Union representative, gathered in front of the EPCOR Tower on October 24, 2023
- The Union representative could be heard stating, among other things, that BioWare has gotten the message, is listening, and is clearly concerned
- Picketers also handed out flyers with a QR code linked to a video that asked viewers to “[s]end a message to the CEOs of Keywords Studios, BioWare and Electronic Arts (BioWare’s owner) calling for fairness for their unionized staff”

BioWare v. UFCW, Local 401

Regulation of picketing in Alberta

- Picketing in Alberta is regulated under section 84 of the *Labour Relations Code*
- Limits picketing to the employees' "place of employment"
- "Place of employment" is not specifically defined under the Code
- "Place of employment" can include secondary picketing locations such as premises:
 - at which work that is normally done by striking or locked-out employees is done during a strike or lockout,
 - the employer uses to further a lockout or resist a strike, or
 - at which a third party assists the employer in furthering a lockout or in resisting a strike by performing services for the employer that it does not normally provide

But only if permission is granted by the Alberta Labour Relations Board in advance

BioWare v. UFCW, Local 401

Application to prevent picketing

- October 24, 2023, BioWare filed an application with the Alberta Labour Relations Board to prevent picketing outside of the EPCOR Tower
- Two grounds for application:
 1. BioWare's offices at EPCOR Tower were not a "place of employment" for the striking Keywords workers; and
 2. Even if BioWare's offices were, at one time, a place of employment, they ceased to be after Keywords stopped providing quality assurance work to BioWare in September 27, 2023

BioWare v. UFCW, Local 401

Determining place of employment

- Given the variability in remote work arrangements, it is not possible to identify the place of employment for all remote workers
- Considerations that may be relevant to this determination:
 1. Does the employer have a location that the employee can or does attend if not working remotely?
 2. When working remotely, does the employee connect with or log into a specific location?
 3. To whom does the employee report, and where are they located?
 4. To whom does the employee provide a service, and is it to one location or multiple locations?
- The answers to these questions may point to a specific location as a place of employment for remote workers, or there may be multiple places of employment
- List of considerations is not exhaustive.

BioWare v. UFCW, Local 401

Determining place of employment

- Board rejected the notion that employees' homes were places of employment
 - Using employee's homes as place of employment would render picketing ineffective
 - Using employee's homes as place of employment would create significant labour relations difficulties / issues:
 - Employees have different residences / not consistent with the concept that employees in the same bargaining unit should presumably have the same place of employment
 - Can employees picket the homes of their fellow employees?
 - Can employees picket their own homes?

BioWare v. UFCW, Local 401

Findings regarding place of employment

- BioWare's office located in the EPCOR Tower was a place of employment for the Keywords employees
- Keyword employees had a significant connection to BioWare's offices at EPCOR Tower, notwithstanding that they never physically attended at that office:
 1. Keywords does not have any office in Alberta at which employees work, connect, log into, or report
 2. The employees in the bargaining unit performed work exclusively for BioWare at its office in the EPCOR Tower
 3. In order to perform their work, Keywords employees remotely logged into a computer located in BioWare's Office, and it was acknowledged that if there was a power outage in BioWare's Office, the Keywords employees could not perform any work

BioWare v. UFCW, Local 401

Findings regarding place of employment

- Keyword employees had a significant connection to BioWare's offices at EPCOR Tower, notwithstanding that they never physically attended at that office (cont.):
 4. Employees that required special equipment or tools picked those up from BioWare's Office
 5. Keywords employees were told that they would be required to attend work at BioWare's Office, and, though this was later said to be a misunderstanding, employees could still work in BioWare's Office if wanting to work in-person rather than remotely

BioWare v. UFCW, Local 401

Right to picket and end of employment

- Right to picket may continue after employment has ended if employees retain a sufficient continuing interest
- Employees can retain a sufficient continuing interest if:
 1. there is a reasonable prospect that the certified business will re-open and employ members of the bargaining unit; or
 2. there continues to be negotiation of a closure agreement, severance, or other collective agreement benefits

BioWare v. UFCW, Local 401

Right to picket and end of employment

- Board will be hesitant to prevent picketing at the outset of a strike or lockout, even if the employer's business is closed with no prospects of re-opening:

It would undermine the right to picket and invite labour relations mischief if the Board were to find that employees could not picket at their place of employment at the start of a strike or lockout solely on the basis that the employer's business at that location had closed and there was no prospect of it reopening. There may be a time, after there are no more outstanding issues between the parties, that the Board will find the union and employees no longer have any legitimate interest or reasons to picket at the place of employment, and the Board may direct that any picketing cease

- Picketing could continue despite end of Keyword's contract with BioWare because outstanding issues relating to the unfair labour practice complaint remained to be resolved.

BioWare v. UFCW, Local 401

Takeaways

- Remote workforce does not eliminate to possibility of picketing in a labour dispute
- Remote workforce may lead to picketing being permitted at multiple locations associated with the employer
- Possible locations include:
 - Employer's offices
 - Location that employees log in to
 - Location where the employees' supervisor is located
 - Employer customers to whom employees provide services

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Updates to Alberta Labour Relations Board practices

Adrian Elmslie

Alberta Labour Relations Board practices

Electronic voting

- Changes to the Alberta Labour Relation Board's voting rules now allow for electronic voting (i.e. a ballot submitted by the voter through a secure software platform that records and transmits ballot information electronically)
- Electronic voting now permitted in the following matters:
 1. Representation Votes
 2. Proposal Votes
 3. Strike and Lockout Votes

Alberta Labour Relations Board practices

Electronic voting

- Electronic voting is not automatic and depends on a number of considerations including:
 1. nature of the workplace, including whether the employees have varying hours of work or different shift schedules
 2. size of the bargaining unit or proposed bargaining unit
 3. location(s) and number of worksite(s)
 4. the overall accessibility of the vote
 5. any other relevant factor(s)

Alberta Labour Relations Board practices

Electronic petition evidence

- Board has recently accepted that electronic petition evidence can be used in certification applications noting the following justifications:
 - Permitting electronic support evidence is consistent with the Code's objectives
 - Employees are increasingly transient, now more than ever there is greater reliance on smart phones to the detriment of other forms of communication
 - Electronic support evidence improves access to employees, facilitating the dissemination and collection of support cards, and reducing physical impediments
 - Electronic support evidence may provide an additional layer of security and privacy from an employer who may be tempted to interfere with the exercise of employees' rights

Alberta Labour Relations Board practices

Electronic petition evidence

- In order to be accepted, the Board must be satisfied that the electronic petition evidence is authentic (i.e. employee signatures are both genuine and accurately dated)
- Considerations
 1. How is access to the petition card or its hyperlink provided? Personally? Directly by email, text or other electronic modes? Or is it distributed more randomly?
 2. What measure of control does the organizer, or their delegate maintain over access to the petition card or hyperlink?
 3. How well does the organizer and their delegate know the employees being organized?

Alberta Labour Relations Board practices

Electronic petition evidence

- Considerations (cont...)
 4. What level of knowledge and confidence does the organizer and their delegate have that the email, text, or other contact information used for sending or receiving the petition card or hyperlink actually belongs to the employee in question?
 5. Was a signed card subsequently investigated to confirm its validity? For example, did the organizer or their delegate contact the employee in question to confirm they did indeed sign it?

Thank you



Craig Lawrence
Partner, Toronto
D +1 416 863 4420
craig.lawrence@dentons.com



Larysa Workewych
Associate, Toronto
D +1 416 863 4613
larysa.workewych@dentons.com



Emily Kroboth
Associate, Toronto
D +1 416 361 2378
emily.kroboth@dentons.com