THE YEAR IN REVIEW: LABOUR AND EMPLOYMENT LAW 2008-2009

Steven Barrett

Sack Goldblatt Mitchell

SUPREME COURT OF CANADA

Confederation des sydicats nationaux v. Canada (A.G)

- Constitutionality of Active Employment Measures Upheld

- Constitutionality of Billion Dollar EI Surplus – Essentially Upheld with Slight Slap on the Wrist

Shafron v. KRG Insurance Brokers (Western) Inc.

- Strong Judicial Statement Against Enforceability of Ambiguous Restrictive Covenant Clauses in Employment Contracts

- Judicial Reluctance to Sever or Rectify Ambiguous Clauses

Nolan v. Kerry (Canada) Inc.

- Pension Plan Expenses: Absent Express Language, Employer entitled to pay expenses out of plan assets
- Contribution Holiday: Confirms Right of Employer to Take Contribution Holiday out of Plan Surplus, unless explicitly restricted, or implicitly limited because plan mandates a formula for calculating employer contributions which removes actuarial discretion altogether.

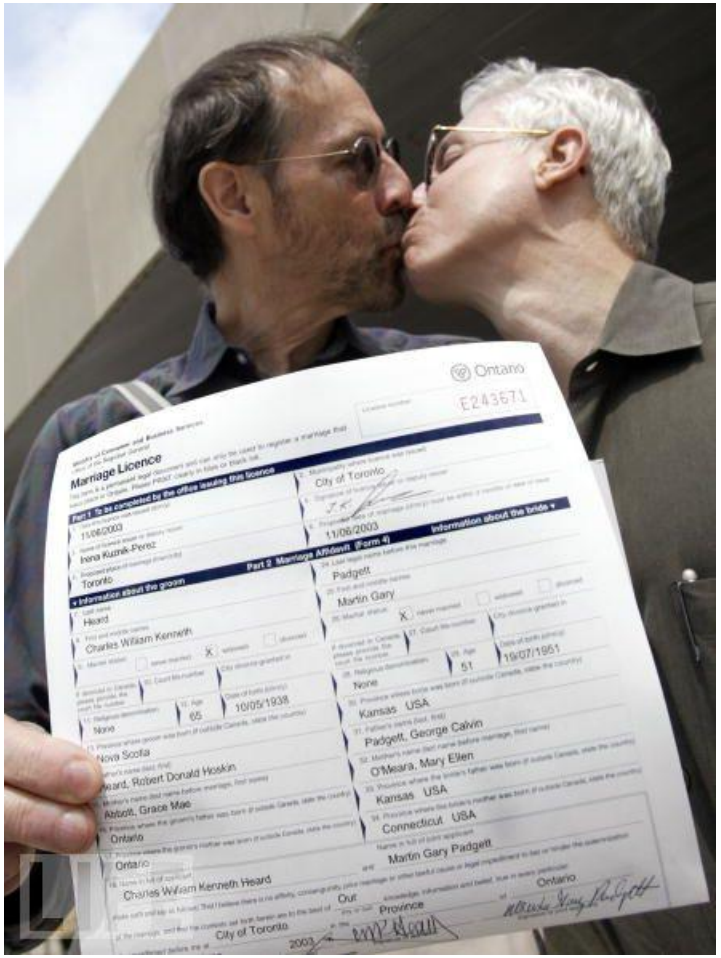
Nolan v. Kerry

- Conversion of Defined Contribution Surplus to Fund Defined Contribution Holiday:
  - Absent legislative restriction, or express restriction in the Plan documents, an employer can retroactively designating DC members as beneficiaries of a previously exclusively DB Pension Plan Trust, thereby creating a single plan and trust comprised of the pre-existing DB and new DC components, in order to provide for DC contribution holidays out of the DB surplus

Nolan v. Kerry

- Legal Costs out of the Pension Plan
  - Test is whether litigation is adversarial or brought for due administration of the pension plan
  - Court held that in this case, no costs payable out of the pension fund, because the litigation challenged the propriety of the employer's actions and because the plaintiff employee committee sought to have funds paid into the Fund to the benefit of the DB members only

ONTARIO COURT OF APPEAL



Fraser v. AG Ontario

- Court of Appeal strikes down exclusion of agricultural workers from collective bargaining legislation
- Found to be denial of freedom of association, because in Canadian context, exclusion of vulnerable workers from bargaining duty, exclusivity and dispute resolution mechanism for resolving collective bargaining impasses denies their freedom to collectively bargain

Birch v. Union of Taxation Employees, Local 70030

- Court of Appeal finds that union fines are subject to non-enforceability for unconscionability, since:
  - a contract between a union and its members is a contract of adhesion characterized by an inequality of bargaining power; and
  - the fine was unfair, *inter alia*, because it exceeded the take home pay of the strikebreaking union members earned during the strike at a time they were experiencing financial hardship

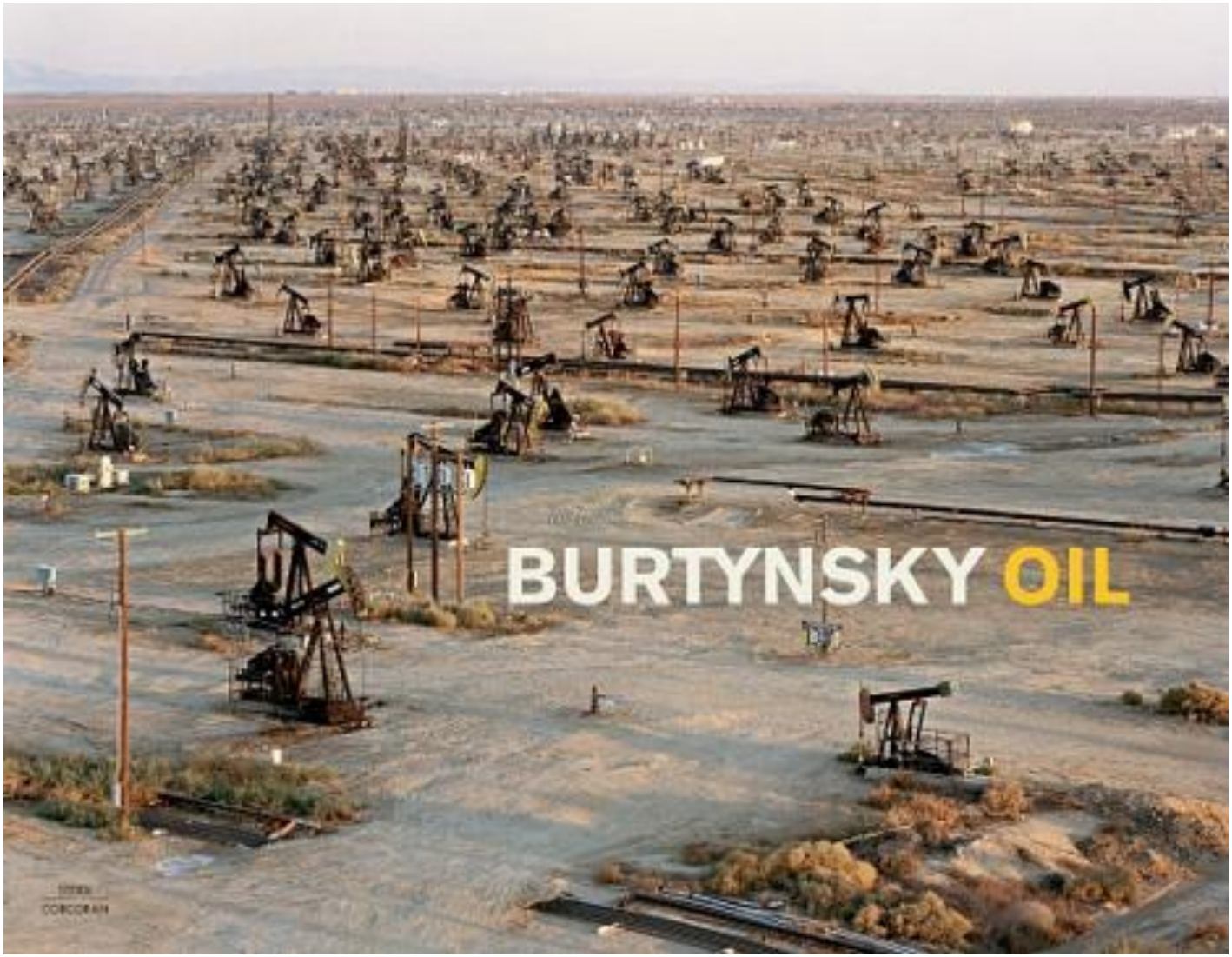
Universal Workers Union v. Ferreira

- Disciplinary hearing held pursuant to a union constitution is not an arbitration, and thus not capable of being enforced through the courts
- As in the *Birch* decision, the Court viewed the union constitution as a contract of adhesion, since those who join the union have no bargaining power to affect the terms of membership and, in many situations, membership is a prerequisite to employment, leaving the individual with little choice but to accept the constitution and its terms

Imperial Oil Ltd. v. CEP, Local 900

- Court of Appeal upheld the decision of a board of arbitration under a collective agreement holding that Imperial's policy of drug testing certain employees, absent reasonable cause, violated the collective agreement
- Court affirmed the prevailing arbitral jurisprudence holding that random drug testing – as opposed to testing for reasonable cause, post-incident or as part of a rehabilitation plan – will seldom be justified, even in safety-sensitive work environments.

ALBERTA COURT OF APPEAL



Bantrel Constructors

- Court of Appeal overrides arbitration board decision, finding instead that employer drug testing policy for existing employees in breach collective agreement limit on testing only as a "condition of employment"

Finning

- Court of Appeal upholds Labour Board finding of breach of statutory freeze when employer announced intention to contract out of significant portion of bargaining unit after receipt of notice to bargain
- While nothing in collective agreement precluded contracting out, the majority found right was not exercised in good faith, and that exceptions to statutory freeze should be narrowly construed.

BC COURT OF APPEAL

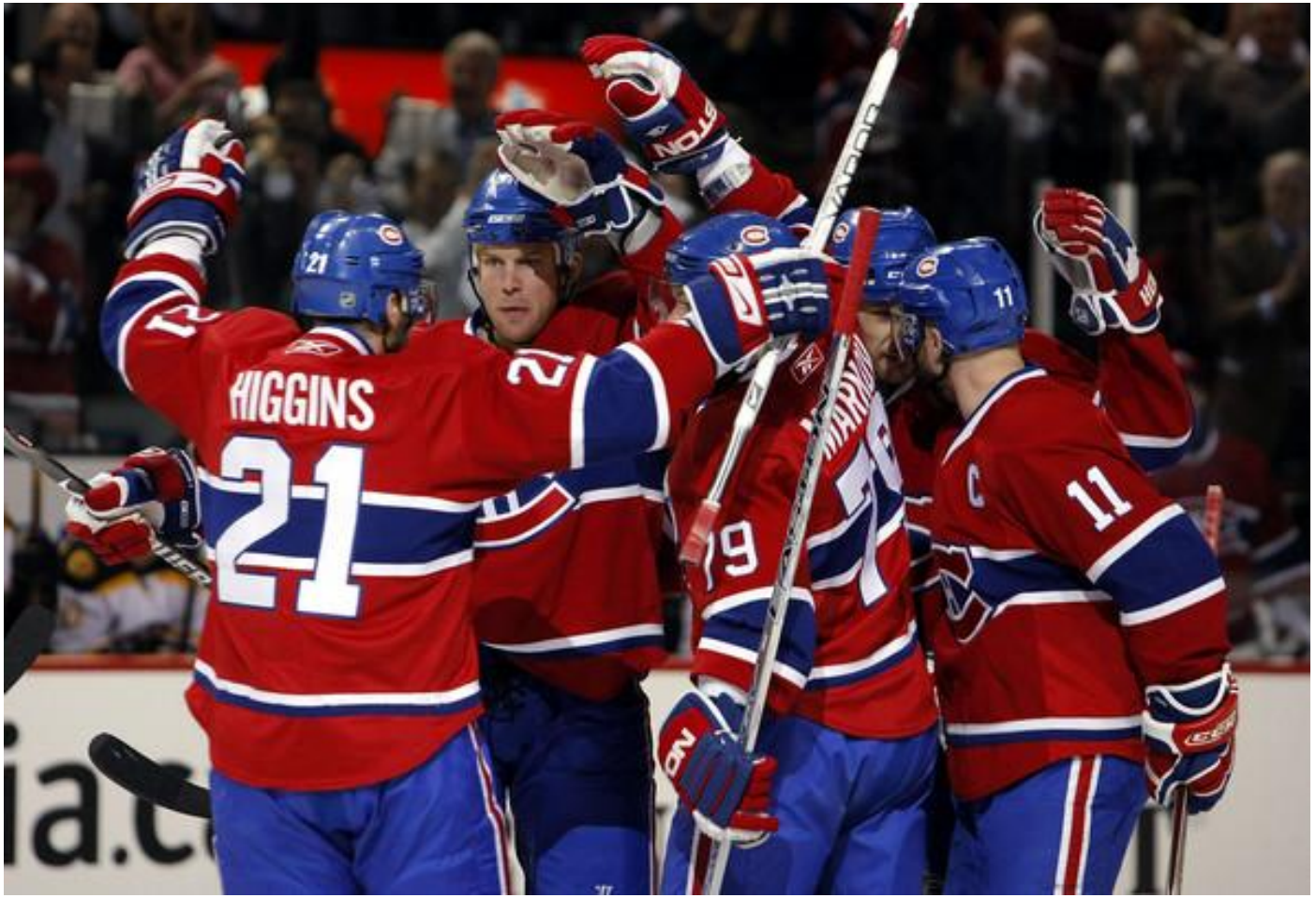
British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.

- The Court found that, while restrictions on mid-contract political protest strikes interfered with freedom of expression, they were justified as a reasonable limit under section 1 of the Charter

Victoria Times Colonist v. CEP Local 25-G

- BC Court of Appeal upheld as reasonable Labour Board decision that freely negotiated "hot declaration" collective agreement clauses (allowing unions and their members to refuse to handle products and services declared hot as a result of third party labour disputes) do not amount to unlawful strikes under the BC Labour Code

QUEBEC COURT OF APPEAL



Coll v. Syndicat des cols bleus regroupés de Montréal

- Quebec Court of Appeal dismissed class proceeding for damages against union for traffic jam inconveniences, flowing from lawful political protest/demonstration, despite connection with with unlawful work stoppage

SCC: Looking Forward

- *Fraser*: Freedom of Association and Collective Bargaining Redux
- Appeals from BC and Federal Court of Appeal decisions finding delivery of child and family services to First Nations children within provincial labour relations jurisdiction
- Appeals from Quebec regarding whether Labour Board or labour arbitrators have jurisdiction to determine statutory just cause grievances

SCC: Looking Forward

- *Fullowka v. Pinkertons*: liability of national union, in negligence and vicariously, for the murder by a striking miner of nine replacement workers, as a result of a bomb he deliberately placed
- *Consolidated Fastfrate*: Appeal of Alberta Court of Appeal's decision that the operations of an employer using third party carriers for the interprovincial transport of freight falls within federal jurisdiction
- *Plourde v. Wal-Mart*: whether the Quebec Labour Code's prohibition against termination of or reprisal against employees for engaging in protected union activity applies to the permanent closure of an employer's operation