



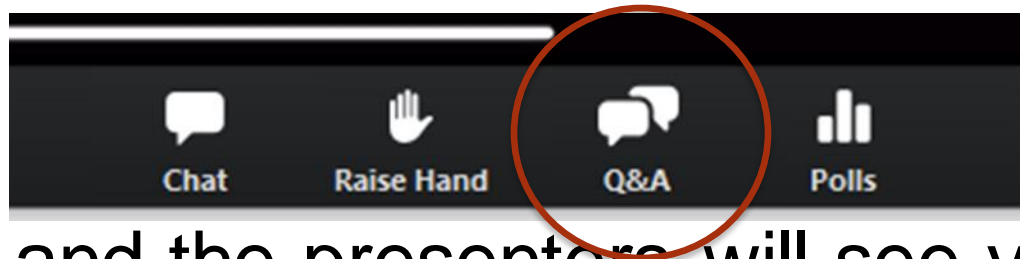
What Unions Need to Know about Criminal Law

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Overview

- *Charter* rights and prosecution process
- Timing of and movement of information between criminal and labour processes
- Questions to ask and steps to take in specific scenarios

Life cycle of a criminal file

- Investigation
- Arrest, charge, and release from custody
- “Set date” appearances in court
- Disclosure
- Crown and judicial pre-trials
- Trial

The COVID factor: all of this is happening remotely now!

Section 7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

- This includes the right to silence and the principle against self-incrimination

Canadian Charter of Rights and Freedoms

Section 8

Everyone has the right to be secure against **unreasonable** search or seizure

- Must have a reasonable expectation of privacy

Section 9

Everyone has the right not to be **arbitrarily** detained

Canadian Charter of Rights and Freedoms

Section 10

Everyone has the right **on arrest or detention**

- a) To be informed promptly of the reasons therefor;
- b) To retain and instruct counsel without delay and to be informed of that right;
- c) To have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Canadian Charter of Rights and Freedoms

Section 11

Any person **charged with an offence** has the right

- b) To be tried within a reasonable time;
- c) Not to be compelled to be a witness in proceedings against that person in respect of the offence;
- d) To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- e) Not to be denied reasonable bail without just cause; ...

Section 13

A witness who testifies in **any proceedings** has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Canadian Charter of Rights and Freedoms

Section 24

1. Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
2. Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Criminal Process

Investigation

- Workplace / employment related conduct
 - Police investigation may prompted by or parallel to workplace investigation
 - What information can employer gather?
 - What information can employer share?
 - Suspension pending outcome of the investigation?
 - What about the right to silence when the employer wants to interview the member?

Criminal Process

Charge & Release

- Appearance notices
- Releases from police station
- Bail proceedings
 - limited bases for detention, Crown onus
 - “ladder” principle
 - “sureties” – pledge not cash deposit

The COVID factor: fewer detentions for bail, video bails

Charge & Release

- Off-duty conduct
 - Does the employee have a duty to disclose that he or she has been criminally charged?
 - If held for bail, can the employer discipline for being absent?
 - What about bail conditions that affect the employee's work?

Criminal Process

Pre-Trial Process

- Before a trial date can be set, there must be both a Crown Pre-Trial and a Judicial Pre-Trial
- These are opportunities for the parties to explore one another's positions, potentially narrow the issues, and get a judge's view of the strengths and weaknesses of the case
- From charge to trial can take as long as 18 months for less serious charges, and as long as 30 months for more serious cases (in Superior Court)
 - These are presumptive ceilings – additional delay can be waived

The COVID factor: Court operations have been seriously impacted, so judges have considered pandemic an “exceptional circumstance” extending time limits

Criminal Process

Pre-Trial Resolution

- At any stage, the accused has the option of pleading guilty
- The Crown and the accused can enter into resolution discussions
- Diversion and peace bonds can avoid findings of guilt
- The Crown can also withdraw (permanently) or stay the charge (can be revived within one year), including as part of a negotiated resolution (e.g. following completion of counselling)

The COVID factor: Crowns are resolving on easier terms

Criminal Process

Potential trial outcomes

- Judicial stay (*Charter* remedy)
- Accused is acquitted (found not guilty)
- Accused is found not criminally responsible by reason of mental disorder (placed under the jurisdiction of the Ontario Review Board)
- Accused is found guilty and discharged (only available for certain offences, and where not contrary to the public interest)
- Accused is convicted

Criminal Process

Sentencing

- Sentencing may be delayed to allow the offender to attend a treatment program (taking into consideration the interest of justice and of the victim)
- Depending on the nature of the offence, the sentence may be served in the community (conditional sentence, probation) or in custody
- If it is served in the community, it can be subject to various conditions (which may also have an impact on employment)

Post-Resolution Employment Implications

Workplace / employment related conduct

- The fact that charges have been withdrawn or stayed, or that the accused has been acquitted, does not necessarily mean that there won't be employment consequences for the same activity
 - Different duties in the employment context
 - Different standards of proof
 - Potential regulatory issues

Post-Resolution Employment Implications

Off-duty conduct

- A conviction for off-duty conduct can constitute just cause where:
 - There is a nexus between the offence and the essential duties of the job
 - There would be an impact on the employer's reputational interests

Criminal Process to Grievance

- A criminal charge may still be pending as settlement negotiations happen
- If the criminal charge relates to the employer, be careful in negotiations!
 - Criminal charges are laid by police, the employer can't agree to "drop the case" or "withdraw the charge"
 - An employer can't commit to not cooperating further with the criminal process – subpoenas may compel witnesses to attend
 - The Crown and police may pay attention to the employer's opinion about what should happen, often the best you can accomplish

Criminal Process to Grievance

- A criminal conviction cannot be relitigated through the grievance process
 - *Toronto (City) v CUPE, Local 79*, [2003] 3 SCR 77
- Disclosure that was part of the criminal process can't be used in a civil proceeding except on notice to and consent of Crown and police or court order

Scenario #1

- A grievor tells you that she secretly recorded a meeting with the employer, and wants to use it as evidence at arbitration
- Part of the recording covers a time when the grievor left the room, leaving the recorder behind to capture two managers talking to each other about her

Scenario #2

- You are in a meeting (or receive a call from a local official who is in a meeting) in which a member is accused of misconduct that would also be a criminal offence – e.g. sexual exploitation of a vulnerable person who is a client of the employer.

Scenario #3

- Your cell phone rings. It is one of your local reps. Without being told why, a member has been contacted by police and asked to report to the police station and is
 - a) about to go there, or
 - b) is already there and is being asked to give a statement

Scenario #4

- Your phone rings. A member has been arrested at the picket line and charged – what do you do?

Scenario #5

- A member has been arrested and charged and released on conditions. One of the conditions is that they cannot have any contact with the complainant. The complainant works at the same workplace...what do you do? The member has also been terminated for the incident involving the complainant. Do you file a grievance? Do you try to interview the complainant?

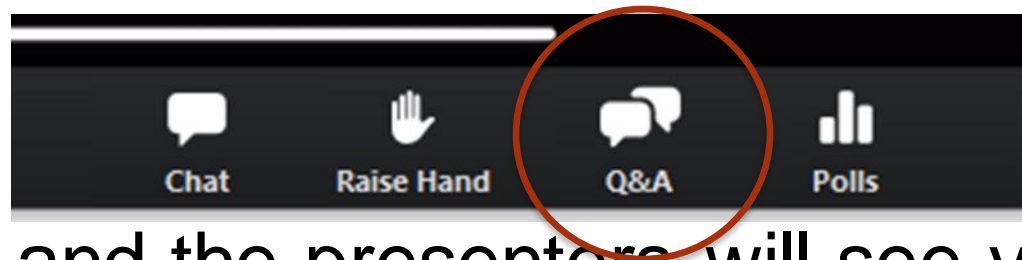
Scenario #6

- A grievance is filed and a criminal trial is scheduled for 10 months from now. The grievance procedure has consisted of very little discussion and now it's time to arbitrate. The employer will not agree to put the matter in abeyance. What do you do?

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