HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Lynn Korevaar on behalf of Barbara Kacan

Applicant

-and-

Ontario Public Service Employees Union

Respondent

AND BETWEEN:

Dalton Yuill by his litigation guardian Cathy Yuill

Applicant

-and-

Canadian Union of Public Employees

Respondent

DECISION

Adjudicator:	David A. Wright
Date:	July 16, 2012
File Numbers:	2008-00381-I and 2010-05753-I
Citation:	2012 HRTO 1388
Indexed as:	**Kacan v. Ontario Public Service Employees Union**

APPEARANCES

Lynn Korevaar on behalf of Barbara Kacan and Dalton Yuill by his litigation guardian Cathy Yuill, Applicants	)	M. Kate Stephenson and Grace Vaccarelli, Counsel
Ontario Public Service Employees Union, Respondent	)	Nick Coleman and Danny Kastner, Counsel
Canadian Union of Public Employees, Respondent	)	Peter Engelmann and Anne Gregory, Counsel

INTRODUCTION

[1] Barbara Kacan and Dalton Yuill (the "claimants") are people with intellectual disabilities who reside in group homes operated by their local Community Living organizations. The respondent unions are the bargaining agents for employees of these organizations whose jobs it is to support them and other residents with intellectual disabilities.

[2] During a legal strike in 2007, the Ontario Public Service Employees Union ("OPSEU") engaged in legal picketing at the group home where Ms. Kacan lives, operated by Community Living Tillsonburg. During a legal strike in 2009, the Canadian Union of Public Employees, Local 1521.02 ("CUPE") engaged in legal picketing at the group home where Mr. Yuill lives, operated by Community Living Lanark County. The applicants argue that this picketing constituted discrimination with respect to services, contrary to s. 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*") and with respect to occupancy of accommodation, contrary to s. 2 of the *Code*. They argue that the picketers, and therefore the union, are linked to the delivery of services and the occupancy of accommodation because their regular function is to serve the residents, and that this picketing has a differential impact on them as compared with picketing elsewhere because it took place at and disrupted their homes, because their intellectual disabilities made it difficult for them to fully understand what was occurring, and because it drew attention to the group homes, potentially adding to opposition from neighbours.

[3] Following various decisions on preliminary issues in each case (see *Kacan v. Ontario Public Service Employees Union*, 2010 HRTO 795 and 2010 HRTO 2444 and *Yuill v. Canadian Union of Public Employees,* 2010 HRTO 1717, 2010 HRTO 2443, 2011 HRTO 126 and 2012 HRTO 366), the Tribunal directed in a Case Assessment Direction dated February 22, 2012, that a joint summary hearing be held in both cases pursuant to Rule 19A to determine whether the Applications should be dismissed, in whole or in part, on the basis that they have no reasonable prospect of success.

[4] The summary hearing was held on June 7, 2012 and all parties made oral submissions. I find that assuming the facts as alleged by the claimants to be true, the *Code* does not govern the relationship between a union and those using or seeking to use the services at a place the union's members are picketing. Therefore, I conclude that the Applications should be dismissed on the basis that they have no reasonable prospect of success.

RELEVANT PROVISIONS

[5] Sections 1 and 2 of the *Code* read as follows at the relevant time (they have since been amended to add new grounds that are not relevant to this Application):

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.
>
> 2. (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, disability or the receipt of public assistance.
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> (2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, disability or the receipt of public assistance.

[6] Rule 19A reads as follows:

> The Tribunal may hold a summary hearing, on its own initiative or at the request of a party, on the question of whether an Application should be dismissed in whole or in part on the basis that there is no reasonable prospect that the Application or part of the Application will succeed.

[7] Section 2 of the *Canadian Charter of Rights and Freedoms* reads as follows:

> Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

THE CLAIMANTS' ALLEGATIONS AND THEORY OF DISCRIMINATION

[8] The claimants state that during the labour disputes, picketers positioned themselves in front of the homes for several hours at a time, during days and evenings. They state that they controlled the coming and going of people into the homes, and were sometimes adversarial with replacement workers.

[9] The picketing, they argue, was distressing to the claimants. Ms. Kacan was afraid and anxious, and she felt strongly that it was unfair that she had to endure this at her home. She wrote a letter asking for the picketing to stop. Mr. Yuill exhibited signs of distress, including seizures. His sister asked more than once for the picketing to stop. Many of the picketers were individuals known to the claimants, but some were not. Both claimants have mobility problems, and could not leave the premises on their own.

[10] The nature of the claimants' disabilities, it is argued, made it difficult for them to understand and to deal with the presence and conduct of the picketers. The location – at their home – allegedly exacerbated the situation because they could not avoid or leave the site to get away. They did not have any place they could go to live, even temporarily.

[11] The claimants argue that the claims fall within the social area of "services" because the picketers are service providers when they are at work serving the claimants and other residents. They say the link continues to exist when they are on a legal strike, picketing their workplaces. First, they say, the perspective of the claimants is key, since they know some of the picketers as the people who normally help them with their day to day lives. This does not change, from their perspective, when they go on strike. Second, they argue, the picketing is related to the service provision, since the services are provided in a unionized environment, part and parcel of which is the possibility of temporary labour disruption. Third, a connection to services exists because the workers are present to demonstrate that they are not providing services; they are announcing themselves as workers who have decided to withdraw their services. Finally, they argue, it is not appropriate to import a "temporal restriction" into the Code protection against discrimination with respect to services.

[12] They argue that there is a link to "occupancy of accommodation" because what is fundamentally at stake is their right to live and feel safe in supportive housing integrated into the community. The picketing, they say, impacted them in relation to their homes. They say that the term "occupancy" of accommodation means that it includes not just access to housing, but the conditions associated with living there. They emphasize that there is no built-in limitation on the type of persons who are potential respondents, in contrast to s. 2(2), harassment in accommodation. Finally, they argue that because picketing can negatively impact the housing environment, a link to occupancy of accommodation is established.

[13] Central to the claimants' argument is the allegation that other locations were available for the unions to conduct their picketing, such as the employers' offices, and that picketing did take place at those locations. They argue that there is no reason why the picketing could not have been limited to those other locations, to avoid the negative impact on the claimants and other residents in their homes. They state that any impact on the respondent unions and on their ability to convey their message would therefore have been minimal.

[14] The claimants argue the picketing constitutes constructive discrimination on the basis of disability, and that they can establish differential treatment, causing negative effects, and a link between the effects and their disabilities. They say that the law permitting union members to picket at their workplace during a lawful strike is a "neutral" rule, but it has a differential impact on the claimants, as people with disabilities, as compared with people without disabilities. First, they argue, the workplace in question is not a public site, but is the claimants' personal and private home. The fact that picketing takes place at their home arises because they are people with disabilities, and it is the need for support that turns their homes into workplaces. Second, they argue, picketing at a home is more intrusive that picketing at a "public location". They emphasize that the community living movement promotes the dignity and citizenship of people with intellectual disabilities by enabling them to live in ordinary homes and ordinary communities, rather than institutions. Picketing undermines this aim by evoking the institution in residential communities and feeds negative community attitudes that continue to be a barrier to social inclusion. Third, they say, the claimants' disabilities make it more difficult for them to understand the picketers' conduct and to develop personal coping strategies for dealing with the picketers and associated anxieties. They have no control over their living situation or the outcome of the labour dispute.

[15] If the elements of discrimination are established, the applicants argue, the Tribunal must balance the competing rights of picketing and freedom from discrimination. They rely upon the Ontario Human Rights Commission policy on competing rights, and state that this is a factual inquiry that must be engaged in following evidence at a hearing.

OTHER FACTS

[16] It is undisputed that in each strike, a picket line protocol was agreed to between the union and the employer. Among other things, it was agreed that there would be no delay or obstruction of supported persons, their family, and other visitors. The protocols also included limits on the amount of time replacement workers or managers would be delayed at the picket line.

[17] In the 1990s, various organizations providing support to persons with developmental disabilities were found by the Ontario Labour Relations Board to fall within the scope of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14, ("*HLDAA*") including Community Living Lanark County. See *Community Living Assn. (Lanark County)*, [2001] O.L.R.D. No. 2457. Under *HLDAA*, compulsory interest arbitration takes the place of the right to strike or lockout. However, the *Government Efficiency Act, 2001,* S.O. 2001, c. 9, sched. C, amended the legislation to exclude employers like community living associations from the application of *HLDAA*. When the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disability Act, 2008,* S.O. 2008, c. 14 was under consideration, various organizations advocated that the legislation prohibit strikes and lockouts and provide for interest arbitration in the sector, but the Legislature did not do so.

ANALYSIS

[18] In *Dabic v. Windsor Police Service*, 2010 HRTO 1994, the Tribunal explained the inquiry during a summary hearing as follows at paras. 8-9:

> In some cases, the issue at the summary hearing may be whether, assuming all the allegations in the application to be true, it has a reasonable prospect of success. In these cases, the focus will generally be on the legal analysis and whether what the applicant alleges may be reasonably considered to amount to a *Code* violation.
>
> In other cases, the focus of the summary hearing may be on whether there is a reasonable prospect that the applicant can prove, on a balance of probabilities, that his or her *Code* rights were violated. Often, such cases will deal with whether the applicant can show a link between an event and the grounds upon which he or she makes the claim. The issue will be whether there is a reasonable prospect that evidence the applicant has or that is reasonably available to him or her can show a link between the event and the alleged prohibited ground.

[19] This case falls into the first category. The central issue is whether, assuming the facts alleged by the applicant to be true, there is a violation of the *Code*.

[20] The claim that this Application falls within the social areas of occupancy of accommodation and services depends principally upon the theory that the unions and their members have special obligations to the claimants while on strike because they support the claimants when they are not on strike. Although the claimants rely upon the broad nature of the wording in ss. 1 and 2 ("with respect to"), their counsel also accepted in oral argument that the *Code* would not apply to the actions of a person who has no underlying relationship with the persons in the home, such as a neighbour or passer-by on the street.

[21] The question is whether the employees' support role in their jobs leads to *Code* obligations towards the residents for them – and their union – when they picket as union members in the context of a labour dispute. In my view, the *Code* does not govern the relationship between a union and those using or seeking to use the services at a place the union's members are picketing.

General Principles

[22] The approach to interpreting the *Code* must be purposive and contextual. As stated in *Landau v. Ontario (Finance)*, 2011 HRTO 1521 at para. 12:

> While it may be helpful to refer to particular rules of statutory interpretation, the fundamental principle in interpreting any statute, including the *Code*, is to take a purposive and contextual approach. Statutes are interpreted in "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament": see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 1; *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Ontario Human Rights Commission v. Christian Horizons,* 2010 ONSC 2105 at para. 42. In applying this principle in the context of the *Code*, rights are to be interpreted broadly and exceptions narrowly.

Equal Treatment "With Respect to" Services and Occupancy of Accommodation

[23] Section 1 of the Code provides for "equal treatment with respect to services, goods and facilities, without discrimination" and section 2 provides for "equal treatment with respect to occupancy of accommodation, without discrimination". Important to the analysis in this case is whether, and to what extent, this requires that the respondent be providing or offering services or accommodation that the applicant is using or seeking in order for the allegations to fall under the *Code*.

[24] Beginning with the text of the provision, the applicants argue that *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 suggests that the words "in respect of" signal a broad connection between the discrimination and the service. In that case, the Supreme Court was interpreting a provision in the *Indian Act*, R.S.C. 1970, c. I-6, which provided that "no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of" personal property situated on a reserve. The issue was whether employment income earned was subject to income tax. The Court held, at p. 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[25] More relevant is the Supreme Court's decision in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353. In that case, the Court addressed the provision in the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, which prohibited discrimination "against a person or class of persons with respect to any accommodation, service or facility customarily available to the public". While the Court's focus was on the question of whether services offered to a subset of the public, students at the university, fell within this provision, the Court's comments throughout the decision suggest the need for the claimant to be seeking or receiving services from a respondent "service provider". At p. 386 it held:

> The idea of defining a "client group" for a particular service or facility focuses the inquiry on the appropriate factors of the nature of the accommodation, service or facility and the relationship it establishes between the accommodation, service or facility provider and the accommodation, service or facility user, and avoids the anomalous results of a purely numerical approach to the definition of the public. Under the relational approach, the "public" may turn out to contain a very large or very small number of people.
>
> [emphasis added]

[26] The Tribunal has suggested that for the social area of services to apply, something must be provided by the respondent to the applicant. In *Braithwaite v. Ontario (Attorney General)*, 2005 HRTO 31 at para. 22, the Tribunal held: that "'service' must mean something which is of benefit that is provided by one person to another or to the public". This was cited with approval by the Divisional Court on appeal: (2007) 88 O.R. (3d) 455 at para. 39.

[27] In *Cooper v. Pinkofskys*, 2008 HRTO 390, at para. 10, in holding that a lawyer representing a party does not owe *Code* duties to others involved in litigation, the Tribunal stated:

> These definitions, and the various contexts in which the Tribunal has found the area of "services" to be engaged, suggest the necessity for some sort of service relationship, as opposed to a mere interaction, between the parties.

Similar principles were applied in the context of accommodation in *Crawford v. 2176534 Ontario*, 2009 HRTO 1028.

[28] In finding that a claim of one student against fellow students at a college was not "in respect of services" under s. 1, the Tribunal emphasized that the classmates "were not responsible for the provision of goods, services or facilities to the applicant": see *Tohidy v. Mckenzie*, 2009 HRTO 2264. In *Suhanovs v. Toronto Transit Commission*, 2010 HRTO 1240, the Tribunal held that not all activities of a service provider engage

the prohibition on discrimination with respect to services in s. 1 of the *Code*. The Tribunal relied upon *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 138, which emphasized the difference between activities that are part of a service and those extraneous to it. In *Suhanovs*, it found that the TTC's physical plant, and noises allegedly coming from it, did not form part of a service relationship between the TTC and the applicant.

[29] In a series of cases, the Tribunal has also emphasized that ambiguity in the scope of *Code* rights should be resolved in favour of protecting matters at the core of *Charter* rights and freedoms: *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152 and *Dallaire v. Les Chevaliers de Colomb – Conseil 6452*, 2011 HRTO 639. As stated in *Tesseris v. Greek Orthodox Church in Canada*, 2011 HRTO 775 at para. 6:

> The interpretation of the meaning of "services" in light of the purposive and contextual approach to statutory interpretation does not involve merely looking at the words: *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435; *Whiteley, supra*; *Dallaire v. Les Chevaliers de Colomb – Conseil 6452*, 2011 HRTO 639 (CanLII); *Zaki v. Ontario (Community and Social Services)*, 2009 HRTO 1595 (CanLII). Moreover, if there is ambiguity about whether "services" includes the interactions in question, it must be resolved in favour of the protection of rights under *the Canadian Charter of Rights and Freedoms*: *Whiteley, supra*, at para. 17; *Dallaire, supra*; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 61-66.

[30] These Tribunal cases flow directly from Supreme Court of Canada authority about the interpretation of human rights legislation. In *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435 ("*GATE*"), decided before the *Charter* came into force, the definition of discrimination "with respect to any accommodation, service, or facility customarily available to the public" was interpreted by both the majority and dissenting judges as being limited by the principle of freedom of the press. As Justice Dickson, dissenting, stated at p. 469:

> There is an important distinction to be made between legislation designed to control the editorial content of a newspaper, and legislation designed to control discriminatory practices in the offering of commercial services to

> the public. We are dealing in this case with the classified advertising section of a newspaper. The primary purpose of commercial advertising is to advance the economic welfare of the newspaper. That part of the paper is not concerned with freedom of speech on matters of public concern as a condition of democratic policy, but rather with the provision of a "service or facility customarily available to the public" with a view to profit. As such, in British Columbia a newspaper is impressed with a statutory obligation not to deny space or discriminate with respect to classified advertising, unless for reasonable cause. It should also be made clear that the right of access with which we are here concerned has nothing to do with those parts of the paper where one finds news or editorial content, parts which can in no way be characterized as a service customarily available to the public. The effect of s. 3 of the British Columbia *Human Rights Code* is to require newspapers within the province to adopt advertising policies which are not in violation of the principles set out in the Code.

[31] The analytical approach of the majority of the Court in *GATE* to interpretation of what is "customarily available to the public" was subsequently overturned in *Berg*, *supra*. The Court in that case, however, continued to explicitly rely upon the competing interest in freedom of the press to justify the interpretation of s. 2 to exclude certain matters from "services"; see p. 379.

[32] I agree with the following list of "key legal principles" set out at p. 18 of the Ontario Human Rights Commission Policy on Competing Human Rights (the "Policy"):

> 1. No rights are absolute
>
> 2. There is no hierarchy of rights
>
> 3. Rights may not extend as far as claimed
>
> 4. The full context, facts and constitutional values at stake must be considered
>
> 5. Must look at extent of interference (only *actual* burdens on rights trigger conflicts)
>
> 6. The core of a right is more protected than its periphery
>
> 7. Aim to respect the importance of both sets of rights
>
> 8. Statutory defences may restrict rights of one group and give rights to another.

[33] In my view, the central principles applicable in this case are that "rights may not extend as far as is claimed" and that "the core of a right is more important than its periphery". As noted in the Policy at p. 36, with reference to *Dallaire*, "the setting or sector may affect the limits on the exercise of a right". The fact that the claim is against the unions who have withdrawn their services is key, as is the fact that picketing is at the core of the right to freedom of expression and freedom of association.

[34] The claimants argue that in light of principle #4, this case should go to a full hearing so that all the facts are known. I do not agree. As in *Dallaire* and *Whiteley*, the scope of the rights in question can be determined based on the facts as alleged by the claimants.

Union Activities Are Different than Work for the Employer

[35] When picketing and on strike, the unions and their members were acting not as service providers or assisting with the occupancy of accommodation. They had expressly withdrawn their services, and were protesting the employer's failure to reach an agreement with them. They were not, in the words of *Braithwaite*, offering or providing something of benefit to another. They had no role in providing or regulating services or accommodation but were union members, protesting and expressing their views about their employer's actions. Although, like a neighbour, passer-by, or other protestor, they could do things to affect the applicants' services and living requirements, this is, in my view, not a sufficient link to engage the *Code*.

[36] Moreover, the claim here is against the unions as organizations. The unions have no role as service or accommodation providers at any time. The unions' role is to represent their members in their workplace interests, not to serve the clients of the homes.

[37] I appreciate that from the claimants' perspective, picketing by the workers who normally support them in their day-to-day activities may have been perceived differently from that by others, in particular because of their intellectual disabilities. In my view,

perception cannot lead to an expansion of social areas into relationships that they do not otherwise govern.

The *Code* Should Be Interpreted to Avoid Restricting Core Expressive Rights

[38] Also significant, in my view, is the fact that picketing is at the core of the right to freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and is also protected by the right to freedom of association in s. 2(d). To the extent that there may be ambiguity in the *Code* as to whether it applies to this situation, it should be resolved in favour of not affecting these rights.

[39] In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at paras. 32-34, the Supreme Court of Canada outlined the constitutional significance of picketing as follows:

> Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(*b*) of the *Charter*. This Court's jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortious acts: *Dolphin Delivery*, *supra*. The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society (see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452). The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.
>
> Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-

worth: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *KMart*, *supra*.

> Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life. Moreover, the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 92, *per* Iacobucci J. Free expression in the labour context thus plays a significant role in redressing or alleviating this imbalance. It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour dispute, elicit the support of the general public in the furtherance of their cause: *KMart*, *supra*. As Cory J. noted in *KMart*, *supra*, at para. 46: "it is often the weight of public opinion which will determine the outcome of the dispute".

[40] The claimants emphasize that the freedom to picket is not absolute, and that *Pepsi* justifies restrictions on picketing under s. 1 of the *Charter* when the picketing causes harm. They argue that the harms the claimants experience must be balanced against the value of the picketing. It is correct that the right to picket is not absolute, but the question here is not whether a clear restriction on picketing can be justified under s. 1 of the *Charter*. Rather, the claimants ask the Tribunal to interpret ss. 1 and 2 of the *Code* in a manner that would create a restriction on picketing. If there is ambiguity, these sections should be interpreted so as not to restrict picketing, regardless of whether or not such restrictions could be justified under s. 1.

[41] I recognize, of course, that the *Code* does regulate expression, for example in prohibiting sexual or racist comments in the workplace or by service providers that constitute harassment. The difference in this case is that peaceful picketing and protest by a union who is not the service provider are at the core of these rights, and unlike sexual harassment or racist comments, it is far from the heart of what the *Code* is intended to govern.

The Claimants' Arguments Would Extensively Involve the Tribunal in Regulating Picketing and Labour Relations

[42] In deciding whether the *Code* should be interpreted as the claimants suggest, it is also relevant to consider the consequences of the interpretation they propose. While they attempt to limit their submissions to situations of community living and picketing, the logic they rely upon is not nearly so narrow. There are numerous situations in which legal picketing could affect people's homes, or have a particular impact upon them because of a protected ground under the *Code*. The claimants' logic could require unions to show that their picketing of seniors' homes, mental health facilities, women's shelters or public housing accommodated the residents to the point of undue hardship. It would, in essence, set up the Tribunal as a separate regime for control of picketing in certain types of workplaces, in addition to the common law and labour relations laws. Indeed, their logic could apply not only to the union's actions in picketing, but to strikes or lockouts themselves, which may have many of the same effects on the claimants. In my view, it is important to be cautious about these consequences, in particular given the careful balance between the rights of management and unions that labour relations law establishes.

CONCLUSION

[43] In summary, I find that the picketing falls neither within the social area of services nor occupancy of accommodation. The *Code* was not intended to regulate this type of conduct. There is no involvement by the respondents in service or accommodation provision sufficient to engage the *Code*, since the employees were acting as union members rather than service providers at the time. The *Charter*-protected rights of picketing and the consequences of the interpretation proposed by the applicants also favour an interpretation which would exclude the application of the *Code* to these respondents, assuming all the facts alleged by the applicants to be true. The Applications have no reasonable prospect of success.

[44] This conclusion does not mean that the claimants have no legal recourse to deal with their concerns about picketing. They may be able to put forward their concerns about the effect on them in other types of legal proceedings, or perhaps make a claim under the *Code* against the service providers or government. The claims made here against the unions, however, are not covered by any of the social areas in the *Code*.

ORDER

[45] The Applications are dismissed.

Dated at Toronto, this 16th day of July, 2012.

David A. Wright

David A. Wright
Associate Chair