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TALKING UNION IS A BI-MONTHLY NEWSLETTER HIGHLIGHTING  
MATTERS OF INTEREST TO THE LABOUR RELATIONS COMMUNITY

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**ONTARIO COURT OF APPEAL AFFIRMS IMPORTANT UNION AND EMPLOYEE RIGHTS IN  
BANKRUPTCY**

With increasing frequency, collective bargaining law and insolvency law collide and produce results that often disadvantage workers and trade unions. However, in an important recent decision called *TCT Logistics*, the Ontario Court of Appeal has signalled a much needed change in direction.

The *TCT Logistics* case concerned a series of related employer/sale of a business/unfair labour practice applications brought against a bankrupt predecessor employer, the purchaser of the business and an interim receiver who was later appointed as trustee in bankruptcy. The Ontario Labour Relations Board would not entertain the applications, however, because the applicant union had not sought or obtained the permission of the bankruptcy court. When the union appeared before the bankruptcy court, the judge denied it permission to have the case heard at the labour board on the basis of the Court's own assessment that the interim receiver was not a "successor employer" under the *Labour Relations Act*. On appeal, a majority of the Court of Appeal ruled that:

- The provision in the receivership order that deemed that the receiver was not a "successor employer" could not stand. That portion of the order was not authorized by the *Bankruptcy and Insolvency Act*. Furthermore, the labour relations board has unequivocal, exclusive jurisdiction to decide who is, and who is not, a successor employer for labour relations purposes *in every case*.
- The practice of receivers attending on bankruptcy judges *ex parte* with draft orders that give the receiver extensive powers, while at the same time cloaking it with immunity from responsibilities to parties who are not before the court *can no longer be sanctioned*.
- Despite what a number of other courts have ruled, a collective agreement does not terminate on bankruptcy. The status of a collective agreement is governed by the *Labour Relations Act* and is only terminated in specific circumstances set out under the Act. It follows that a collective agreement can bind a successor employer who takes over the business of the debtor if the labour board so declares.

- The bankruptcy court can use the *Bankruptcy and Insolvency Act* in a proper case to deny permission to bring a successor employer proceeding against a trustee or receiver before the labour relations board.
- In this case, the bankruptcy court erred when it denied the union permission to have its applications heard by the labour board. The union should return to the bankruptcy court to have the issue properly decided according to the correct legal test.

In dissent, Mr. Justice MacPherson wrote that the Court of Appeal should have itself determined whether the applications could be heard by the labour relations board and it should have granted the union permission to proceed against the receiver. He also said this:

"In a bankruptcy context, as in any other employment context, the position and rights of employees must be considered and respected, including by the receiver and the bankruptcy judge. Moreover, if a collective agreement is in place, the receiver and the bankruptcy judge cannot ignore it. Specifically, the receiver cannot 'cherry pick' the terms of the collective agreement, and seek court approval for such a decision. If the receiver seeks to operate the debtor company as a going concern with a view to a future sale, it will need to involve the employees and their union in an open, honest and comprehensive discussion about the basis on which the employees will continue their employment during the receivership. If the receiver proposes to change any of the terms of employment or provisions in the collective agreement during the receivership, it will need the consent of the employees and their union."

The receiver is currently considering whether it will seek to appeal this decision to the Supreme Court of Canada.

### **LABOUR ARBITRATORS ENTITLED TO LESS DEFERENCE**

For many years, the courts have noted that the distinctive characteristics of labour relations warrant a high degree of judicial restraint and self-control. Accordingly, when asked to set aside decisions of arbitrators interpreting a collective agreement, the courts have said that they will do so only when an arbitrator's decision is "patently unreasonable". In a recent decision, however, the Supreme Court of Canada has determined that a somewhat lower standard of deference is appropriately paid to arbitrators' decisions of this kind.

*Voice Construction Ltd.* was an entirely straightforward labour arbitration case. The union grieved the company's refusal to employ a labourer dispatched from its hiring hall. Reading the collective agreement as a whole, the arbitrator found that the company was required to hire all qualified workers properly dispatched by the union. The Alberta Court of Queen's Bench quashed the arbitrator's decision. The Court of Appeal agreed with the court below on the basis that "management rights in this area are a critical pillar in modern industrial relations...[and] only an unruffled hiring and selection process can contribute to [the completion of work on deadline]." A more dispassionate Supreme Court of Canada allowed the union's appeal, set aside the ruling of the Alberta court, and restored the arbitrator's decision.

The Supreme Court of Canada first determined the standard of review. It ruled that the applicable standard of review of an arbitrator who is not protected by a full privative clause, who is seized of a problem of pure collective agreement interpretation and whose decision does not require "polycentric" decision-making is "reasonableness" – not the "patently unreasonable standard". In other words, because the case did not require the consideration of broad policy issues and because courts have some expertise in interpreting contracts, a certain degree of curial deference was appropriate – but not too much. Ultimately, on the facts of the case, the Court was satisfied that there was a reasonable basis for the arbitrator's decision and that it should not, therefore, be disturbed.

### **WHO CAN RULE ON ALLEGATIONS OF CONFLICT OF INTEREST?**

Does the Ontario Labour Relations Board have the jurisdiction to direct lawyers for a party to cease representing that party before the Board? In a series of decisions over the last 15 years, the Board has doubted that it has that authority and it has consistently refused to entertain requests to remove counsel for alleged conflicts of interest. But in a recent decision of the Ontario Superior Court of Justice, the Mr. Justice Nordheimer concluded that the Board has that very jurisdiction under the *Statutory Powers Procedure Act* and that it is for the Board to exercise it when the matter is properly raised before it.

The issue arose recently in the context of ongoing litigation at the Board involving various locals of the Labourers' International Union of North America, the Ontario Provincial District Council of the Labourers' International Union of North America, and the International union. The Board, however, declined to inquire into the alleged conflict of interest, so an application in the Superior Court of Justice was commenced.

Mr. Justice Nordheimer concluded that the Board and the courts exercise *concurrent* jurisdiction over matters of alleged conflict of interest by counsel and that, in this case, the Board was the *more* suitable body to determine the issue. He ruled that the Board is in a much better position "with its specialized knowledge and expertise to know whether the lawyer or law firm is in possession of confidential information, whether the confidential information is relevant to the issues that the Board has to determine and whether that confidential information could be used to the detriment of the objecting party". Finally, in a mild rebuke directed at the Board, the Court added: "...the possibility that on a subsequent judicial review of any decision that the Board might reach on the issue, the court 'would not likely defer to the Board's judgment in this area' is not a proper basis for the tribunal to decline to decide the issue in the first instance".

### **FEDERAL BILL C-45 PROCLAIMED IN FORCE**

Bill C-45, which received Royal Assent on November 7, 2003, was proclaimed into force effective **March 31, 2004**. The enactment amends the *Criminal Code* to impose corporate accountability for criminal health and safety offences. Bill C-45 outlines rules for attributing criminal liability to "organizations" – including corporations and trade unions – for acts of their representatives. "Representative" is broadly defined to include directors, partners, employees, members, agents or contractors. The Bill also establishes a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public.

### **COMPASSIONATE CARE EMPLOYMENT INSURANCE BENEFIT NOW IN EFFECT**

The Employment Insurance Compassionate Care Benefit came into effect on January 4, 2004. Workers eligible for Employment Insurance (EI) will be entitled to up to six weeks of Compassionate Care Benefits to provide care or support to a gravely ill family member with a significant risk of death within 26 weeks. Family members include a spouse or common law partner, a parent, the spouse or common law partner of a parent, a child, or a child of the spouse or common-law partner. Care or support to a family member means providing psychological or emotional support, or arranging for care by a third party, or directly providing or participating in the care. A medical certificate from a physician indicating that the family member is gravely ill and needs care or support is required to obtain the benefit. While more than one family member may claim the benefit, the total number of weeks of benefit paid in any 26 week period cannot exceed six weeks for all family members.

Currently, employers in Ontario are not obligated to give their employees unpaid time off work for the duration of the benefit period, but recently announced changes to the *Employment Standards Act* (described below) will soon alter that situation.

### **EMPLOYMENT STANDARDS ACT TO INCLUDE FAMILY MEDICAL LEAVE**

The Ontario Government has recently introduced amendments to the *Employment Standards Act* ("ESA") to allow employees up to 8 weeks of job-protected, unpaid leave while caring for a gravely ill family member with a significant risk of death within 26 weeks. The *Employment Standards Amendment Act (Family Medical Leave), 2004* (Bill 56) would, if passed, apply to all employees covered by the ESA, including part-time employees. Family medical leave would require an employee to obtain a supporting medical certificate and to provide notice of the leave. Family medical leave would be *in addition* to the emergency leave provisions in the ESA so that employees eligible for emergency leave would have full entitlement to both leaves.

Under Bill 56, employees would not be required to have worked a specific length of time in order to qualify for the leave and they would earn seniority and credit for length of service and length of employment while on leave. While an employee is on leave, the employer would have to continue to pay its share of the premiums to certain benefit plans (*i.e.*, pension plans, life and extended health insurance plans, accidental death plans and dental plans) that were offered before the leave. Bill 56 is expected to become law this spring.

### **HUMAN RIGHTS TRIBUNAL ORDERS EXTENSIVE REMEDIES IN SEXUAL HARASSMENT CASE**

The Human Rights Tribunal of Ontario is the statutory body that hears unresolved complaints under the *Human Rights Code* that are referred to it by the Ontario Human Rights Commission. The Tribunal conducts hearings, determines complaints and decides on the appropriate remedial order(s). In unionized workplaces, labour arbitrators enjoy shared jurisdiction for such complaints, which proceed as grievances under a collective agreement. In a recent decision, *August v. Hetherington*, the Tribunal allowed a complaint of discrimination in employment on the basis of sexual harassment and reprisal and provided an unusual and extensive set of remedies. The respondents were directed to: pay to the complainant \$10,000 for her mental anguish, \$50,000 for the loss arising from the infringement of her statutory rights, and \$8000 in damages for the reprisal. The personal respondent was ordered to report to a psychologist or psychiatrist "to determine the nature of his malady" and for counselling. He was also directed to give a copy of the Tribunal's decision to the psychologist or psychiatrist consulted, to post a copy of it at his business premises "where any visitor to that premises would see it" and to give a copy of the Tribunal decision to any person who seeks to be in his employment for the

next 2 years. The \$50,000 award for the infringement of the complainant's rights and the order to attend for a psychiatric or psychological assessment are both without precedent in Ontario.

### **KOSKIE MINSKY'S LABOUR BOARD BRIEFS**

Koskie Minsky LLP produces an electronic newsletter known as *Labour Board Briefs* that is available by e-mail at no cost to interested readers. It aims to report on decisions issued by the Ontario Labour Relations Board within a week or two of their release date and to provide readers with the most timely information possible about the state of the law at the Ontario Labour Relations Board. If you are interested in receiving *Labour Board Briefs*, please contact us at rlebi@koskieminsky.com and provide your e-mail address.

### **WHAT'S NEW?**

#### **At Koskie Minsky LLP:**

**New lawyer:** **Clio Godkewitsch** has joined the firm's pension department. She can be reached at (416) 595-2120.

#### **At the OLRB:**

**New Vice-Chairs:** **Ian Anderson**, formerly counsel with the United Food and Commercial Workers International Union, Local 1000A and **Peter Chauvin**, formerly a partner at Miller Thomson LLP, have been appointed full-time Vice-Chairs effective March 24, 2004. **Kelley Waddingham**, formerly a lawyer with Ryder, Wright, Blair and Doyle, has been appointed a part-time Vice -Chair effective April 7, 2004.