



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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### **TIME LIMITS SET ASIDE WHERE EMPLOYER ENGAGES IN "FRAUDULENT CONCEALMENT"**

An employer who terminates an employee is under a legal obligation to provide accurate information about the employee's statutory rights. In a recent decision, the Ontario Court of Appeal held that to do otherwise is an "abuse" of the "special relationship" between an employer and employee in such circumstances.

In *Halloran v. Crown Cork and Seal Canada Inc.*, an employee delayed more than 5 years before making a claim for severance pay under the Employment Standards Act ("ESA"). At the time, the ESA contained a two-year limitation period. (The limitation period is now only 6 months.) An Employment Standards Officer and, later, a Referee under the ESA held that the claim was statute-barred because it was filed too late. However, the Divisional Court and, now, the Court of Appeal for Ontario disagreed.

The Court of Appeal found that the employee had delayed filing his claim because he relied on his employer's categorical representation that its severance package "exceeded provincial requirements". But that representation, it turns out, was wrong. The employee eventually filed his claim years later only after learning of a court decision involving his former employer's obligation to pay severance pay to some other employees. The Court of Appeal ruled that it was "unconscionable" for the company to invoke the ESA's limitation period to deny the employee's claim when the employer was responsible for his delay in filing the claim. As a result, applying the doctrine of "fraudulent concealment", the Court determined that the limitation period in the ESA did not apply.

Since 1996, alleged violations of the ESA that take place in a unionized setting may only be pursued under the grievance arbitration provisions in a collective agreement - where time limits are usually measured in days, rather than months. The potential affect of this decision on the application of those time limits remains to be seen.

### **CIRB SETS SENIORITY INTEGRATION RULES**

The Canada Industrial Relations Board has issued its first decision under its new statutory mandate to deal with seniority issues when bargaining units have been consolidated. In the Air Canada case, the CIRB set aside an arbitration award concerning the merger of seniority lists for pilots at Air Canada. The 90-page decision marks a departure from both the previous Canadian and US merger cases, particularly in the CIRB's emphasis upon the preservation of existing collective agreement rights, which it interprets as the fundamental objective of the Canada Labour Code in the context of industry restructuring.

The arbitrator's award that was quashed by the CIRB strongly favoured Air Canada pilots over former Canadian Airlines pilots. His award was based on what the arbitrator described as the "cold hard fact" that the former Canadian Airlines pilots had been employed by a failing airline, and that their jobs were "saved" by Air Canada upon the merger of the airlines. For that reason, the arbitrator indicated that a substantial "premium" was necessary to preserve the legitimate expectations of career progression of the Air Canada pilots, and to prevent the windfall of former Canadian Airline pilots acquiring additional benefits from the merger at the expense of the Air Canada pilots.

The principal reason that the CIRB overturned the award was the arbitrator's failure to adequately consider the principles of the Code. In this context, this meant the "preservation of existing bargaining rights and bargained for rights". In the Board's view, the Code requires a careful analysis of the collective agreement entitlements that each employee group brought with it into the merger, rather than an examination of the economic circumstances of the companies that were subject to the merger. Where, as here, the collective agreements of the two groups were identical, the equities were essentially identical. And the arbitrator's provision of "premiums" and "discounts" on the basis of the companies' relative economic performance was, according to the Board, wrong and contrary to the principles of the Code.

The CIRB ordered the parties to attempt to negotiate a new integrated seniority list (with or without the assistance of the arbitrator or another arbitrator) and gave them 120 days to complete the task. Failing agreement, the CIRB retained jurisdiction to resolve the matter.

An application to judicially review the CIRB's decision has already been initiated.

### **ARBITRATOR DECLINES TO DIRECT "LOCAL AREA MODIFICATION" OF PROVINCIAL AGREEMENT**

In the first decision of its kind, a "final offer selector" has heard and dismissed an application for "local area amendments" to a construction industry provincial agreement.

In Ontario Painting Contractors Association, the arbitrator dismissed an employer's application to "remove competitive disadvantage and

regain market share" by making a number of changes to the provincial agreement (including changes to wages, vacation pay, pension contributions, shift premiums and overtime) in the Ottawa area. The application had been brought under a new provision in the Painters' provincial agreement that had been included as an alternative to sections 163.2 and 163.3 of the Labour Relations Act. (Readers will remember that these sections were introduced into the Act by Bill 69 in December 2000. Bill 69 set up quite a complicated process for local area modification of provincial agreements in the ICI sector.)

Under the Painters' provincial agreement, as under Bill 69, an arbitrator may make local amendments to the provincial agreement through a process of Final Offer Selection. But the arbitrator may act only where employers bound by the provincial agreement are at a "competitive disadvantage". In this case, the arbitrator was left unsatisfied that unionized contractors in the Ottawa area were having difficulty obtaining certain painting work because of the provisions of the provincial agreement. Instead, the arbitrator concluded that to the extent that unionized contractors were having difficulties in this respect, they were due to factors unrelated to the operation of the provincial agreement, or irrelevant to the issue. Indeed, the arbitrator accepted the union's main submission: that the "underground economy" was a significant competitive factor in the painting market in the Ottawa area, but that this could not be considered a relevant factor in the application. Because the employer failed to verify a "competitive disadvantage", the arbitrator dismissed the application. The arbitrator, however, went on to note that if he had to choose between the competing "final offers" put to him by the parties, he would have selected the Union's final offer as doing the most to address the alleged competitive disadvantage while least altering the collective agreement.

## **BOARD STAYS APPLICATIONS INVOLVING INTERIM RECEIVER/TRUSTEE IN BANKRUPTCY**

The Ontario Labour Relations Board has, on several occasions, found court appointed (and even privately appointed) receivers to be successor employers under the Labour Relations Act.

In a recent decision, however, the Board concluded that it would not entertain the union's sale of a business/related employer/unfair labour practice applications - all of which named an interim receiver who was later appointed as trustee in bankruptcy, as responding parties - because the union had failed to seek or obtain the permission of a judge of the Superior Court of Justice to bring the applications. In the Spectrum Supply Chain Solutions case, the Board distinguished a number of earlier labour board decisions and relied on section 215 of the Bankruptcy and Insolvency Act to stay the union's applications pending permission from the Superior Court of Justice to proceed. Section 215 bars an "action" against a receiver or trustee regarding any action arising out of its statutory duties. The Board found that an "action" includes an application to the Board and that the "privative clause" in the Labour Relations Act does not immunize Board proceedings from the effect of the Bankruptcy and Insolvency

Act.

The Board held that leave of the Court must first be sought in order to ensure fairness and order in the insolvency process and to avoid a multiplicity of proceedings.

## **WHAT'S NEW?**

### **AT KOSKIE MINSKY:**

**New Lawyer:** Jonathan Ptak has joined the firm's civil litigation department. He can be reached at (416) 595-2149.

**New Electronic Newsletter:** Koskie Minsky is pleased to introduce a new electronic newsletter - available by e-mail at no cost to interested readers. Labour Board Briefs is a regular digest of significant decisions issued by the Ontario Labour Relations Board. It aims to report on decisions 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 [publications@koskieminsky.com](mailto:publications@koskieminsky.com) and provide your e-mail address.