



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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**BERRY V. PULLEY:
SUIING UNION MEMBERS**

In a recent decision called *Berry v. Pulley*, the Supreme Court of Canada ("SCC") has discarded the "legal fiction" that union members are joined to each other through a web of individual contracts. That idea first arose in Canada over 40 years ago as a way for judges to exert jurisdiction over the internal affairs of trade unions. As a result of the SCC's new analysis of the legal relationship between unions and their members, the Court tossed out one part of a lawsuit filed by a group of union members against another group of (former) union members. That suit alleged that the former union members had violated the union's constitution and in so doing had breached their individual contracts with other members. The plaintiffs claimed \$300 million in damages.

In its unanimous decision, the SCC decided that no union member can be held personally liable to other members in a breach of contract action based on the terms of the union constitution and dismissed that portion of the claim.

The court reviewed its historical approach to trade unions as unincorporated associations. Since the 19th century, Canadian law has recognized that trade unions have legal status for some purposes, but not for others. For example, the law permits trade unions to enter into enforceable collective agreements, but unions have no status to sue or be sued in the courts. The SCC has now decided that trade unions must be considered to have legal status to enter into contracts with their members, so that when an individual joins a trade union, a contract is created between the individual and the trade union. The terms of the contract are set out in the union's constitution. According to Mr. Justice Iacobucci, "a member wishing to sue his or her union for breach of the constitution is not impeded by a lack of legal status." (This last statement should be read cautiously, at least in Ontario, because the Rights of Labour Act says that a trade union may not be made a party to any action in any court "unless it may be so made irrespective of any of the provisions of this Act or the Labour Relations Act".)

Importantly, the SCC recognized that allowing disagreements

between union members to result in court claims against their personal assets would have a chilling effect on union democracy. It also seemed to understand that trade unions might find it difficult to recruit members or obtain new bargaining rights if joining a trade union exposed individuals to personal liability in damages to other members for alleged breaches of the constitution. Further, if union members were permitted to bring suit against other members instead of resorting to internal dispute resolution mechanisms where breaches of the constitution were alleged, the ability of unions to resolve internal conflicts would be hindered. This loss of control over internal affairs would undermine the ability of unions to present a united front to employers and pursue the collective interests of their members. The Court seemed sensitive to all of these concerns in dismissing the multi-million dollar breach of contract action.

OLRB GRANTS SUBSTANTIVE INTERIM RELIEF

The Ontario Labour Relations Board ("OLRB") has granted substantive interim relief under the Statutory Powers Procedure Act ("SPPA") for the first time since the interim order provisions of the Labour Relations Act were amended in 1998.

In *OPSEU v. The Crown in Right of Ontario* (Board No. 0107-02-OH), the OLRB was seized of a reprisal complaint under the Occupational Health and Safety Act ("OHSA"). The union alleged that the employer had violated the OHSA by failing to conduct a stage 1 investigation following a work refusal and by failing to pay the refusing workers pending completion of that investigation. The employer asserted that it had no knowledge that the workers' refusal had a health and safety rationale and it denied that the failure to pay wages was an unlawful reprisal.

On the basis of the pleadings and the representations of counsel, and pursuant to section 16.1 of the SPPA, the OLRB directed the employer to meet with the refusing workers and conduct the investigation required under the OHSA. The Board was also satisfied that the refusing workers had a prima facie entitlement to be paid, at least as of the date that the OHSA application was filed. It ordered the employer to pay all wages lost between the application filing date and the date of the stage 1 investigation, provided the workers authorized the employer to recover the payments should the Board later determine that they were not entitled to be paid.

The Board had never before made an interim order requiring the payment of lost wages.

Prior to the 1998 amendments to the Labour Relations Act, the OLRB issued dozens of substantive interim orders, including orders reinstating discharged employees, restraining lay-offs, and granting unions interim exclusive bargaining agency status. Those orders usually issued very quickly in response to a variety of labour relations problems. The amended Act now limits the OLRB to making interim orders regarding procedural matters only and the substantive interim order provisions of the SPPA do not apply. Nevertheless, as this decision demonstrates, the OLRB continues to have the power to

make substantive interim orders in cases under the various other statutes that it administers, including the OHSA, the Employment Standards Act, and the Public Sector Labour Relations Transition Act. It remains to be seen whether the Board has the appetite to exercise its interim order jurisdiction in other cases when invited to do so.

ARBITRATORS AND HUMAN RIGHTS COMMISSION SHARE JURISDICTION

The Ontario Court of Appeal has confirmed that labour arbitrators and the Ontario Human Rights Commission have concurrent jurisdiction to apply the Human Rights Code to workplace disputes. In *Ford Motor Co. v. Naraine* (Court File C32965), the Court rejected the argument that the SCC ruling in *Weber* applied to oust the jurisdiction of the Board of Inquiry under the Human Rights Code where a labour arbitrator had already heard and dismissed an employee's discharge grievance. The Court noted that the Commission has authority under s. 34(1)(a) of the Code to decide, in its discretion, not to deal with a complaint where it is of the view that the complaint "could or should be more appropriately dealt with" under another Act (such as the Labour Relations Act).

Indeed, the Human Rights Commission regularly exercises that discretion when dealing with complaints filed by employees who work in unionized workplaces. But because the decision whether to proceed with the grievance of a unionized employee is the union's and not the employee's, and because in an arbitration under a collective agreement, only the employer and union have party status, deferral to arbitration is not always appropriate.

CRIMINAL CONVICTIONS AT ARBITRATION: SCC TO DECIDE

In September 2001, TALKING UNION reported that the Ontario Court of Appeal had ruled that an employee who has been discharged and also convicted of a criminal offence may not, except in exceptional circumstances, use the grievance arbitration procedure to contest an allegation of criminal conduct. The Supreme Court of Canada has now granted leave to appeal this decision. Koskie Minsky counsel Craig Flood will be representing OPSEU in the appeal, which is expected to be heard in February 2003.

SCC TO RULE WHETHER CANADIAN HUMAN RIGHTS TRIBUNAL INDEPENDENT

In May 2001, TALKING UNION noted that the Federal Court of Appeal ("FCA") had allowed the unions' appeal in the Bell Canada pay equity case. The FCA accepted that the Canadian Human Rights Tribunal is an independent, unbiased, quasi-judicial tribunal. The FCA decision allowed the Tribunal hearing to resume and the seven complaints filed against Bell Canada between 1990 and 1994 to continue. The Supreme Court of Canada has now granted leave to appeal from the FCA's decision. Our Larry Steinberg will be representing the CTEA in the appeal.

WHAT'S NEW?

AT KOSKIE MINSKY:

New Lawyer: Ron Lebi, formerly Solicitor at the Ontario Labour Relations Board has joined the firm's labour department. Ron has extensive experience in the area of labour law and administrative law. He can be reached at (416) 595-2148.

AT PPI:

Public Perspectives Inc., in cooperation with Koskie Minsky, has established an Affordable Housing Team to facilitate the delivery of affordable housing projects from concept to completion. Contact Margaret Rodrigues at (416) 595-2132 or visit www.publicperspectives.com for more information.

LEGISLATIVE NEWS

Privacy legislation: The government has now completed its public consultations on Ontario's new privacy legislation, which will be effective January 1, 2004. Trade unions hold some personal information for their members and their employees and are expressly covered by the federal and proposed provincial laws. Trade unions in the federal sector should have privacy policies and procedures in place now. Provincial unions should be getting ready. Need help? Call Elizabeth Mitchell of the KM/PPI Privacy Group at (416) 595-2095 to discuss.