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

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## **ARBITRATORS MAY ENFORCE HUMAN RIGHTS CODE, SUPREME COURT RULES**

Labour arbitrators have both the power and the responsibility to enforce rights and obligations under the *Human Rights Code*, the Supreme Court of Canada has ruled.

In *Parry Sound Social Services Board v. OPSEU*, a majority of the Court held that employers' "management rights" are subject, not only to the express provisions of the collective agreement, but also to the *Human Rights Code* and other employment-related statutes. According to the Court, "human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract". In other words, the parties to a collective agreement may add to these statutory rights, but they may not detract from them.

In the *Parry Sound* case, an employer discharged an employee during her probationary period. The collective agreement provided that probationary employees could be discharged for any reason satisfactory to the employer and that such action by the employer could not be questioned in the grievance arbitration process. Despite this provision, the union grieved. It alleged that the grievor's discharge was motivated by unlawful gender discrimination and that the Board had jurisdiction to deal with the discharge as an alleged violation of the *Human Rights Code*. The arbitrator agreed and so, eventually, did a 7-2 majority of the Supreme Court of Canada.

In reaching its conclusion, the majority of the Court rejected the argument that an arbitrator has the power to interpret and apply the *Human Rights Code* if – but only if – it already has jurisdiction to hear the grievance. The Court noted that the right of a probationary employee to equal treatment without discrimination is "implicit" in every collective agreement and a grievance alleging denial of that right is, for that reason, arbitrable in any event. The Court was also influenced by policy considerations. Its

holding, the Court said, bolsters human rights protection and promotes the prompt, informal and inexpensive resolution of workplace disputes.

Finally, the Court had occasion to consider (and reject) a technical argument made by the employer having to do with the union's failure to refer to either the *Human Rights Code* or the *Employment Standards Act* in its written grievance. The Court embraced an approach to grievance arbitration first announced by the Ontario Court of Appeal more than 25 years ago in the *Blouin Drywall* case: Grievance arbitration cases, wrote the Court, should not be won or lost on technicalities. Instead, grievances should be liberally construed so that the real complaint is dealt with and the appropriate remedy is provided.

### **CCAA TRUMPS WORKER SAFETY, COURT RULES**

In a recent decision involving Air Canada, Ontario's Superior Court of Justice has affirmed its jurisdiction to "temporarily" stay federal regulators (including workplace health and safety regulators) pursuant to the *Companies Creditors Arrangement Act* ("CCAA") and the court's "inherent jurisdiction".

Since April 1, 2003, federal regulators have been powerless to enforce federal legislation at the airline because of the extensive "stay" of proceedings ordered by the Court. In the *Air Canada* case, the federal Attorney General argued that the Court has no jurisdiction to stay federal regulators and that the health and safety provisions of the *Canada Labour Code* explicitly prevail over other legislation, including the CCAA. Mr. Justice Farley rejected each of these arguments. He held that the CCAA is remedial legislation in its "purest sense" and that the "proceedings" to be stayed under that Act are not limited to those involving economic, financial or commercial rights. There was nothing, wrote the Court, to oust the Court's inherent jurisdiction to "do justice between the parties" and to "do what practicality demands" in insolvency situations. Finally, according to Justice Farley, the *Canada Labour Code* provision that the Code applies "notwithstanding any other legislation" had no application in this case because the stay – anticipated to run 9 months – is not permanent and, for that reason, created no "conflict".

This decision appears to recognize a hierarchy of "rights" – with those associated with restructuring a debtor company at the top, and the statutory rights of workers below. The Attorney General has initiated an appeal of this decision.

### **BOARD ADOPTS NEW DESCRIPTION OF BOARD AREA 8**

In response to an application made by the General Contractors' Section of the Toronto Construction Association ("TCA"), the Ontario Labour Relations Board has adopted a new, detailed, 2 ½ page, on-the-ground, boundary description of Board Area No. 8. The description is meant to allow construction industry parties to determine, with certainty, whether a particular project is in, or outside, Board Area 8.

During the course of this labour board proceeding, and after noting the deficiencies of the description initially proposed by the TCA, the Toronto-Central Ontario Building and Construction Trades Council developed its own proposed description. The TCA subsequently accepted that description, except with respect to one issue (regarding the lake beds of Lake Simcoe and Lake Ontario) that the Board was asked to adjudicate. In the end, the Board accepted the Council's position that Board Area 8 extends to the middle of Lake Simcoe and, with respect to Lake Ontario, to the international boundary. Copies of the detailed Board Area 8 description are available from the Board.

### **CONSTITUTIONAL CASES AT THE OLRB**

Canadian courts have frequently held that constitutional issues involving labour relations legislation should be decided by labour tribunals and only later, if necessary, by reviewing courts. A number of important constitutional cases are to be heard by the Ontario Labour Relations Board this fall.

In *Great Blue Heron Gaming Co.*, the Board will decide whether the *Labour Relations Act* has no effect on the labour relations of the employer – a casino operated on First Nation land – by virtue of the enactment of the *Mississaugas of Scugog Island First Nation Labour Relations Code* and/or aboriginal or treaty rights of the Mississaugas of Scugog Island First Nation recognized in the Constitution Act and the Indian Act and/or the inherent rights to self-government of the Mississaugas of Scugog Island First Nation.

In *Kingsville Rol-Land Farms*, the Board will consider whether s. 3(b.1) of the *Labour Relations Act*, which denies collective bargaining rights to agricultural employees covered by the *Agricultural Employees Protection Act, 2002* is contrary to the *Charter of Rights and Freedoms*. This issue arises as a result of a certification application brought by UFCW for employees of a mushroom farm. In this case, an overwhelming majority of the employees (132-45) voted in favour of union representation in a Board-supervised secret ballot representation vote.

Finally, in *Greater Essex County District School Board* and in *Windsor Essex Catholic District School Board*, the Board will determine whether the "non-construction employer" termination provisions described in s. 127.2 of the *Labour Relations Act* are void as contrary to sections 7 and 15 of *Charter*.

### **ARBITRATOR REJECTS EMPLOYER APPLICATION FOR LOCAL AREA AMENDMENT TO PROVINCIAL AGREEMENT**

An arbitrator has once again heard and dismissed an employer application for "local area amendments" to a construction industry provincial agreement. Under the Bill 69 amendments to the *Labour Relations Act*, 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 the *Labourers Employer Bargaining Agency* case – only the second such case decided since Bill 69 was enacted – Arbitrator R.O. MacDowell considered, and rejected, the employer's submission that its members were at a "competitive disadvantage" in performing form work in the London area. One year ago, Arbitrator George Surdykowski dismissed a similar application brought by the Ontario *Painting Contractor's Association* proposing changes to the provincial agreement in the Ottawa area (see the August 2002 issue of **Talking Union**). An application for judicial review of the *Ontario Painting Contractors* decision was heard by the Divisional Court in June 2003 and is under reserve.

## **PIPEDA MAKES IMPACT ON LABOUR RELATIONS**

The *Personal Information Protection and Electronic Documents Act* ("PIPEDA") applies to federal organizations that collect, use, and disclose personal information about customers, clients and employees. The labour relations impact of PIPEDA is only now beginning to be felt. Three recent cases illustrate the point.

In the *Via Rail* case, Arbitrator Weatherhill considered whether Via Rail was required to provide the Union with the home addresses and telephone numbers of employees in accordance with the collective agreement or whether providing the information would violate PIPEDA. The Union needed the contact information in order to conduct national elections. The arbitrator found that Via Rail was required to comply with PIPEDA, that the information requested constituted personal information, that the collective agreement required Via Rail to provide the information to the Union so that it could communicate with its members, and that the provision did not violate PIPEDA. The decision of the arbitrator was based, in part, on his finding that the Union's purpose in collecting and using the information complied with section 5(3) of the Act namely, it would be considered by a reasonable person to be appropriate in the circumstances and the fact that, in view of the role of the Union under the *Canada Labour Code*, employees had implicitly consented to the Union having this information. The arbitrator also found that the Union was required to comply with PIPEDA.

In *Rosedale Transport Ltd*, the issue was whether a surreptitious video surveillance tape of the grievor was admissible at arbitration proceedings. Adjudicator Brunner, in an adjudication under section 242(1) of the *Canada Labour Code*, found that PIPEDA applied to the employer, that the videotape captured personal information that was collected without the grievor's consent, and that the employer breached PIPEDA when it collected that information because the collection was not reasonable for any purpose relating to the investigation of a breach of the employment agreement. In reaching his decision on this last point, the adjudicator applied the principles which arbitrators have generally used to determine if video tape evidence is admissible at arbitration in cases where PIPEDA did not apply.

Finally, the *Dorval Airport* case concerned access to an employee's personal information by an employer's labour relations department and her bargaining agent. The applicant had complained to the Privacy Commissioner of Canada when her employer refused her requests for personal information about prior complaints against her and then sent copies of its refusal to the Union and to the employer's labour relations coordinator. The Commissioner found that it was appropriate for the company to notify the labour relations coordinator of its refusal, but that notifying the Union breached PIPEDA. Unhappy with this result, she applied to the Federal Court Trial Division for review. The Federal Court concluded, however, that the dispute arose from the collective agreement and was

exclusively a matter for arbitration under the Canada Labour Code. The Court decided that neither the Commissioner, nor the Federal Court, had jurisdiction in this matter.

Even though it was not necessary for the Court to address the merits of the application, the Court did take the opportunity to state that in a collective bargaining context it would not be unreasonable to expect that correspondence between the employer and the employee would be copied to the union. In addition, the Court stated that the employer had a duty to do so under both the collective agreement and the Canada Labour Code since any direct communication between the employer and the employee without union involvement might amount to an unfair labour practice. This decision is being appealed.

Although PIPEDA currently applies only in the federal jurisdiction, unless the Province of Ontario passes legislation that is substantially similar before the end of the year, the federal statute will also apply to organizations in Ontario that collect, use, and disclose personal information in the course of a commercial activity as of January 1, 2004. PIPEDA will not, however, apply to the personal information of employees of organizations that are governed by Ontario's Labour Relations Act.

## **WHAT'S NEW**

### **KOSKIE MINSKY LECTURE in LABOUR LAW:**

Koskie Minsky, together with the University of Western Ontario, are proud to present the Inaugural Koskie Minsky University Lecture in Labour Law to be delivered by **Professor Harry Arthurs** on Friday, October 17, 2003. Professor Arthurs is one of Canada's most distinguished lawyers, educators and legal scholars. His lecture is titled "Whose Afraid of Globalization? Speculations on the Future of Canadian Labour Law". The event will be held at the UWO Faculty of Law Building at 5:30 pm on October 17, 2003 and will be followed by a reception at the Faculty of Law Library.

The lecture is open to the public and is free of charge. It will be co-chaired by Craig Flood of Koskie Minsky and Prof. Michael Lynk of the University of Western Ontario Faculty of Law.

For further information, please contact Craig Flood (416) 595-2105 or [Cflood@koskieminsky.com](mailto:Cflood@koskieminsky.com), or Claudia Vicencio, Faculty of Law [cvicenci@uwo.ca](mailto:cvicenci@uwo.ca).

## **CONFERENCES:**

Koskie Minsky lawyer **Craig Flood** will co-chair the Fall 2003 "Health and Safety Law Conference" to be held at the Metro Toronto Convention Centre on October 2, 2003. The conference is presented by the University of Toronto Centre for Industrial Relations and Lancaster House. For further information phone (416) 977-6618.



BARRISTERS & SOLICITORS

Koskie Minsky lawyer **Elizabeth Mitchell** will be speaking on “Meeting and Exceeding the Duty to Accommodate and Other Key Human Rights issues” at the 8th Annual Forum on Union/Management Relations to be held in Toronto on December 3 and 4, 2003.

**AT KOSKIE MINSKY:**

*New Lawyer:* **Kathleen Riggs** has joined the firm’s pension department. She can be reached at (416) 595-2150.