ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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April 2004

New Vice-Chairs

The Board is pleased to announce the appointment of three new Vice-Chairs:

Ian Anderson has practised labour, administrative and constitutional law with private firms and as in-house counsel to trade unions. Earlier in his career, he was founding review counsel for a workers' rights group at a community clinic. Ian was called to the Bar in Ontario in 1987. He joins the Board as a full-time Vice-Chair.

Peter Chauvin comes to the Board after twenty years of practice with a management-side law firm where he acted for clients before a variety of administrative tribunals and all levels of court. Peter has spoken and written widely on employment law topics. He was called to the Bar in 1985. He joins the Board as a full-time Vice-Chair.

Kelly Waddingham has had an extensive practice in labour and administrative law. She has acted in a number of high profile inquests, professional discipline matters, hearings before Boards of Inquiry, and in court. She was called to the Bar in 1994. Kelly will be a part-time Vice Chair at the Board.

OLRB Shoot-Out

The Board will be hosting its 5th annual golf tournament in support of the Ministry of Labour's United Way Campaign on Thursday, June 17, 2004 at the Heron Point Golf Links in Ancaster, Ontario. Information regarding the "OLRB ANNUAL SHOOT-OUT", including registration information, is appended to this issue of **eHighlights**. For further details, please contact Tim Parker at 416-326-7442 or by email at tim.parker@mol.gov.on.ca or visit the Board's website at www.gov.on.ca/lab/olrb/home.htm

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. Some of these decisions will appear in the March/April issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Termination – Timeliness – The applicant sought to terminate the bargaining rights of the responding party by filing an application one year after interim certification was granted by the Board – The trade union, citing *Comstock Funeral Home Ltd.* [1982] OLRB Rep. Oct. 1436, argued the application was untimely because a final certificate had not been issued – The Board held that because the composition of the bargaining unit had not been agreed upon nor adjudicated, the trade union had not achieved the full measure of its bargaining rights – Accordingly, the application for termination was not filed in a timely way – Addressing the potential for interim certification *ad infinitum*, the Board imposed a date by which the parties had to reach agreement on the bargaining unit, failing which a hearing date would be set – Application dismissed

ARISTOCRAT SUITE HOTEL, 131 COOPER STREET LIMITED O/A; RE MARIVEL MENDOZA, ON HER OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF 131 COOPER STREET LIMITED, O/A ARISTROCRAT SUITE HOTEL; RE HOSPITALITY AND SERVICE TRADES UNION, LOCAL 261; File No. 1845-03-R; Dated March 22, 2004; Panel: Patrick Kelly (12 pages)

Health and Safety – The employer requested suspension of a health and safety inspector's order requiring it to conduct monthly inspections of the workplace – The Board considered the existing practice and the fact that the internal responsibility system had been established through negotiation by the employer and the trade union – Acknowledging that there existed ongoing health and safety concerns, the Board held there were other, potentially more effective means of achieving a safe workplace than the imposition of a change in inspection frequency – There was no evident danger to workers' safety, the employer demonstrated that it was prejudiced by the order, and that it had a strong *prima facie* case for a successful appeal – Request for suspension granted

CARMEUSE LIME (BEACHVILLE) LIMITED; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 3264 AND ALAN THIBERT, INSPECTOR; File No. 3961-03-HS; Dated March 31, 2004; Panel: Harry Freedman (6 pages)

Certification – Employer – Practice and Procedure - Related Employer – Sale of Business – Timeliness – On the day a response was due in an application for certification, the responding party submitted a letter advising it was not the employer – A complete response was filed on the day of the representation vote – The applicant argued that the Board should disregard the response because it was untimely – The Board held that s. 7(14) requires an acknowledged employer to file its response within two days of receiving the application, giving notice of its proposed bargaining unit – In this instance, the responding party's position that it was not the employer constituted its position on the bargaining unit – The Board exercised its discretion to permit the response to be filed late – Matter referred to Registrar

CLAYBROOKE MARKETING SERVICES; RE CJA, LOCAL 446; File Nos. 2144-03-R; 2593-03-R; Dated March 3, 2004; Panel: Laura Trachuk, J. Tomlinson, A. Haward (4 pages)

Employment Standards – Reconsideration – After dismissing an employee's application for review of the employer's failure to comply with a settlement effected by an employment standards officer, the Board, on its own motion, re-opened the matter – The Board noted that since the workplace parties did not do what they had agreed to do under the settlement, the employment standards officer could have proceeded with an investigation and ultimately issued an order – The Board should have treated the officer's closing letter as a refusal to issue an order – Matter remitted to mediation

DILIGENT BAILIFF SERVICE AND DIRECTOR, EMPLOYMENT STANDARDS; RE CHRISTOPHER MAHONEY; File No. 3320-03-ES; Dated March 2, 2004; Panel: Mary Ellen Cummings (2 pages)

Employment Standards – Timeliness – The Board adopted a Court of Appeal test for prejudice when considering a request for an extension of time for filing an application for review – The Board found there is a rebuttable presumption of prejudice to the employee and the Director of Employment Standards – The request for an extension was denied and the application dismissed

DYNATEC CORPORATION; RE GEORGE MONDOUX AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3563-03-ES; Dated March 11, 2004; Panel: David A. McKee (3 pages)

Certification – Construction Industry – Representation Vote – In this displacement application, the applicant sought a second vote because (1) access to the building where the vote was to take place was denied; (2) the employer had allegedly left the province one day after being served with the application; (3) notices to employees were not posted; and (4) the employer agreed that a second vote should be held – Notwithstanding the above submissions, the applicant's representative signed the Confirmation of Vote attesting to the propriety of the first vote – Relying on *Midtown Meats* [2002] OLRB Rep. Nov./Dec. 1117 and subsequent cases, the Board held that a party will not lightly be allowed to resile from the position it took at the vote – None of the reasons tendered persuaded the Board that a second vote was appropriate – Application dismissed

G. SALVADOR CONTRACTING LTD.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; ONTARIO PROVINCIAL CONFERENCE OF THE BAC, AND ITS LOCALS 1, 2, 4, 5, 10, 12, 20, 23, 28, 29 AND 31; RE BAC;

RE BAC, LOCALS 6, 7, 20 AND 25; File No. 3653-03-R; Dated March 9, 2004; Panel: David A. McKee (5 pages)

Parties – Sale of Business – Standing – An application seeking a sale of business determination was brought by the predecessor employer – All of the successor employers as well as the bargaining agent sought dismissal of the application (their motion was brought by a party that was neither a responding party nor an intervenor) – The Board held that there was nothing in s. 69 of the Act that would preclude an application by a predecessor and noted that there may be circumstances when a predecessor might be affected or otherwise have an interest – The parties were directed to make submissions regarding whether the predecessor had pleaded a *prima facie* case for sale of business declaration – Motion dismissed

HOTEL DIEU OF KINGSTON, RELIGIOUS HOSPITALLERS OF ST. JOSEPH OF THE; RE COUNTY OF FRONTENAC; AND OPSEU; File Nos. 3176-03-R; 3177-03-R; 3178-03-R; Dated March 9, 2004; Panel: Mary Ellen Cummings (4 pages)

Employment Standards – The employer applied for a review of two Notices of Contravention issued approximately one month apart for failing to pay wages, vacation pay and termination pay, and for failing to produce employment records – The Board, finding that the second Notice related to matters which predated the issue of the first Notice, reduced the amount of the subsequent penalties

HOWARD'S PAWN SHOP/HOWARD'S BUY SELL TRADE, 1135196 ONTARIO INC. OPERATING AS; RE SHAWN SARAZIN AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 0908-03-ES; 0909-03-ES; Dated March 26, 2004; Panel: Susan Serena (5 pages)

Health and Safety – The employer sought suspension of an order requiring it to erect a guardrail around a containment pit, asserting that the pit had a chain-link fence around it, was covered by a lid 99% of the time, and was uncovered only when maintenance work in the pit was being performed by qualified personnel – The Board focused its attention on the time when the pit was uncovered (and without an appropriate barrier) – The Board held, in deference to the health and safety inspector, that the existing chain-link fence did not meet the requirement of the regulation, so worker safety could not be ensured – Suspension request dismissed

HYDRO ONE NETWORKS INC.; RE POWER WORKERS UNION, AND ERIC THEISEN, INSPECTOR; File No. 4067-03-HS; Dated March 31, 2004; Panel: David A. McKee (5 pages)

Conflict of Interest – Interference with Trade Union – Interim Relief – Local 183 brought an application pursuant to s. 149 of the Act, asserting that the International sought to undermine the Local's authority when it brought the Local up on various charges (including campaigning beyond its geographic jurisdiction) under the LIUNA Constitution – Local 183 applied for interim relief to stop the prosecution before a Special Hearings Panel and also alleged that the firm representing the International had placed itself in a conflict of interest because it had formerly represented the Local in Board matters relating to the subject of the prosecution – The Board earlier issued a bottom line decision and now provided its reasons – The Board observed that there were other fora (the courts, the Law Society of Upper Canada) available to the parties to deal with the law firm's conflict and declined to inquire into the allegation – On the main application, the Board was satisfied that (1) it had the jurisdiction to grant the relief sought; (2) the applicant had made out a *prima facie* case for entitlement to the remedy it was seeking; and (3) the applicant had shown that it would suffer the balance of harm if it had to defend itself against the charges before the Special Panel when its application before the Board dealt with the same or similar circumstances – Interim relief granted in part

LIUNA; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; RE MASONRY CONTRACTORS' ASSOCIATION OF TORONTO INC., TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU; METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; ONTARIO CONCRETE & DRAIN CONTRACTORS' ASSOCIATION; THE RESIDENTIAL LOW-RISE FORMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY; THE ONTARIO FORMWORK ASSOCIATION; PIPELINE CONTRACTORS ASSOCIATION; THE UTILITY CONTRACTORS' ASSOCIATION OF ONTARIO; METROPOLITAN TORONTO ROAD BUILDERS' ASSOCIATION; THE HEAVY CONSTRUCTION ASSOCIATION OF TORONTO; GREATER TORONTO SEWER AND

WATERMAIN CONTRACTORS ASSOCIATION; RESIDENTIAL FRAMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY INC.; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA, LOCALS 506, 527 & 837; File Nos. 2320-03-M; 2049-03-U; Dated March 17, 2004; Panel: Mary Ellen Cummings (17 pages)

First Contract Arbitration – The union sought a direction from the Board that a first collective agreement be settled by arbitration, acknowledging that the bargaining unit was a voluntarily recognized addition to an earlier agreement with a different geographic scope and conceding that there were no, and never had been any, employees in the bargaining unit – A majority of the Board found that in the absence of employees (with no prospect of any), there was no obligation to bargain and the process of collective bargaining could not be said to have failed, triggering the operation of s. 43 of the Act – Application dismissed

LAFARGE CANADA INC.; RE TEAMSTERS LOCAL UNION NO. 230, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; File No. 1164-03-FC; Dated March 25, 2004; Panel: Caroline Rowan, R. O'Connor, R.R. Montague (15 pages)

Consent to Prosecute – Contempt – *Hospital Labour Disputes Arbitration Act* – During negotiations for the renewal of a collective agreement between OPSEU and the Ontario Hospital Association, the union issued a press release announcing a "Hospital Emergency Day of Action" – After an expedited hearing, the Board declared the Day of Action to be an illegal strike, issued a cease and desist order against OPSEU and its officers, and restricted picketing in and around hospitals – When OPSEU members did not report for work on the scheduled Day of Action, the OHA brought an application seeking the Board's consent to prosecute OPSEU or, alternatively, asking the Board to state a case of contempt – OPSEU countered arguing that s. 76 of the *Provincial Offences Act* precluded the prosecution of an offence more than six months after the offence was committed – The Board reviewed the parties' conduct subsequent to the Day of Action, noted their progress in negotiations, and acknowledged their concerted activity on a number of other related fronts – The Board dismissed the application for consent to prosecute because the prosecution was barred by the POA – Furthermore, it found that nothing would be gained by a prosecution or a finding of contempt – Application dismissed

ONTARIO HOSPITAL ASSOCIATION; RE OPSEU; File No. 4165-02-U; Dated March 9, 2004; Panel: Kevin Whitaker (7 pages)

Employment Standards – Remedies – Reprisal – The applicant employee alleged that he had been terminated from his employment for asserting his right to a statutory holiday – The employer, who bears the onus in a reprisal complaint, failed to appear at the hearing – The Board awarded the applicant the vacation pay he was seeking as well as the money he requested to satisfy the reprisal – The Board held it had no jurisdiction to order legal costs

RESPIRONICS GEORGIA INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE STEVEN DAITCH; File No. 0531-03-ES; Dated March 22, 2004; Panel: Patrick Kelly (4 pages)

Health and Safety – Practice and Procedure - Reconsideration – The Board dismissed an application for the suspension of various orders relating to materials handling, ventilation and safety equipment – The applicant requested reconsideration – The Board held that its stand-alone rules for health and safety appeals do not give it the power to reconsider its decisions – Application for reconsideration dismissed

SALON CORP.; RE ALAN ROUSE AND JOHN FLETCHER, INSPECTORS; File No. 3986-03-HS; Dated March 19, 2004; Panel: David A. McKee (2 pages)

Court Proceedings

Certification – Collective Agreement – Judicial Review - Related Employer – Sale of Business – The Board considered the validity of a collective agreement entered into between the CHCW and CHS and its impact on two applications for certification filed by the CAW – CHS had acquired a number of retirement homes and entered into a voluntary recognition agreement with CHCW based on their representation of employees involved in the personal care of individuals in various settings – The Board ruled that, on the specific facts of the instant case, the CAW was allowed to seek to attack the collective agreement, and held that the agreement was not a relevant consideration in the certification applications by operation of section 53 of the Act (the collective agreement was tainted by employer support) – CHCW sought to judicially review the Board's decision – The Divisional Court found that the Board's expertise was engaged in fashioning the remedy in this matter, and the remedy was entirely within the Board's jurisdiction - Application for judicial review dismissed

CENTRAL PARK LODGES LTD. KANATA RETIREMENT RESIDENCE; RETIREMENT RESIDENCES OPERATIONS (REIT) LP; CAW-CANADA; RE CENTRAL HEALTH SERVICES; RE CANADIAN HEALTH CARE WORKERS; File Nos. 1951-01-R; 2179-01-R; 2180-01-U; 2187-01-R; 2173-01-R; 2335-01-R; 2338-01-R; 3292-01-R; (Court File No. 646/02) Then, Carnwath, Swinton, JJ.

Certification – Judicial Review – Termination – Unfair Labour Practice – The employer was opening a new facility in a different municipality, and proposed to move several of its existing bargaining units (represented by different trade unions) to the new location – Two trade unions (CAW and UFCW, Local 175) communicated with employees, staking a claim to represent them in the new facility based on similar language in their respective collective agreements – The CAW subsequently applied to certify the employees – The employer and the UFCW, Local 175 responded by asserting the CAW's application was untimely because of a pre-existing collective agreement covering other locations – The following day the national office of the UFCW filed a second application for certification – The Board found that s. 66 of the Act did not apply to the instant case – An agreement to extend pre-existing bargaining rights is not the same as an agreement to give bargaining rights where none existed before – The Board held further that there was no evidence of employer support which would attract the application of s. 53 of the Act, nor were there any other violations of the Act which would oust the collective agreement entered into between the employer and UFCW, Local 175 – The Court found that the Board's decision that the preconditions to the application of section 66 had not been met was not patently unreasonable and agreed with the Board's finding that the CAW had not met the significant evidentiary burden required under section 53 – The Court stated that "the determination of competing representation and bargaining rights between trade unions falls squarely within the specialized jurisdiction, expertise and experience of the Board" – Application for judicial review dismissed

COCA COLA BOTTLING COMPANY, UFCW, LOCALS 175 AND 393W AND OLRB; RE CAW-CANADA AND ITS LOCAL 385; File Nos. 0176-01-R; 0178-01-U; 0179-01-R; 0203-01-R

Board decision reported at [2002] OLRB Rep. Nov./Dec. 1008

Divisional Court decision reported at [2003] OLRB Rep. Sept./Oct. 969

Leave to appeal to Court of Appeal dismissed (Court File No. M30491); McMurtry, Moldaver, Cronk JJA (1 page)

Construction Industry Grievance – Judicial Review – The Board found that the employer was bound to the collective agreement with the Millwrights by virtue of a letter of agreement signed by the parties in settlement of an earlier grievance – On judicial review, the Court held that determining representation rights falls squarely within the specialized jurisdiction, experience and expertise of the Board, consequently the Board's decision was not patently unreasonable – Application for judicial review dismissed

GIROTTI ST. CATHARINES LTD.; RE MILLWRIGHTS UNION LOCAL 1007; File No. 3060-02-G (Court File No. 368/03) O'Driscoll, Kealey, Swinton JJ.

Contempt – Discharge – Health and Safety – Judicial Review – The Board found that the applicant's work refusal was not *bona fide* and that his termination was not a reprisal for acting in compliance with or seeking the enforcement of the *Occupational Health and Safety Act* – The

Board also declined to substitute a lesser penalty for the discharge under s. 50(7) of the OHSA – The Board further declined to state a case for contempt to Divisional Court based on the allegation that the applicant had distributed documents received in another Board proceeding, in breach of an implied undertaking that such documents are to be used only in the litigation for which they were produced – On judicial review, the Court held that the Board had denied the applicant's right to a fair hearing when it consolidated the reprisal and contempt matters into one proceeding – Application for judicial review allowed

MCNAUGHT, WILLIAM; RE TTC AND ITS SUPERVISORS, CHIEF GENERAL MANAGER DUCHARME, GENERAL MANAGER G. WEBSTER, S. QUIGLEY, HUMAN RESOURCES DEPARTMENT, D. HAFFERY, HUMAN RESOURCES DEPARTMENT AND SUPERINTENDENT J. HAFFEY, DANFORTH BUS DIVISION AND OLRB; File Nos. 3616-99-U; 3297-99-OH

Board decision reported at [2001] OLRB Rep. Nov./Dec. 1102

Divisional Court decision reported at [2003] OLRB Rep. Nov./Dec. 1102

Leave to appeal to Court of Appeal granted (Court File No. M30576); Laskin, Rosenberg, Aitken, JJA. (1 page)

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Some of the decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Library, now located on the 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Atyourservice Corp. **Pape Rehabilitation & Wellness Ctre**. v. Victoria Blentzas, et al Divisional Court No. DC-04-002687-00	2801-02-ES	Pending
Sheet Metal Workers' Int'l Assoc. Local 30 v. **Crossby-Dewar Projects Inc**., Int'l Assoc. Heat & Frost Local 95 Divisional Court No. 144/04	1643-03-JD	Pending
Vincent Borg v. OPSEU, The Crown in Right of Ontario et al Divisional Court No. 83/04	1208-02-U	Pending
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Labourers' International Union of North America v. **Universal Workers Union**, et al Divisional Court Nos. 71/04 & 22/04	2320-03-M 2049-03-U	Pending
James Andrew Gerrie v. Ms. Charlotte Budd and Vice-Chair Timothy Sargeant Divisional Court No. 2/04	2290-00-U	Pending
Great Blue Heron v. Mississaugas of Scugog Island First Nation et al Divisional Court No. 7/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Mississaugas Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Elementary School Teachers' Federation v. OSSTF, Dist. 14 Kawartha Pine Ridge DSB et al Divisional Court No. 17/04	0797-01-JD	Pending
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Pending
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV – HAMILTON	0185-03-U	Pending
Cecilia Collier v. TTC Divisional Court No. 706/03	0632-02-U	Pending
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 Divisional Court No. 679/03	1894-02-G	Pending – Oct. 7/04
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending
Slavtcho Petrov Detchev v. OLRB, Ministry of Labour, **Canadian Feed Screws Mfg. Ltd**. Divisional Court No. 618/03	2701-00-ES	Dismissed – Mar. 30, 2004
Director of Employment Standards v. William Brown, **North York Chevrolet Oldsmobile Ltd**. Divisional Court No. 559/03	2235-02-ES	Pending – Apr. 2, 2004

Case name & Court File No.	Board File No.	Status
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court No. 410/03	2087-01-U	Pending – June 24/04
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court No. 368/03	3060-02-G	Dismissed - Mar. 9, 2004
CAW-Canada v. **National Grocers Co. Ltd**. and UFCW, Locals 1000A, and 175/633 Divisional Court No. 382/03	0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U	Pending – Apr. 30, 2004
Greater Essex County District School Board Divisional Court No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court No. 277/03	3426-00-R	Pending
OPSEU v. **Ontario Hospital Association** Divisional Court No. 83/03	3631-02-U	Abandoned Mar. 25/04
Canadian Health Care Workers v. CAW-Canada, **Central Park Lodges** et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Dismissed March 2, 2004 (reasons Mar. 8/04)
CAW-Canada & its Local 385 v. **Coca-Cola** et al Divisional Court No. 751/02	0179-01-R; et al	Dismissed October 10/03; leave to appeal dismissed Mar. 12/04
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. **Ottawa Transition Board**, et al Divisional Court No. 02-DV-723	2353-00-PS	Heard – Nov. 27/03 - Reserved
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; leave to appeal granted Mar. 26/04
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Pending – April 7, 2004
Marc. A. Crockford et al v. UFCW et al Divisional Court No. 543/02	1350-99-U; 2809-99-U	Dismissed Sept. 30/03; Applic. for leave to appeal Apr. 28/04