

- Standing
- Rights of Participation

AWARD ON A PRELIMINARY ISSUE

BETWEEN: UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1252

(hereinafter called the "Union")

AND: NEWFOUNDLAND ASSOCIATION OF PUBLIC
AND PRIVATE EMPLOYEES

(hereinafter called the "Employer")

AND: COLLEEN MORRISON

(hereinafter called "Ms. Morrison")

AND: CHRISTINA KENNEDY

(hereinafter called "Ms. Kennedy")

GRIEVOR: JUDY SNOW

FOR THE EMPLOYER: Stuart Morris, LL.B.

FOR THE UNION: David Goodland LL.B.

FOR MS. MORRISON
& MS. KENNEDY: Christina Kennedy LL.B.

ARBITRATOR: David G.L. Buffett, QC

THE GRIEVANCE

This case concerns a grievance by a Grievor who claims a Collective Agreement violation by her Employer, a Labour Union. The claim is that the Employer acted

contrary to the Collective Agreement by not granting her a promotion from her position as Public Relations Communications and Research Officer to the position of Employee Relations Officer or ERO.

The Grievance is dated April 21, 2006 and reads, inter alia, as follows:

Date of Occurrence April 21, 2006, Nature of Grievance - Denial of Promotion to ERO by letter dated April 19, 2006, Remedy Sought - to be placed in the ERO position and to be compensated for all loss salary, benefits, allowances, and lieu days.”

The Hearing was convened on January 16, 2007 at St. John’s.

The Parties agreed that:

1. I, as Arbitrator, am a properly constituted tribunal and have authority to hear the case.
2. I, as Arbitrator, will take notes and that in the event of a dispute as to what transpired at the hearing or a conflict in the evidence, my notes will prevail.

I was made aware by the Parties that there was a preliminary issue to be dealt with concerning a claim by persons that they were affected by the proceeding and were thereby entitled to standing.

The Parties pointed out that the two applicants Ms. Morrison and Ms. Kennedy were present and stated that they were seeking standing at the hearing.

The Employer indicated that it would be supporting their application for standing and the Union indicated that it would be opposing their request for standing.

Ms. Morrison and Ms. Kennedy were uncertain as to whether they would be represented by legal counsel or not but indicated that they needed some time to sort this out. They indicated that to this point the Union has declined to provide them with legal representation.

The hearing was set over to February 19, 2007 for argument on the Application for Standing and to give Ms. Morrison and Ms. Kennedy time to secure legal representation if they so wished.

The hearing was reconvened on February 19, 2007 for argument on the Application for Standing.

At that time, Ms. Kennedy and Ms. Morrison indicated that they would both be represented on the Application for Standing by Ms. Kennedy, a lawyer and a member of the Ontario and Newfoundland and Labrador Bars.

The following items were received into evidence as Consent Exhibits:

1. Consent 1 – The Collective Agreement between NAPE Staff (UFCW Local 1252) and the Employer;
2. Consent 2 – A Job Posting for the position of Employee Relations Officer (Temporary) Location: St. John's, Closing Date April 7, 2006;
3. Consent 3 – A Job Posting for the position of Employee Relations Officer (Temporary for three months under review) Location: St. John's, Closing Date April 7, 2006;
4. Consent 4 – A letter dated April 6, 2006 from the Grievor to Carol A. Furlong, President of the Employer applying for one of the positions of Temporary Employee Relations Officer to which letter was attached the Grievor's Resume;
5. Consent 5 – A letter dated April 19, 2006 from Carol A. Furlong, the President of the Employer, to the Grievor indicating that she did not meet the qualifications for the position and would therefore not be contacted for an interview;
6. Consent 6 – The Grievance dated April 21, 2006;
7. Consent 7 – A letter from Ms. Furlong dated April 28, 2006 advising that the grievance was denied;
8. Consent 8 – A Job Posting for two positions of Employee Relations Officer: Employee Relations Officer (Temporary Full time) and Employee Relations Officer (Temporary for Three Months, Under Review) closing on May 10, 2006;

9. Consent 9 – A letter to Carol A. Furlong from Ms. Morrison dated May 4, 2006 applying for the position of Employee Relations Officer as advertised in the Saturday, April 29, 2006 edition of the Telegram to which was attached her resume;
10. Consent 10 – A letter to the Employer dated May 10, 2006 from Ms. Kennedy applying for the position of Employee Relations Officer to which was attached her resume.

The Parties agreed that any time limitations that may exist for publication of this Preliminary Award are waived and they agreed that any witnesses may remain in the hearing room during the taking of evidence on the Preliminary Issue.

One witness was called on the Preliminary Issue. This was Carol A. Furlong. She is the President of the Employer. She was called by the Employer and gave evidence after being affirmed.

During the course of her evidence Ms. Furlong referred to each of the consent exhibits and identified each.

She indicated that Consent 2 and Consent 3 were internal job postings. They were first posted internally as required by the Collective Agreement. Consent 2 was a posting for a temporary position of Employer Relations Officer. Consent 3 was a posting for a temporary position of three months.

Ms. Furlong indicated that there were many other applicants but that Ms. Morrison and Ms. Kennedy were the two successful applicants.

Under cross examination she indicated the internal job postings occurred in accordance with Article 11.01 of the Collective Agreement and agreed that Article 11.03 of the Collective Agreement governs the hiring of applicants.

Ms. Furlong indicated that it was she who did the hiring.

There were two internal applicants, Ms. Snow and another person who has also grieved.

Ms. Furlong hired both Ms. Morrison and Ms. Kennedy. There was also a temporarily assigned senior Employee Relations Officer involved in the external process doing the interviewing but not in the internal process.

The internal process closed April 7, 2006 according to the postings and though she can't specifically remember the closing date independently of those documents she has no reason to believe that the closing date was actually other than as stated on the postings.

She stated that though she couldn't be sure she thought Ms. Morrison was hired in August of 2006. She filled the three month temporary position. At the time of the internal posting in April of 2006 she was not a member of the bargaining unit.

She stated that as of April 2006 Ms. Kennedy was also not a member of the bargaining unit. She became a member in June of 2006 to the best of Ms. Furlong's recollection. Although not certain of that date, Ms. Furlong could state that it was "ball park".

Ms. Furlong testified that the positions are still temporary.

Both Ms. Morrison and Ms. Kennedy, according to Ms. Furlong, passed their six month probationary periods. Ms. Furlong also testified that the three month position itself has been extended to allocate some of the workload and to address work that would ordinarily be done by an individual on sick leave who has had that sick leave extended.

Ms. Kennedy's position is still a temporary one. It involves no commitment to a specific period of time and no guarantee that the job would be permanent. Ms. Kennedy's job was not based on the sick leave of any individual but was based on an increased workload and the need for a person based strictly on the increased workload. She testified that the Employer was effectively short two people given the workload.

Ms. Kennedy was originally hired in June as a staff solicitor replacing a person who normally held that position but who was on maternity leave.

The Employee Relations Officer interviews took place over a span of several months and Ms. Kennedy was interviewed for the Employee Relations Officer position after she came into the staff solicitor position.

Ms. Furlong testified that her Employee Relations Officer position was filled in late July 2006.

ISSUE

The Issue is whether or not Ms. Morrison and Ms. Kennedy are entitled to standing and should be given a right to participate in the hearing.

ARGUMENT

The Employer:

The Employer maintains that the Union is improperly seeking to preclude bargaining unit members from participating in the hearing.

The Grievor is “seeking to knock one of these two persons out of their job”.

The Union will say that the interests of the applicants for standing are contingent interests but the Employer contends that they have a direct and a major interest. The Employer stresses that when one’s job is on the line one should be granted standing. It is hard to imagine how the interests of the applicants could be anymore direct than is the case here.

The Employer stressed that the incumbents want to be involved in the hearing and that the Employer wants them involved. It wants them involved because they deserve to be involved but also in order to avoid a multiplicity of proceedings such as would inevitably occur if they were not permitted a right to participate.

The Employer stressed that a pragmatic approach should be taken and suggested that there are not problems associated with having these persons participate but that there are a multitude of problems that will arise if they are not permitted to participate. In support of its position the Employer cited numerous cases.

The first was *T.W.U. v. Canada (Canadian Radio, Television and Communications Commission)* 1995 Carswell Nat. 969; also reported at 31 Admin. L.R. (2d) 330, 125 D.L.R. (4th) 471, 183 N.R. 161, and [1995] 2 S.C.R. 781 and 55 A.C.W.S. (3d) 896. The case involved an application by the T.W.U. for judicial review of a CRTC decision. The T.W.U. argued that the CRTC did not give it notice of a CRTC hearing. The case involved Shaw Cable wishing to affix cable apparatus to B.C. Tel poles. B.C. Tel employees were represented by the T.W.U. and the T.W.U. was concerned that Shaw employees would be doing work on the poles that its members should be doing. The Court held that the audi alteram partem rule did not require that the T.W.U. be provided with notice as the interests of the T.W.U. were purely indirect, the CRTC decision being one based on telecommunications policy and not one related to the work jurisdiction of the T.W.U. The majority held that even if it was wrong, that statutory provisions applied in that case to relieve the CRTC from having to give the T.W.U. notice.

The Employer stressed the dissenting judgment of Sopinka J. as setting forth the principles that we have to examine and apply. At paragraph 6 he wrote:

“The jurisprudence of this Court has made it clear that the requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the subject matter being dealt with and the statutory provisions under which the tribunal is acting.”

He goes on further to say:

“In each case it must be determined whether the party claiming the right to have been given notice and an opportunity to be heard had a sufficient interest in the proceeding such that notice was required by the *audi alteram partem* principle.”

He differed from the majority in that he viewed the T.W.U. interest as a direct one and not as a contingent one.

The Union also cited the case of *CUPE v. Canadian Broadcasting Corporation* (1990) 70 D.L.R. (4th) 75, Ont. C.A. This was a case which involved the CBC assigning staging to one union and lighting to another union. A third union grieved. An arbitration was held concerning that grievance without notice having been given to the two other unions. A challenge was launched in Court and the Divisional Court dismissed the challenge on the

basis that the two unions were not affected directly by the decision though they may have been affected consequentially. The Court of Appeal disagreed with the Divisional Court and quashed the Arbitrator's decision holding that the employment opportunities of members of the two unions in question had been decided in a hearing in which they were not given an opportunity to participate.

The Employer cited the case for general principle purposes but also because Carthy J.A. canvassed the cases of *Re Bradley and Ottawa Professional Fire Fighters Association* in 67 Carswell Ont. 116, also cited at [1967] 2 O.R. 311, 63 D.L.R. (2d) 376, 67 C.L.L.C. 14043 and *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co.* 1967 Carswell Ont. 79, also cited at [1968] S.C.R. 30, 65 D.L.R. (2d) 641, 67 C.L.L.C. 14, 064.

It indicated that Carthy J.A. based his decision on these authorities. At page 179 and 180 Carthy J.A. noted that while in *Bradley supra* the employee's legal rights were directly affected that there was nothing in the reasons of Laskin J.A. (as he then was) in *Bradley supra* to limit the entitlement of notice to cases where the rights were directly affected.

He also notes that the Supreme Court of Canada in *Hoogendoorn supra* did not make mention of a distinction between legal effect and practical effect. He concluded that the two unions' members were in the same position as was Hoogendoorn who could be fired by force of the award and could then presumably challenge the dismissal claiming to be unaffected by a proceeding in which he did not participate. Nonetheless, the Supreme

Court of Canada, in the view of Carthy J.A. held Hoogendoorn entitled to notice to enable him to seek to avoid the damage of being fired.

This brings us to the two cases which have been the focus of arbitral jurisprudence on the issue of the right of third parties to participate, *Hoogendoorn supra* and *Bradley supra*.

Hoogendoorn supra involved an employee not paying his dues which fact upset other employees in the union and resulted in the union submitting a grievance to arbitration complaining about the fact that the employer was not collecting dues from Hoogendoorn.

Both the employer and union in *Hoogendoorn supra* wanted a resolution and the Arbitrator decided that Hoogendoorn was obliged to sign a form permitting and was obliged to permit the Employer to deduct dues from his pay and that if he refused to do so the Employer was to terminate him. The problem arose from the fact that Hoogendoorn was not given notice of or the opportunity to participate in the arbitration proceeding.

The Supreme Court of Canada quashed the award on the basis that Hoogendoorn was affected by the proceeding and was entitled to notice and to participate if he wished.

The Employer suggested that *Hoogendoorn supra* supports its position that the incumbents are entitled to participate in the arbitration.

Bradley, supra involved promotions made by a fire chief. The Association representing the fire fighters protested and ultimately challenges were launched to six promotions. The Court held that those affected, namely the incumbents who had been successful in getting promoted were entitled to be given notice. The Employer stressed the following portions of that decision as being in support of its position namely paragraphs 14, 15 and 16.

“The Association would be the first to contend that salary, job security and other benefits of its members rest on the Collective Agreement which binds the City, as well as the Association and its members, to its terms. Certain initiatives are given to the City which, although open to challenge under the grievance procedure because of the allegedly wrongful exercise, may result in gains and monetary or other benefits to some employers rather than others. It is to me ex post facto reasoning to contend that because in the end it may turn out that the City was wrong, the employees benefited by its exercise of initiative have not been adversely affected in a direct way by withdrawal of the benefits. This is a situation with respect to promotions to jobs for which there are more applicants than vacancies; this is so with respect to resistance to lay offs where there are fewer jobs than where there are employees coveting them. In such cases, just as the City must make a choice in administering the collective agreement, so must the Association decide whether it will challenge the City decision and thus range itself in fact with a different group of employees. It is my view that it is not an answer to a challenge of the City’s action to say that

it alone must be left to protect the position of the employees whom it has selected for preferment.

A Collective Agreement is a unique legal institution because, despite the generality of its terms as part of a bargain made between a representative union and an employer, its existence and application result in personal benefits to employees who are covered by it. Once it is accepted, as it must be, that the benefits running to the employees may differ according to job classification or seniority ranking (to take two illustrations), and that the representative union is put to a choice between employees who competed for the same preferment as to which it will support against a different choice made by the employer, substantive employment benefits of particular employees are put in issue and they are entitled to protect them if the union will not.

It follows that they are entitled to notice of arbitration proceedings taken to test their right to continue the enjoyment of the benefits. The fact that particular provision for notice is not made either in the statute or in the collective agreement is of no moment. There is a large silence in both – and this is not limited to collective bargaining relations in fire fighting – so far as concerns the procedure to be followed in an arbitration. The common law has been especially sensitive to deprivation of property or contractual advantages in proceedings of an adjudicative character without

previous notice thereof to persons likely to be directly affected, unless there is clear statutory exclusion of such notice. In the present case, there is none. I leave for consideration when it arises any question of the power of bargaining unions and employers to commit employees to waiver of notice or intervention in arbitration proceedings and situations such as that under review here.”

The Employer argued that this case stands for the proposition that it is not the job of the Employer to carry the interest of the incumbents and that it should not be left to the Employer to do so.

Appleton v. Eastern Provincial Airways 1983 Carswell Nat. 118 (Fed. C.A.) also reported at 6 Admin. L.R. 128, 12 D.L.R. (4th) 147, 50 N.R. 99, [1984] 1 F.C. 367 is also cited by the Employer. That case involved a ruling that pilots who had replaced striking pilots during a strike were entitled to be given notice of and involved in a Canadian Labour Board proceeding whereby the Board made orders against EPA which affected the employment status of the replacement pilots. The majority held that the replacement pilots fit within the statutory wording of “any party directly affected by the decision or order” and though the order was directed to EPA and not the replacement pilots, it affected them just as surely as if it had been directed to them and they had been ordered to resign.

The case of *Orillia Soldiers Memorial Hospital v. O.N.A.* 1997 Carswell Ont. 662 Ont. Court of Justice, Gen. Division (Divisional Court) and *Orillia Soldiers Memorial Hospital v. O.N.A.* 1993 Carswell Ont. 1244 (Swan, Stephens and Rundle) was cited by the Employer as standing for the proposition that not only is notice required when a grievor grieves based on a relative ability clause or in a situation of competition for a job by employees, but also where the grievance deals with a collective agreement which contains a sufficient ability or threshold clause that requires that the grievor's qualifications be measured only against the qualifications prescribed for the job as opposed to being compared to the qualifications of other employees or those of persons competing for the job.

The employer noted what the Court had to say at paragraph 7 of the Divisional Court decision:

“It seems to us the decision invoking the requirement of natural justice, in the context of labour relations is different from a decision that denies natural justice.

In the former case it can be said that the arbitrator is entitled to curial deference and that the Court would only interfere if it finds the decision to be unreasonable.”

The Employer has suggested that it would be wise to err on the side of inclusion and participation. It stated if I did otherwise I'd be challenged. It also indicated that based on the language of the Divisional Court in *Orillia Soldiers supra* that I would be held to a standard of correctness if I ruled against inclusion but only to a standard of reasonableness if I ruled in favour of inclusion.

It acknowledged that the case of *Scarborough General Hospital v. O.N.A.* (Langille) 60 L.A.C. (4th) 170 and 1996 Carswell Ont. 5787 was part of another line of authority but argued that it should not be viewed as being as persuasive as *Orillia Soldiers supra*. This was because Arbitrator Langille, while having the benefit of Arbitrator Swan's *Orillia Soldiers* decision, did not have the benefit of the Divisional Court decision since it has not been handed down when Langille rendered his decision in *Scarborough Hospital supra*.

The final decision on this issue which the Employer cited was *Diversicare Inc. v. O.N.A.* 1995 Carswell 1418 (Saltman, Ursel, and Riddell). It was cited as standing for the proposition that as regards the entitlement to notice it did not matter whether the incumbents were hired subsequent to the grievance having been filed or before the grievance had been filed.

The case of *Stelco Inc. v. U.S.W.A., Local 1005* 2001 Carswell Ont. 6015 also reported at 97 L.A.C. (4th) 436 was cited for the proposition that if the incumbents are entitled to participate that it is a right of full and complete participation that they are entitled to.

In summary the Employer posed a series of questions:

- (a) Are the interests of Ms. Morrison & Ms. Kennedy purely indirect – No;
- (b) Are they affected – Yes;
- (c) If I do not decide in favour of their inclusion will it give rise to a multiplicity of proceedings – Yes.

Mr. Morris' concluding comments also queried where Ms. Morrison and Ms. Kennedy would be if the Employer "cut a deal with the Union".

In further support of its position the Employer submitted for my consideration the text Donald J.M. Brown & David M. Beatty Canadian Labour Arbitration, 4th Edition (Aurora, Ont. Canada Law Book, 2006) pages 3-4 to 3-11.

The argument of Ms. Morrison and Ms. Kennedy:

Ms. Kennedy on behalf of herself and Ms. Morrison made it known at the outset that what is being sought is full standing with a right of full participation which would include the right to cross examine other party witnesses and call witnesses themselves.

It is their Union they say that is denying representation.

They state that their employment is truly at stake here. There are no other Employee Relations Officer positions and if the grievor is successful one or both of them will be unemployed.

Ms. Kennedy argued that it makes imminent legal sense to grant the two incumbents standing because of concepts such as *res judicata* and natural justice. She also argued that it made labour relations sense as well since it would be filling a gap caused by the fact that the Union is not representing the two applicants for standing.

The incumbents relied mainly on *Hoogendoorn, supra* and *Bradley supra*. They argue that based on *Hoogendoorn* standing is necessary to allow for natural justice. *Hoogendoorn*, they said, stands for the proposition that where there is direct impact on an employee that employee is entitled to notice and to standing. *Bradley* they say, stands for a requirement of notice where the proceeding in question affects or touches on the right of third party employees to their continued enjoyment of their benefits.

The incumbents noted that in the *Orillia Soldiers supra* decision of Swan at paragraph 27 page 10 the issue was raised of the incumbents being bound because of *res judicata* or issue estoppel even though they were not participants in the proceeding.

Ms. Kennedy expressed the view that the incumbents would have nowhere to go. They could not grieve. They could not go to the Union. The Union would say that it was

bound because of the decision of the arbitrator in this case. While a Court might be an avenue it is by no means certain that they would be successful in that arena.

Orillia Soldiers supra involved a threshold or sufficient ability clause as here and standing was granted in that case. Ms. Kennedy contended that this is a sound decision and should be followed.

The incumbents also stressed that the latest in the line of cases is a 2005 decision which supports the position they are taking. This case is *Windsor – Essex County Health Unit v. CUPE Local 543.3* (Arbitrator Crljenica) 2005 Carswell 8453, also reported at 142 L.A.C. (4th) 316. The incumbents state that this case concluded that the two lines of authority that exists can't be reconciled but that it noted that Laskin J.A. (as he then was) in *Bradley* did not distinguish between incumbents who might be deprived of contractual advantage arising from a competition as opposed to a threshold clause and that he made no reference to "the competition" clause in the collective agreement but focused on the common law right of natural justice of the incumbents who may be deprived of employment benefits. *Windsor-Essex*, they said, was a case involving a sufficient ability or threshold clause and not a relative ability or competition clause but that nevertheless a right was granted to the incumbents to participate in the hearing. The same should hold true here.

Ms. Kennedy noted that the case of *Diversicare, supra* and *CUPE v. Canadian Broadcasting, supra* both gave Intervener status to parties outside of the bargaining unit and that such persons were held entitled to standing on the basis of *Hoogendoorn*.

It was thus of no consequence that neither her or Ms. Morrison were members of the bargaining unit when the grievance arose or was filed.

In addition to the foregoing, Ms. Kennedy endorsed the position taken by the Employer in its argument.

In support of the position of the incumbents, she cited the following authorities in addition to those mentioned previously herein:

Hamilton Civic Hospitals v. O.N.A. 1994 Carswell Ont. 260 (Ont. Arb. Bd.), *Ottawa (City) v. CUPE Local 503* 1993 Carswell Ont. 1240 (Ont. Arb. Bd.), *CUPE v. Regina Qu' Appelle Health Region* 2004 Carswell Sask. 621 (Sask. Arb. Bd.), *Wilson Memorial General Hospital v. O.N.A.* (1995) 50 L.A.C. (4th) 85, (Ont. Arb. Bd.), and *Alberta v. A.U.P.E.* (1988) 32 L.A.C. (3d) 353 (Alta. Arb. Bd.).

Union Argument:

Mr. Goodland for the Union indicated that it appears that the Employer is asking me to take the path of least resistance. Unlike the Employer, the Union wants me to do what is legally correct not take what is the easiest course of action.

It stressed that there are nine facts before me which are as follows:

1. That the UFCW and NAPE are the parties;
2. The UFCW represents the employees in the bargaining unit;
3. As indicated by Consent 4 Ms. Snow, the Grievor, has been in the bargaining unit since 1998 in the position of Public Relations Communications and Research Officer;
4. In April 2006 there were two postings for the positions of Employee Relations Officer;
5. Both were internal postings as per the requirements of the Collective Agreement Article 11.01;
6. On the 6th of April, 2006 the Grievor applied for both positions;
7. On the 19th of April, 2006 as indicated by Consent 5 the Grievor was informed, without having had the benefit of an interview, that she was not the successful candidate;
8. From there the Grievance was filed as evidenced by Consent 6; and
9. The Grievance was denied as evidenced by Consent 7 on April 26, 2006.

The Union stressed that the two applicants for standing did not exist as far as the Union was concerned or as far as the Employer was concerned in April of 2006. Neither of the incumbents were members of the bargaining unit and neither was employed by the Employer at the time that the grievance was filed or at the time that the grievance arose.

When the Grievor applied in April of 2006 for a position as an Employee Relations Officer her rights to that position were governed by Article 11.03(b) of the Collective Agreement which is a sufficient ability and not a relative ability clause.

The Union maintains that this reality is pivotal. If the clause contemplated competition between employees and was a competitive clause then the applicants could suggest and argue that they were more qualified.

That is not the case here and provided Ms. Snow meets the qualifications for the job, it does not matter if the interveners are significantly more qualified.

The proposed interveners never applied for the positions pursuant to the internal competition so Mr. Goodland questions how they can attack the skill and ability of the grievor when they had no knowledge about what skill and ability she possessed. Mr. Goodland suggested that they just do not bring anything to the table that would help or assist in resolving the grievance. The interveners cannot provide any evidence on the issues which are before me which centre on and focus on the skill and ability and qualifications of the grievor and no one else.

The Union conceded that the case law consists of two schools of thought.

It suggested that a key consideration is whether there is a direct impact as opposed to an indirect impact upon the proposed interveners.

In all cases the Union suggested there is an impact on third parties. That does not qualify the third parties for intervener status.

In support of its position the Union referred to *Scarborough General Hospital supra* and also cited *John Noble Home and O.N.A.*, Loc. 162 39 L.A.C. (4th) 324, *Vancouver Community College and V.M.R.E.U.* 33 L.A.C. (4th) 105 and *Boliden – Wesmin Resources Ltd. and C.A.W.* Loc. 3019 74 L.A.C. (4th) 374.

Scarborough General Hospital supra was a case where Arbitrator Langille disagreed with Arbitrator Swan's reasoning in *Orillia Soldiers supra* that the right to notice extended as far as to cases where the party seeking standing had only a contingent right or where a sufficient ability clause governs such that the third party's skill relative to that of the grievor was not an issue.

In that case an injured employee who could not agree with the Employer on the matter of accommodation to the injured employee launched a grievance. Incumbents in jobs she could possibly be placed in were held to be entitled to notice because consideration of a duty to accommodate involves an examination of the relative impact on the grievor and on the incumbents that she could displace and the case was consequently more like a competition for a job than a case where the sufficient ability of the grievor was all that was being considered.

Boliden-Wesmin supra was a case where Arbitrator Blasina concluded that the *Hoogendoorn* principle has largely been limited to competing seniority cases and did not extend to cases involving sufficient ability clauses. In the latter cases the incumbents are outside the boundary of the immediate dispute and have nothing to contribute as an independent party. They are no different than an incumbent occupying a position that had previously been occupied by a discharged employee who is now grieving his discharge and is seeking reinstatement.

John Noble Home supra was a decision where Arbitrator Mitchnick held that there was not an entitlement to notice on the part of junior nurses who had been placed in positions where senior nurses had grieved their rights to bump based on a threshold seniority clause and not a relative ability clause.

He held that there was a difference from the situation of a relative ability clause and *Hoogendoorn supra* and *Bradley supra* should be extended no further than to situations of relative ability clauses. If one were to extend the right to notice beyond the situation of relative ability cases than one would have to extend it to incumbents in all discharge grievance cases.

The Union also made reference to *Re National Arts Centre Corporation and P.S.A.C.* (1981) 30 L.A.C. (2d) 431 where a person grieved after the person was demoted as a matter of discipline. Arbitrator Shime held that the incumbent in the position was not entitled to notice.

Reference is also made to the case of *Re Queen Elizabeth Hospital and CUPE Loc. 1156* (1988) 2 L.A.C. (4th) (Craven). The arbitrator in that case held that too broad a reading of *Hoogendoorn supra* and *Bradley supra* would extend the right of participation as interveners in practically every case and he distinguished between threshold clauses where the grievor's qualifications were solely what was at issue and competition provisions where the relative qualifications of various applicants are compared and concluded that in the threshold clause cases there was not an entitlement to notice.

The Union argued that *Hoogendoorn* was unique on its facts and *Bradley* was a case of competition between employees where the relative qualifications of the various employees were of focus.

It disagreed with *Orillia Soldiers supra* and urged that I take the cautious approach taken in *Re National Arts Centre supra*, *Re Queen Elizabeth Hospital supra*, *John Noble Home supra*, *Vancouver Community College supra*, and *Boliden-Wesmin supra*.

If I did not, I would be complicating the process and adding layers to it which in the end would not prove valuable in terms of better enabling me to resolve the issue.

If I were to permit notice in a case such as this I would have to do so in a discharge case.

Employer Rebuttal:

In rebuttal Mr. Morris for the Employer stated that the fact that the Employer is holding up the specter of a multiplicity of proceedings should not be viewed as a threat but simply as a statement of reality and that as an Arbitrator I should not ignore reality.

This proceeding involved the incumbents and they should be granted standing.

The rebuttal of Ms. Morrison and Ms. Kennedy:

In rebuttal Ms. Kennedy indicated that I should not lose sight of the fact that the Union focused on the circumstances that the incumbents' rights were not in existence at the time that the grievance was filed. It reiterated that the *CBC supra* and *Alberta supra* cases granted standing to persons outside the bargaining unit.

The incumbents also indicated that the merits have not yet been argued and that it would be a mistake at this point to conclude that any evidence the incumbents could call would not be relevant.

In response to the *Vancouver College* case supra cited by the Union the incumbents stressed that it was a 1992 case and argued that the *Windsor-Essex* case supra is the most recent arbitral decision on the issue and that it provides the greatest amount of guidance. Ms. Kennedy stressed that under principles of

natural justice herself and Ms. Morrison have a right to be heard. If this grievance is allowed they will be unemployed.

CONSIDERATIONS AND REASONS FOR DECISION

The Collective Agreement provision in question and which governs hirings to positions is Article 11. It reads as follows:

“Article 11 – Promotions and Staff Changes

Article 11:01 – When a vacancy occurs, a new position is created or the status of an existing position changes from temporary to permanent, either inside or outside the bargaining unit, the Employer shall post notices of the position in an accessible place in the Employer’s premises for a period of not less than five (5) days. Posting of vacancies outside will not occur until the application(s) of bargaining unit employees has been fully processed.

11:02 – For vacancies or new positions inside or outside the bargaining unit such notice shall contain the following information: Title of position, qualifications, required knowledge and education, skills, wage or salary range. All job postings shall contain “this position is open to male and female applicants”.

1:03 – Role of Seniority in Promotions and Transfers

Both parties recognize:

- (a) the principle of promotion within the service of the employer;
- (b) that job opportunity should increase in proportion to length of service.

Therefore, when a vacancy occurs in an established position within the bargaining unit, or where a new position is created within the bargaining unit, employees who apply for the position or promotion or transfer will be given preference on a seniority basis for filling such vacancy, provided that the applicant's qualifications meet the required standards for the new position. Appointment from within the bargaining unit shall be made within four (4) weeks of posting.”

The parties and the applicants for standing are all in agreement that this clause represents what is known in the Labour Relations or Labour Law Area as a sufficient ability clause, sometimes called a threshold clause, and does not represent what is known in the Labour Relations and Labour Law world as a relative ability clause or competition clause.

The article requires that the qualifications of the senior employee who has applied for the job are to be measured simply against the required standards or qualifications that the position calls for. His or her qualifications are in no way to be measured against or compared with the qualifications of other applicants for the job, whether inside or outside the bargaining unit and provided that the senior applicant has the required qualifications

it matters not that there are other applicants who may be more qualified or even significantly more qualified.

The parties and the applicants for standing also appear to agree that the jurisprudence clearly indicates where hirings are to be done on a competitive basis or pursuant to a relative ability clause where a candidate's qualifications are to be measured against the qualifications of other candidates, that persons given the position are entitled to notice of and standing in an arbitration concerning a grievance launched by an unsuccessful candidate.

Where the Union differs from the Employer and the applicants for standing, is as regards to the entitlement to notice and the right of standing where the clause is a sufficient ability clause (as is the case here) as opposed to a relative ability clause. In such a case, the Union argues there is not a right to standing or notice and the applicants for standing and the Employer argue that there is such an entitlement to notice and to standing on the part of the successful candidates or those occupying the position.

The Union also differs from the others around the table on the point of entitlement of a person who was outside the bargaining unit at the time that the grievance was initiated or where such persons obtained the position as a result of a job competition other than the one the grievor was involved in.

The facts are clear.

The grievor applied for a job of Employee Relations Officer on April 6, 2006 as a result of two internal job postings which closed on April 7, 2006.

On April 19, 2006 she was informed in writing that she was not qualified for the position of Employee Relations Officer and would therefore not be interviewed.

On April 21, 2006 the grievor filed a grievance claiming that the Employer had wrongfully denied her the job or a promotion into the job.

In later April 2006 the two jobs were advertised externally and Ms. Morrison applied on May 4, 2006. Ms. Kennedy applied on May 10, 2006.

Ms. Kennedy was hired as a replacement for a solicitor in June of 2006 at which time she became a member of the bargaining unit. Ms. Kennedy went into an Employee Relations Officer position in late July 2006.

Ms. Morrison went into the Employee Relations Officer position which she occupies on August 6, 2006.

Both still occupy these positions.

No person was hired into an Employee Relations Officer position via the internal posting.

Ms. Morrison and Ms. Kennedy were the only two persons hired and they were from outside, at least when they applied, though when she actually went into the position Ms. Kennedy had been a member of the bargaining unit for a short while.

The grievor had been a member of the bargaining unit since 1998.

Clearly, based on the wording of the Collective Agreement the Grievor is entitled to the position by being virtue of being a bargaining unit member and having seniority provided her qualifications meet the required standards for the position.

It is the Grievor's qualifications and the required standards for the position that are of concern and not the qualifications of anyone else. This is a sufficient ability clause. As I see it, the qualifications of the incumbents relative to the Grievor's or otherwise, are not something to be focused on.

The arbitral jurisprudence seems to indicate that in cases of discharge the person replacing the discharged employee will not be entitled to notice of or have a right to participate in the arbitration proceeding concerning the grievance filed by the discharged employee.

Likewise in cases of disciplinary demotions, the person replacing the demoted employee is not entitled to notice or a right to participate in the arbitration wherein the demoted employee grieves his or her demotion.

The case of *National Arts Centre, supra* in 1981 was a case in point. It concerned a disciplinary demotion. The incumbent in the position that the Grievor was demoted from was held not to be entitled to notice. Arbitrator Shime, in that case, was of the view that if the appointment to the position of the incumbent was made conditionally it would leave the incumbent without any legally recognized right which could be affected by the outcome of the hearing. In Shime's view there was an implied term of the collective agreement that no right to fill the position would accrue until after the grievance had been resolved and members of the bargaining unit can be deemed to have received notice of the conditional nature of appointment to a position that is or may be the subject of a challenge through the grievance procedure.

In *CUPW v. Canada Post Corporation* 149 L.A.C. (4th) 306 (Canada Arbitration Board – Dorsey) heard on February 8, 2006, the decision being rendered February 13, 2006, the arbitrator was concerned with the dismissal of a mail carrier who subsequently grieved. The issue was raised as to the entitlement to notice of the incumbent who replaced her. Arbitrator Dorsey ruled that the incumbent was not entitled to notice. She was not entitled to the position based on a contractual or statutory right independent of the position being vacant because the grievor was dismissed.

Arbitrator Swan in *McKenna v. R.* (1980) 20 L.A.C. (2d) 410 (Ontario Arbitration Board) held that an incumbent in a job vacated by a discharged employee had no right to participate in the hearing of a grievance relating to the justness of a discharge. He held that reinstatement of the discharged employee may affect the incumbent but that does not create a situation where the Union takes an interest adverse to his interest.

Counsel did not place before me, nor was I able to find, any case where an incumbent in the position vacated as a result of a discharge of the employee who previously held the position, was held entitled to notice of an arbitration concerned with the justness of the discharge.

In *CUPW v. Canada Post, supra* Arbitrator Dorsey at page 21 stated the same thing, that is, that counsel did not place before him nor did he know of any case where a replacement for a discharged employee was given notice or held to have a right to participate.

The arbitral consensus therefore seems to be that in discharge cases, incumbents are not entitled to notice. Even Arbitrator Swan in *Orillia Soldiers, supra* in 1993, seems to suggest that that was the correct position when at page 11 paragraph 33 he states that applying the concepts stemming from *Hoogendoorn supra* and *Bradley supra* that *National Arts Centre supra*, a case of disciplinary demotion would be correct. He goes on to distinguish that situation from the situation of an incumbent occupying the position where there is a sufficient ability clause.

Of course as noted earlier in 1988 he agreed in *McKenna v. R.*, *supra* that there was not an entitlement to notice in a discharge case.

The arbitral jurisprudence also appears to be in a state of consensus that in situations concerning applications under relative ability clauses or competitions between candidates for jobs where their qualifications are measured against those of the other candidates, there is an entitlement to notice.

In those decisions which have tended to restrict the application of *Hoogendoorn* and *Bradley*, the arbitrators appear to accept that there is an entitlement to notice in relative ability cases.

For instance, in *Boliden-Westman*, *supra* Arbitrator Blasina appears to accept this when he says as page 3:

“The point of this digression is that Arbitrators will err on the side of caution when it comes to applying the ‘Hoogendoorn Principle’, lest their award be subject to appeal for want of natural justice. However seniority cases where the seniority language provides for a ‘relatively equal’ clause and employees compete or are measured against one another are distinguishable from those where there is sufficient ability clause and employees are measured against the requirements of the job. In the latter

case the incumbent is not party to the issue being arbitrated notwithstanding that its status may be affected by the result.”

In *Scarborough General Hospital, supra* Arbitrator Langille held the view that while in a sufficient ability case there was not an entitlement to notice, in the case before him, a case which involved accommodation, there was an entitlement to notice because accommodation cases were more like relative ability cases and considerations went beyond just the grievor. He therefore can be taken to have accepted that relative ability clauses carry with them an entitlement to notice to incumbents.

In *Re Vancouver Community College supra* Arbitrator MacPhillips wrote at page 7

“this is not a situation of a job competition where the union is representing one member of the bargaining unit and is directly contesting the promotion of another. This is not a situation like the Ontario Court of Appeal described in *Bradley* where the union is put to a choice between employees who competed for the same preferment.”

In distinguishing the case before him from such cases the Arbitrator was recognizing that in such cases where there is competition for the same preferment, as would be the case of competitions under a relative ability clause, there would be an entitlement to notice.

The issue therefore, assuming the jurisprudence is correct that there is not an entitlement to notice in discharge cases but is an entitlement to notice in relative ability cases, is whether there is a qualitative difference, in terms of the justification for the entitlement to notice, between the discharge case and the sufficient ability case.

I am in agreement that there is much about the relative ability cases or competition cases that commend the incumbent having notice. Firstly, his/her qualifications as well as the grievor's are being examined and his/her superior fitness for the job, if such is the case, is a live issue. The incumbent brings something to the table. He or she knows as much or more about his or her qualifications than anybody else. He/she has a right to trumpet his/her qualifications as being superior to those of the grievor. Secondly, the union has clearly chosen to represent one employee's interest and to applaud his or her qualifications while aggressing against another employee's interest and downplaying his or her qualifications. Thirdly, the arbitrator's decision is going to speak to the relative qualifications and a determination is going to be made by the Arbitrator in that regard which gives rise to issues of res judicata and the parties being bound.

The arbitration of the discharge case or the disciplinary demotion case deals strictly with the justness of the discharge or disciplinary demotion and is not meant to concern itself with the rightness or wrongness of the appointment of the incumbent or his/her fitness for the job or his/her entitlement as against the employer if he/she is displaced as a result of the reinstatement of the grievor. The incumbent in such cases would bring absolutely nothing to the table in terms of insight or evidence that would allow for a more thorough

adjudication of the issues. The fact that he/she may end up losing his/her job is of no consequence to the arbitrator. Nothing would be added, the proceeding may take longer and the risk would be that even subliminally what the incumbent has at stake would find its way into the proceeding, when it clearly has no place there.

I find therefore that the positions taken in the jurisprudence in both the relative ability clause situation and the discharge or disciplinary demotion situation are correct.

The only question is therefore whether qualitatively, in terms of the justification for an entitlement to notice, the sufficient ability clause situation is more akin to the discharge/disciplinary demotion situation or more akin to the relative ability/competition situation.

Arbitrator Swan in *Orillia Soldiers supra* at page 11 articulated what he saw as the distinction between the discharge/disciplinary demotion cases and the sufficient ability clause cases when after analyzing *Hoogendoorn supra* and *Bradley supra* he wrote:

“Applying these concepts to the cases where arbitrators have found that employees apparently to be affected by an arbitration have no right to notice or standing in that arbitration, it will be clear that this approach would lead to exactly the same result in the *Re National Arts Centre* case, but the opposite result in the *Queen Elizabeth Hospital* case.

In *Re National Arts Centre*, the employee who filled a vacancy left by the employee who was demoted cannot be bound in any way by the outcome of the demotion grievance, since the only question between the employer and the union is whether the demotion is for just cause. Obviously, if the union succeeds and the remedy is reinstatement, the employer will have two incumbents for the same position and may well choose to resolve the problem by acting against the other employee. But the other employee will not have lost any rights to challenge whatever action is taken, and to whatever extent the employee may be able to seek remedies under the collective agreement, all of those remedies will still be available.

In the *Queen Elizabeth Hospital* circumstances on the other hand, there will of necessity, if the grievance were successful, be a decision that someone other than the affected employee is entitled to the posted position.”

At page 10 Arbitrator Swan further elaborates upon what he perceives is the distinguishing feature which allows him to decide as he did in that case as distinct from the discharge cases. In reference to *Hoogendoorn* he writes:

“Thus the totality of the decision of the Supreme Court of Canada, when the majority, the dissent, and the concurring judgment of Chief Justice Cartwright are all read together, very clearly makes the distinction

between two kinds of circumstances. In the first, where employees will be generally affected by an interpretation of the collective agreement, which is binding upon all members of the bargaining unit, some of whom will be advantaged and others disadvantaged there is no right to standing. The second situation is where it is sought specifically to advantage one employee at the expense of another in an arbitration *in such a way that the outcome will be binding upon the disadvantaged employee* [emphasis is mine], but the employee's interest will not have been represented before the arbitrator by the union, the statutory bargaining agent with an obligation to represent employees in the bargaining unit for which it is certified. In the latter case, the rights of an employee will have been adversely affected in a final and binding way, not subject to further challenge at the instance of the employee, without the employee having any representation made on his/her behalf. In such circumstances, the Court says that the employee must be granted standing in order that there not be a denial of natural justice."

I have reviewed the cases where there was departure from Swan's position in *Orillia Soldiers supra* but I do not see that anyone attacks Swan's analysis. Rather they depart from Swan on the basis that it will add layers to and complicate the process, that the cases where third parties could be affected are limitless and the Swan approach would involve opening flood gates, that the third party brings very little to the table inasmuch as his/her qualifications are not a focus and the issue is not really his/her issue, and if one adopted

the Swan approach one could not justify an exception for the case of the incumbent who would be displaced by a reinstated discharged employee. They say that *Hoogendoorn supra* and *Bradley supra* have been extended too far. *Hoogendoorn* is unique on its facts and was a situation of an employer and Union acting in concert to get rid of Hoogendoorn and *Bradley* was a case of competition between employees.

Having reviewed all of the arbitral jurisprudence as well as the jurisprudence emanating from the Courts I have come to the conclusion that the incumbents are entitled to standing in this case.

I am in agreement that they may very well bring very little to the table in the sense that their credentials or qualifications are not an issue. I am also in agreement that just because a party might be affected in a practical sense consequentially by the proceeding is not sufficient reason for them to be accorded standing or to be entitled to notice. An incumbent who will be displaced by a reinstated discharged grievor is affected by the proceeding in the practical sense and affected consequentially. However I see that situation as being different from the case of the incumbents here. Here my decision might determine that the grievor, the person with the seniority, has an entitlement to the position because she is qualified for the position. Such a determination not only has practical effect for the incumbents but it also has a potential legal effect on them in the sense that as a result of my decision they may be faced with arguments of *res judicata* and/or issue estoppel from the employer if they through their union took issue with their displacement. I am deciding in effect that this grievor has greater entitlement to the job

than anyone else. Leaving aside the issue of whether or not their lack of involvement in the proceeding could operate to alleviate them from such a situation to any degree, as I see it my decision could potentially pose legal hurdles for them that they would not otherwise have to face.

As I see it, I am deciding not only that the grievor is entitled to the position but I am also passing judgment on the validity of the incumbents' appointment.

Such would not be the case in the situation of the discharged grievor who is reinstated and displaces his/her replacement. The decision in that case would simply be that he/she was unjustly dismissed and is entitled to be reinstated. In that case when the displaced incumbent took issue with his/her employer he/she would not face the potential or the threat of having issue estoppel or res judicata raised. The displaced incumbent in that case would face no further or greater legal impediment or hurdle as a result of my decision than he or she would otherwise have faced. In that case I would not be passing judgment on the validity of the appointment of the incumbent to the position subsequent to the discharge of the employee. This is unlike the instant case where I am passing judgment on an incumbent. I am saying she should not have been appointed.

Morley R. Gorsky, S. J. Upsrich and Gregory J. Brandt, *Evidence and Procedure In Canadian Labour Arbitration*, (Toronto: Carswell, 1991) distinguish between the promotion cases and the demotion grievance cases in this fashion at page 7 – 18.

“Unlike a promotion case, where the grievor and the incumbent each enjoy a right to have the collective agreement interpreted in their favour, an employee who fills a vacancy created as a result of discipline that is the subject of a challenge does not have any interest recognized by law that entitles him to a right to separate status.”

I would extend this further and say that in the case of promotions the incumbent and the unsuccessful candidate have not only a right to argue that a collective agreement provision be interpreted in their favour but also a right to argue that it should be applied in their favour.

In this respect, I do not perceive a distinction between the successful candidate in a relative ability situation and one in the sufficient ability situation. I do however perceive a distinction in the case of a discharge or disciplinary demotion.

I find comfort in the fact that the Divisional Court in *Orillia Soldiers supra*, at page 2 did not just refrain from overturning Arbitrator Swan’s decision on the basis that it was not unreasonable but that it went further and stated that it was inclined to view that the Board was correct in the order that was made.

I do not believe that it is an answer to say that the Employer will carry the day for the incumbents. What if the Employer embarked on a particular strategy that meant foregoing or sacrificing another particular strategy that the incumbents thought was a

better one? What if the Employer conceded certain points that the incumbents believed should not have been conceded?

As to the incumbents being outside the bargaining unit when the grievance was filed I see that as going more to the issue of whether the Union was justified in taking a position of supporting the grievor and not providing representation to the incumbents than it does to whether or not they are entitled to standing. It is not a conclusive determining factor on the issue of standing.

For the foregoing reasons and for the reason that the involvement of the participants can be managed such that no unfairness is worked to the Union I am of the view that Ms. Kennedy and Ms. Morrison should be granted standing.

Their involvement has to be managed in such a way as to not work any unfairness to the Union. For instance, their involvement should not result in the Employer getting "two kicks at the can". By way of example, as I see it, the incumbents should not be permitted to cross examine or ask leading questions of Employer witnesses who were not adverse to them. They should instead be confined, as is the Employer, to conducting the examination of such witnesses as if it were an examination in chief.

DECISION

It is ordered that Ms. Morrison and Ms. Kennedy are granted standing and shall have full right of participation having regard to the concern that their involvement is to be

managed in such a manner as to not work any unfairness to the Union and it is to be anticipated that the Arbitrator will rule on any such issues as they arise.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 13th day of March, 2007.



David G.L. Buffett, QC