of Rio Algom, represents in my view a private arrangement between Rio Algom and participants that would not give any rights to third parties except perhaps shareholders of Rio Algom derivately.

When Albino encashed his rights under the Incentive Plan, he sold no shares into the market. There was no person in the market who purchased shares from or sold shares to him. No report of any trade was made over the Toronto Stock Exchange tape or the tape of any other stock exchange on which the shares of Rio Algom were listed. His encashment of award units was market neutral. If his actions brought harm, it was harm to Rio Algom itself who, as a result of his actions, may have paid more on encashment than it might otherwise have done. This would probably give Rio Algom a right of action against Albino. We were advised when this matter first came before us on January 25 that litigation was pending between Rio Algom and Albino and that Rio Algom had pleaded the actions of Albino in encashing his units in its statement of defence. The matters now before us were accordingly in issue in the action. It was on the basis of this information that we granted Albino's counsel the adjournment which he sought. We were also advised that the litigation had been settled. While details of the settlement were not before us, nor indeed should they have been, we can only assume that all matters at issue between the parties, including the encashment by Albino of his award units, were considered in reaching the settlement.

The conduct of Albino cannot be condoned. It seems clear, from the evidence before us, which Albino chose not to contradict, that he manipulated the time of the disclosure of the amendments to the Hydro Contract to his own advantage so that this news was not made public until the window had opened for encashment of award units under the Incentive Plan. That Albino undloubtedly knew what the market reaction would be does not take much imagination. His was not the type of conduct that one would expect from the chief executive of a large Canadian company. But his actions hurt his company, not the market.

In the result, for the reasons given, I would dismiss the application by staff and dissolve the order, made on January 25, 1990 as a condition of the adjournment that day, that the exemptions contained in sections 34, 71, 72 and 92 of the Act and the Regulations to the Act do not apply to Albino.

I would like to express my thanks to all counsel in this matter for their very clear and helpful arguments. This has been a very difficult case and I found their submissions very helpful.

J.W. BLAIN

C. SALTER:-- In his foregoing reasons, Commissioner Blain has provided a full and careful review of the facts of this case, and I will add to that review only where necessary to illustrate aspects of the facts that bear particularly on my own analysis. With Commissioner Blain, I have concluded that Albino manipulated the timing of the disclosure of 1986 changes to the Rio Algom-Ontario Hydro contract. Albino compelled a delay in the timely disclosure of that material change in Rio Algom's business and affairs until he could cash in his award units under the Rio Algom Incentive Plan, resulting in a gain to himself of some $50,000. I cannot share Commissioner Blain's characterization of the Rio Algom award units - in my view, they are securities and Albino's encashment of his award units was a constructive sale of these securities with knowledge of a material change with respect to Rio Algom that, as of the effective date of that sale, had not generally been disclosed. And if the award units are not securities, the connections between the award units and the capital markets are nonetheless so close as to compel action by this Commission for the protection of the investing public.

Request for Standing

At the opening of the hearing we considered a request for standing by Craig C. Thorburn, a partner in the law firm of Blake, Cassels & Graydon. He sought standing on behalf of his firm and unnamed clients of the firm to make submissions by way of a letter addressing, not the allegations against the respondent George Albino, but their concerns for the impact on public companies with phantom stock plans of a Commission finding that interests in such plans constitute securities. Mr. Pollock thought that that submission would be helpful to us in considering the public policy implications raised in this proceeding.

Mr. Douglas, for his part, objected to intervention by Mr. Thorburn. Mr. Thorburn's firm and the firm's clients, he said, have no direct pecuniary interest in these proceedings; to grant them standing to intervene would allow participation in Commission proceedings by any number of persons who might feel themselves situated similarly to the specific respondents, and such proceedings could thereby become unduly protracted.

It might be useful at this time to draw together the Commission's several decisions on matters of standing. Requests for standing by would-be interveners in Commission cases are not unusual, and the principles to be applied in considering such requests were reviewed in Re Torstar Corporation and Southam Inc. (1985), 8 OSCB 5068. In that case, brought as is this case under section 124 of the Act, a breach of a bylaw of The Toronto Stock Exchange was alleged. Staff sought an order denying named directors of the respondent corporations the benefit of certain exemptions in the Act. There, as in this case, the matter was brought before the Commission some time after the alleged breach. The Exchange sought standing as a party in the proceeding, as did three holders of significant blocks of Southam shares. In denying such standing, the Commission adopted the test set out by the British Columbia Court of Appeal in MacMillan Bloedel Limited v. Mullin et al, [1985] 3 W.W.R. 380:

> "In each case, it will be necessary to consider the nature of the issue and the degree of likelihood that interveners will be able to make a useful contribution to the resolution of the issue, without injustice to the immediate parties."

Although full standing was denied, the Commission drew on the then new Rule 13.02 of the Ontario Rules of Civil Procedure and granted the Exchange and the shareholders a limited role in the hearing - what we have come to call "Torstar standing" - to intervene for the purpose of rendering assistance to the Commission by way of argument, but not to lead evidence or cross-examine witnesses.

In Re Canada Maltino Co. Limited (1986), 9 OSCB 3566 a group of minority shareholders applied for a hearing and review of a decision of the Exchange permitting a private placement of Canada Malting treasury shares; the purchasers under the private placement challenged the applicants' standing to do so. The Act provides that

"Any person or company directly affected by any... decision made under any by-law, rule or regulation of (the Exchange) may apply to the Commission for a hearing and review thereof..." (emphasis added).

The Commission held that the minority shareholders indeed had standing, finding that those whose rights or whose economic interests have been affected by decisions of the Exchange are persons who are "directly affected" by such decisions:

> "If minority shareholders in a company (seeking Exchange approval of a private placement) are not affected when their company is making a large share issuance to major shareholders in which they are not invited to participate, then it is hard to think of a case in which shareholders would be 'directly affected'."

In Re Canadian Tire Corporation, Limited et al (1987), 10 OSCB 858, a hearing was called immediately after the announcement of a take-over bid, in which staff sought a cease trade order against the bid. A number of significant shareholders, and the target company itself, sought and received full standing; the Exchange was accorded Torstar standing. The Commission based its ruling on a finding that the shareholders would be financially affected by the outcome of the hearing:

> "...There is little doubt that substantial equity shareholders in a company that is the subject of a takeover bid, when that bid is being made at a very high premium in which they will not participate, have a direct interest in the outcome of a hearing, one result of which could be to block the bid."

In Re Selkirk Communications Limited, Southam Inc. et al (1988), 11 OSCB 286, Southam applied for and staff opposed certain exemptions from the take-over bid provisions of the Act in respect of a proposed private agreement purchase. Without objection, full standing was granted to a broker representing a number of institutional holders of Selkirk shares. The same broker, again representing institutional clients affected by take-over bids or issuer bids, was also granted standing in Re CDC. Life Sciences Inc. et al (1988), 11 OSCB 2541, Re Falconbridge Limited et al (June 28, 1988 - order published at 11 OSCB 3403) and in Re Enfield Corporation Limited et al (1990), 13 OSCB 3364.

The Commission has granted offerors full standing to appeal exchange decisions respecting a competing takeover bid (Re Core-Mark International Inc. et al (1989), 12 OSCB 3185) and to join in a cease trade application by staff against a private agreement purchase that would frustrate the offeror's bid (Re H.E.R.O Industries Ltd. et al (1990), 13 OSCB 3775).

ln a decision on an application for standing (Re James F. Matheson, May 9, 1990, Alberta Securities Commission Summary for June 1, 1990) the Alberta Securities Commission Board reviewed a number of the cases mentioned above and offered the following:

> "...the position in Ontario would appear to be that where a hearing is purely or largely disciplinary in its nature, interventions will not be allowed. Adversarial proceedings brought in the public interest are to be prosecuted by counsel for the Commission, and the intervention of other parties is not warranted. However, where the result of the hearing may affect the financial or other rights of the intervener, such as in applications regarding takeover bids, intervention might be allowed even though the applications have a secondary disciplinary character to them."

However, the disciplinary component of a hearing does not of itself dispose of the issue. As our Commission noted in Torstar, its holdings in earlier cases (Zenmac and EIectra) as to standing to intervene in a disciplinary hearing

> "...may have been overly broad. Given the structure of the Act, it is often only through section 124 or section 123 hearings that shareholder rights may be pro-

> tected. In such cases, to characterize the hearings as solely disciplinary in nature is to take too narrow a view of what is involved and what is at stake in the process. Shareholder rights may be involved to an extent that particular shareholders should be given standing to intervene to bring to the attention of the panel facts that are essential to a resolutior of the matters in issue."

In conclusion, it seems to us that on requests for standing the Commission must first and foremost consider the nature of the issue and the likelihood that intervenors will be able to make a useful contribution without injustice to the immediate parties (the MacMillan Bloedel test, adopted in Torstar). Where a would-be intervenor has a direct financial interest, in that that person may acquire a benefit or incur a loss as an immediate result of a Commission decision, full standing is appropriate. The clearest application of that principle is to security holders and to those who have announced an intention (i.e., offerors in take-over bids) to acquire securities. Where the intending intervenor has a clear financial interest - most obviously, as a holder of securities of the subject issuer - but that interest will not be immediately affected by the decision the Commission may make, then only restricted (i.e., Torstar) standing is to be granted, as in section 124 proceedings such as Torstar itself. (The practices developed by the Commission are broadly consistent with the recommendations of the Report on the Law of Standing, Ontario Law Reform Commission, 1989 in chapter 5 - "Intervention"; see in particular pages 132-134. See also Anisman's discussion of minority shareholders' access to Commission proceedings, in The Commission as Protector of Minoritv Shareholders (Law Society of Upper Canada, Special Lectures, 1989) at pages 478-482.)

But in the present case neither Mr. Thorburn's firm nor his firm's unnamed clients have such interest as would, on the above test, justify Torstar standing. Mr. Thorburn comes here not to ask "Why mine?" but to put in a defence of oxen in general. To hear him on that footing would compel us, and other Commission panels in future hearings, to hear any and all others situated similarly to Mr. Thorburn's clients. Such interventions could seriously protract Commission proceedings and add to the costs of the true parties to those proceedings, a result which we must in the public interest seek to avoid. We accordingly denied standing to Mr. Thorburn.

Phantom Stock Plans - a Security?

Securities legislation is remedial and must be construed broadly; it must be read in the context of the economic realities to which it is addressed: Pacific Coast Coin Exchange v. O.S.C (1977), 80 D.L.R. (3d) 529 at 538 (Supreme Court of Canada). In applying that purposive approach to the administration of the Act it is to be noted that the principle stated above in Pacific Coast. and in many of the other cases that have turned on the definition of a security, was adopted in the context of legislative provisions respecting the distribution of securities to the public. If the particular set of legal rights and obligations under review was found to be a security, the investing public would be protected through full, true and plain disclosure of all material facts in a prospectus. Investors would also enjoy statutory rights to claim for rescission or damages if the prospectus contained a misrepresentation, and the offering could be made only through persons duly registered as dealers or salespersons under the relevant statute. This present case must be considered in quite another context. That context is not the distribution of securities, but insider trading.

There are, of course, two distinct strands in the regulation of insider trading. The first is disclosure of insiders' transactions; the second imposes liability for trading with undisclosed material information. The basis for a disclosure requirement - the first strand - was stated in the Jenkins Report

(Report of the Company Law Committee, June, 1962, Cmnd. 1749) at section 88, endorsing the position stated in the 1945 report of the Cohen Committee, as follows:

> "Whenever directors buy or sell shares of the company of which they are directors, they must normally have more information than the other party to the transaction and it would be unreasonable to suggest that they were thereby debarred from such transaction; but the position is different when they act not on their general knowledge but on a particular piece of information known to them and not at the time known to the general body of shareholders...
>
> ...The best safeguard against improper transactions by directors and against unfounded suspicions of such transactions is to ensure that disclosure is made of all their transactions in the shares or debentures of their companies..."

Regulation of insider trading in Ontario was introduced in The Securities Act, 1966 and reflected the recommendations of the Kimber Report (Report of the Attorney General's Committee on Securities Legislation in Ontario - March, 1965). That report considers both strands:

"Insider Trading

> 2.01 In the securities industry, the phrase "insider trading" is generally used to denote purchases or sales of securities of a company effected by or on behalf of a person whose relationship to the company is such that he is likely to have access to relevant material information concerning the company not known to the general public. Although there is no statistical information available showing the volume of such trading, there is no doubt that it takes place. The question which the Committee considered was whether this tradirg is a matter of such concern to the investing public that rules to control it should be established. The Committee's conclusion, as developed in this Part, is that statutory rules are required in the public interest.
>
> 2.02 In our opinion, it is not improper for an insider to buy or sell securities in his own company. Indeed, it is generally accepted that it is beneficial to a company to have officers and directors purchase securities in the company as they thereby acquire a direct financial interest in the welfare of the company. It is impossible to justify the proposition that an investment so made can never be realized or liquidated merely because the investor is an insider. However, in our view it is improper for an insider to use confidential information acquired by him by virtue of his position as an insider to make profits by trading in the securities of his company. The ideal securities market should be a free and open market with the prices thereon based upon the fullest possible knowledge of all relevant facts among traders. Any factor which tends to destroy or put in question this concept lessens the confidence of the investing public in the market place and is, therefore, a matter of public concern.
>
> ...
>
> 2.04 The Committee has concluded that the legislation required to meet the problems should provide for full and public disclosure of all transactions effected by insiders in the securities of their companies. This is the primary requirement. The insider who

> knows that his trading will become public knowledge will be less likely to engage in improper trading. Such disclosure will also lead to greater investor confidence in the securities market. However, disclosure, while a deterrent, is not, in our view, sufficient by itself. The possibility that improper trading may occur requires that there be a sanction against those who engage in it. Consequently, the law should provide an effective procedure to recover any benefits derived by those who engage in improper insider trading. The Committee therefore recommends the enactment of legislation to deal with both the reporting and liability aspects of insider trading, the recommended details of which are considered below."

The Kimber Report notes the deterrent effect upon wrong-minded insiders of public reporting of their trading and on the public confidence to be derived from insider reporting. On the same point, Dickerson, Howard and Getz in Proposals for a New Business Corporations Law for Canada (1971):

> "256. The principle behind the obligation of disclosure imposed upon insiders rests on what may be called the "goldfish bowl" theory, that improprieties are less likely to occur if those tempted to commit them are likely to be discovered and exposed to the glare of publicity. Consequently, provision is made not only for disclosure to the Registrar but (for) the Registrar to publish periodic summaries of the information thus obtained."

Another advantage of the public reporting of transactions by insiders, not considered in the studies just mentioned, is in the information thus provided to investors. Directors and senior officers of public companies, together with those holding significant numbers of shares and thus insiders, may buy or sell for many reasons. Some of those reasons may relate only to the insider's own financial condition, or they may reflect the insider's estimation of the future business prospects (and share prices) of the issuer. Summaries of insider reports are published by the Commission in its Bulletin and are followed closely by the financial press and by investment professionals. Some investors take account of information on insider trading activities in setting their own investment strategies. Indeed, a major Canadian investment dealer converts data contained in insider reports into a standardized index, available to its clients, of insiders' relative confidence in some 200 stocks listed on The Toronto Stock Exchange: see discussion by Suret and Cormier, Insiders and the Stock Market, Canadian Investment Review, Fall 1990. That article also cites some of the considerable number of studies on the significance of trading by insiders to be found in the finance and economics literature.

Under our statutory scheme, directors and senior officers as insiders (the term is defined in paragraph 1(1)17 of the Act; see also paragraph 1(1)41 for the definition of "senior officer") of a reporting issuer are required to file an initial report of their "direct or indirect beneficial ownership of or control or direction over securities of the reporting issuer" and thereafter to report any change in those holdings (section 102). No insider of a reporting issuer shall "purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed" (section 75) and is exposed to heavy penalties (section 118) upon conviction of a breach of section 75, as well as to liability for damages (section 131) both to the opposite party on the purchase or sale and to the reporting issuer itself. For the purposes of the section 75 prohibition, and for certain of the civil liability provisions just mentioned, a "security of the reporting issuer" is deemed (subsection 75(6) and subsection 131(8), introduced in the 1987 amendments to the Act) to include

> "(a) a put, call, option or other right or obligation to purchase or sell securities of the reporting issuer; or
>
> (b) a security, the market price of which varies materially with the market price of the securities of the issuer."

Albino was an insider of the reporting issuer (Rio Algom) at all material times; were the award units (under Rio Algom's phantom stock plan) a security? The value of award units to their holders varied directly with the market price of Rio Algom's common shares. However, there was no market in such award units and therefore the extended meanings of "security" in subsections 75(6) and 131(8), quoted above, do not squarely answer the question. But, as will shortly be seen, those extended meanings provide important guidance in seeking out the answer.

The 1966 Act's provisions for insider reporting, and civil liability for misuse of non-public material information, focussed on "capital securities" of a company: shares of any class of shares and bonds, debentures, notes or other obligations. The now-commonplace derivatives - financial instruments drawing their characteristics from some other instrument - were then largely unknown. An exception was the ADR or American depository receipt (the first ADRs were issued by an American bank in 1922) that gives U.S. investors an interest in securities of a foreign issuer. Technically, an ADR is a certificate, denominated in shares, representing proof of ownership of foreign securities on deposit with a foreign depositary bank affiliated with an American bank. Then and now, little if any use of ADRs has been made by Canadian issuers. Another exception was the dealer-originated put or call option, not frequently seen in Canada. Warrants to purchase common shares were widely used to bonus issues of bonds or debentures, and free-standing rights offerings were frequently made, but there was nothing in the Canadian securities markets of the mid-1960s that would lead those who drafted the 1966 Act to anticipate the next two decades' development of derivative instruments.

Perhaps the earliest of these were the exchange-traded options developed by the Chicago Board Options Exchange in the early 1970s; contracts, issued by a clearing corporation, evidencing the right to buy or to sell shares of public companies. Other arrivals cn the derivative scene include instruments known by improbable acronyms: CATs, COUGRs, TIGRs and ZEBRAs are certificates or receipts evidencing entitlement either to the interest or the principal components of certain underlying government bonds; PRIMEs and SCOREs relate separately to the dividend income stream and capital appreciation of underlying equity shares of a public company. "Ginny Mae", along with "Fanny Mae", "Farmer Mac" and "Freddie Mac", are the popular names for U.S. agencies that led in the process of turning assets (mortgages, in their cases) into asset-backed securities. That securitization process continues to expand. Another class of derivatives comprises instruments - usually commodity futures contracts or options - related not to a specific underlying security but to a recognized index of the trading in a market in which those underlying securities are bought and sold: the Standard and Poor 500 Index, the Standard and Poor 100 Index, the Nikkei 225 Index and others. TIPs are a hybrid in that they track the performance of The Toronto Stock Exchange 35 Index and at the same time represent ownership in a pool of actual underlying shares. The list lengthens. Derivatives draw their substance, and their value, not from themselves but from something else: their underlying securities, pools of securities or a security trading index. As to their form, they may be conventional securities - shares in a corporation, units in a trust, participation certificates in a pool of income or capital entitlements - that fall squarely within the specifically enumerated heads of the Act's non-exclusive definition of "security" in paragraph 1(1)40. Other securities, not themselves

securities of the reporting issuer (option contracts issued by a clearing corporation are an example), are caught up in the extended definition of subsections 75(6) and 131(8), and that definition is also non-exclusive. Should the definitions be construed so as to include entitlements under phantom stock plans such as Rio Algom's?

The foregoing brief review of derivative instruments suggests that that construction is consonant with modern economic realities and entirely appropriate under an embracive statute such as the Act. Given the clear and close relationship between Rio Algom common shares and Rio Algom award units, the latter is properly seen as a derivative of the former, should be classified as a security and so regulated. (It is not necessary here to consider any of the tensions between securities and commodity futures regulation that have vexed the American markets.)

Enforcement actions by Commission staff within recent years, in the field of investment contracts, have led to consent orders against such diverse distributions as interests in shipping containers, in the management and sale of advertising space, in pools of lottery tickets, in a product for which extraordinary enhancement of crude oil recovery was claimed, and in a pizza preparation and delivery scheme. In each of these cases a broad interpretation of the Act was applied, investment contracts were found to have been offered and the investing public were protected. So should the Commission do here, in construing the definition of a security for the purposes of the insider trading provisions of the Act and the public interests in respect of insider trading.

Commissioner Blain has discussed a number of the American decisions under section 16(b) of the Securities Exchange Act of 1934. That provision has been taken to impose absolute liability upon insiders to account to the corporation for short-swing trading profits and has given rise to a number of derivative actions, brought in the name and for the benefit of the corporation. While the nominal plaintiff in such an action rarely has any significant economic interest in the matter, there is a segment of the American bar that, fuelled by contingent fees, pursues these cases; that aspect may contribute to the huge distaste for any extension of section 16(b) shown in the comments, quoted by Commissioner Blain, of the American Bar Association. An important principle, and one highly relevant to our present decision, is referred to in Matas v. Seiss, 467 F.Supp. 17 (1979). There the court cites at page 220 the decision of the United States Supreme Court in Kern County Land Co. v. Occidental Petroleum, 411 U.S. 582, 594-5 (1973) for the following:

> "In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent - the realization of short-swing profits based upon access to inside information - thereby endeavouring to implement congressional objectives without extending the reach of the statute beyond its intended limits."

Taking that approach, to bring transactions in phantom stock plans - Albino's encashment of his Rio Algom award units - within the reach of the Act is indeed to implement the legislature's objectives respecting trading by insiders of reporting issuers, and does so well within the embracive objects of the statute.

I therefore conclude that Albino's impugned transaction was a transaction in securities of Rio Algom and that his encashment of award units was a constructive sale of securities of Rio Algom. Albino's conduct in and about that transaction was wholly reprehensible. For the protection of the public, an order should be made against Albino under section 124 denying him the benefit of the regis-

tration (section 34), prospectus (sections 71 and 72) and take-over bid (section 92) exemptions in the Act.

Section 124 orders are not punitive. They are made to protect the public from the harms that might reasonably be anticipated if the respondent continued to enjoy those exemptions from compliance with the several sets of rules, provided to protect the public, in respect of trading, distribution of securities and take-over bids. In Re Mithras Management Ltd. (1990), 13 OSCB 1600 at 1610 the Commission set out its statutory mandates, in respect of suspension or cancellation of registration, cease trading orders and orders denying the benefit of exemptions, as follows:

> "Under sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out."

While in Mithras the Commission matched its denial of exemptions under section 124 to the particular conduct considered in that case, more often the Commission has considered that the demonstrated breach of the provisions of the legislation leaves no confidence that any of the statutory exemptions will be responsibly employed, and thus has denied all of the exemptions mentioned in section 124.

So should we do here. In all the circumstances of this case, and noting that an interim section 124 order has been in place since January 25, 1990, our order should have effect until January 1, 1992.

Alternative Finding

If it were concluded that the Rio Algom award units are not a security, the same order should be made. Commissioner Blain rightly notes that there must be some nexus with the capital markets to support an order under section 124. Not all conduct, however reprehensible, requires such an order; the Commission's regulatory ambit must be restricted to conduct significant to the workings of the capital markets. In my view, that nexus exists. Even if not a security, the award units' key characteristic of varying in value with the price of Rio Algom's common shares provides, without more, the required connection with the capital markets. That view is reinforced by the terms of the plan under which the award units were issued. The plan's objectives and design include providing senior personnel "with the opportunity to realize gains if the opportunity to realize such gains is also available to the Corporation's shareholders"; the plan is designed "to commonize the interests of the plan participants with those of the shareholders"; and the exercise of rights to gains under the plan, as well as being restricted in time, is conditioned on the participants not having "become privy to insider information that would make such (exercise) improper" (emphasis added). A section 124 order, in

the terms set out above, is accordingly appropriate by reason of these close links between the award units and the capital markets. As the Commission put it in Mithras, even if (on the view that the award units are not securities) no particular breach of the Act has been made out, Albino's conduct has been so abusive of the capital markets as to warrant our apprehension of future harm and our intervention to prevent such harm.

Other Considerations

There are certain practical consequences that would flow from my finding that the award units are securities. I would recommend to the Commission the adoption and publication of a "no-action" policy, to be effective for some reasonable period of time, on insider reporting of interests in phantom stock plans. During that period issuers, insiders and their advisers would have an opportunity to discuss with Commission staff such matters of interpretation and practice as will no doubt arise. The Commission would consider whether such a no-action policy should extend to possible prosecutions for prior breaches of section 75; and of course that policy should not and could not affect the position of any plan participants who might be at risk under the civil liability provisions of the Act.

In reaching my conclusion that the award units are securities and should be regulated as such I have had regard for the same questions that would arise if the Commission were proposing legislation on the issue. Those include an estimation of the related regulatory costs and the costs of compliance on the part of the affected individuals.

It was suggested to us that perhaps one-fourth of the major Canadian companies have phantom stock plans in place. If that estimate is approximately accurate, not more than thirty or forty issuers would be affected. Only those plan beneficiaries who are also directors or senior officers, and therefore insiders, would be required to report their current interests under such plans and, from time to time, both their realization or encashment of such interests and their receipt of any additional such interests. Such reports would not add significantly to the workload of Commission staff. Many of those directors and senior officers required to report phantom stock holdings are undoubtedly holders of other securities of their respective issuers and are already filing insider reports; their additional reporting requirements would not be significant.

Finally, all the affected individuals are deemed to know the law regarding improper insider trading and must be at least generally aware of the wide public comment on the conduct of insiders. Among many books and articles on the topic, Insider Trading in Canada, prepared for the Institute of Corporate Directors, is well known. Most major corporations have written their own rulebooks providing specific information and guidance on the legal and ethical standards that their directors, officers and employees are expected to observe if they trade in their corporation's securities. This Commission has nothing to teach the vast majority of insiders respecting such standards, and Commission staff's enforcement actions should be seen as reinforcing that majority's view of right conduct in trading by insiders.

C. SALTER

L.B. HANSEN:-- Commissioner Blain has fully reviewed the relevant facts of this case and I adopt his statement of those facts. I also adopt Vice-Chairman Salter's reasons for denying a request for standing made at the commencement of the hearing.

In Commissioner Blain's view, the Rio Algom award units are not securities and in the view of the Vice-Chairman they are; I decline to decide that issue. But with the Vice-Chairman, I find significant connections between the award units under the Rio Algom incentive plan and the capital markets. I also find that the behaviour of Albino was seriously prejudicial to public confidence in the capital markets and calls for sanction by the Commission to prevent its repitition.

While I depart from the Vice-Chairman on his characterization of the award units as securities, I endorse his analysis of the legislature's objectives respecting trading by insiders of reporting issuers. One of the key purposes of legislation on insider trading is to prevent the profiting by an insider on the basis of material, non-public information. The economic reality of the action by Albino with respect to the encashment of the award units was exactly that which the insider trading rules work to eliminate. The range of possible motivations as to timing of encashment parallels that for the sale of shares. The encashment of award units generates the same signal to the marketplace as a sale of shares. Both must be reported if the signals on insider trading are to reach the marketplace.

But that analysis does not bring me to conclude that the award units should be found to be securities under the provisions of the Act as it presently stands. To do so calls for what may be an overly broad reading of the legislation. Nor am I persuaded to follow Commissioner Blain's analysis of the issue, an analysis that may in my respectful view be overly restrictive. The matter should be approached as a policy issue to be handled in the Commission's normal way. The Commission's much-quoted decision in Re Cablecasting Limited, [1978] OSCB 37 at 43 goes squarely to the point. The Commission considered in that case, as I consider here, that

> "...we must move with caution. The Commission's policy pronouncements are tested by experience and by public debate. Frequently the versions of these statements initially published for comment require modification to deal with implications not envisaged by the draftsman. To create a new policy and apply it in the heat of a contested application without being subject to these disciplines would be a bold act. Clearly, in our view, the Commission has authority to do this; equally clearly, it should refrain from exercising this authority except on facts that demand some relief."

While the facts of this present case indeed demand action, that action can be supported without risking a perhaps precipitous finding that phantom stock plans in general and the Rio Algom award units in particular should or should not be regulated as securities.

That support is to be found in the several characteristics of the award units and their close connection with the capital markets. In addition to the aspects set out by Vice-Chairman Salter, I see the economic considerations of a decision by an insider to sell shares of the reporting issuer as similar to that of the insider's decision to encash award units, and most persuasive of the connection that must be found between the award units and the capital markets before action is taken under section 124. All of these aspects taken together provide the necessary linkages and support action by the Commission. I join with the Vice-Chairman in making an order against Albino under section 124 of the Act, the order to have effect until January 1, 1992.

Commissioner Blain, Vice-Chairman Salter and I are unanimous in characterizing this as a most difficult case, and in expressing our thanks to all counsel for their assistance.

L.B. HANSEN

Cited as:
Manitoulin and District Assn. for Community Living

Manitoulin and District Association for Community Living,
Applicant v. Canadian Union of Public Employees, Local 2624,
Responding Party

[2000] OLRB Rep. July/August 649

[2000] O.L.R.D. No. 2023

File No. 0197-00-M

Ontario Labour Relations Board

BEFORE: Christopher J. Albertyn, Vice-Chair

July 11, 2000

(37 paras.)

Hospital Labour Disputes Arbitration Act -- Parties -- Practice and Procedure -- Reference -- Employee operating as charitable organization providing services, facilities and supports for adults with developmental disabilities and their families -- Minister referring question under section 3(2) of Hospital Labour Disputes Arbitration Act ("HLDAA") as to whether employer a "hospital" within meaning of HLDAA - Board declining to allow Ontario Association for Community Living to intervene as "interested party", but granting it amicus curiae status -- Employer challenging Board's jurisdiction to consider reference on the ground that Minister did not have authority to delegate referral of question under section 3(2) of HLDAA to a subordinate acting on his behalf and on ground that Minister allegedly acted in a routine and automatic fashion and did not genuinely exercise his discretion in making reference to the Board -- Employer's objection to Board's jurisdiction dismissed.

Appearances:

Brian R. Gatien, Marguerite Hayes and Garry R. Bergeron, for the employer.
Risa Pancer, Anna Sweet, Shirley Sagle and Janet Anning, for the trade union.
Rod Walsh, for Ontario Association for Community Living.

DECISION OF THE BOARD

would not be prejudiced by its participation, nor would the hearing be unnecessarily protracted.

8 I was referred to INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, [1996] OLRB Rep. Feb. 70; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, [1999] O.L.R.D. No. 247; and ONTARIO (ATTORNEY GENERAL) v. DIELEMAN [1993] 16 O.R. (3d) 32, [1993] O.J. No. 2587. The principles which emerge from these cases are that for a party to be granted intervenor status it must have a real, direct, discernible interest in the proceedings; that interest must be substantial and identifiable; the intervenor must have an important perspective which is distinct from the immediate parties; the intervenor should be a well-recognized group with a special expertise and with a broad identifiable membership base; and the participation of the intervenor should not result in undue delay or prejudice to the main parties. Of these principles, the most important is that the party seeking intervenor status must have a clear and direct interest in the outcome of the proceedings.

9 The standard is less stringent for the grant of AMICUS CURIAE status. The Board must be satisfied that it will benefit from the participation of the AMICUS, and that its participation will not result in prejudice or delay to any of the parties. The more the characteristics of the AMICUS and its interests approximate those of an intervenor, the more should its capacity to participate in the proceedings be recognized. The role of the AMICUS, i.e. the level of participation, can be determined in each matter as the Board considers suitable depending upon the exigencies of the particular case.

10 In this case I am not satisfied that the OACL has a real or direct interest in the outcome of the matter. It has a discernible interest in that its members may be affected by the outcome of this matter and, in due course, it will have to assist its members in dealing with the implications of the Board's decision. It does not have a substantial or identifiable interest. Arguably the OACL may have a perspective - its provincial perspective - which is distinctive and which may be of benefit to the Board. The OACL is a well-recognized group with a special expertise and with a broad identifiable membership base. These characteristics advance the cause of its participation. Taking all of the factors together I am not satisfied that the OACL meets the requirements for intervenor or interested party status, and its request in that regard is denied. I am satisfied, though, that the OACL has some general interest in these proceedings and that it can possibly bring a useful perspective to some or other aspect of the matter which may be of value to the Board.

11 In the circumstances, the OACL will be granted AMICUS CURIAE status in the hearing. It will be entitled to be present throughout the hearing and to cross-examine the witnesses of the employer and of the union, provided that its participation will not unduly protract the proceedings. At the close of the employer's case (the parties have agreed that the employer will proceed first) an assessment will be made by the Board as to what evidence, if any, the OACL may itself present, before the union presents its case. The Board will grant the OACL the opportunity to present evidence only if it is satisfied of its relevance and if the anticipated evidence has not been adequately canvassed by the employer's witnesses.

THE BOARD'S JURISDICTION TO CONSIDER THE REFERRAL

12 On April 17, 2000 Mr. Reg Pearson, the Director: Labour Management Services sent the following reference to the Board:

THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT

In the matter of a Reference to the Ontario Labour Relations Board Pursuant to Subsection 3(2) of the Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14

MANITOULIN AND DISTRICT ASSOCIATION FOR COMMUNITY LIVING ("EMPOYER")

- AND -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2624 ("UNION")

1. On February 2, 1999, the Union requested the appointment of a conciliation officer. On February 10, 1999, a conciliation officer was appointed to confer with the parties and endeavour to effect a collective agreement.
2. The parties have been in the conciliation process but have been unsuccessful in resolving all of their issues.
3. The Union is of the opinion that the Employer falls within the jurisdiction of the HOSPITAL LABOUR DISPUTES ARBITRATION ACT ("HLDAA"). The Employer does not agree.
4. The Minister is of the view that it would be appropriate to refer to the Ontario Labour Relations Board ("Board") the question of whether the HLDAA applies to the parties.
5. Accordingly, the following question is referred to the Board for its advice:

   Is the Employer a "hospital" within the meaning of the HOSPITAL LABOUR DISPUTES ARBITRATION ACT?

6. The name and address of the Union is:

   Canadian Union of Public Employees, Local 2624 205-288 Regent St.
   Sudbury, Ontario P3E 6C6

   Attention: Ms. Anna Sweet, CUPE National Representative

7. The name and address of the Employer is:

   Manitoulin & District Association for Community Living
   P.O. Box 152, King Street
   Mindemoya, Ontario P0P 1S0

Attention: Marguerite Hayes, Executive Director

8. The name and address of the solicitor for the Employer is:

Gatien & Braithwaite
1970 Paris St.
Sudbury, Ontario P3E 3C8

Attention: Brian Gatien

Attached is a copy of the Union's request for the appointment of a conciliation officer, received February 5, 1999.

I hereby direct this reference pursuant to the authority delegated to me under the HOSPITAL LABOUR DISPUTES ARBITRATION ACT, R.S.O. 1990, c. H.14.

13 Mr. Pearson was acting under a general authorization, consent, delegation and designation for the administration of the Ministry of Labour issued by the Minister on October 28, 1999. It reads:

I, CHRIS STOCKWELL, as the Minister of Labour, hereby order as follows:

Administration, general

1. The person appointed or designated as, or acting in the capacity of, the Deputy Minister of Labour from time to time ("Deputy Minister") is assigned the responsibility for the administration of the Ministry of Labour ("Ministry") by Cabinet and by me, and he or she has full signing authority to enable him or her to carry out these responsibilities.

PSA, consent to delegate

2. Pursuant to subsections 23(1) and (2) of the PUBLIC SERVICE ACT ("PSA"), I consent to the Deputy Minister delegating any of his or her powers and duties under the PSA to any public servant or class thereof in the Ministry, in accordance with those subsections.

PSA, unclassified service appointments

3. Pursuant to subsection 8(1) of the PSA, I designate the Deputy Minister or any public servant delegated by the Deputy Minister in accordance with subsections 23(1) and (2) as the person to make appointments to positions in the unclassified service of the Ministry, as provided in section 8 of the PSA.

LRA, 1995; conciliation officers, mediators, arbitrators, etc.

4. I reserve the power to make a direction under section 41 of the LABOUR RELATIONS ACT, 1995 ("LRA, 1995") and an appointment under subsection 43(7) of the LRA, 1995.

   However, pursuant to subsection 121(1) of the LABOUR RELATIONS ACT, 1995 ("LRA, 1995"), I delegate my power to make any other appointment, order and direction for the purposes of the LRA, 1995 to,

   (a) the Deputy Minister;
   (b) the person appointed or designated as, or acting in the capacity of, the Director of Labour Management Services from time to time ("LMS" Director"); and
   (c) the person appointed or designated as, or acting in the capacity of, the Assistant Director of the Office of Mediation from time to time ("OM Assistant Director").

I also authorize the Deputy Minister, the LMS Director and the OM Assistant Director to make all references and give and receive all notifications and reports for the purposes of the LRA, 1995.

HLDAA; interest arbitrators

5. I reserve the power to make any appointment, order and direction under section 6 of the HOSPITAL LABOUR DISPUTES ARBITRATION ACT ("HLDAA"). However, I authorize the Deputy Minister, the LMS Director and the OM Assistant Director to make all references and give and receive all notifications and reports for the purposes of the HLDAA.

EPPA, 1997; conciliation officers, arbitrators

6. I reserve the power to make any appointment, order or direction under section 50.2 of the FIRE PROTECTION AND PREVENTION ACT, 1997 ("EPPA, 1997"). However, pursuant to subsection

50.7(1) of the EPPA, 1997, I delegate my power to make any appointment, order or direction under sections 49 and 53 of the EPPA, 1997 to the Deputy Minister, the LMS Director and the OM Assistant Director. Furthermore, I authorize those persons to make all references and give and receive all notifications and reports for the purposes of the EPPA, 1997.

OHSA; joint health & safety committees

7. Pursuant to section 5 of the OCCUPATIONAL HEALTH AND SAFETY ACT ("OHSA"), I hereby delegate my powers under subsections 9(3) and 9(3.1) of the OHSA to the Ministry officers appointed or designated as, or acting in the capacity of, the following Ministry positions:

    1. Director, Central Region
    2. Director, Eastern Region
    3. Director, Northern Region
    4. Director, Western Region

In the exercise of these delegated powers, the foregoing officers shall consider the factors enumerated under subsection 9(5) of the OHSA.

General

Although I am delegating a number of my powers and duties, I hereby also expressly reserve the right to revoke a delegation in any particular case and to exercise the applicable power or duty myself as Minister of Labour.

8. This document replaces the previous document titled "Authorization, Consent, Delegation and Designation for the Administration of the Ministry of Labour" dated March 12, 1998 and all amendments thereto. However, anything that was done pursuant to the authority under that document or its amendments remains effective unless spent or until expressly revoked.

14 The employer's argument is twofold. Firstly, as stated, it says that the Minister did not have the authority to delegate a referral of a question pursuant to subsection 3(2) to a subordinate acting on his behalf - he should have made the referral himself. The employer argues that the Act and HLDAA authorize the Minister to delegate his powers to make an appointment, order or direction under those Acts, but not to refer a question to the Board.

Because the Minister does not have the express power to delegate references to the Board, so the argument goes, he cannot delegate that authority.

15 Secondly, the employer takes the position that the Minister has applied his discretion in a rigid and automatic fashion, thereby fettering his discretion inappropriately. As a matter of course, says the employer, if a party requests a determination under HLDAA that a particular employer is a hospital, the Minister will refer the question to the Board for advice, without exercising any critical review of the merits of the request before doing so.

16 In the employer's submission, the proper course of conduct by the Minister is to consider each application for a declaration under HLDAA on its own merits, seek the views of the parties on the merits of the issue and, if the Minister considers it necessary, he might then seek the advice of the Board on the question. He should not refer immediately to the Board for advice as a matter of course.

17 In support of its argument, the employer makes reference to the facts in the case. The parties have had a collective bargaining relationship for about four years. They successfully concluded a first collective agreement, which expired in March 1999. The union applied for conciliation on February 2, 1999. The parties had two bargaining sessions, on February 21 and 22, 2000. They met at conciliation on April 4, 2000. The parties agreed to request a No-Board Report from the Minister.

18 On about April 16, 2000 the union verbally informed the Ministry of Labour that it would apply for the designation of the employer as a hospital under HLDAA. On April 17, 2000 the Ministry sent a letter to the parties informing them that the Minister was referring the question of whether the employer is a hospital to the Board for its advice pursuant to section 115 of the Act and subsection 3(2) of HLDAA. Also on April 17, 2000 the Director: Labour Management Services referred the question to the Board. On April 18, 2000 the union wrote to the Ministry formally requesting a declaration that the employer is a hospital within the meaning of HLDAA. Thus the referral to the Board by the Ministry occurred before the written request to the Minister for a declaration was made by the union.

19 Dealing with the first argument (the alleged improper delegation of authority), what is effectively challenged is the Minister's delegation of authority of October 28, 1999 to the Director: Labour Management Services, among others, to make references. In effect, the employer argues that the Minister has no power to delegate that function to the Director of LMS; in its submission, he must make the reference himself.

20 Despite the absence of notice to the Ministry of this argument, and the absence of any submissions by the Ministry on the matter, there are several reasons why this argument cannot be upheld. Firstly, the Board follows a presumption of regularity in dealing with official submissions to it by the Ministry. Ostensibly the referral of the question to the Board has been done by a person duly authorized and delegated to act in his stead by the Minister. Hence the Board presumes the regularity of the conduct of the Ministry's officials on the basis of their ostensible authority.

21 Secondly, under subsection 9.2(1) of HLDAA the Minister is expressly authorized to delegate in writing his power to make any appointment, order or direction under this Act. The Minister has applied his mind to this authorization and, in his written delegation of October 28, 1999, he has retained for himself specific power to make appointments, order

and directions under section 6 of HLDAA, but he has delegated his power to make references under HLDAA, including reference of a question to the Board for advice as to whether an employer is a hospital under HLDAA. Referring a matter is a lesser act than any appointment, order or direction. The Minister has an implied power to delegate any lesser act than those acts (like appointments, orders, directions) which he is expressly empowered to delegate.

22 Thirdly, the Minister has delegated a purely administrative function. He has not delegated any power: he has charged a subordinate official to seek the advice of the Board instead of doing it himself. In referring a question he is not delegating a statutory power of decision. He is seeking advice. The agent for his communication is the Director: MLS. He is having his staff frame the request. That is all they are doing. The Minister retains the right to ask the question of the Board; he has chosen though to have it done by one of his officials. That is a perfectly proper assignment of administrative responsibility. As stated in ADMINISTRATIVE LAW IN CANADA, Second Edition, Sara Blake, Butterworths, Toronto 1997, at 129:

> ... Ministers have an implied power to delegate their powers to Deputy Ministers and to the officials in their Ministry. "The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally". However, powers that are expected to be performed by a Minister personally cannot be delegated to the Minister's subordinates. Appellate powers, for example, cannot be delegated. A party, who has a right of appeal from a Ministry official to the Minister, is entitled to have the appeal decided by the Minister and not by another official. Approval of bylaws and regulations may require the personal attention of the Minister. If the statute expressly confers certain powers on specified officials, but reserves the most important powers for the Minister, the Minister may have no implied power to delegate these powers to subordinates. Even where there is no implied power to delegate, the Minister need not do the "leg work" in person, but may rely on the assistance of staff. ...

See also Re O.I.S.E. and ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS (1988), 1 L.A.C. (4th) 348 (Burkett), at 249-350:

> ...
>
> The Supreme Court of Canada in R. v. HARRISON (1976), 66 D.L.R. (3d) 660, 28 C.C.C. (2d) 279, [1977] 1 S.C.R. 238, accepted that a Minister of the Crown may act through his/her departmental officials in carrying out the administrative tasks assigned to him/her by statute. Dickson J. speaking for the court cited with approval the statement of Lord Denning in METROPOLITAN BOROUGH & TOWN CLERK OF LEWISHAM v. ROBERTS, [1949] 2 K.B. 608 at p. 621, [1949] 1 All E.R. 815 (C.A.), that:

> ... when a minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorized official of his department. The minister is not bound to give his mind to the matter personally. This is implicit in the modern machinery of government ...

In upholding an appeal from a judgement of the British Columbia Court of Appeal that the appeal of a criminal conviction by the Attorney-General must come directly from the Attorney-General in order to comply with the CRIMINAL CODE, the Supreme Court held [at pp. 665-6] in R. v. HARRISON, SUPRA, that:

> The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the Minister is accountable to the Legislature, will act on behalf of the Minister, within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and inefficiency.

Although a stricter requirement of ministerial involvement was articulated and relied upon by the Ontario High Court of Justice in HORTON v. ST. THOMAS ELGIN GENERAL HOSPITAL (1982), 140 D.L.R. (3d) 274, 39 O.R. (2d) 247, 20 B.L.R. 129, the afore-cited judgment of the Supreme Court in R. v. HARRISON, SUPRA, was not referred to. Accordingly, in our view the correct statement of the law is as set out in R. v. HARRISON, SUPRA. ...

The decision of the Supreme Court relied upon by the board of arbitration in the above matter, R. v. HARRISON (1976), 66 D.L.R. (3d) 660, 28 C.C.C. (2d) 279, [1977] 1 S.C.R. 238, dealt with the matter, at 665 as follows:

> ... In my opinion, there is implied authority in the Attorney-General to delegate the power to instruct, in s. 605(1). I do not think that s. 605(1) requires the Attorney-General personally to appeal or personally to instruct counsel to appeal in every case. Although there is a general rule of construction in law that a person endowed with a discretionary power should exercise it personally (DELEGATUS NON POTEST DELGARE), that rule can be displaced by the language, scope or object of a particular administrative scheme. A power to delegate is often implicit in a scheme empowering a Minister to act. As Professor Willis remarked in "Delegatus Non Potest Delegare", 21 Can. Bar Re. 257 (1943) at p. 264:
>
> > ... in their application of the maxim DELEGATUS NON potest delegare to modern governmental agencies the Courts have in most

> cases preferred to depart from the literal construction of the words of the statute which would require them to read in the word "personally" and to adopt such a construction as will best accord with the facts of modern government which, being carried on in theory by elected representatives but in practice by civil servants or local government officers, undoubtedly requires them to read in the words "or any person authorized by it".
>
> See also S.A. deSmith, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 3rd ed. (1973), p. 271. Thus, where the exercise of a discretionary power is entrusted to a Minister of the Crown it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his Department: CARLTONA LTD. v. COM'RS OF WORKS ET AL., [1943] 2 All E.R. 560 (C.A.).

In just the same way, the Minister in this case has an implied power to delegate purely administrative acts, such as writing to the Board giving it a reference to provide advice.

23 For all of the above reasons the employer's first argument against the Board's jurisdiction is dismissed.

24 The employer contends in its second argument that the Minister, through his subordinates in the Ministry, acted perfunctorily in dealing with this matter. As a matter of course and practice, says the employer, he immediately sought the advice of the Board as to the question of whether the employer is a hospital. He did so without seeking any representations from the parties and without considering whether the advice of the Board was necessary. By doing so, says the employer, the Minister has fettered his discretion. The employer says the Minister has applied his discretion in a unreflective and automatic manner, and that, in its submission, is an improper exercise of his discretion.

25 The employer refers to the wording of subsection 3(2) of HLDAA:

> The Minister may refer to the Ontario Labour Relations Board any question which in his or her opinion relates to the exercise of his or her power under subsection (1) and the Board shall report its decision on the question.

26 The employer emphasizes that the Minister MAY refer a question to the Board. That, in the employer's submission, means that the Minister must apply his mind to the question of whether he should, or should not, seek the Board's advice BEFORE he does so. By failing to give the matter thought, and by automatically referring the question to the Board, in the employer's submission, the Minister has unreasonably and improperly fettered his discretion.

27 The employer relies upon TESTA v. BRITISH COLUMBIA (WORKERS' COMPENSATION BOARD) (1989), 58 D.L.R. (4th) 676, particularly 687, in which the B.C. Court of Appeal said that "to blindly follow a policy laid down in advance is to disable the tribunal from lawfully exercising a discretion". The employer refers also to Re MAPLE LODGE FARMS LTD. and GOVERNMENT OF CANADA ET. AL. (1980), 114 D.L.R. (3d) 634, affirmed 137 D.L.R. (3d) 558. In that decision the Federal Court of Appeal held, at

645, that guidelines, "which are not regulations and do not have the force of law, cannot limit or qualify the scope of the discretion conferred by statute, or create a right to something that has not been made discretionary by statute. The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion ..., but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion."

28 There is a real likelihood that the Board has no jurisdiction to consider the employer's second argument. The Board has a statutory obligation to answer questions referred to it and it cannot inquire into the reasons why the referral has been made. Therefore, the employer's proper forum for advancing the second argument would appear to be the Courts, and not the Board.

29 Nonetheless, assuming without deciding that the Board may consider the employer's second argument, the authorities cited by the employer are not of assistance to the employer. The Minister has not in any manner fettered his discretion by seeking advice from the Board, even assuming the employer's submission (not established in evidence) that the Minister does so as a matter of course before actually addressing the issue himself. This is because the Minister retains a complete discretion to act as he chooses once he has the advice of the Board. He may choose to follow the Board's advice, particularly as it is likely to be the result of a contested, full hearing of the merits of the issue, or he may choose not to do so. He maintains a full and unfettered discretion, even though he seeks the advice of the Board and, as I have said, even assuming that he seeks the advice as a perfunctory and reflexive act upon receiving a request for a declaration that a particular employer is a hospital.

30 See, in this regard, REGINA v. ONTARIO LABOUR RELATIONS BOARD, EX PARTE KITCHENER FOOD MARKET LTD. (1966), 57 D.L.R. (2d) 521 (O.C.A.), reversing 54 D.L.R. (2d) 219, in which the Court of Appeal held, at 529, that a decision of the Board, in response to a request for advice from the Minister, is for the purpose of informing the Minister, and is not a decision affecting rights or imperiling the interests of a party. That is so because the Board's advice is only the subject matter of a report from which nothing flows unless the Minister takes some further step. At 530 the Court stated:

> ... What the Board decides has no legal effect; first, because the proceeding before it is not a required original step leading to adverse action against the parties; and, secondly, because the Board's decision does not control in law any following action of the Minister. ...

That is so, according to the Court, "even though it may be realistic to anticipate that the Minister would act upon" the Board's advice.

31 Accordingly, the cases cited by the employer do not assist its argument. Those cases are authority for the proposition that an official body, tribunal or person should not be so wedded to particular guidelines and modes of practice that it, he or she cannot reflect fully and independently upon the issues at stake in the particular exercise of its, his or her discretion. This proposition has no bearing upon the exercise of the Minister's discretion to seek the Board's advice. His doing so is for the purpose of ultimately exercising a real power, i.e. one that directly affects the rights of the parties, namely to declare a particular employer to be a hospital, or not. When he does that he is not in any manner bound by the advice he has

received from the Board. He has that advice to guide him, but he need not treat that guidance as being binding upon him, or as otherwise restricting the exercise of his discretion. Hence he has not fettered his discretion. There is accordingly nothing improper in him (through a delegated agent) referring (even as a matter of course or practice) a question to the Board for advice, which he can then take into account, or not, as he chooses. As stated in REGINA v. ONTARIO LABOUR RELATIONS BOARD, EX PARTE KITCHENER FOOD MARKET LTD., above, at 529, "In making a reference the Minister exercises a discretionary administrative power; and I am unable to appreciate how the bare exercise of the power can be challenged any more than its non-exercise can be challenged."

32 In my view, the proper forum for a challenge to the Minister's reference is the Courts, and not the Board. The Board must impute regularity into Ministerial acts, which are ostensibly performed under the Minister's powers under HLDAA. If, despite such ostensible regularity, the Minister did not in fact have the power under subsection 3(2) of HLDAA to delegate references to the Board and to make this reference in the manner he did, then the employer's proper remedy is to seek the setting aside of the reference in the Courts, and not before the Board.

33 Hence, assuming without deciding that the Board has jurisdiction to entertain it, the employer's second argument fails. The reference to the Board will not be set aside for the reason that the Minister's agent referred to the Board for advice to the Minister, without his first giving the matter consideration (assuming that to be factually the case).

SUMMARY

34 The OACL is granted AMICUS CURIAE status in the hearing on the basis explained above.

35 For the reasons stated, the employer's objections to the Board's jurisdiction are dismissed.

36 The matter will now proceed to hearing on the question referred to the Board by the Minister. Six days of hearing should be allocated to the matter. It will be heard in Toronto.

37 The matter is referred to the Registrar. I am not seized.

cp/e/qlmmp/qlmxp

Cited as:
Greenberg Stores Ltd.

United Steelworkers of America, Applicant v. Greenberg Stores Limited, Responding Party

[1997] OLRB Rep. January/February 61

[1997] O.L.R.D. No. 293

File No. 2778-96-U

Ontario Labour Relations Board

BEFORE: G.T. Surdykowski, Vice-Chair

February 3, 1997

Collective Agreement -- Interest Arbitration -- Parties -- Practice and Procedure - Unfair Labour Practice -- Union alleging that employer violating the Act because of its refusal to execute or implement first collective agreement as directed by board of arbitration -- Employer asserting that board of arbitration exceeded its jurisdiction and that its award is a nullity -- Employer asserting same position in pending judicial review application of arbitration award -- Board determining that bargaining unit employees not entitled to notice or to participate in Board proceeding -- Board doubting its jurisdiction to sit in review of board of arbitration process -- Board, in any event, exercising its discretion not to inquire into complaint because fundamental issue between the parties best dealt with by the Court in judicial review application -- Application dismissed.

APPEARANCES: Mark Rowlinson, Robert McKay and Mike Armstrong for the applicant; Harry Freedman and Heather Ritchie for the responding party; C.J. Abbass for Susan Osmond.

DECISION OF THE BOARD

I WHAT THIS CASE IS ABOUT

1 This is a complaint under section 96 of the LABOUR RELATIONS ACT, 1995, in which the applicant trade union (the "USWA") alleges that the responding employer has violated sections 17, 56 and 70 of the Act, essentially because the employer has refused to execute or implement a first