

**ONTARIO LABOUR RELATIONS BOARD RULES THAT ABORIGINAL RIGHTS DO NOT INCLUDE THE RIGHT TO REGULATE LABOUR RELATIONS ON FIRST NATION RESERVES**

*CAW-Canada, Local 444 v. Great Blue Heron Gaming Company*, November 30, 2004 (Whitaker)

The Ontario Labour Relations Board (the "Board") recently released a precedent-setting decision which will impact Aboriginal rights across Canada. The Board has ruled that Aboriginal rights do not include the right to regulate labour relations on First Nations reserves.

On January 23, 2003, the CAW was certified as the bargaining agent for 600 employees of the Great Blue Heron Casino, an enterprise managed by the Great Blue Heron Gaming Company on behalf of the Mississauga of Scugog Island First Nation. The Mississauga of Scugog Island First Nation had enacted its own *Labour Relations Code* (the "Code") which was modeled on the *Canada Labour Code*. However, there were certain key differences in the First Nation's Code, including no right to strike or lockout in a labour dispute.

When the CAW applied for conciliation, the casino took the position that it did not know whether the Ontario *Labour Relations Act* (the "Act") or the Code applied. The First Nation claimed that the Code applied. The Minister of Labour therefore referred the matter to the Board for a decision on the issue of whether or not a Code enacted by a First Nation could supercede the provisions of the Act.

Following a hearing in December of 2003, the Board issues a "bottom line" decision finding that the Act was not nullified by the Aboriginal rights of the First Nation, nor by any inherent right to self-government. Full reasons for this decision were released on November 30, 2004.

According to Board Chair Kevin Whitaker, since the passage of Canada's Constitution in 1982, the government could not unilaterally abrogate Aboriginal and treaty rights, though they could be limited by a substantial and compelling public objective. Whitaker noted that the issue was whether, historically, the First Nation had the right it asserted. Relying on *Mitchell v. Ministry of National Revenue*, [2001] S.C.R. 911, Whitaker observed that the First Nation had to establish a practice, tradition or custom that was "integral to the distinctive culture" of the Aboriginal society, or one that "truly made the society what it was" or was "vital to the life, culture and identity of the Aboriginal society in question."

In the circumstances, Whitaker found, the specific right asserted by the First Nation was not to self-government on its own territory but "to regulate labour relations on their reserve lands." However, in Whitaker's view, the First Nation could not prove the existence of a distinctive, ancestral practice suggesting such a right, or a reasonable continuity between the historical practice and the contemporary claim.

Whitaker noted that "labour was organized consensually through community and kinship relations," but "the regulation and management of labour relations ... was in no way part of the traditional culture or practices of the First Nation." Further Whitaker noted that:

There can be no doubt that there were no employees or employers and certainly no groups or organizations analogous to trade unions that purported to represent the interests of either employers or employees within the society. There was no labour market, nor anything resembling a wage-labour relationship where labour would be sold in exchange for some form of compensation.

Whitaker concluded that "there is nothing about the right being asserted which is in any way distinctive to the First Nations society historically unless the right itself is cast as broadly as the general right of 'self-government.'" In short, he stated:

[t]he rights being advanced here by the First Nation — the right to self-government and the right to organize and direct labour — are really universal and are in no way characteristic of the particular culture of the First Nation.

In any event, Whitaker noted that even if the right asserted existed, "the adoption by the Legislature of a '*Wagner Act*' form of labour relations scheme which permits free collective bargaining, balancing the right to strike with the binding nature of collective agreements, is in the furtherance of a compelling and substantial policy objective." Moreover, the application of the Act did not breach "the government's special fiduciary relationship with the First Nation."

Whitaker's decision regarding the application of the Act to the casino is currently under judicial review and is to be heard by the Ontario Divisional Court in late February 2005.