FACULTY OF LAW
FINAL EXAMINATION – DECEMBER, 2004
LAW 555:A1 – LABOUR LAW (Eisenbraun/Feth)

Time Allotted: THREE (3) hours

Code Number: DO NOT ENTER YOUR NAME ON ANY ANSWER SHEETS. A list will be circulated and your name is to be entered opposite a number on that sheet. That number will be your code number FOR THIS EXAMINATION ONLY and should be entered in the space provided above. This is to ensure anonymity during marking.

Special Instructions: 1. This examination paper contains 4 questions (question 3 has 4 parts) on 8 pages. Check to ensure it is complete before starting.

2. Answer ALL questions noting alternatives where offered.

3. Questions are not of equal value. Apportion your time accordingly.

4. This is a CLOSED BOOK examination except for the Labour Relations Code, the Employment Standards Code, and the Human Rights, Citizenship, and Multiculturalism Act.

5. Cell phones, pagers, beepers and related equipment are strictly forbidden. These items must be turned off and stowed. Except by permission of the instructor, which will not routinely be given, lap top computers are not allowed in examinations.

6. Adhere to the time limitation imposed on this examination strictly. Failure to stop writing at the end of the examination may lead to a deduction of grades or a failure to accept the examination paper.

7. To avoid disturbing your classmates, please do not leave the room during the last 15 minutes of the examination.
John Booker worked for 16 years in a midsized manufacturing company. He was never a member of a union. He was originally hired right after high school for a summer position working as a Labourer. Following the summer job, he was invited to stay with the company as a Salesman, earning $18,000 per year. Following his first week as a Salesman, the company provided him with a letter confirming the terms of his employment. The letter stated in part: “Your position may be terminated at any time for just cause, or without just cause on one month’s notice or pay in lieu of notice”.

During his second year with the company, John met Mary Brown, the daughter of the company’s President, Frank Brown. John and Mary fell in love and were soon married. Following the wedding, Frank promoted John to the position of Sales Manager. Five years later, John was promoted to Vice President. As Vice President, John oversaw the company’s 86 employees and was responsible for the Sales Division. In January 2004, his salary was set at $120,000 per annum, plus a performance bonus equal to 3% of the company’s gross profit margin. He also had the use of a company car, cell phone and a laptop computer.

In March 2004, John and Mary separated after John was caught having an affair. The separation was acrimonious and the couple will be divorced some time next year.

On May 1, 2004 Frank Brown announced that the company would be undergoing some changes to respond to increased economic pressures caused by the appreciating Canadian dollar. Several management portfolios were changed, including that of the Vice President. John was made responsible for both the Sales and Manufacturing Divisions of the company, assuming the duties of the Manufacturing Manager whose position was eliminated. Frank also explained that the company would need to eliminate unnecessary perks, including performance bonuses and company cars. Those changes became effective June 1, 2004.

In July 2004, Frank met with John to indicate that the company’s performance was not improving as much as he wanted. Frank told John that the company’s sales needed to improve by the end of the year or “your job will be on the line”.

By September 2004, the strain of his new job responsibilities, along with his marital problems, was too much for John. He went to see his doctor, who gave him a
medical note advising him to take four weeks stress leave, which he did.

John returned from stress leave in early October. Frank met with him on his first day back. Frank was very upset. He said that John had been absent during the most important time of the year for the company. The company’s performance was not improving. He said that John had disappointed the company, just as he had disappointed Mary. Frank told John that he was a “mess” and of no value to anyone. He gave John two weeks to “get his act together” failing which Frank would need to “act in the best interests of the company”.

John was despondent. He kept working but matters did not improve. Frank was no longer talking to him. At the end of October, Frank approached John on the plant floor. In the presence of the Floor Supervisor and two Labourers, Frank came up to John with an envelope. He handed the envelope to John and said: “You’re fired”. Frank asked the Supervisor to escort John from the premises. Frank said that John’s personal effects in his office would be packaged and shipped to him.

After leaving the premises, John sat in his car and opened the enveloped. Inside were two letters. The first indicated that he was dismissed for incompetence and dereliction of his responsibilities. The second, marked “without prejudice”, stated the company believed it had cause, but was prepared to offer him one month’s salary, specifically $10,000.00, in exchange for a Release “pursuant to the notice provision established when you commenced employment with the company”.

John has been referred to you by a friend who has heard that you are a bright new lawyer. Unfortunately, due to the financial strains of his divorce and some bad investments, John is worried that he can’t afford another legal battle. He thinks that he can find a temporary position for three months earning $8,000.00 per month, but doesn’t know what he will do after that. He is tempted to take the $10,000.00 severance offer but doesn’t know what to do.

(24 Marks)

Analyze the legal and strategic issues that are relevant in advising John. Consider liability, damages, as well as appropriate forums.
2. You are approached by Sally Jones, a Certified General Accountant, who wants some advice about a possible wrongful dismissal claim. Sally has handled the bookkeeping for ABC Taxi Ltd. for five years. Most of the work has been done from her home. She attends at the ABC Taxi office every Monday morning to collect the past week’s receipts and to deliver updated financial records and ledgers. She is required to be in the office from 9:00 a.m. to 5:00 p.m. every Wednesday. Otherwise, she is at home with her children. She reports directly to the President of ABC Taxi and is required to comply with all of the company’s policies, including the Dress Code and the Conflict of Interest Guidelines. Under the Conflict of Interest Guidelines, she is not permitted to work as a bookkeeper for anyone else. Sally is paid $1,500.00 per month, which is deposited into her personal bank account on the last day of the month as a lump sum. She remits her own deductions to CCRA for income tax.

Sally recently informed the President of ABC Taxi’s that she is pregnant and will be taking a 12 month maternity leave. After congratulating her, the President informed Sally that ABC Taxi will be required to replace her on a permanent basis. When Sally protested, the President explained that she is an independent contractor and not entitled to a maternity leave.

Analyze and discuss the threshold issue of whether Sally is an employee or an independent contractor. Address all of the factors that bear on your analysis.

3.(a) Arctic Diamonds (“AD”) operates a mining and production facility outside Grande Prairie, within the province of Alberta and under Alberta law. Its operations include the following Departments:

- Mining and Drilling (“Miners”): 40 Employees
- Equipment Operators (“Drivers”): 30 Employees
- Sorting & Cleaning (“Line”): 20 Employees
- Administrative (“Office”): 5 Employees
- Managerial Staff: 5 Employees

The Miners work 12 hour shifts, 4 days per week (Monday – Thursday, 7:00 a.m. to 7:00 p.m.). They work out in the
quarry, using explosives and other tools to loosen the kimberlite (gravel containing raw diamonds) so that it can be transported to the production facility for sorting and cleaning. Miners do not require specialized training as most of their skill is learned on the job.

Drivers work the same hours as Miners, because they have to be available to move the kimberlite to the production facility. Drivers must have licenses to operate heavy equipment, and receive regular training in first aid and triage given the dangerous work in the quarry.

Line workers are skilled trades. They have certificates from the Canadian Geological Society certifying them as proficient in the skill of diamond selection and grading. Their job requires intense concentration, watching the kimberlite as it passes through various light filters to hi-lite diamond deposits. They work 5 days a week, but only 8 hours per day (Monday – Friday, 8:30 a.m. to 4:30 p.m.). Of those 8 hours, half their shift is working on the line culling diamond ore from the kimberlite conveyor, and the other half is doing the less intensive work of cleaning the raw diamonds before they are sold to craftsmen for cutting.

Administrative staff handle all office related tasks at the facility, from correspondence to purchasing supplies and equipment, to looking after deliveries of raw diamonds. They work the same hours as Line Workers. At the end of each day of production, the total amount of diamonds found in the mine fills a 2 litre container, and is worth approximately $1 million.

AD is in a voluntary recognition relationship with the “Arctic Diamonds Employees Association” (the “ADEA”), which represents all employees at the facility except the managers. Under the terms of the ADEA’s constitution, one manager from AD sits on ADEA’s executive as a ‘consultant’. That consultant helps assess potential grievances and gives advice on interpreting and bargaining the collective agreement. AD and ADEA entered into a collective agreement on March 1, 2002. This collective agreement has a 5 year term, expiring on February 28, 2007.

(5 Marks)

You are Legal Counsel to the International Union – Brotherhood of Mine Workers (“BMW”). Assuming a decision was made by BMW to proceed with an attempt at certification, explain the procedural steps that would
have to be followed for BMW to acquire a certificate for a group of employees known as “All employees at AD, excluding administrative and managerial staff” where it is not yet registered as a union in Alberta.

QUESTION
15 Marks 3.(b)
BMW generally represents miners though it does include other types of employees within its membership. You have today been asked to review AD’s operations and its relationship with ADEA to determine whether it would be a good target for a certification application by BMW (a.k.a. a raid).

What advice would you give to BMW regarding this initiative, having regard to the timing of a potential attempt at certification, bargaining unit issues, the status of ADEA at law, as well as any potential Labour Relations Board applications which might be required as part of the raid.

QUESTION
14 Marks 3.(c)
AD and the ADEA both find out about BMW’s anticipated raid. In response both of these entities take a number of preventative measures:

An AD manager approaches one of his trusted employees and asks him to start keeping an eye open for BMW operatives within AD’s operations. The Manager asks for information about potential BMW organizers on staff to be reported back to him so he can keep a list of BMW supporters and loyal company employees. As well, AD installs a fence around the employee parking lot and requires staff to show identification when entering AD property. Anyone not showing such identification, or not having a specific appointment at the facility, is denied entry.

As well, AD management holds a voluntary information session on a Saturday night at a local community hall. Employees are invited to attend and to ask questions about the potential impact of a successful raid by BMW. Managers are careful not to make explicit threats, though they do say that BMW’s timing couldn’t be worse given the state of the diamond economy. A comment is made at the meeting that the company is considering downsizing because demand is low (which is true).
The ADEA approaches the potential raid more aggressively: members of the ADEA executive call their members into meetings while they are on the job, while on coffee breaks, and in the parking lot after shift change and ask them up front whether they are going to support the BMW initiative. Employees are told that if ADEA finds out that someone is supporting BMW, there could be ‘serious consequences’ for that person and their family members. Those consequences are not spelled out, but ADEA executive members say that both it and the company have a lot to lose if BMW gets in.

(14 Marks)

Discuss the legality of the various actions taken by both AD and the ADEA, and explain what LRB relief might be applicable against each of them, if any.

QUESTION

16 Marks 3.(d)

Ultimately BMW’s raid succeeds and a new bargaining certificate is issued to BMW for “all employees of Arctic Diamonds excluding managers”. BMW immediately serves notice to commence collective bargaining upon AD.

AD and BMW have trouble agreeing on dates for bargaining because AD’s managers and BMW’s negotiators are always busy. BMW serves its opening proposals on AD, and requests disclosure of financial stats back five years. AD provides the statements as requested. It also provides opening proposals which are a series of two word topic headings with no further elaboration: freeze wages; reduce overtime; reduce benefit premiums; reduce personal leave days; eliminate grievance process; increase production targets.

In response to AD’s proposals, BMW sends an email to staff at their company email addresses (@arcticdiamonds.ca) at 2:00 p.m. in the afternoon on a Wednesday telling them of AD’s conduct at bargaining. Coincidentally at roughly the same time AD cuts employee hours in response to a downturn in the diamond economy, advising BMW members by letters sent to their homes. Three days after the letter is received at employee homes, all the drivers show up for work, take their trucks out to the quarry and park them. They then leave work for the day without explanation to management. BMW officials are unavailable for comment.
Discuss the issues raised for both BMW and AD as a result of these events.

**QUESTION**

20 Marks  4. In *Pepsi-Cola*, the Supreme Court of Canada established a new paradigm for picketing in Canada. Explain the historical Canadian position, the shift in approach introduced to the law by this case, and discuss the reasons for the change relied on by the Court.

**TOTAL MARKS: 100**

End of Examination