
TALKING UNION IS A NEWSLETTER HIGHLIGHTING MATTERS OF
INTEREST TO THE LABOUR RELATIONS COMMUNITY

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Divisional Court rejects bias allegation made against arbitrator

Mediation/arbitration, as a method of resolving labour relations disputes is not new, but it is still sometimes controversial.

In *Santa Fe Masonry v. Bricklayers, Masons Independent Union of Canada, Local 1*, unreported decision released December 18, 2006, the Divisional Court confirmed the propriety of an arbitrator acting as both a mediator and arbitrator in the same case pursuant to section 48(14) of the *Labour Relations Act*. (Vice-Chairs of the Labour Relations Board often perform this dual function, as well, but they do so without any explicit statutory authority.) In the *Santa Fe Masonry* case, the employer alleged that the mediation/arbitration procedure denied it natural justice. The Court, however, accepted that there can be no denial of natural justice where the purported denial of a right is permitted by statute. Furthermore, the arbitrator in *Santa Fe Masonry* conducted the mediation with the consent of the parties exactly as contemplated by the *Labour Relations Act*.

In this case, the employer also complained about the arbitrator's conduct while acting as mediator. The arbitrator was said to have told the employer during the mediation that "**you better settle with the union because it looks like you are going to lose.**" The employer claimed that this statement gave rise to a reasonable apprehension of bias. The Court disagreed. It pointed out that the test for bias is a "high one". There is a presumption that adjudicators will carry out their responsibilities fairly and impartially. That presumption can only be displaced with "cogent evidence." The Court held that the arbitrator's statement did not indicate bias because it was made during the course of the mediation – not the hearing. The Court accepted that the statement represented a tentative opinion only. According to the Divisional Court, the employer failed to establish that the arbitrator "exhibited such a degree of prejudgment or predisposition to one side that it gave rise to a reasonable apprehension that he was or would be unresponsive to the evidence or arguments raised by both parties." Accordingly, the Court unanimously dismissed the employer's application to set aside the arbitrator's decision.

The Union in this case was represented by Koskie Minsky lawyer **Stephen Wahl**.

“Successor rights” protection restored and expanded for Crown employees

In amendments to the *Crown Employees Collective Bargaining Act* enacted last month in Bill 158, the Ontario Government has restored and, indeed, expanded “successor rights” protection for Crown employees. These rights, which are enjoyed in one form or another by most other unionized workers in Ontario, were stripped away from provincial employees back in 1995 by the former Conservative government. The passage of Bill 158 represents a significant achievement for the Ontario Public Service Employees Union, which campaigned long and hard for these changes.

Successor rights offer key protections for workers whose jobs are transferred or contracted out to another employer. These rights are particularly important for public employees because divestment and contracting out have been the centrepiece of provincial government restructuring for more than a decade. Successor rights means that when work is divested or contracted out, Crown employees have the right to move with their jobs – and to take their trade union, collective agreement, seniority, wages and benefits with them. The reverse is also true. Successor rights protection will apply with respect to the transfer of an undertaking where employees of one or both employers are Crown employees.

The “successor rights” protection offered by the *Crown Employees Collective Bargaining Act* is now significantly broader than that provided in the *Labour Relations Act*. Under the *Labour Relations Act*, successor rights are triggered by the transfer of a “business” or “part of a business”. There is often a real question as to whether what has been transferred amounts to a “business” or “part of a business”. But the Board has regularly stated that a transfer of “work” does not, by itself, result in a transfer of bargaining rights.

The amended *Crown Employees Collective Bargaining Act* says the very opposite. Section 10 of the Act now provides for “successor rights” where there has been a transfer of an “undertaking” and then goes on to define “undertaking” to mean **“all or part of a business, enterprise, institution, program, project or work.”** In other words, collective bargaining rights now attach to the jobs that Crown employees do, rather than to the “business”, as traditionally defined. This amendment appears to reinstate the law of successorship as it first developed under the *Crown Transfer Act* in cases such as *KBM* and *Charmaine’s* decided in the 1980s. It will be very interesting to watch developments in this area in the next year or two.

Workplace deaths rising sharply, according to new report

The number of work-related fatalities in Canada is rising sharply, according to a study released last month by the Centre for the Study of Living Standards. The report, titled **“Five Deaths a Day”**, analyzed data collected by the Association of Workers’ Compensations Board of Canada, as well as the International Labour Organization. The Report reveals that there were **1,097 workplace fatalities in Canada in 2005**, up 45% from 738 in 1993 and 18 percent from 958 in 2004. As Canadians work on average 230 days per year, this means that there were nearly five work-related deaths per working day in this country.

The 119-page report includes the following findings:

- The most dangerous industry in which to work over the 1996-2005 period was mining, quarrying and oil wells (49.9 per 100,000 workers or one out of 2,000); followed by logging and forestry (42.9 per 100,000 per workers or one out of 2,300); fishing and trapping (35.6 fatalities per 100,000 workers or one out of every 2,800 workers), agriculture (28.1 fatalities per 100,000 workers or one out every 3,600 workers and construction (20.6 per 100,000 workers or one out of 4,900). Finance and insurance was the least dangerous industry, with only 0.2 fatalities per 100,000 workers or one death for every 500,000 workers.
- Like industries, workplace fatalities are highly concentrated in certain occupations. Over the 1996-2005 period, occupations unique to primary occupations had the highest fatality rate at 19.5 per 100,000 workers, followed by trades, transport and equipment operators and related occupations (19.0 per 100,000 workers), and occupations unique to processing, manufacturing, and utilities (10.2). All other major group occupations had a fatality rate less than 4per 100,000.
- Men are much more likely to die on the job than women. In 2005, the incidence of workplace death was 30 times higher among men than women: 12.4 deaths per100,000 workers versus 0.4 deaths.
- Older workers are much more likely to experience a workplace-related fatality than a younger worker. In 2005, the incidence rate rises from 1.8 deaths per100,000 workers for the 15-19 years age group to 18.1 deaths per 100,000 workers for the 60-64 age group.
- In 2005, the incidence of workplace fatalities in Canada was 6.8 per 100,000 workers, up from 5.9 per 100,000 in 1993. This rate represents one death for every15, 000 workers.
- The ILO Workplace Fatality database shows that in 2003 Canada had the fifth highest incidence of workplace fatalities out of 29 OECD countries. Only Korea, Mexico, Portugal, and Turkey had higher workplace fatality rates.

A full copy of "Five Deaths a Day: Workplace Fatalities in Canada, 1993-2005" can be obtained from the Centre for the Study of Living Standards website at www.csls.ca.

Government passes *Human Rights Code Amendment Act, 2006 (Bill 107)*

The Provincial Government has enacted its package of controversial amendments to the *Human Rights Code*. Bill 107, which was introduced last April, received Third Reading on December 5 and Royal Assent on December 20, 2006. Its most important features are expected to be proclaimed into force in the fall.

Bill 107 has three main purposes:

1. To revise the administration and functions of the Ontario Human Rights Commission.

2. To provide that applications relating to the infringement of rights under the Code are to be made directly to the Human Rights Tribunal of Ontario.
3. To continue the Tribunal and revise its procedures and powers in dealing with matters brought before it.

Under Bill 107, the Commission will no longer have the power to investigate complaints and pursue remedies for individual complainants. The Commission's primary role will shift from being an investigatory body to one that pursues research and policy work and public education. The Commission will also cease to be a party in all proceedings before the Human Rights Tribunal, although it will retain the right to initiate certain proceedings and to intervene in other proceedings in accordance with the Tribunal's Rules. The Chief Commissioner will direct an Anti-Racism Secretariat and a Disability Rights Secretariat, to be established.

As noted, Bill 107 eliminates the role of the Commission with respect to complaints. An individual who believes that his or her rights under the Code have been infringed will apply directly to the Tribunal for a remedy. The time limit for filing a complaint has been extended to one year from 6 months. The Tribunal will become a greatly expanded agency. It currently receives 150 applications a year. Once Bill 107 is in force, it is expected that the Tribunal will have to deal with more than 3000 complaints a year. The Tribunal is given significant powers to make rules governing its own practices and procedures. Those rules will prevail over the *Statutory Powers Procedure Act* in the event of a conflict. The rules must also ensure that an application that is within the jurisdiction of the Tribunal will not be disposed of without giving the parties an opportunity to make oral submissions or without written reasons.

Where an application is made to the Tribunal, there are no limits on the amount of monetary compensation that may be ordered and the compensation may include compensation for injury to dignity, feelings and self-respect. The current \$10,000 cap on damages for "mental anguish" has been removed. The Tribunal will have the power to order "any party to do anything that, in the opinion of the Tribunal, the party ought to do" to promote compliance with the Code. The decisions of the Tribunal are final and not subject to appeal. However, the Tribunal may reconsider its decisions. Decisions of the Tribunal may not be altered or set aside on judicial review or in any other proceeding unless the decision is "patently unreasonable".

Finally, the Bill establishes the Human Rights Legal Support Centre. The Centre is a corporation that is independent from, but accountable to, the government. The purpose of the Centre is to provide legal services and other services with respect to the enforcement and application of rights under the Code. The services are to be provided throughout Ontario "in a cost-effective manner" and are to be funded by the Ministry of the Attorney-General.

Artists and cultural workers still waiting for Status of the Artist legislation

Professional artists, cultural workers and artists' unions united last month to release a **Statement on Status of the Artist Legislation in Ontario**. The Statement is signed and supported by over 30 artists' organizations from Ontario and across Canada, including the American Federation of Musicians of the United States and Canada – AFM, the Toronto Musicians' Association - AFM Local 149, International Alliance of Theatrical Stage Employees (IATSE), Ontario Public Service Employees Union (OPSEU), ACTRA, Canadian Actors' Equity Association (Equity), Canadian Alliance of Dance

Artists, CARFAC, Directors Guild of Canada, National Association of Broadcast Employees & Technicians (NABET) Local 700 CEP, Writers Guild of Canada and the Writers' Union of Canada.

Status of the Artist legislation would provide basic income security and benefits to cultural workers and artists. Prior to the last provincial election, Premier Dalton McGuinty promised to bring in such legislation within the first two years of his mandate. That promise remains unfulfilled.

The Statement, which was released on December 13, 2006, notes that many professional artists and cultural workers in Ontario are unable, under current legislation, to improve their working conditions and livelihoods through collective bargaining, a right presently enjoyed by six million other Ontario workers. The Statement calls on the Ontario Government to introduce within its current mandate, a *Status of the Artist Act* which, at a minimum, must include both of the following:

- Labour standards and taxation measures to immediately improve the working lives of artists in Ontario including protections for child performers, access to training and professional development programs and funds, tax measures favourable to artists (income averaging and/or exclusions of certain incomes from provincial taxes), and protections for senior artists.
- A consultative process leading to the creation and enactment within 24 months of “an appropriate labour relations mechanism encompassing a collective bargaining procedure for all professional artists and producers/engagers in the province of Ontario.”