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

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**Divisional Court upholds arbitrator's declaration that discipline was void *ab initio***

Whenever an employer fails to exercise its disciplinary powers according to required procedures, the arbitrator must decide what the effect of the breach will be. If the defect relates to a provision in the collective agreement that is regarded as critical to the integrity of the process, most – although not all – arbitrators will treat whatever discipline was imposed as void *ab initio* – that is, void from the outset. Most arbitrators have looked at clauses guaranteeing union representation in this way. Even if such clauses do not say so explicitly, they are read by most arbitrators as requiring the invalidation of any disciplinary sanction that is imposed following a breach of the collective agreement.

Accordingly, for at least 12 years, the Grievance Settlement Board (the "GSB") has accepted that where the Liquor Control Board of Ontario ("LCBO") denies an employee the right to union representation at a meeting to discuss alleged misconduct, any subsequently imposed discipline is automatically void. In *LCBO v. OPSEU*, released on March 13, 2007, a three-judge panel of the Divisional Court firmly and unanimously rejected the LCBO's challenge to this line of cases.

In the decision of the GSB under review, the employer called an employee to a meeting to deal with an allegation of fighting in the workplace that was made against him by a co-worker. The meeting was actually initiated by an investigating police officer, but was also attended by the employee's supervisor. The employee was not told the purpose of the meeting. Nor was he advised of his right to union representation at the meeting. The employee was disciplined about a week later. In these circumstances, the GSB found that the employer had breached the provision in the collective agreement that triggered a right to union representation when "an employee ... is required to attend a meeting for the purposes of discussing a matter which may result in disciplinary action being taken against the employee".

The LCBO challenged both the GSB's finding that the employer had violated the collective agreement and its determination that the violation rendered the later discipline void. It argued that "automatic voiding" of discipline is irrational and inconsistent with labour relations principles. Instead, it argued, arbitrators should adopt a "nuanced approach" that takes into account all of the circumstances, including the presence or absence of actual prejudice. It relied on decisions from the Alberta and Saskatchewan Courts of Appeal.

The Divisional Court rejected the employer's challenge. It found that the GSB's decision was entitled to firm curial deference and could only be disturbed if "patently unreasonable". The Board's decision

was far from that. The GSB's conclusion was, in fact, entirely consistent with its established jurisprudence, the arbitration caselaw generally, two other decisions of the Divisional Court, the reasonable expectations of the parties, and important labour relations considerations. Despite the cases from Alberta and Saskatchewan, the Court noted that **“good policy reasons support the Board's consistent and informed approach to the consequences of a breach”** of the union representation clause. It dismissed the employer's application with costs.

### **Automatic termination clauses do not necessarily violate the “duty to accommodate”**

The *McGill University Health Centre* case, released by the Supreme Court of Canada on January 26, 2007, dealt with “the role of a collective agreement in the assessment of an employer's duty to accommodate an employee who is absent for an indeterminate period owing to personal health problems.” At issue in this case was whether a clause in a collective agreement which provided for the automatic discharge of an employee who was absent from work for three years violated the employer's duty under human rights law to accommodate a disabled employee. When the employer invoked this clause against an employee, her union, relying on the Quebec *Charter of Rights and Freedoms*, filed a grievance. This was denied by the arbitrator who ruled that “it is not discriminatory to refuse to give a job to someone because he [or she] is physically incapable of performing it.” The award was upheld on judicial review but quashed by the Quebec Court of Appeal.

The Supreme Court of Canada restored the arbitrator's decision.

The Court found that the parties to a collective agreement have a right to negotiate, in good faith, clauses to ensure the attendance of employees and to ensure that they do their work. A clause that provides for termination of employment should an employee be absent longer than a specified period of time is clearly aimed at ill or disabled employees and, considered from the perspective of the duty to accommodate, is among the measures implemented to accommodate them. However, although the period negotiated by the parties is a factor to consider when assessing the duty to accommodate, it does not definitively determine the specific accommodation measure to which an employee is entitled, since each case must be evaluated on the basis of its particular circumstances. In light of the individualized nature of the accommodation process, the parties cannot definitively establish the length of the period in advance, the Court ruled. On the facts, the majority concluded that the arbitrator had not automatically or mechanically applied the termination clause. And it agreed with the arbitrator's conclusion “that the employer could not continue to employ someone who had been declared to be disabled for an indeterminate period.”

In an unusual concurring decision, Justice Abella (joined by two other judges) rejected the majority's conclusion that the case turned on the question of accommodation. Rather, she declared that the pivotal issue was whether the grievor had “established *prima facie* discrimination”. In fact, Justice Abella found that automatic termination clauses in a collective agreement are *not* presumptively discriminatory. Therefore, the employer in this case was neither required to justify the automatic termination provision, nor its actions.

## **Federal Parliament to vote on anti-scab law**

Legislation banning the use of replacement workers during labour disputes in the federal sector may soon become law. Similar legislation has been in place for many years in British Columbia and Quebec.

Bill C-257 was introduced as a Private Member's Bill by Bloc Quebecois MP Richard Nadeau on May 4, 2006. With the support of the NDP and Bloc Quebecois caucuses and a majority of Liberal MPs, it made quick progress. The Bill passed Second Reading on October 26, 2006 by a margin of 167 to 101, and was referred to the Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities. That Committee heard from trade unions, employer groups, and various technical experts. On February 15, 2007, a coalition of Liberals, New Democrats and Bloc Québécois MPs voted 7-4 against the Conservatives to move an amended Bill C-257 to Third Reading. The Bill could be tabled for a final vote in the House of Commons as early as March 21, 2007.

The legislation has sparked outrage and complaint from almost every business group in the country. As might be expected, they argue that a ban on replacement workers will cripple industry and threaten the survival of countless small businesses. Last month, the leader of the Liberal Party Stéphane Dion announced that he would not support the Bill – even though the majority of Liberal MPs supported the first and second readings of the legislation in Parliament. The final Third Reading vote is expected to be a “free vote” and the result is, therefore, uncertain. For more information about the campaign in favour of Bill C-257, visit: [www.canadianlabour.ca](http://www.canadianlabour.ca).

## **American legislators consider *Employee Free Choice Act***

It has been many years since Canadian trade unionists could look to American labour law developments with envy, but this may soon be about to change.

On March 1, 2007, the U.S. House of Representatives passed the *Employee Free Choice Act*. The Bill has been described as the most important piece of labour reform legislation to come before Congress in more than 70 years. Its goal is to remedy the egregious violations of labour rights that are routinely visited on workers who attempt to organize a union in their workplace. Its core provisions would provide for:

- **Certification on the Basis of Signed Authorizations** (In Ontario, card-based certification is available – but only in the construction industry.)
- **Automatic Access to First Contract Mediation and Arbitration** (In Ontario, a trade union can obtain first contract arbitration only after lengthy and expensive hearings where it must first convince the labour board that the employer has been unreasonable or uncompromising in collective bargaining.)
- **Stronger Penalties for Violations while Employees are Attempting to Organize or Obtain a First Contract** (In Ontario, unlawfully discharged employees who successfully prove their case at the labour board are entitled to damages equal to lost wages. They are also under a duty to mitigate their damages by seeking alternative employment. The *Employee Free Choice Act* would increase the amount that an employer is required to pay to *three times the amount of the*

*employee's back pay* when an employee is discharged or discriminated against during an organizing campaign or first contract drive.)

The *Employee Free Choice Act* must still pass the United States Senate and survive a promised veto by President George W. Bush before it becomes law.

### **New report profiles "victimization" in the Canadian workplace**

In recent years, violence in the workplace has been the subject of increasing public attention. In response to growing concerns over workplace victimization (such as assaults and incidents of criminal harassment) both public and private sector workplaces have developed policies to deal with workplace violence and harassment. A new national study provides a detailed look at the nature, severity and prevalence of this problem. The report published by the Canadian Centre for Justice Statistics is the first-ever study measuring criminal victimization on the job in Canada.

The study reports that nearly one-fifth of all incidents of violent victimization – including physical assault, sexual assault and robbery – occurred in the victim's workplace in 2004. It found that there were more than 356,000 violent incidents in the workplace in the 10 provinces. The majority of these workplace incidents – 71% – were classified as physical assaults. For the purposes of the study, a "workplace" was a commercial or institutional establishment, such as a restaurant or bar, a school, a commercial or office building, a factory, a store, a hospital or a prison. It was found that men and women were equally likely to have reported experiencing workplace violence, but men were more likely to be injured. Specifically, 27% of incidents involving male victims resulted in injuries, compared with 17% of those involving female victims. Violence in the workplace was much more common in certain employment sectors. One-third of all workplace violent incidents involved a victim who was working in social assistance or health care services such as hospitals, nursing or residential care facilities. The study also found a high proportion of incidents against those working in accommodation or food services, retail or wholesale trade, and educational services sectors.

The report, titled "Criminal victimization in the workplace", is now available from the *Publications* module on the Statistics Canada website: [www.statscan.ca](http://www.statscan.ca).