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

May 2007

EDITORS:

Ron Lebi, rlebi@kmlaw.ca
Phone: (416) 595-2148

Elizabeth Mitchell, emitchell@kmlaw.ca
Phone: (416) 595-2095

Divisional Court re-writes certification rules under *Labour Relations Act*

Ontario's Divisional Court has recently re-written the rules for dealing with time-sensitive applications under the card-based construction industry certification provisions in s. 128.1 of the *Labour Relations Act*. The change in direction, mandated by the Court's decision in ***Maystar General Contracting***, is not a positive one.

Since August 2005, the Ontario Labour Relations Board had consistently ruled that the 2-day time limit within which an employer must reply to a card-based certification application is mandatory. The Board accepted that it had no power to forgive an employer's failure to meet this statutory time limit – no matter how “good” its excuse for that failure. As a consequence, the Board issued dozens of certificates under s. 128.1 where the employer filed a late response (or no response at all). In other cases, the Board refused to allow amended responses filed by employers after the 2-day time limit. The Board's strict approach ensured that certification applications were dealt with quickly, wherever possible. And much expensive and time-consuming litigation was, accordingly, avoided.

But in the *Maystar* case, released on March 20, 2007, the Divisional Court determined that the Board's consistent approach to s. 128.1 was wrong. According to the Court, the Board has a discretion to receive and to act on information presented to it beyond the two-day time limit established by s. 128.1 – although the Court *never* explained where that discretionary power could be found in the *Labour Relations Act*.

The Divisional Court decision is disappointing in at least 2 ways:

- First, despite 30 years of established jurisprudence from Canada's highest courts (to the effect that labour board decisions should be allowed to stand unless they are “patently unreasonable”) the Divisional Court determined that the labour board should be held to a standard of “correctness” on judicial review. This was a significant ruling because an “incorrect” decision is simply a decision with which the Court disagrees. In *Maystar*, the Court held that “no deference” was owed to the Board in its interpretation of the certification provisions of *Labour Relations Act*. This conclusion, of course, has the potential to open up *any* decision of the Board to searching review by the Court, even though the *Labour Relations Act* provides that Board decisions are “final and conclusive for all purposes” and that “no decision [of the Board]... shall be questioned or reviewed in any court.”

- On the merits, the Court held that the Board's interpretation of s.128.1 of the Act was incorrect and that the Board may choose to receive and act on information presented to it outside the two-day time limit established by s. 128.1(3) of the *Labour Relations Act*. According to the Court, the statutory time limit binds neither employers, nor the labour board. The effect of this decision is to significantly compromise the statutory scheme for dealing with certification applications. The obligation of parties to file information with the Board within strict time limits is a defining feature of the certification process – a process that places a significant premium on expedition (consistent with s. 2 of the Act). The Court's decision seriously undermines this fundamental aspect of the certification process.

The International Union of Painters and Allied Trades, Local 1819 has initiated an appeal of the Divisional Court's decision. The Court of Appeal will likely decide in the next month or two whether it will hear the Union's appeal. In the meantime, however, the Divisional Court's interpretation of the *Labour Relations Act* is binding.

Labour Board rejects untimely termination application

Under s. 66 of the *Labour Relations Act*, an application to terminate bargaining rights may be made by an employee in the bargaining unit within one year after a voluntary recognition is entered into. Whether an employee has status to make such an application and whether the application has actually been made within the one year statutory time-limit depends on an application of the Board *Rules of Procedure* and the Board's established case law. These principles were recently illustrated in the ***Dryden Electrix*** case released by the Labour Relations Board on May 2, 2007.

In this case, the parties agreed that the last day that an application could be brought under s. 66 of the Act was on December 19, 2006. In fact, the applicant had sent the application by Purolator – a courier service owned by Canada Post – on that very day. But the application was sent from Thunder Bay to the Board by overnight courier and so the application was not actually received by the Labour Relations Board in Toronto until December 20, 2006. Under the Board's *Rules of Procedure* – and subject to a single exception – an application is considered filed by the Board when it is actually received. The Board agreed with the Union that the application that was received on December 20th, 2006 was untimely. Accordingly, the Board ruled that had no jurisdiction to consider it. The Board noted that the situation would be different *if* the application had been made under the Rules pertaining exclusively to construction industry certification and termination applications and *if* the application had been sent by Canada Post's Priority Courier service, rather than Canada Post's Purolator courier. In that case – but *only* in that case – the Rules provide that an application is considered filed on the date that the application is *sent* (as verified by Canada Post).

The Board also accepted the Union's argument that the applicant had no status to bring the application in this case because he was not actually at work on the application date. On December 20th, the applicant was on a leave of absence in order to deal with the serious consequences of a traffic accident involving his girlfriend. The Board had little difficulty applying its long-established jurisprudence to the effect that in order to "count" as an employee in a construction industry bargaining unit under the Act, one must be actually at work on the application date. The Board saw no reason to depart from that jurisprudence here. So the Board dismissed the application – both because it was untimely and because the applicant had no status to bring it.

The Union in this case was represented by Koskie Minsky lawyer **Ernie Schirru**.

Ontario's "fair wage policy" to undergo "independent review"

The Provincial government announced last month that it will review its Fair Wage Policy "to ensure that employees of contractors hired by the government are paid fairly."

Ontario's Fair Wage Policy was established in 1995 by an Order of Cabinet, and has not been reviewed or updated since that time. The policy is intended to "level the playing field" for businesses bidding for government contracts by ensuring "fair compensation levels for employees." The policy sets minimum wage and employment conditions that private sector employers must provide in order to bid on certain Ontario government contracts. It currently applies only to the following types of services:

- Construction projects in the industrial, commercial, and institutional (ICI) sector valued at \$100,000 or more
- Road building projects where the contract value is \$160,000 or more
- Sewer and watermain projects, regardless of the contract value
- Contracts for any janitorial and security services, regardless of contract value.

Professor Morley Gunderson of the University of Toronto has been retained by the Provincial government to conduct the review of its policy. His review is to be completed by the end of 2007.

Court upholds restriction on use of agency workers to do bargaining unit work

The Ontario Court of Appeal has overturned a decision of the Divisional Court and reinstated an arbitrator's ruling that an employer's use of outside agency workers to perform bargaining unit work "in house" was "implicitly" prohibited by the collective agreement (if those agency workers were used for a period longer than two weeks).

In ***Ottawa Hydro v. IBEW Local 636***, released last month, the Court of Appeal held that the arbitrator's finding regarding Hydro Ottawa's assignment of work to outside agency workers was not patently unreasonable – notwithstanding the opposite conclusion reached by the Divisional Court. Justice Robert Blair wrote for a unanimous court, "The Arbitrator committed none of the errors attributed to him. Respectfully, the Divisional court misconstrued the Arbitrator's decision when it concluded that he had amended or rewritten the collective agreement. It erred in two respects in this regard: first, the Arbitrator's decision did not create a new class of employee not provided for in the collective agreement; secondly, the Divisional Court's approach overlooks both the Arbitrator's finding that the work arrangement in this case did not constitute 'contracting out', and the implications of that finding for the interpretation of the collective agreement."

The Court of Appeal pointed out that several arbitration awards have emphasized that "contracting in" is "inherently destructive of the bargaining relationship" and generally contrary to the obligations undertaken by the employer in the collective agreement. These situations are to be contrasted with "contracting out" or subcontracting situations, "where an integral function or a whole operation of the business of the employer is assigned to an independent contractor; the work is often done off site and, where done at the same location as the bargaining unit employees, usually involves work of a

different nature.. ; the independent contractor controls the work; and the employer has 'effectively abdicated' the work to the outside contractor."

One issue in the case concerned the power of an arbitrator to imply terms into the collective agreement that would restrict management's rights where "residual rights" are reserved under the collective agreement to management. The Court accepted that the arbitrator, indeed, had this power and that this did *not* offend a prohibition in the collective agreement against an arbitrator "adding to or subtracting from or otherwise changing the provisions of the collective agreement." The Court of Appeal specifically accepted that an implied term is itself a term of the contract – it is not an amendment to or modification of the contract. The Court adopted the following statement from an arbitration award called *Re School District No. 57 (Prince George) and United Brotherhood of Carpenters & Joiners, Local 2106*, where the arbitrator wrote;

"An implied right is not one that is invented by an arbitrator, but rather, is one that arises out of an interpretation of the collective agreement. It is one that is not expressed in absolute terms but that can, nevertheless, be inferred by an ordinary and natural reading of the agreement. Were it otherwise, an arbitrator would not be entitled under art. 4.02[8] to interpret the collective agreement where the meaning was not absolutely clear."

Finally, the Court addressed the argument that the arbitrator's decision under review was contradicted by a host of other arbitration decisions. The failure of a subsequent arbitrator to follow previous decisions, wrote the Court, does not by itself make the subsequent arbitrator's decision patently unreasonable. The doctrine of *stare decisis* has no application in such circumstances. In each case, the issue is whether the arbitrator's interpretation of the collective agreement is supportable on the record and not patently unreasonable in that context. Lack of unanimity, the Court explained, is the price to be paid for having independent and specialized decision-makers in the labour relations field protected by the standard of review of patent unreasonableness.

IBEW Local 636 was represented in this case by Koskie Minsky lawyer **Ron Lebi**.

Chief Justice of Canada to deliver Koskie Minsky Lecture in Labour Law

The **5th Annual Koskie Minsky University Lecture in Labour Law** is scheduled for Friday, October 26, 2007 at the Faculty of Law, University of Western Ontario, London, Ontario. Our Lecturer will be the **Right Honourable Beverley McLachlin, P.C.**, Chief Justice of Canada. After the lecture, Koskie Minsky will be holding a reception to which all are invited. There is no fee for attendance at the Lecture or Reception. The Heenan Blaikie Labour Law Conference will be held on Saturday October 27, 2007. Please mark your calendar now. Additional information on the Lecture and Reception will be provided in the near future.