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

November 2007

EDITORS:

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

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

Labour Relations Board's most recent "remedial certification" decision disappoints

Readers of **TALKING UNION** will be aware of the Ontario Labour Relations Board's first two decisions under Bill 144's remedial certification provisions.

In *Swing Stage Equipment Rentals*, released last spring, the Board embraced its restored jurisdiction under section 11 of the *Labour Relations Act*. It granted automatic certification, notwithstanding the union's inability to sign up even 40% of the bargaining unit, where the employer had discharged the union's key inside organizer. In the *East Elgin Concrete Forming* case, decided a month later, the Board took a similar enlightened approach. It found that certain threats, including threats to employees' job security, had tainted a representation vote. And it accepted that no remedy – other than certification – could counter the effect of the employer's unfair labour practices.

The Board's most recent decision in *L & L Painting and Decorating* (released October 15, 2007), therefore, comes as a disappointment. In *L & L Painting*, the Board accepted that the employer had made certain intimidating statements that were designed to dissuade employees from joining the union. It accepted that the employer's surveillance of a meeting between employees and union representatives was improper and a violation of s. 70 of the *Labour Relations Act*. And the Board also accepted that the union's key inside organizer was discharged contrary to the Act. But the Board declined to provide any relief under section 11 of the Act. That is because the employer violations of the Act – which were described as "serious matters" – did not result, according to the Board, in a situation where the Union was unable to secure the support of at least 40 percent of the bargaining unit. In other words, the Board found no link between the employer's illegal conduct and the union's inability to achieve significant support amongst employees.

In spirit and in tone, the *L & L Painting* case is difficult to reconcile with the Board's earlier decisions. While every case must be considered on the basis of its own unique facts, the foundation of section 11 is the recognition that certain employer misconduct cannot be adequately remedied – short of certification. Unfortunately, if the Board continues to send out mixed messages about its appetite to properly address employer unfair labour practices, it is likely that such illegal behaviour will proliferate and that section 11 cases before the Board will multiply.

Ontario enacts new statutory holiday to be known as “Family Day”

One day after the Liberal Government’s re-election, the Premier of Ontario announced the creation of “Family Day”, a new public holiday under the *Employment Standards Act* (“ESA”). “Family Day” will fall on the third Monday in February. On October 12, 2007, the Government filed a regulation that creates the new holiday (Ontario Regulation 547/07), which will ensure that it is in place for February 2008.

Ontario follows Alberta and Saskatchewan, which have also designated the third Monday in February as “Family Day” and made it a statutory holiday. Adding “Family Day” to the calendar gives residents of Ontario who work for provincially-regulated employers a total of nine statutory holidays per year, putting the province on par with Saskatchewan, Alberta, Manitoba, British Columbia and the federal jurisdiction. (The ESA’s public holiday provisions do not apply to Crown employees or to employees who works in the construction industry and receive at least 7.3 per cent of their hourly rate or wages for vacation pay or holiday pay. There are other exemptions, as well.)

Notwithstanding that “Family Day” is a now public holiday under the ESA, there will be an issue in some workplaces as to whether the employer must actually recognize the new holiday if it is not included in a collective agreement. That is because the ESA allows parties to “contract out” of the ESA if they have agreed to a “greater right or benefit”. Where this happens, the “greater right or benefit” will be enforced instead of the minimum standard. Specifically, the ESA provides at section 5(2) that:

“If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.”

Determining whether a collective agreement provides a greater right or benefit than the ESA is not an easy task. In the *Queen’s University* case, decided more than 20 years ago, the Divisional Court directed a comparison between the “entirety of the terms of the agreement respecting holidays” and not “each individual item”. The employer may lawfully contract out of the ESA’s public holiday provisions if the collective agreement provides a greater totality of public holiday rights or benefits.

Readers may wish to consult their collective agreements and take legal advice about their rights with respect to Ontario’s newest public holiday.

Ontario court refuses to enforce fine against union member for crossing picket line

In *Birch and Luberti v. Union of Taxation Employees Local 70030* (released October 17, 2007), an Ontario Superior Court judge has ruled that the courts will not enforce fines imposed by trade unions on members who cross picket lines during a strike.

The circumstances were these. Birch and Luberti were union members who crossed picket lines and reported to work on 3 days during a 7-day strike in 2004. After the strike ended, their union suspended the employees’ membership for three years and levied fines in the amount of \$476.75 against each of them. The fine was equivalent to the employees’ gross salary for each day worked during the strike. In imposing the fines and suspensions, the trade union was acting under the specific

terms of its constitution and by-laws. When the employees refused to pay, the union sued them in Small Claims Court. The employees did not defend the claim. Instead they brought an application in the Superior Court to quash the Small Claims Court proceeding.

Justice Smith of the Superior Court ruled in favour of Birch and Luberti on all issues. Amongst other things, he ruled that the fines were “penalties” that were “onerous” and excessive and, therefore, unenforceable. In the circumstances, he found that the amount of the fines was “unconscionable”. The judge accepted that the union was entitled to take steps to prevent employees from becoming free-riders on the collective bargaining process, but held that the union had several other options to achieve that goal. He concluded that the imposition of an “onerous fine...was not a reasonable or fair way to achieve the goal of preventing free-riders.” Finally, the court rejected the argument that the authority to levy fines was authorized by statute. In this regard, he contrasted the *Public Service Labour Relations Act* (the statute that applied to Birch, Luberti and their trade union) with the Saskatchewan *Trade Union Act*. Section 36 of the Saskatchewan legislation provides as follows:

(4) ... a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during that strike.

(5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.

(6) A fine imposed on a member pursuant to subsection (4) with respect to an action that takes place after the coming into force of this subsection is deemed to be a debt due and owing to the trade union and may be recovered in the same manner as a debt owed pursuant to a contract in a court of competent jurisdiction.

In the absence of legislation of this kind, the judge held, the trade union’s fines could not be enforced in Ontario’s courts.

An appeal from this decision is anticipated.

Supreme Court of Canada denies leave to appeal in *Hydro Ottawa* case

On November 15th, 2007, the Supreme Court of Canada dismissed the employer’s application for leave to appeal in *Hydro Ottawa v. IBEW Local 636*.

In the *Hydro Ottawa* case, which was reviewed in the May 2007 issue of **TALKING UNION**, the Ontario Court of Appeal 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. The decision was controversial because the collective agreement explicitly permitted “contracting out”. In seeking to persuade the Supreme Court of Canada to hear the case, the employer argued that the arbitrator had no authority to imply into a collective agreement what it called “a non-negotiated limit on an employer’s right to contract work to an outside agency”. In the end, this argument failed to persuade. As is customary, the Supreme Court of Canada gave no reasons for its decision to dismiss the leave application.

Ontario court affirms low “costs” orders in labour cases

One important difference between court proceedings and proceeding before the labour board or other employment tribunals concerns the obligation of the “loser” to pay the legal costs of the “winner”. In the courts, an award of “costs” is routine. In labour matters, an award of costs is almost unheard of. Indeed, since the early 1990s, the Ontario Labour Relations Board has held that it has no jurisdiction to award costs.

When it comes to challenging labour relations decisions in court, the rules on “costs” change – but only slightly. The Divisional Court decision in *Maystar General Contractors* illustrates this point. In *Maystar*, the Divisional Court set aside a decision of the Labour Relations Board in a certification case. (The decision of the Divisional Court is now under appeal. The appeal will be heard by the Court of Appeal on March 25, 2008.) The Divisional Court ordered the union to pay “costs” to the employer. But the union and the employer could not agree on the amount to be paid and the Court was obliged to rule on the matter. In its written submissions, the employer advised that its lawyers had devoted 112 hours to the judicial review application and that legal fees based on the lawyers’ normal rates would have amounted to more than \$47,000. On a “partial indemnity” scale, actual costs incurred were over \$32,000. The employer, however, asked for costs in the amount of \$10,000.

The union argued that even the \$10,000 sought by the employer was excessive. It noted that labour relations matters are normally adjudicated in a “no costs” environment, which may explain why judicial review applications in labour relations matters are also considered a “low costs environment”. The Court accepted this submission. It wrote:

“I agree with the submissions of the Union that the labour relations cases in this court are, on the whole, low cost cases. This may well reflect, as Union counsel submits, the absence of costs orders in labour arbitrations. Whether that is the reason or not, the normal rate is as exemplified in the cases referred to – in the range from \$3,000 to \$5000 – and in many cases the amount of the costs is agreed before the hearing. In the present case, I see no reason for departure from the norm. In particular, I am reluctant to raise the bar for cases generally by adopting the quantum leap suggested by the applicant.

Having regard to the circumstances of this particular case, I would award costs to the Employer of \$4,000 as a reasonable sum for the losing party to pay...”

Readers should note that the practice regarding judicial review applications outside of labour relations matters may well be different. For example, last spring, in a case called *Weyerhaeuser*, the Divisional Court allowed a company’s application to review and set aside a decision of the Human Rights Tribunal of Ontario. The case concerned employee drug testing. The Court ruled that the Tribunal had no jurisdiction and it ordered the Ontario Human Rights Commission (the “losing party”) to pay the company’s costs. Before the Divisional Court, the company represented that its legal team had devoted more than 100 hours to the judicial review application itself. The Commission proposed that it pay costs to the company in the amount of \$7500. The Court disagreed. It ordered the Commission to pay costs in the amount of \$20,563.57 – an amount that reflected that the issues were “somewhat complex, novel and important” and that the company was “entirely successful in the application.”