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

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**EDITORS:**

**Ron Lebi**, [rlebi@koskieminsky.com](mailto:rlebi@koskieminsky.com)  
Phone: (416) 595-2148

**Elizabeth Mitchell**, [emitchell@koskieminsky.com](mailto:emitchell@koskieminsky.com)  
Phone: (416) 595-2095

**Employer jailed for violating collective agreement and arbitration decisions**

In the world of labour relations, employers and trade unions usually comply with orders and directions made by arbitrators and labour boards. When they do not, those orders can be filed in court and they become enforceable through "contempt of court" proceedings. Enforcement proceedings are rare and punishment by the Court is rarer still. It follows that a recent case in which an employer was fined and sentenced to jail for failing to comply with his collective agreement obligations is receiving considerable attention.

The case involved a trade union (UFCW Locals 175 and 633), an employer (the Rainy Lake Hotel), the hotel's corporate owner (a numbered company), and the numbered company's President. In ***UFCW Locals 175 and 633 v. Rainy Lake Hotel*** (unreported decision dated September 16, 2005), Justice Patrick Smith of the Superior Court of Justice declared that the hotel, the numbered company, and the President were in contempt of court for their failure to comply with several arbitration awards directing compliance with the collective agreement -- more particularly, directing the remittance of union dues, health and welfare contributions, and other payments. Justice Smith directed them to comply with the collective agreement and with the arbitration awards. The court also imposed a \$25,000 fine on the numbered company and its President, for which they were made "jointly and severally" liable. Finally, although the employer was a corporate entity, Justice Smith determined that this was an appropriate case to "pierce the corporate veil". He ordered that the hotel's President be sentenced immediately to 30 days imprisonment and issued an arrest warrant forthwith to be executed by the Ontario Provincial Police. The Court found that any personal sanction other than incarceration would be ineffective and would bring the administration of justice into disrepute.

**The decline in union certification continues**

Ontario Labour Relations Board certification statistics for both 2003-2004 and 2004-2005 reveal that the dramatic slide in union certification since 1995 continues apace.

In the June 2003 issue of **TALKING UNION**, we reported that in 2001-2002, the Board placed only 16, 255 employees in newly certified bargaining units. In 2002-2003, the numbers were even worse. Only 13, 708 employees were newly certified.

The most recent figures are no more encouraging. In 2003-2004, the Board certified trade unions to represent only 12, 363 employees. In 2004-2005, the number grew only slightly to 13, 255.

The significance of these figures is brought home when they are compared to statistics for 1994-95 – the fiscal year that immediately preceded Bill 7 (the Conservative government’s labour law reform bill). In that year, the Board received 1077 certification applications and granted 762 certificates covering 32, 116 employees. Put another way, 10 years after Bill 40 was repealed, the annual number of newly certified workers has declined by almost 60 percent.

It remains to be seen whether the Bill 144 changes to the Act – enacted in June 2005 – will have any positive impact on these disturbing statistics.

### **OLRB refuses to deal with non-enforcement of TQAA**

In a recent decision, *KE Electrical Services* (unreported decision dated September 26, 2005), the Ontario Labour Relations Board determined that it has no power to direct the Ministry of Labour how to do its job when it comes to enforcement of the *Trades Qualification and Apprenticeship Act* (“TQAA”).

Responsibility for enforcement of the TQAA is actually shared by Ministry of Labour health and safety inspectors and by Training Consultants employed by the Ministry of Training, Colleges and Universities. However, the TQAA has, for years, been chronically and notoriously under-enforced by both ministries. This under-enforcement has had significant and widespread consequences: Contractors who violate the TQAA typically exploit their employees and underpay them. The quality of work produced by such contractors is often suspect. Significant risks to worker safety and public safety are posed by unqualified persons doing work regulated by the TQAA, such as electrical work. Finally, contractors who fail to comply with the TQAA compete unfairly with unionized contractors. Such contractors can under-bid unionized contractors because they are not complying with the law.

IBEW Local 586 has sought to shine a light on this problem for several years. Earlier this year, it initiated an appeal to the Ontario Labour Relations Board regarding a non-union electrical contractor in the Ottawa area known as KE Electrical Services (“KE”). The union alleged that the company had been violating the TQAA for years. When the union finally succeeded in getting a Ministry of Labour inspector to visit a KE worksite, she observed a number of labourers unlawfully performing electrical work. A stop work order issued. However, that order was lifted almost immediately and four (4) of the unlawfully employed labourers were quickly registered as apprentices by the Ministry of Training.

IBEW Local 586 asserted that electrical work on the jobsite should have stopped until the Ministry could satisfy itself through a proper and thorough investigation that the apprentices were properly registered under the TQAA *and* that they were properly trained, competent, and supervised as required by the *Occupational Health and Safety Act*. The union complained that the employer had not been prosecuted or punished in any way for its repeated and consistent violations of the TQAA. It argued that the Ministry of Labour should have considered this history of misconduct and, therefore, should not have been satisfied with the employer’s reluctant – at best, technical – compliance with the TQAA.

The Labour Relations Board concluded that the union’s request was beyond the function and ability of the Board. As to whether the Occupational Health and Safety Branch of the Ministry of Labour was behaving in the most appropriate way, the Board said that it had “no institutional opinion on the

subject". It observed that such opinions are "in the realm of political argument and debate" and that this was not an adjudicative function assigned to the Board.

IBEW Local 586 Business Manager James Barry advises that his local is not prepared to give up the fight to achieve compliance with the TQAA. "The Ministry of Labour and the Ministry of Training will be held to account – one way or another – for their failure to enforce the TQAA," he said. "Hopefully, it won't take more injuries and deaths in the workplace to make that happen," he added.

### **OLRB displays caution in early "interim relief" cases under Bill 144**

The Ontario Labour Relations Board has considered its new Bill 144 power to grant interim reinstatement in several recent cases. While these decisions borrow explicitly from caselaw developed by the Board between 1993-1995 under Bill 40, the Board clearly aims to establish a distinct – arguably less generous – jurisprudence under Bill 144. More problematic, the Board seems unwilling to schedule and hear these cases in an expedited fashion, as it did under Bill 40 and as is contemplated in Bill 144. In these circumstances, even successful applications for interim reinstatement produce unsatisfactory results for trade union applicants.

***DMS Concrete and General Contracting Inc.*** (unreported decision dated September 7, 2005) was the Board's first interim relief case. In this case, the Board reinstated a key union supporter who had been discharged during the union's organizing campaign. The Board accepted that his discharge would have a "chilling effect" on other employees and that any determination of the merits – and any final remedy – would be months away. The Board acknowledged that this would entail irreparable harm for the trade union. Accordingly, the Board directed the employee's reinstatement and prohibited the employer from making any changes to his employment without first obtaining the permission of the Board. These findings and conclusions were made easier, perhaps, because the employer never filed a response to the union's application. Despite the employer's failure to comply with the Board's Rules or file any responding material, the Board's decision arrived more than two weeks after it received the union's uncontested application.

In ***Northern Construction and Maintenance*** (unreported decision dated September 13, 2005), the Board denied an application for interim reinstatement without a hearing. This was because after the employees had been discharged, the Board certified the union under s. 128.1 of the Act. The Board determined that, in these circumstances, an interim order was not necessary to prevent irreparable harm or to achieve other significant labour relations objectives. The Board also found that the balance of harm did not favour the union, in part because the employer would suffer "significant financial harm" if required to employ 4 persons when only 2 were required (as alleged in the employer's materials).

***UPS Supply Solutions Inc.*** (unreported decision dated September 14, 2005) was the first contested case under Bill 144 in which the Board directed an employer to reinstate a discharged employee on an interim basis. In this case, the Board accepted that the interim reinstatement of a key inside organizer was necessary to prevent irreparable harm to the union and that the other statutory conditions had been met. The Board also commented on s. 98(3) of the Act and wrote that at a minimum, it requires that the Board engage in "careful inspection of the materials filed by the parties." It went further and offered that in interim relief proceedings, the Board may engage in "some very limited questioning of one or more declarants by the Board" or allow the parties to do so. The Board heard this case 2 ½ weeks after the application was filed by the union and issued its decision a week after that.

Finally, in **Sarnia Paving Stone Ltd.** (unreported decision dated October 3, 2005) the Board granted interim reinstatement to one discharged employee, but denied it to two others. In reaching this result, the Board emphasized the differences between the Bill 144 and Bill 40 versions of the Board's interim relief power. In particular, the Board considered the requirement in s. 98(3) that the Board not make an interim order if it appears to the Board that the alleged reprisal "was unrelated to the exercise of rights under the Act by the employee". The Board described this as an "override provision" that prevails over the test in s. 98(2) of the Act. On the basis of the written material filed by both sides, the Board decided that one of the discharged workers was really terminated for refusing to work with a particular co-worker and that his termination was "for reasons unrelated to the exercise of his rights" under the Act. In the case of another discharged worker, the Board noted that his classification was not included in the bargaining unit, and that his discharge, therefore, did not create any irreparable harm.

### **Card-based certification: a mixed success so far**

The new card-based certification procedures under Bill 144 have proved a mixed success since they were enacted in June 2005. OLRB officials report, anecdotally, that construction industry applications have increased by approximately 50% in the last 4 months. And there have been some good early decisions (see below). On the other hand, the Board's commitment to expedition is somewhat haphazard. The procedures for resolving "status" disputes are as slow as ever and hearing dates are much too hard to obtain. Contested applications can still take months to resolve.

In a series of decisions, the Board has said that s. 128.1 makes no provision for "petitions" or other forms of revocation of membership. Accordingly, the Board has paid no attention to these "change of heart" documents: see **Holman's Welding Ltd.** (unreported decision dated July 6, 2005) and **Tecumseh Home Centre** (unreported decision dated August 2, 2005). The Board has rejected the argument that its "snapshot" approach should be abandoned under Bill 144. Accordingly, the Board continues to count only those persons at work in the bargaining unit on the application date when determining the union's level of support, even when the application is filed on a Saturday: see **Controltech Electrical Ltd.** (unreported decisions dated August 3 and September 26, 2005). In perhaps the most important decision under s. 128.1 thus far, the Board held that the statutory requirement placed on employers to provide the Board with the names of employees in the bargaining unit within 2 days after receiving the union's application is mandatory (and not merely directory). This means that the Board has no power to extend that time limit. Accordingly, the Board will not consider any "list of employees" filed by an employer beyond the two-day time limit. Instead, it will measure the union's support based only on the material in the union's application: see **Air Kool Limited** (unreported decision dated August 17, 2005) and **Northern Construction and Maintenance** (unreported decision dated September 17, 2005). Finally, in *Air Kool Limited*, the Board also commented on the Board's discretion to order a vote even when the union has demonstrated greater than 55% support. The Board should only consider ordering a vote in such a case if there "is some flaw or doubt with respect to the membership evidence itself, or some problem arising from the process of the application."

While there are sure to be some disappointing decisions in the future, the cases reviewed above all indicate a positive commitment by the Board's adjudicators to making Bill 144's card-based certification procedures work as they were intended.

**Ministry of Labour announces “proactive employment standards inspections”**

Ontario’s Ministry of Labour has announced that it is increasing what it calls “proactive employment standards inspections” in order to protect vulnerable employees. The Ministry now has 144 employment standards officers working throughout the province. It says that over the next year, employment standards officers will carry out 2,500 surprise proactive workplace inspections to look for contraventions of the *Employment Standards Act, 2000* (ESA). In addition to so-called proactive inspections, the officers deal with nearly 17,000 claims filed every year by employees over alleged violations of the ESA relating to overtime, minimum wage, vacation pay and other rights.