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

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**Ontario Court of Appeal to hear *Maystar* appeal**

In the May 2007 issue of **TALKING UNION** we reported that in a case called *Maystar General Contracting* Ontario's Divisional Court had re-written the rules for dealing with time-sensitive construction industry certification applications. The change in direction mandated by the Court's decision was not a positive one. The Divisional Court determined that the Board's consistent approach to s. 128.1 of the *Labour Relations Act* – the new card-based certification provision introduced in Bill 144 – was wrong. According to the Court, the Labour Relations Board can receive and act on information presented to it by employers 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 International Union of Painters and Allied Trades, Local 1819 promptly initiated an appeal of the Divisional Court's decision – but appeals of this kind are only heard "with leave" (that is, with the permission) of the court. In an endorsement released on July 26, 2007, the Court of Appeal for Ontario determined that it would, indeed, hear the Union's appeal. The case will likely be heard early in 2008.

**OLRB orders remedial certification for a second time under Bill 144**

In the last issue of **TALKING UNION**, we reported on a case called *Swing Stage Equipment Rentals*. This was the very first decision of the Ontario Labour Relations Board to deal with Bill 144's remedial certification provisions. In that case, the Board embraced its restored jurisdiction under section 11 of the *Labour Relations Act* and it granted automatic certification to the union, notwithstanding its inability to sign up even 40% of the bargaining unit.

The Labour Relations Board has now issued a second section 11 case and the Board has, again, exercised its discretion to certify the union to remedy an employer's unfair labour practices. In the *East Elgin Concrete Forming* case, the Board found that one of the owners of the company repeatedly threatened the union's organizer with physical violence in a telephone call. In addition, the company held a captive audience meeting with employees in which another one of the company's owners told employees that he would pay \$100 to anyone who punched a union organizer. The amount of money

was then "auctioned up" to \$250 and then \$500. The owners claimed that this was all a joke, but the Board found that at least some employees took it seriously. The Board wrote:

"Threats or suggestions to physically harm people because they are organizing for or associated with a trade union is a violation of the Act. In this case it exhibits the depth of the employer's feelings about how it would respond to legitimate union activity and it could suggest to employees a willingness to engage in illegal activity in order to stop the union. It also suggests to employees the consequences of what their support for the union could mean. That is not free speech but intimidation."

The Board also found that the owners threatened the job security of employees by suggesting that unionization would lead the company to lose customers and would mean that employees would have to use their own cars to get to job sites.

The Board had little trouble accepting that the effect of the employer's violations was that employees' true wishes were not likely reflected in the representation vote that had been held. The Board then considered what remedies – other than certification – could counter the effect of the employer's violations. The employer had emphasized that any number of remedial options *other than* certification were appropriate where, as here, no discipline, dismissal or removal of benefits was perpetrated by the employer. The Board rejected this submission. It wrote:

"The remedy suggested by the employer is the holding of another representation vote with ancillary relief such as was provided by the Board in cases relied on by the employer. For the reasons given, I am not persuaded that a second representation vote with some additional relief would be sufficient to counter the effects of the employer's contraventions of the Act. This is because the continuing effects of the potential risks of violence and job insecurity are such that they would unduly influence the employees in the event a second representation vote were ordered, even with conditions attached which would advance the union's organizing efforts and seek to counteract the employer's conduct. As a consequence no remedy, other than certification, would be sufficient to counter the effects of the employer's unfair labour practices. I am prepared to certify the union."

The power to grant automatic certification in response to serious unfair labour practices has long been considered essential. While this is only the second case decided under section 11 (as amended in Bill 144), it is important that the Board continues to signal its intention to use its new remedial powers, without hesitation, when employers unlawfully threaten employees in the context of an organizing campaign.

### **Tim Armstrong to review whether to expand compulsory trades certification**

Tim Armstrong has been appointed by the Government of Ontario to review compulsory certification in the skilled trades. Compulsory certification means that only certified skilled workers or registered apprentices can work in that trade – as opposed to voluntary certification, where it is left up to individual employers, workers and consumers to determine the level of training required to do the work. According to the Ministry of Training, Colleges and Universities ("MTCU"), 21 of the more than 140 skilled trades in Ontario that involve apprenticeship currently require compulsory certification.

Mr. Armstrong has been appointed to review and report on the scope and impact of compulsory certification for the province's skilled trades workforce. He will "study the implications of expanding compulsory certification, including such factors as health and safety, consumer protection and economic impact." Mr. Armstrong is a former labour lawyer, former Chair of the Ontario Labour Relations Board, and former Deputy Minister of Labour. He is to deliver his written report to the MTCU in January 2008.

### **Ontario government to recognize bargaining rights for part-time college workers**

The Ontario government announced last month that it intends to introduce legislative amendments that would extend collective bargaining rights to part-time college workers. (Currently, part-time college workers are excluded from coverage under both the *Colleges Collective Bargaining Act* and the *Labour Relations Act*.) The government has appointed Kevin Whitaker to conduct what it calls a "broad-based review" of the *Colleges Collective Bargaining Act*. The review will examine the current Act and "whether it enables Ontario's colleges to meet their mandate, to respond to changing needs of students, employers and their local communities, and to establish and maintain good labour relations." Mr. Whitaker is the Chair of the Ontario Labour Relations Board and, since 2005, has also been Chair of the College Relations Commission and the Education Relations Commission. He is to submit a written report setting out the review's findings and recommendations to the Minister of Training, Colleges and Universities by the end of February 2008.

### **Saskatchewan recognizes harassment as a health and safety issue**

The Ontario Labour Relations Board long ago recognized that sexual or racial harassment is, at least arguably, a workplace health and safety hazard and that an employee who seeks an end to such harassment on the job is exercising rights under the *Occupational Health and Safety Act*. But in the *Meridian Magnesium Products Ltd.* case, decided in 1996, the Board determined that it should decline to hear such complaints under the *Occupational Health and Safety Act* and should, instead, defer these matters to the Ontario Human Rights Commission. Since 1996, the Board has consistently deferred hearing complaints of this sort.

The idea that workplace harassment is properly understood as a health and safety issue, however, remains a powerful one. Last spring, the Government of Saskatchewan introduced legislation intended to address harassment, abuse of power and bullying in the workplace. The *Occupational Health and Safety (Harassment Prevention) Amendment Act, 2007* ("Bill 66") enacted last May will come into force on October 1, 2007. Somewhat similar to the psychological harassment prohibition introduced in Quebec in 2005, Bill 66 expands the definition of harassment *beyond* the grounds prohibited by human rights legislation, as follows:

"harassment" means any inappropriate conduct, comment, display, action or gesture by a person:

(i) that either:

(A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or

(B) subject to subsections (3) and (4), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and

(ii) that constitutes a threat to the health or safety of the worker . . .

Employers in Saskatchewan are under a new statutory duty to ensure that workers are not exposed to “harassment” with respect to “any matter or circumstance arising out of the worker’s employment”. The amended *Occupational Health and Safety Act* now provides that harassment can result from a single serious occurrence, not just repeated occurrences, where it has a lasting, harmful effect on a worker. The Act excludes “reasonable actions” taken by an employer, manager, or supervisor relating to the management and direction of the worker or place of employment. Finally, the legislation provides for the creation of “special adjudicators” to hear appeals from decisions involving occupational health officers respecting matters involving harassment.

### **Expert Commission on Pensions to hold public hearings**

The Ontario Expert Commission on Pensions was appointed in late 2006 to review the province’s *Pension Benefits Act*, the rules governing the funding, deficits and surpluses of defined benefit pension plans, and other issues relating to the security, viability and sustainability of the pension system in Ontario.

The Commission has recently announced that it will hold public hearings across Ontario in October and November 2007, and it invites written and oral submissions from stakeholders in the pension system including plan sponsors, plan members and pensioners, unions and other representative organizations, plan administrators, pension professionals, academic, community and other groups, and employers, workers, retirees and other interested Ontarians.

A tentative schedule of public hearings and further information about the scope and content of submissions that the Commission wishes to receive are available on the Commission’s website: [www.pensionreview.on.ca](http://www.pensionreview.on.ca).

### **Human Rights Code Amendment Act, 2006 to come into effect in June 2008**

As reported in the January 2007 issue of **TALKING UNION**, the package of controversial amendments to the *Human Rights Code* contained in Bill 107 received Third Reading and Royal Assent last December.

Bill 107 has three main purposes:

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

2. **To provide that applications relating to the infringement of rights under the *Human Rights 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.** The Tribunal will become a greatly expanded agency. It currently receives approximately 150 applications a year. Once Bill 107 is in force, it is expected that the Tribunal will have to deal with more than 4000 complaints annually. Bill 107 contemplates that the Tribunal will adopt practices and procedures “that are alternatives to traditional adjudicative or adversarial procedures.” And its new rules of procedure will prevail over the *Statutory Powers Procedure Act* in the event of any conflict.

The Government of Ontario has now named **June 30, 2008**, as the day on which Bill 107's most important features (ss. 1-5 & 7-9) will come into effect.

### **Unionization rates in first half of 2006 and 2007 stable**

A report issued by Statistics Canada shows that unionization rates have remained stable in the last 12 months.

At 14.1 million, average paid employment during the first half of 2007 was 283,000 higher than during the same period a year earlier. On the other hand, union membership increased by 72,000 to 4.2 million. Compared with last year, employment grew less while union membership expanded more. As a result, the unionization rate remained unchanged at 29.7%. Unionization rose slightly in the public sector (to 71.7%), but remained the same in the private sector (17.0%). Seven provinces recorded increases. Decreases were seen in Quebec, Saskatchewan and Alberta. The unionization rate for permanent employees remained at 30.2%, but decreased to 25.8% for those in non-permanent jobs. The rate fell in workplaces with less than 20 employees, and those with 100 to 500, it increased in those with more than 500 employees and those with 20 to 99 employees. Unionization rose in 8 of the 16 major industry groups, including construction, public administration and education.

Further unionization data can be found in the August 2007 issue of “Perspectives on Labour and Income”, which is available on the Statistics Canada website at: [www.statcan.ca](http://www.statcan.ca).

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

On Friday October 26, 2007, the Right Honourable Chief Justice of Canada, Beverly McLachlin, P.C. will deliver the **5th Annual Koskie Minsky University Lecture in Labour Law** focusing on “*The Charter, Human Rights and Labour Law: 25 Years Later*”, at the Faculty of Law, University of Western Ontario, London, Ontario.

The Koskie Minsky University Lecture is part of a special weekend of labour law scholarship and discussion. On Saturday October 27, 2007, the Faculty of Law and the Heenan Blaikie law firm will sponsor a conference on the same topic to be addressed by Chief Justice McLachlin in her Lecture. We encourage anyone interested in labour law to attend both the Lecture and the Conference. There is no charge for attendance at the Lecture or the subsequent reception.

Further information with respect to both the Lecture and Conference is available at: [www.law.uwo.ca/conferences/labour2007.html](http://www.law.uwo.ca/conferences/labour2007.html).