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

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**Court of Appeal invites labour board to decide time limits issue without its intervention**

Does the Ontario Labour Relations Board have the authority to even consider an employer response to a construction industry certification application when it is filed *after* the 2-day time limit established under *Labour Relations Act*?

In more than 30 labour board cases decided between August 2005 and March 2007, the Board's consistent answer to this question was an emphatic "no". The Divisional Court's decision in the *Maystar* case, released in March 2007, dictated the opposite answer. But the Court of Appeal's recent judgment in the *Maystar* appeal, released on April 11, 2008, makes it clear that this question is one to be answered by the Labour Relations Board – *not* by the Court. And the Court of Appeal has invited the Labour Relations Board to, again, work out its own response to the issue – without any regard to the Divisional Court's view of the matter.

Some background to this confusing state of affairs is in order.

Shortly after the Bill 144 amendments to the *Labour Relations Act* were enacted, the Ontario Labour Relations Board ruled that the 2-day time limit within which an employer must reply to a card-based certification application is *mandatory*. The leading case was called *Air Kool* and it was followed at least 30 times by the Board. In these decisions, the Board accepted that it had no power to forgive an employer's failure to meet the statutory time limit – no matter how "good" the employer's 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 avoided.

The Board's approach was successfully challenged in court by an employer in a case called *Maystar*. In the *Maystar* case, released on March 20, 2007, the Divisional Court set aside principles of curial deference and determined that the Board's consistent approach to s. 128.1 was *wrong*. According to the Divisional Court, the Board had a discretion to receive and to act on information presented to it beyond the 2-day time limit established by s. 128.1 of the Act – although the Court *never* explained where that discretionary power could be found in the *Labour Relations Act*.

The Divisional Court decision was surprising and disappointing. The International Union of Painters and Allied Trades, Local 1819 appealed. In a judgment released April 11, 2008, the Court of Appeal dismissed the appeal as “moot”. But the Court did much more than that. After dismissing the appeal, the Court announced that the Divisional Court was *wrong* when it held that the Board’s interpretation of the *Labour Relations Act’s* certification provisions was entitled to “no deference” from the Court. Indeed, the Court of Appeal said that the opposite is true. In other words, there is no uniquely “correct” way to interpret the Act’s certification provisions and the Board is not obliged to accept the Divisional Court’s view of the matter. Then, the Court of Appeal went on to explain that the obligation to defer to the Board was another reason for the Court to avoid deciding the *Maystar* case on the merits. As the Court explained:

To embark on a review of the merits would require this court to do precisely what the jurisprudence indicates is improper – rather than defer to the Board, it would have this court dictate the process the Board is to follow when making decisions on certification, a matter within its exclusive jurisdiction.

In other words, on the question of considering late-filed employer responses, it’s back to “square one”. According to Ontario’s Court of Appeal, the question of whether s. 128.1 of the Act establishes a strict mandatory time limit is a question for the Board to decide – *not* the Court. The Divisional Court decision in *Maystar* is no longer binding on the Board. Instead, the Board must determine the matter itself and that decision, whatever it is, will be entitled to deference if it is ever challenged in Court.

The Union in the *Maystar* case was represented in the Ontario Court of Appeal by Koskie Minsky lawyers **Alan Minsky** and **Elizabeth Mitchell**.

### **“Remedial certification” decisions continue to disappoint**

After a strong start, the Ontario Labour Relations Board has retreated from its embrace of its restored remedial certification jurisdiction under the *Labour Relations Act*.

As mentioned, the Board’s initial approach was promising. In *Swing Stage Equipment Rentals*, released a year ago, the Board seemed to send a strong signal to employers about the consequences of interfering with the organizational rights of trade unions and employees. The Board granted automatic certification in that case, 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. A month later, in the *East Elgin Concrete Forming* case, the Board took a similarly enlightened approach. It found that certain employer 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.

But the Board’s more recent section 11 decisions have been very disappointing.

In *L & L Painting and Decorating*, released October 15, 2007, the Board accepted that the employer had committed various unfair labour practices, including the discharge of the union’s key inside organizer. But it declined to provide any relief under section 11 of the Act because it found no link between the employer’s illegal conduct and the union’s inability to achieve significant support amongst employees. In *K.D. Clair Construction Ltd.*, released February 26, 2008, the employer acknowledged

that it knew or suspected that two employees were engaged in union activity by seeking support for the union among the employees in the bargaining unit and, also, that their discharge was motivated by that knowledge or suspicion. But, again, the Board denied section 11 relief because it was not persuaded that the union “was not able to demonstrate 40 percent or more support among the employees in the bargaining unit as a result of the unfair labour practices” committed by the employer.

Finally, and most recently, in *Lecompte Electric*, released on April 15, 2008, the Board accepted that one employee had been discharged contrary to the Act and that, on a different occasion, the employer had made a number of coercive, intimidating and illegal statements to two other employees. But in the end, the Board found – as it did in *L & L Painting* and in *K.D. Clair Construction* – that the Union's inability to achieve 40% support was *not* a result of these unfair labour practices and the request for certification under s. 11 was dismissed.

In these recent section 11 decisions, the Board has adopted a much too narrow view of its jurisdiction. And in all these cases, serious employer unfair labour practices have gone under-remedied by the Board. The Board's reluctance to back up labour relations rights with effective remedies must be of real concern. These recent decisions also undermine the deterrent effect of s. 11 of the Act. By design, s. 11 is meant to restrain an employer's impulse to commit unfair labour practices, because such conduct might *itself* produce the very outcome the employer sought to avoid: certification of the union. But deterrence can only be achieved by the Board actually exercising its statutory powers – *not* by a series of decisions that seek to explain its failure to do so.

### **Arbitrator reinstates school bus driver who inadvertently abandoned child on bus**

In deciding whether discharge is an appropriate penalty for any disciplinary offence, arbitrators regularly have regard both to the nature and circumstances of the offence and to the personal characteristics of the grievor, including his or her seniority, past record and future prospects. An employee's lengthy and satisfactory service generally entitles that employee to equitable consideration in job-related decisions.

A good example is the recent decision of Arbitrator Kevin Burkett in *Re RWDSU District Council of the UFCW and Laidlaw Transit Ltd.*, released on March 13, 2008.

In this case, a school bus driver abandoned a junior kindergarten passenger on the bus after the driver completed her run and parked the bus. The driver did not know that her young passenger was asleep on the floor immediately behind the driver's seat. The passenger was discovered by the driver 40 minutes after the bus had delivered the children to school and about 10 minutes after the bus service received a call from the school indicating that the student was missing. The next day, the bus company fired the driver. At arbitration, the only issue was the appropriateness of the penalty. Arbitrator Kevin Burkett recognized the seriousness of the misconduct, but was impressed by the mitigating circumstances. He substituted a 4 month suspension for the discharge and explained his decision this way:

“The grievor...has more than 12 years of unblemished service. She has never been disciplined nor has she ever been cited for any safety infraction or disregard of safety protocol. She was extremely upset when she discovered the child, profusely apologized to the parent and accepted responsibility for her actions.

The failure to account for a child on board, with the result that the child is left unattended on a parked school bus, is a very serious offence that warrants a very serious response. While the Employer's response is understandable, it did not, in my view, take into account the grievor's relatively long unblemished service and her acceptance of responsibility. These are significant mitigating factors that satisfy me that what occurred on December 10, 2007 was, in respect of this grievor's employment, an anomalous event that would not likely happen again."

In discipline cases, the arbitrator is not only judging the grievor. He or she is also judging the employer. Here, the arbitrator judged the grievor favourably (based on her history) and accepted that the employer ignored a most relevant consideration: the grievor's long and satisfactory service with the employer.

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

### **Labour board dismisses employer-initiated termination application**

Under section 63(16) of the *Labour Relations Act*, the Board may dismiss an application to terminate a union's bargaining rights if it is satisfied that the employer or a person acting on behalf of an employer initiated the application. Experience and common sense suggest that a large number of termination applications are instigated by the employer. But because the burden of proof in these cases is on the union, and because the actual circumstances surrounding the termination application are hard to discover, applications under s. 63(16) rarely succeed. A recent decision of the Board in the *ENER-TECH* case illustrates how a sensitive adjudication process can, however, overcome these obstacles.

In *ENER-TECH*, an employee sought to terminate the Union's bargaining rights less than 6 months after certification of the Union. At the Board hearing, the employee testified extensively about how and why he brought the application. But when that evidence was assessed – as it was in this case in close detail – the Board concluded that the evidence of the applicant was "entirely unbelievable and was not true." The Board went on:

"Applications for the termination of bargaining rights don't just happen; they must be initiated by somebody. It is the applicant, in this case Mr. Poisson, who is in the best position to explain how an application came to be filed. Here, I have concluded that Mr. Poisson was not honest in his evidence concerning how he became aware that a termination application could be filed, when such an application would be timely under the Act and in describing his alleged motivation for bringing this application. Accordingly, and considering all of the evidence, the only natural explanation of, and the inference I draw from, Mr. Poisson's lack of honesty is that he wishes to cover up misconduct and that his employer, ENER-TECH, in fact initiated this application."

Prior to amendments to the *Labour Relations Act* made in 1995, applicants in termination applications had to demonstrate that their application was brought free of employer support. Today, an applicant need not bear that burden. He or she must only testify honestly and credibly, if testifying at all. This

ought not to be a high standard to meet. It follows that where an applicant fails to meet this standard, the Board should be able to infer, as the Board did here, that the applicant's dishonesty is aimed at covering up the employer's role in the termination application.

### **New construction industry regulation for return to work and re-employment under WSIA**

The Provincial Government has made a new regulation under the *Workplace Safety and Insurance Act* governing return to work and re-employment in the construction industry (O. Reg. 35/08). The regulation was filed on February 22, 2008 and comes into force on September 1, 2008.

Key aspects of the new regulation include:

**Application:** The Regulation applies to all employers engaged primarily in construction regardless of the number of workers that are employed.

**Suitable Work:** The term "suitable employment" has been replaced with the term "suitable work" and the definition now encompasses work that is safe, productive and consistent with a worker's functional abilities. The previous definition of "suitable employment" found in Regulation 259/92 described employment that was within the worker's trade and that the worker already had the necessary skills to perform. Accordingly, the Accident Employer is now obligated to consider and offer work that may be available *outside* of the Worker's trade.

**Accident Employer's Re-Employment Obligation:** The specific provision that the Board notify the Accident Employer that an Injured Worker is medically able to perform the essential duties of pre-injury employment has been revised and reference to the WSIB providing the notification has been removed. In addition, the duration of the Accident Employer's re-employment obligation will expire one year after the date the Injured Worker declines an offer of employment that is made in accordance with the Regulation. An offer of employment may be made to a position that is considered "suitable work", that is work that may not be within the Worker's trade, another construction trade or a workplace **covered by a collective agreement**.

**Employer Obligations and the Duty to Accommodate:** Regulation 35/08 maintains the requirement that the Accident Employer accommodate the work or the workplace to the needs of the Worker to the extent that the accommodation does not cause undue hardship. *However, section 7(2) of the Regulation provides that the Accident Employer is not required to accommodate the workplace to the needs of the Worker if the employer does not control the workplace.*

**The Employer's Obligation to Re-Employ and the Rebuttable Presumption:** The Regulation addresses both the general and specific circumstances under which an Accident Employer will be presumed to have breached the re-employment obligation owed to an Injured Worker by not re-employing the injured Worker as required or re-employing and then terminating the injured Worker.

Generally, the Accident Employer is presumed not to have fulfilled its obligations if it re-employs an injured Worker in accordance with the Regulation and then terminates the Worker's employment within 6 months of the date of employment. There are also provisions specific to re-employment at a construction project that consider circumstances in which an Injured Worker is terminated following re-employment. Again, in such circumstances, the Accident Employer is presumed not to have fulfilled its obligations.

The Accident Employer may rebut the presumption by showing that the termination or failure to re-employ is not related to the injury.

**Re-Employment of Unionized Workers:** Sections 9 through 14 apply if, at the time of injury to the Worker, the Accident Employer was bound to a collective agreement with a union representing the Worker. Sections 11 through 14 address specific circumstances, such as when:

- the Injured Worker is able to perform the essential duties of the pre-injury position.
- the Injured Worker is medically able to perform suitable work in construction.
- there is more than one position as described above that can be offered to the Injured Worker.
- it is unlikely that the Injured Worker will be medically able to perform construction work but is medically able to perform suitable work other than in construction.

The Workplace Safety and Insurance Board is developing policies to apply Regulation 35/08 and will be requesting feedback from construction industry stakeholders during this process.

For more information about O. Reg. 35/08 and related matters, please contact Koskie Minsky's **Trish O'Hearn** at 416 595-2132 or **Craig Flood** at 416 595-2105.

### **Koskie Minsky lawyers file complaint alleging violation of international labour standards**

Last month, two global union federations and more than 40 labour organizations in Canada, the United States and Mexico jointly filed a complaint against the United States under the North American Agreement for Labour Cooperation (NAALC). The complaint was filed by the Koskie Minsky lawyers **Susan Philpott** and **Graham Williamson** acting for the Canadian Association of Labour Lawyers (CALL) on behalf of the labour organizations, including the Canadian Labour Congress, the Canadian Union of Public Employees, the CEP, and the UFCW.

The NAALC is the labour side agreement to the North American Free Trade Agreement (NAFTA). The NAALC requires the United States, Mexico and Canada to provide for "high labour standards" in their laws, and lists freedom of association and the right to collective bargaining among its core principles. The complaint charges that North Carolina and the United States are violating international labour rights standards embodied in NAALC by denying 650,000 public employees in the state the right to engage in collective bargaining. North Carolina General Statute 95-98 actually prohibits collective bargaining by state and local government employees.

The NAALC complaint was filed with the National Administrative Office (NAO) within Canada's federal department of labour. Under NAFTA's terms, the U.S., Canada and Mexico each established an NAO to act on complaints of violations of the NAALC. The petitioners are asking the Canadian NAO to investigate North Carolina's labour rights violations, and issue a report and recommendations for action.

For further information, contact Susan Philpott at [sphilpott@kmlaw.ca](mailto:sphilpott@kmlaw.ca).