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

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This Issue's Editors:

Craig Flood

Phone: (416) 595-2105
cflood@kmlaw.ca

Anne Cumming

Phone: (416) 595-2089
acumming@kmlaw.ca

James Harnum

Phone: (416) 542-6285
jharnum@kmlaw.ca

1. New Board Procedures for Applications For Certification in the Construction Industry

The Ontario Labour Relations Board has established out a new process for resolving Applications for Certification in the Construction Industry, effective January 1, 2012. The new process – which is designed to expedite the processing of construction industry Applications - is set out in Information Bulletin Nos. 6 and 9.

The changes affect only the way in which the Board processes such Applications. The changes do **not** alter the rules regarding the number of membership cards that an Applicant must provide in the case of a vote (i.e., cards from at least 40% of the bargaining unit) or automatic certification (i.e., cards from at least 55% of the bargaining unit) nor the requirement that an employee must be at work in the bargaining unit on the day of Application in order to be included in the count.

Under the new procedures, in vote-based certification, status disputes submissions are now to be delivered to other parties, and filed with the Board, within 5 days after the vote; reply submissions are to be delivered and filed within a further 5 days. Any other issues arising from the certification application are to be fully pleaded, with substantial particulars of the facts relied upon and a statement of the legal issues raised, within 15 days of the representation vote.

Similar timelines exist for card-based certification applications i.e., the union's challenges to the employer's list need to be identified, and additions need to be pleaded with particulars, within 5 days of the Board's initial decision. The employer is to respond to those challenges and proposed additions, with a statement of the facts upon which it is relying and produce all relevant documents related to the status dispute within 10 days of the decision. The union then has 5 days to respond. Once the union has filed its statement, neither the union nor the employer will be permitted to alter the list without agreement by the parties or leave of the Board.

Another major change to OLRB procedure involves the scheduling of case management hearings within 5 weeks of the vote or 5 weeks of the Board's initial decision in the case of a card-based certification. This new process replaces the Post-Vote Mediation Process and the Regional Certification Meeting.

Scheduling of settlement discussions are independent of the case management hearing, and documents used at the settlement discussions not yet filed with the Board do not automatically become evidence.

Case management hearings are intended to resolve the issues in dispute, or direct how they are to be litigated before the Board. Following the hearing, the Vice Chair or Panel will issue a decision outlining any decisions made, and may refer the matter to a hearing on the merits. The Board will direct any remaining procedural or production issues to be outlined in writing within 5 days of the Board's decision.

2. Threats in the Workplace and Bill 168

Bill 168 introduced a number of amendments to Ontario's Occupational Health and Safety Act, to address violence or harassment in the workplace.

In *Kingston (City) v. Canadian Union of Public Employees, Local 109*, Arbitrator Elaine Newman recently considered the effect of Bill 168. The Grievor, with some 28 years of service, was terminated for uttering a death threat against a co-worker, who was also her Local Union President. The Grievor had a history of angry confrontations with her supervisors and co-workers and had been previously discharged and reinstated on two separate occasions.

The Employer concluded, after investigating, that a threat had occurred, that the threat irretrievably damaged the employment relationship and that, in light of the Bill 168 amendments and the seriousness of the incident, it had no choice but to terminate the Grievor. During the termination meeting, the Grievor expressed no remorse, and did not apologize for or explain her behaviour.

The Union grieved the dismissal, taking the position that the termination was premature and based on an unproven perception of danger. In particular, the Union argued that Bill 168 does not mandate automatic termination for workplace violence nor does it supplant the common law requirements of progressive discipline and proportionality in response to misconduct.

Arbitrator Newman held that Bill 168 affects the arbitral process of determining the appropriate disciplinary penalty for acts of alleged workplace violence in four fundamental ways:

1. Threatening Language Constitutes "Workplace Violence"

In light of Bill 168, language that suggests impending danger or death may be considered an act of violence. While vexatious and unwelcome language is serious in its own right, "language that is made in direct reference [to] the end of a person's life or that suggests impending danger, falls into a category of its own. This is not just language, it is violence." Further, as Arbitrator Newman clarified, "there need not be evidence of an immediate ability to do physical harm. There need not be evidence of intent to do harm" rather, it is the utterance itself which constitutes the workplace violence.

2. Employers Are Required to Fully Investigate and React Appropriately to Allegations of Threats

Bill 168 requires that the alleged utterance of a threat must be reported, investigated and addressed. In Arbitrator Newman's words:

The utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act.

However, this does not mean that termination is always the appropriate response. An employer's response to workplace incidents must still be "informed, reasonable and proportionate."

3. “Seriousness of the Incident” Accorded More Weight

Bill 168 has affected how an arbitrator might assess the reasonableness of termination should a threat be found to have been made. Although traditional factors such as the seriousness of the threat or attack, whether the incident was a flare-up or premeditated act, whether there was provocation and whether the Grievor has expressed genuine remorse and made a sincere apology continue to apply, Bill 168 may require an arbitrator to give greater weight to the seriousness of the incident.

4. “Workplace Safety” an Factor

Bill 168 requires that workplace safety be considered when assessing whether and/or what kind of a disciplinary response is appropriate in the circumstances. While workplace safety used to be considered as part of the question “to what extent can this employment relationship be repaired?”, arbitrators must now specifically address the question: “To what extent is it likely that this employee, if returned to the workplace, can be relied upon to conduct himself or herself in a way that is safe for others?” Workplace safety is an important consideration because, as the Arbitrator found, “the employment relationship will be incapable of reparation, if the offending employee is likely to render the employer incapable of fulfilling its obligation to provide a safe workplace under the Occupational Health and Safety Act.”

The City of Kingston decision confirms the significance of Bill 168: threats of violence - even in the absence of an intent to do harm - now constitute workplace violence; such threats must be investigated and assessed accordingly; and that while Bill 168 may not amount to “zero tolerance” legislation, serious discipline, including termination, may be appropriate in situations involving threats in the workplace.

3. Bill C-377 – Regarding Unions’ Financial Transparency

In October of 2011, Conservative MP Russ Hiebert introduced Bill C- 317, a private members Bill, which sought to amend the rules governing labour organizations under the Income Tax Act. Under the proposed changes to the Act, which currently exempts unions from paying taxes, a union could be denied tax-exempt status if it failed to comply with the new law.

This effort, which would have forced unions to make detailed financial disclosures to the Canada Revenue Agency, was temporarily derailed after the Speaker of the House found that Bill had been improperly introduced and was therefore in violation of the Rules of the House.

Despite this procedural setback, MP Hiebert appears to have been undeterred. He recently “re-proposed” Bill C-377, which has now passed first reading. Bill C-377 is identical to Bill C-317 in terms of what it requires of unions and labour trusts. While Bill C-377 no longer purports to take away tax exempt status from labour organizations or trusts (as the earlier Bill did) it does purport to issue a penalty of \$1,000.00 per day for each infraction of the reporting requirements.

Disclosure Obligations Mandated by the Bill

The Bill requires “[e]very labour organization and every labour trust to file a “public information return” within six months at the end of each fiscal period. Failure to comply with the proposed disclosure and reporting requirements would invite the hefty financial penalty referred to above. As proposed, the information to be filed included:

- A set of financial statements showing liabilities, income and expenditures for the fiscal period.
- A set of statements for the fiscal period setting out all transactions and disbursements over \$5,000. These statements would also have to include the name and address of the payer and payee, the purpose and description of the transaction, and the specific amount paid or received.

The Bill contemplates a series of specific types of expenditures which must be disclosed, including:

- A statement of disbursements and any kind of consideration provided to officers, directors, trustees, employees and contractors;
- A statement of disbursements made in relation to labour relations, organizing and collective bargaining activities;
- A statement pertaining to the costs related to political activities and lobbying;
- A statement of disbursements on legal activities;
- A statement setting out all labour relations expenditures and all non-labour relations expenditures, including relative amounts of salaries paid to officers and employees.

If passed, Bill C-377 will require that the disclosed information be made publicly available by the Minister, unlike information which is filed with the tax authority. We will continue to keep an eye on this Bill and report on its status as it makes its way through Parliament. Please contact our office if you have any questions about the Bill.

Upcoming Events

The Koskie Minsky University Lecture in Labour Law will be held at the University of Western Ontario in London on Friday March 2, 2012. Our lecturer will be Ms. Wilma Liebman, the former Chair of the National Labour Relations Board in the United States, who will speak on Labour law, Economic Justice and Political Rhetoric: Reflections on the Wagner Act. The Lecture will be followed by a wine and cheese reception. The Lecture and Reception are free. On Saturday March 3, Heenan Blaikie will host a Conference on Labour Law, titled Faultlines and Borderlines in Labour Law: The Future of the Wagner Act in the United States and Canada. Further details can be found at our website www.kmlaw.ca or www.law.uwo.ca/conferences/labourlawconference2012.