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

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## **REPLACEMENT WORKERS CANNOT GET RID OF UNION**

In the December 2002 issue of **TALKING UNION** we reported on the Ontario Labour Relations Board decision in the *ResCare Premier Canada* case. In that case, the Board decided, without reasons, that ballots cast by “replacement workers” should not count in determining an application to terminate the union’s bargaining rights. In the result, that termination application was defeated.

The Board has now released reasons for its December 2002 “bottom line” decision. In essence, the Board accepted that “replacement workers” were employees, but it rejected the argument that they were employees “in the bargaining unit”. The Board adopted and applied a 1990 decision of the Saskatchewan Labour Relations Board. It found that when a strike is declared and members of the bargaining unit walk out, the functional bargaining unit “walks out” with them. Non-union replacement workers, it decided, do not become members of the bargaining unit any more than management personnel who may also be replacing striking employees. The Board accepted that “replacement workers” are not represented by the trade union and, therefore, the decision as to whether a trade union should continue to represent bargaining unit members should be made *only* by employees that the union represents.

## **OLRB GRANTS INTERIM REINSTATEMENT OF DISCHARGED EMPLOYEES**

For the first time since 1995, the Ontario Labour Relations Board has ordered interim reinstatement of discharged employees pending a hearing into their complaint before the Board.

In the *Kingsway Electric* case, complaints were filed on behalf of 2 discharged employees under the *Labour Relations Act* as well as the *Occupational Health and Safety Act*. The

union and the employees claimed that the employees had been vocal union supporters in an ongoing organizing campaign and that they were also vocal critics of the employer's health and safety practices. They alleged that they were victims of unlawful reprisals under both statutes. The employees also asked for interim reinstatement in connection with the health and safety complaint pursuant to section 16.1 of the *Statutory Powers Procedures Act*. (Section 98 of the *Labour Relations Act* specifically precludes interim reinstatement under that Act). When the employer failed to file its response to the interim relief application within 2 days, as required by the Board's *Rules of Procedure*, the Board determined the application on the basis of the employees' materials only and it granted the reinstatement order sought. The Board's interim reinstatement order issued 7 days after the application was filed with the Board.

Prior to the Bill 7 amendments to the *Labour Relations Act*, trade unions brought numerous applications to the OLRB for interim orders, with some success, particularly in achieving the reinstatement of discharged union organizers. In that period, the Board was able to prevent harm to organizing campaigns that would not be easily remedied later after a hearing of the merits of the main application. The arguments in favour of interim reinstatement in a health and safety context are equally compelling. Furthermore, in a period when the Board seems unable to schedule and decide such cases in an expeditious fashion, the need for interim orders is even more pronounced. That is why many trade unions are now seeking to persuade the new Liberal government in Ontario to *restore* the OLRB's interim order jurisdiction under the *Labour Relations Act*.

## **SUPREME COURT OF CANADA RULES ON IMPORTANT LABOUR AND EMPLOYMENT CASES**

Since the last issue of **TALKING UNION**, the Supreme Court of Canada has decided 4 significant labour and employment law cases.

In the *Nova Scotia Workers' Compensation Board* case, the Supreme Court of Canada considered whether the Nova Scotia Workers' Compensation Appeals Tribunal has jurisdiction to decide a constitutional challenge to provisions in that Province's *Workers' Compensation Act* and regulations that restrict payments to chronic pain claimants. A unanimous 9-0 court ruled that the challenged provisions of the Act and regulations are unconstitutional because they violate equality rights guaranteed by s.15 of the *Charter of Rights and Freedoms* by discriminating against workers with chronic pain. The Court went further: it ruled that the Act reinforced widespread negative assumptions and demeaned the essential human dignity of chronic pain sufferers. The Court gave the Nova Scotia government 6 months to amend the Act. Finally, the Court clarified the law regarding administrative tribunals' jurisdiction to interpret and apply the *Charter*. Here, the Supreme Court affirmed the Appeals Tribunal's power to review its enabling legislation for compliance with the *Charter*.

The *Maksteel* case concerned a provision in Quebec's *Charter of Human Rights and Freedom* that prohibits employment discrimination against persons convicted of a criminal offence if the offence is not connected with their employment or if a person has obtained a pardon. (In contrast, s. 5 of Ontario's *Human Rights Code* prohibits discrimination in employment based on a number of grounds, including "record of offences", which is defined in s. 10(1) as a conviction for an offence in respect of which a pardon has been granted under the *Criminal Records Act* and has not been revoked, or for an offence in respect of any provincial enactment.) The issue in *Maksteel* was whether the dismissal of an employee due to absence from work while in jail constituted discrimination on the basis of criminal conviction. A unanimous Supreme Court of Canada concluded that it did not. The Court ruled that the employee was dismissed because he was not available for work – not because of the mere fact that he had been convicted.

Finally, in the *City of Toronto and Ontario v. OPSEU* cases, the Court considered the degree to which a discharged employee could use the grievance arbitration procedure to contest an allegation of criminal conduct where the employee had already been convicted in court for that conduct. The Court concluded that the doctrine of abuse of process applied in these cases to preclude a challenge of the grievors' criminal convictions at arbitration. The Court ruled that "re-litigation" is permissible only in very limited circumstances, such as when the first proceeding was tainted by fraud or when new evidence, previously unavailable, impeaches the original result. The Court held that when the arbitrators in these cases received evidence from the union to challenge the facts underlying the conviction, they committed an error of law and produced "patently unreasonable" decisions.

### **BILL C-45 MAKES CORPORATIONS CRIMINALLY ACCOUNTABLE FOR WORKPLACE SAFETY**

Bill C-45 – more commonly known as the "Westray Bill" – received Royal assent on November 7, 2003 and will come into force on proclamation. Bill C-45 is the long-awaited federal response to the Westray Mine disaster in 1992 that resulted in the death of 26 miners. Following that tragedy, and despite serious workplace safety violations committed by Westray's management, neither Westray, nor individual company representatives were punished. Bill C-45 will make it possible to hold corporations criminally liable for the negligent actions of lower-level managers supervisors. It amends the *Criminal Code* to:

- establish a legal duty for all persons directing work to take responsible steps to ensure the safety of workers and the public;
- establish rules for attributing to organizations criminal liability for the acts of their representatives;
- set out factors for courts to consider when sentencing an organization; and
- provide optional conditions of probation that a court may impose on an organization .

As noted, while Bill C-45's amendments to the *Criminal Code* are now law, they have not yet been declared into force. The effective date of the amendments will be determined by the federal Cabinet. A more detailed analysis of Bill C-45 will be included in a later issue of **TALKING UNION**.

### **FAILURE TO POST ESA POSTER ATTRACTS LARGE FINES**

Section 2(1) of the *Employment Standards Act* ("ESA") and section 1 of Regulation 290/01 under the ESA require all employers in Ontario to post a poster in their workplace prepared by the Ministry of Labour entitled "What You Should Know About the Ontario *Employment Standards Act*". The poster aims to inform employees of their rights under the ESA. In December 2001, a Ministry of Labour employment standards officer visited a garment factory in Toronto and asked the employer to post the required poster. Subsequently, the officer issued an order to that effect. But 3 weeks later, the poster had still not been posted. The Ministry prosecuted the employer and a company director under the ESA. Both pleaded guilty. The company was fined \$6000 and the director was fined \$3000. In addition to the fines, the court imposed a 25 percent victim fine surcharge, as required under the *Provincial Offences Act*.

### **OLRB QUASHED IN DIVISIONAL COURT YET AGAIN**

For many years, the Courts have recognized that the Ontario Labour Relations Board is "master of its own procedure". Accordingly, the Courts repeatedly declined to interfere with the Board's procedural decisions. In the *TTC* case, however, a unanimous Divisional Court ruled that the Board's decision to consolidate and hear 2 cases together denied a discharged employee a fair hearing in his health and safety complaint "in accordance with the principles of fundamental justice". It quashed the Board's decision and remitted the employee's complaint back to the Board to be heard by a different panel.

The 2 proceedings before the Board were not clearly related. The first was the employee's reprisal complaint against his employer. The employee alleged that he had been discharged contrary to the *Occupational Health and Safety Act* for exercising rights under that Act. The other proceeding was an application by his employer under the *Statutory Powers Procedure Act* to have the Board state a case to the Divisional Court inviting that Court to punish the employee for "contempt" of the Board in an earlier case. The Court found that the Board's decision to hear the cases together was unfair for at least 2 reasons. First, requiring the employee to *defend* his alleged "contemptuous conduct" in the earlier case in the context of his reprisal complaint constituted serious prejudice. The Court noted that in the contempt matter, the employee was put in a position of being "pitted" against the tribunal. Furthermore, the Court ruled, forcing the employee in his reprisal case to face allegations of contempt of the Board in another case severely compromised the appearance of fairness and "did not create the impression that he was being given a fair hearing by an 'independent and impartial tribunal'." The TTC is seeking leave to appeal this decision to the Court of Appeal.

## **COURT DISMISSES EMPLOYER CHALLENGE TO LOCAL AREA AMENDMENT DECISION**

Ontario's Divisional Court has affirmed arbitrator George Surdykowski's "local area amendment" decision in the *Ontario Painting Contractors' Association* case.

As reported in the August 2002 issue of **TALKING UNION**, the Ontario Painting Contractors' Association ("OPCA") had sought significant changes to the Painters' provincial agreement (including changes to wages, vacation pay, pension contributions, shift premiums and overtime) on the basis of an alleged competitive disadvantage in the Ottawa area. OPCA's application was brought under provisions in the provincial agreement that were included as an alternative to sections 163.2 and 163.3 of the *Labour Relations Act* (which were introduced into the Act by Bill 69 in 2000). The arbitrator dismissed the employer's application for "local area amendments" to the provincial agreement in the summer of 2002.

OPCA subsequently challenged the arbitrator's decision in court. It alleged that the decision was patently unreasonable and was not supported by the evidence. In a recently released judgment, the Divisional Court unanimously decided that the opposite was true. It accepted the arbitrator's interpretation of the collective agreement as requiring proof of "competitive disadvantage" as a pre-condition to the arbitrator amending the provincial agreement. And it found that there was ample evidence to support the arbitrator's ultimate conclusion that unionized painting contractors in the Ottawa area, in fact, suffer *no* competitive disadvantage as compared to legitimate, non-union competition. Accordingly, the Court dismissed the employer's application and it upheld the arbitrator's decision.

## **WHAT'S NEW?**

### **AT KOSKIE MINSKY:**

**New lawyers:** **Ernie Schirru** and **Jackie Crawford** have joined the firm's labour department. Ernie was called to the Bar this year. He can be reached at (416) 595-2142. Jackie was most recently counsel at the Air Canada Component of CUPE's Airline Division. She can be reached at (416) 595-2702.

**Celeste Poltak** has joined the firm's civil litigation department. She can be reached at (416) 595-2701.

**New website:** Koskie Minsky has redesigned its website. Pay it a visit at [www.koskieminsky.com](http://www.koskieminsky.com).