



Talking Union is a bi-monthly newsletter highlighting matters of interest to the labour relations community. We welcome your questions and comments.

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In January, 2001, the government applied for leave to appeal to the SCC the decision of the Ontario Court of Appeal in CUPE and the Minister of Labour. In this case, the OCA had agreed with CUPE and the SEIU that a change in the appointment process for interest arbitrators under the Hospital Labour Dispute Arbitration Act violated the principles of natural justice. The OCA released its decision in November, 2000.

The underlying complaint occurred in 1997 when the government passed Bill 136, the Public Sector Transition Stability Act, 1997. Under HLDA, essential health workers give up the right to strike but have interest arbitrators decide their collective agreements. Under Bill 136, the Minister, on two occasions, ignored the long-standing practice of appointing arbitrators from a mutually agreed list and, instead, appointed two retired judges to hear the interest arbitrations.

The Unions requested a judicial review of the Minister's appointments. Divisional Court dismissed the application and the Unions successfully appealed. The OCA found that the Minister's statutory discretion was reviewable by the courts since the discretion must be exercised in good faith and must be based on considerations pertinent to the objects of the statute. It also found that litigants, including those before administrative tribunals, are entitled to have their claims dealt with by persons who are independent and impartial.

Applying these principles, the OCA found that the retired judges did not have the expertise in labour relations equivalent to that of the experienced arbitrators. Further, since their appointments were ad hoc and were unilaterally made by the Minister, they had no job security and, hence, no independence. The OCA found that, under the new appointment scheme, there was a reasonable apprehension of bias and an appearance of interference with the independence and impartiality required of a board of arbitration. In addition, the OCA found that the Minister's actions, taken unilaterally, without consultation or warning, and contrary to a practice in place since 1979, violated the Union's legitimate expectation of fairness and natural justice.

There is no doubt that the decision of the OCA was a major victory for the Unions, since it limited the Minister's statutory discretion and honoured long-standing labour relations practices. Accordingly, it is not surprising that the government wants to appeal. Hopefully, the SCC will take an equally strong approach to fairness and natural justice as did the OCA.

SCC ALLOWS FULL BOARD DELIBERATIONS

In January, 2001, the SCC released an important administrative law decision upholding the legitimacy of holding full Board meetings to discuss pending decisions, but with certain limitations. (See *Ellis Don Limited v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894.*)

In *Ellis Don*, the issue before the Board in 1990 was whether the IBEW had abandoned its bargaining rights with a general contractor. If so, the Union's grievance would be dismissed. The Vice-Chair decided in a draft decision that abandonment had occurred. However, the VC then requested a meeting of the full Board to discuss the issues, following which she issued a final decision finding no abandonment. ED challenged the change of heart in the courts, claiming a breach of natural justice, a challenge that was dismissed by both Div. Ct. and the OCA.

The issue before the SCC was whether the Board had complied with the requirements for valid institutional consultation established in *Consolidated Bathurst Packaging Ltd.* [1990] 1 S.C.R. 282. If the Board's decision was based on a finding of fact, only the persons hearing the case could decide it. If, on the other hand, abandonment is a question of law, then the panel hearing the evidence may legitimately consult with the full Board about the policy and law they should apply to the facts they have determined.

The SCC held that ED had the burden of proof to show the breach of natural justice, here, an allegation of inappropriate tampering with the assessment of the evidence. It acknowledged that this evidence is difficult to obtain since Board members have statutory protection from becoming witnesses; the deliberations of administrative bodies are normally privileged. The SCC found that ED's complaint was based primarily on speculation of what occurred at the full Board meeting. The SCC concluded that, on the face of the draft and final decisions, the facts remained the same but the panel, after consulting with the full Board, reached a different conclusion on how to apply Board policy and law to those facts. There was no evidence from which the SCC could conclude the full Board altered the factual conclusions. The appeal was dismissed.

This decision of the SCC reinforces principles which were already in existence, i.e. that the Board may engage in consultations with all of its members on matters of policy and law.

WHAT'S NEW?

AT KOSKIE MINSKY

- **New Labour Lawyer:**

Koskie Minsky is pleased to welcome as a labour lawyer **Graham Williamson**, our former articling student and a graduate of the University of Toronto. Graham will specialize in labour relations law, including Workplace Safety and Insurance benefits.

- **New Pension Lawyer:**

We are also pleased to welcome **Lesla MacDonald** in our pension department, who comes to us with experience gained at the Financial Services Commission of Ontario, the Ministry of the Attorney General, and the Pension Commission.

AT PUBLIC PERSPECTIVES INC.

- **New Public Relations Specialist:**

PPI welcomes **Denise Riposati**, a public relations, media, and communications specialist, who has joined PPI after several years of experience in the private sector.

At KM and PPI

- **New Phone System**

To improve our client service, we have moved to a direct dial/direct dial fax system. A full list of numbers is available on request. However, our labour lawyers can now be reached as follows:

Ursula Boylan

tel: 416 595 2064
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You can also continue to use the general numbers for Koskie Minsky:

Telephone: 416 977 8353;
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AT GRIEVANCE SETTLEMENT BOARD

- **New Chair**

Arbitrator Susan Stewart has been appointed to replace Mr. Owen Shime, who is retiring on March 14, 2001.

IN LEGISLATION

The Government has passed the Employment Standards Act, 2000, although the majority of the provisions have not yet been proclaimed and no new Regulations have been published. The expanded parental leave provisions, which allow combined pregnancy and parental leaves to a maximum of 12 months, are effective from December 31, 2000. The ESA, 2000 was highlighted in a TALKING UNION Bulletin, July 2000. The next issue of TALKING UNION will describe the ESA, 2000, and report on its status.

Do you want your issues of TALKING UNION by e-mail? Do you have an issue you would like discussed in TALKING UNION? Do you have additions or corrections to our mailing list? If so, please contact the editors:

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