



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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SUPREME COURT SLAMS ONTARIO'S MINISTER OF LABOUR

Ontario's Minister of Labour exercised his powers in a "patently unreasonable" way when he appointed retired judges to act as arbitrators in hospital labour-management disputes, the Supreme Court of Canada has ruled. The Court declared that arbitrators selected by the Minister of Labour must not only be independent and impartial, they must possess labour relations expertise and also be recognized in the labour relations community as generally acceptable to both management and labour. The Minister's appointments failed to meet that standard. The Court, therefore, rejected the government's argument that it should defer to the Minister's "opinion" when making these selections.

This case began in 1998, when Ontario's Minister of Labour began appointing retired judges to chair arbitration board in the hospital sector. The unions strongly objected to these appointments. They accused the government of abandoning an established practice of appointing acceptable "neutrals" and said that it was attempting to seize control of the bargaining process. The Court of Appeal agreed. The government then appealed. (The Canadian Bar Association intervened in the appeal to support the result in the Court of Appeal. Its legal team included Koskie Minsky lawyers Susan Philpott and Graham Williamson.)

To the surprise of many, the Supreme Court dismissed the appeal, albeit for reasons different from those of the Court of Appeal. The Supreme Court did not accept that retired judges, as a class, held an anti-labour bias. But the Court *did* find that the appointment of retired judges to chair arbitration boards had the effect of "frustrating" the legislative scheme. The Court strongly rebuked the Minister and concluded that his approach to appointments was "antithetical" to the credibility of the arbitration process. The Supreme Court dismissed the appeal, but varied the order of the Court of Appeal.

SUPREME COURT REJECTS EMPLOYER CHALLENGE TO CANADIAN HUMAN RIGHTS TRIBUNAL

The Supreme Court of Canada has found that that the Canadian

Human Rights Tribunal is an independent, unbiased, quasi-judicial tribunal. Bell Canada's arguments to the contrary were rejected as "without merit" in the Court's recent decision in *Bell Canada v. Canadian Telephone Employees Association*.

These proceedings have previously been described in the May 2001 and June 2002 issues of *TALKING UNION*. Bell Canada had been resisting pay equity claims made on behalf of its female employees for more than a decade through various challenges to the Tribunal. Bell argued that the power of the Canadian Human Rights Commission to issue "guidelines" that were binding on the Tribunal, and the discretionary power of the Tribunal's Chair to extend adjudicators' appointments during ongoing inquiries undermined the independence and impartiality of the Tribunal. In a unanimous decision, Bell's appeal was dismissed. The Court noted that the power assigned to the Tribunal's Chair was practical and appropriately placed. As for the guidelines, the Court said this: "The Tribunal seems no more likely to be biased in favour of the Commission because the Commission provides the Tribunal's guidelines than it is likely to be biased in favour of Bell because Bell provides the Tribunal's phone service."

OLRB REPORTS DISMAL CERTIFICATION STATISTICS

The Ontario Labour Relations Board has released certification statistics for both 2001-2002 and 2002-2003 that reveal a dramatic drop in the number of certification applications filed, the success rate of these applications and the number of employees successfully organized into new bargaining units.

In 2001-2002, the Board received only 625 applications - the lowest number in many, many years. The Board allowed only 307 applications - less than one half the number received - and it placed only 16, 255 employees in newly certified bargaining units.

Last year's numbers are, regrettably, even worse. Although the number of applications climbed slightly to 658, only 318 of the applications were allowed - a success rate of 48%. And in 2002-2003, only 13, 708 employees were newly certified. The significance of these figures is brought home when they are compared to statistics for 1994-95 - the fiscal year that immediately preceded Bill 7 (the Conservative government's labour law reform bill). In that year, the Board received 1077 certification applications and granted 762 certificates covering 32, 116 employees, for an effective success rate of close to 71%.

MANITOBA COURT PROTECTS EMPLOYEES' FREEDOM OF ASSOCIATION

Manitoba is one of 5 Canadian jurisdictions that continues to empower its labour board to remedy employer unfair labour practices by granting automatic union certification where appropriate. (The Ontario Labour Relations Board enjoyed this same power for more than 25 years until the Provincial Government removed it 5 years ago in Bill 31.)

In the *Emerald Foods Ltd.* case, the Manitoba Labour Board found that the employer had committed an unfair labour practice when it issued a letter to employees on the eve of a representation vote. The letter carried the implicit warning that improved wages and benefits might be imperiled should the union be certified. The Board decided that the letter was designed to improperly influence the outcome of the vote. It certified the union, notwithstanding that the union had failed to secure the support of a majority of employees. The Court of Queen's Bench quashed the decision, but the Manitoba Court of Appeal restored it. It noted that it was for the Board - not the Court - to determine whether there was an unfair labour practice. And the Court of Appeal agreed that there was "foundation" for the Board's ultimate finding.

LEGISLATIVE UPDATE

The Federal Government introduced **Bill C-45 - An Act to Amend the Criminal Code (Criminal Liability of Organizations)** on June 12, 2003. The long-anticipated bill follows more than 11 years after the 1992 Westray mining disaster, in which a Nova Scotia coal mine blew up, killing all 26 people working in the mine. Subsequently, a public inquiry into the disaster recommended that the Government of Canada enact a law "to ensure that corporate executives and directors are held accountable for workplace safety." Bill C-45, which has only received first reading in Parliament, would establish rules for attributing criminal liability to organizations (including corporations) for acts of their representatives and would create a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public. If this duty is wantonly or recklessly disregarded and bodily harm or death results, an organization could be charged with criminal negligence.

The ***Agricultural Employees' Protection Act*** (Bill 187), which passed third reading on November 18, 2002, was proclaimed into force on June 17, 2003. Bill 187 was described in the October 2002 issue of **TALKING UNION**. Agricultural workers continue to be excluded from the Labour Relations Act and denied the right to engage in collective bargaining. This exclusion is being challenged in a case that is now pending at the Ontario Labour Relations Board called *Kingville Rol-Land Farms*.

The provincial government introduced the ***Mandatory Retirement Elimination Act, 2003*** (Bill 68) on May 29, 2003. Bill 68 would amend the definition of "age" in the Human Rights Code so that mandatory retirement policies would, presumably, constitute unlawful discrimination under the Code. It is difficult to know whether the Government is serious about these changes. The Legislative Assembly recessed for the summer on June 26, 2003 without taking any further action on this Bill. The legislature is scheduled to resume sitting on September 22, 2003.

MINISTRY OF LABOUR REVIEWS IMPACT OF BILL 69

The Ministry of Labour has just released a document titled "Report to the Minister of Labour on Reforms in the Labour Relations

Amendment Act (Construction Industry), 2000 (Bill 69) - Examination of the Impact on the Industrial, Commercial & Institutional Construction Sector". The 77-page report, in more or less detail, reviews:

- the economic and labour market conditions preceding the 2000 labour relations reforms
- compensation trends in ICI agreements between 1992-2001
- language in new ICI agreements negotiated in response to Bill 69 (including hiring hall/mobility provisions and various modification provisions)
- the perspectives of union and employer "stakeholders" on the reforms (including the deemed abandonment regulations)
- the Designated Regional Employer Organization ("DREO") process
- ICI formwork designations
- Project agreements

The Report is dated October 2002, but was released by the Ministry only in June 2003. Although the Report collects a certain amount of relevant information, it draws no conclusions and makes no recommendations. Copies of the Report can be obtained from the Ministry of Labour's Employment and Labour Policy Branch.

WHAT'S NEW

AT KOSKIE MINSKY:

Donna Walwyn has joined the firm's pension department. She can be reached at (416) 595-2150.

Ron Davis will be leaving the firm to become an Associate Professor at the University of British Columbia Law School. Ron will be teaching pension and benefits law and corporation law.

AT THE OLRB:

Susan Serena and **Tanja Wacyk** have been appointed vice-chairs of the Board.

Ms. Wacyk was previously Director of Policy and Research at the Ontario Human Rights Commission and later an adjudicator in the Office of Adjudication. She has been acting as a labour arbitrator and mediator since 1994.

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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