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

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**Bill 144 changes to *Labour Relations Act* now in force**

Bill 144 – the Liberal Government's amendments to the *Labour Relations Act* – received Third Reading and Royal Assent on June 13, 2005. It is now in force. The final version of Bill 144 is almost identical to the Bill first tabled in November 2004.

When it was introduced last fall, Bill 144 produced fairly modest criticism from employers. But the Bill did generate significant controversy *within* trade union ranks. Quite a number of trade unions, especially those in the construction industry, expressed support for the proposed changes. But other trade unions, instead, focussed on sought-after statutory amendments that did not find their way into Bill 144, including: successor rights protection for Crown employees, collective bargaining rights for agricultural workers and card-based certification outside of the construction industry. Indeed, the Ontario Federation of Labour denounced Bill 144 as legislation that discriminates against women and minorities. The NDP joined the Tories in voting against the Bill.

Despite this criticism, Bill 144 will make changes to the Act that probably all trade unions can support. It will:

- reintroduce a Board power to order unfair labour practice certification
- reintroduce a modified Board power to provide interim relief
- reintroduce card-based certification (but only for the construction industry)
- make permanent the limited-strike regime in effect since 2000 in the residential sector of the construction industry in the GTA
- repeal the *Labour Relations Act's* union salary disclosure provisions
- repeal the employer obligation to post information in the workplace about how to terminate union bargaining rights

The most important of these changes, which are summarized below, deal with the certification process – which has been hard hit by various Tory labour law reforms enacted since 1995.

**(i) Remedial certification**

The amendments return the Board's jurisdiction to remedy certain unfair labour practices by granting certification to the union when, in the Board's opinion, no other remedy would be sufficient. The Board had this power for more than 25 years until the enactment of the so-called "Wal-Mart Bill" in 1998.

Currently, 5 other Canadian jurisdictions empower their labour boards to protect the integrity of the certification process in this way.

**(ii) Interim relief**

The *Labour Relations Act* will once again allow the Labour Relations Board to make substantive interim orders, but its jurisdiction will be much more limited than it was under the Bill 40 version of the Act.

First of all, interim relief will be available only with respect to reprisals that take place "at a time when a campaign to establish bargaining rights is underway". One can anticipate that there will be issues at the Labour Relations Board as to when such a campaign has begun and when it is no longer underway. The Board will have the explicit power to reinstate employees who have lost their jobs and to make other interim orders with respect to terms and conditions of employment where these have been altered, even when there has been no dismissal.

As important, the Board will have to apply a new "test" that is now set out in the Act before making an order. There will, first, have to be a "serious issue to be decided" in the main proceeding. Next, the interim relief will have to be "necessary to prevent irreparable harm" or be necessary "to achieve other significant labour relations objectives." (The "irreparable harm" standard is a higher threshold than the Board has used in the past. Indeed, the Board's Bill 40 cases explicitly rejected "irreparable harm" as a useful standard. On the other hand, interim relief may also be available in the absence of irreparable harm so long as the relief is necessary to "achieve other significant labour relations objectives". This language is open-ended and depends explicitly on the Board's labour relations judgment.) Finally, the "balance of harm" will have to weigh in favour of relief. (This, again, is drawn from the established labour board test applied since 1993.)

In addition to its substantive powers, the Board will continue to have its "procedural" interim relief jurisdiction in all matters.

**(iii) Card-based certification in the construction industry**

Construction unions will have a choice as to procedure. They will be able to apply under the general provisions of the Act and get a quick vote. Or they may apply under the construction industry provision and potentially be certified without a vote based only on their membership evidence if the Board determines that the evidence establishes that the union had the support of more than 55% of the bargaining unit. There is no indication in the Bill as to how quick or slow a process this might be. That will largely be up to the Board. Bill 144 says only that within 2 days after receiving notice of the union's application, the employer must provide the Board with the names of employees (in the union's proposed bargaining unit and in the employer's proposed unit, if its proposed bargaining unit is different). Apparently, the Board is supposed to make its determination on the bargaining unit and the percentage of employees in the unit who are members – not those who *appear* to be members – on the basis of "the information provided in or with the application" and on the basis of the employer's list of names and its written description of the bargaining unit. The Act does not appear to contemplate any comparison of cards to "sample signatures" as was the case before 1995.

Where the union achieves at least 40% but not more than 55% actual membership support, the Board will be directed to hold a representation vote. Where actual support exceeds 55%, the Board will have the power to automatically certify or, if it chooses, to direct a vote.

Where votes are directed, the Bill directs that they should, generally, be held within 5 days of the Board's direction ordering the vote.

Losing a certification vote will trigger a mandatory 12 month bar on future applications by any trade union – and not only construction trade unions. The bars described in sections 7(9), (9.1), (9.2), (9.3), (10), (10.1) and (10.2) will also apply.

Bill 144 may leave open the possibility that the Board could consider petitions and revocations in connection with applications as it did before 1993. The Bill does not explicitly direct the Board not to consider petitions or revocations filed after the certification application date. On the other hand, the new section 128.1(3) limits the information to be considered by the Board in determining the question of membership support. This issue, identified on first reading of the Bill, was unfortunately not clarified in the legislative process.

#### **(iv) Transition**

Apart from the amendments regarding residential construction in the GTA, none of the other changes made in Bill 144 will have retroactive effect. The changes to the unfair labour practice certification section apply only to violations of the Act that occurred on or after June 13, 2005. The interim relief changes apply only to reprisals that occurred on or after June 13, 2005. And the construction industry certification changes apply only to certification applications made on or after June 13, 2005.

#### **Labour Board develops new forms and procedures to implement Bill 144**

The Ontario Labour Relations Board has amended several of its forms and information bulletins in order to accommodate Bill 144's reintroduction of card-based certification in the construction industry. Trade unions must ensure that they use these new forms as of June 13, 2005. This material is now available directly from the Board's offices or online at [www.olrb.gov.on.ca](http://www.olrb.gov.on.ca).

An amended Information Bulletin No. 6 now describes how the Board will deal with applications under new section 128.1 (the card-based certification provision). The Board says that "shortly after" the employer's response is filed (or due to be filed), a Vice-Chair will review the file and issue a decision. In that decision, the Board will either: (1) certify the trade union, (2) direct a vote, (3) dismiss the application, (4) hold a hearing, or (5) direct that the parties to attend a Regional Certification Meeting with a Board Officer. If a Regional Certification Meeting is scheduled, it will take place on the Wednesday of the 3<sup>rd</sup> week after the week that the application was filed. And if there are "status disputes", the Regional Certification meeting *may* be held at the employer's premises so that a check of the employer's records can take place. Where a hearing becomes necessary, it will be set by the Board at a time of its choosing. Unfortunately, the Board continues to decline to schedule hearing days "up front" in construction industry applications even though it routinely and automatically schedules 2 consecutive hearing days "up front" in every non- construction industry application. Outside of the construction industry, these hearings are automatically scheduled to take place in the 4<sup>th</sup> week after an application is filed.

The Board has said that Bill 144 will require no rule changes. This means that with respect to applications for interim relief, the Board will continue to rely on signed declarations and, equally important, will require that responses be filed 2 days after the application is made. This is important because it preserves the Board's ability to hear and decide interim relief applications expeditiously.

Hopefully, the Board will resume its former practice of routinely and predictably hearing these matters on the 3<sup>rd</sup> day after the application is filed.

### **Federal government introduces bankruptcy reforms and wage protection program**

Bill C-55, a comprehensive insolvency reform package to “modernize” the *Bankruptcy and Insolvency Act* (BIA) and the *Companies’ Creditors Arrangement Act* (CCAA) was introduced on June 3, 2005 by the Federal Government. The Bill will also create the legislative framework for a new Wage Earner Protection Programme (WEPP), which had previously been announced on May 5, 2005. Bill C-55 is a budget measure introduced as part of the April 2005 budget agreement between the Liberal government and the federal New Democratic Party.

Bill C-55 provides improvements to the protection of employees in (i) giving claims for unpaid wages and vacation pay in bankruptcy situations a higher priority, (ii) introducing the *Wage Earner Protection Program Act*, and (iii) improving pension protection. Bill C-55 would also clarify the status of collective agreements in certain insolvency proceedings.

*Unpaid Wages:* Under Bill C-55, claims for unpaid wages and vacation pay in bankruptcy situations would be given a higher priority, above secured creditors. Workers’ claims would have a charge over the current assets (i.e. cash, inventories and accounts receivables) of the bankrupt employer, up to a maximum of \$2000. The protection would also be made applicable to receivership and restructuring under both the BIA and CCAA.

*Wage Earner Protection Program:* The WEPP would be established under the responsibility of the Minister of Labour and Housing to compensate individuals for amounts earned, but not paid, during the six months preceding the bankruptcy or receivership of their employers under the BIA. The WEPP would help protect workers by providing a guaranteed payment of wages owed up to \$3000 should their employer declare bankruptcy. Under the WEPP, workers’ claims would not depend solely upon the asset value of their bankrupt employers’ estates. Where a worker’s claim was paid by the WEPP, the worker would be required to assign his or her rights under the BIA to the Crown for amounts paid out under the program. (A similar wage protection program existed in Ontario under the NDP government between 1992-95, but was abolished shortly after the Progressive Conservative Party came into government in 1995)

*Pension Protection:* Under Bill C-55, regular pension plan contributions by employees and their employers that are unremitted at the time of bankruptcy or receivership would have priority status, ranking above secured creditors. Moreover, in both the BIA and CCAA, no restructuring proposal or plan could be approved by the Court unless it provided for the payment of outstanding unremitted pension plan contributions and ongoing employer pension plan contributions explicitly protected in the BIA and CCAA, without detracting from protection under pension legislation.

*Collective agreements:* Proposed amendments provide that a debtor company may not disclaim a collective agreement. However, it could seek a Court order authorizing it to serve a “notice to bargain” on the bargaining agent representing its employees, which would trigger a renegotiation of the collective agreement under the applicable labour legislation. In these circumstances, the company would have to satisfy the Court that such an order is necessary for a restructuring of the company, that it has made legitimate efforts to renegotiate the collective agreement with the union, and that the failure to do so would lead to irreparable harm to the employer. The debtor company would be required to provide the union with at least five business days notice before going to the Court to seek

the order. The existing collective agreement would remain in force unless it changed by agreement between the parties. Where a collective agreement is revised, the bargaining agent would be entitled to make a claim, as an unsecured creditor, for an amount equal to the value of the concession.

### **Mandatory retirement is on the way out in Ontario...but slowly**

The *Ending Mandatory Retirement Statute Law Amendment Act* (Bill 211) received first reading at Queen's Park on June 8, 2005. If passed, Ontario would join Alberta, Manitoba, Quebec and Prince Edward Island as provinces that already treat mandatory retirement as a form of unlawful discrimination.

Currently, Ontario's *Human Rights Code* prohibits discrimination in employment on the basis of age. But for the purpose of employment, the Code defines "age" as being 18 years and older, but less than 65. As a result, workplace policies can – and they often do – require workers aged 65 or older to retire. Bill 211 would amend the *Human Rights Code* so that for all purposes, age is defined as "an age that is 18 years or more". Employees aged 65 or older would have the same right as others aged 18 and older to challenge age discrimination. Mandatory retirement provisions in existing collective agreements would no longer be enforceable once the proposed legislation comes into effect.

However, mandatory retirement would still be permissible where it can be justified on "*bona fide* occupational requirement" grounds. Due to the nature of some jobs, an employee may be required to stop working at a specified age such as 65 or even younger. In such cases, the employer must show that:

- an age-based job requirement or qualification is a *bona fide* occupational requirement
- the employee does not meet the job requirement or qualification
- the employee could not be accommodated without causing undue hardship to the employer.

The proposed prohibition on age discrimination in employment beyond age 64 does not extend to employment benefits. Currently, under the *Employment Standards Act*, employers are prohibited from discriminating on the basis of age in providing benefits to employees aged 18 to 64. This provision would remain in place following the coming-into-force of legislation to end mandatory retirement. It appears that under Bill 211, while employees will be permitted to continue to work past age 65, they may be lawfully excluded from benefits coverage once they reach age 65.

Bill 211 would amend several other statutes, including the *Employment Standards Act*. Currently, the *Employment Standards Act* provides that an individual whose employment is terminated at age 65 as a result of a mandatory retirement policy or practice is not entitled to notice of termination or pay in lieu. With the elimination of mandatory retirement, all eligible employees, regardless of age, would be entitled to receive notice of termination or pay in lieu of notice when their employment is ended by the employer. (However, employees who continue to be subject to a mandatory retirement policy or practice that is permitted under the *Human Rights Code* would not be entitled to notice of termination or pay in lieu.)

Bill 211 proposes that there be a one year transition period after the Bill is enacted. In other words, mandatory retirement would become unlawful exactly one year after the legislation received Royal assent.

### **The Ontario Health Premium – The controversy over who pays continues**

In the last 12 months, perhaps hundreds of grievances have been filed throughout Ontario alleging that employers are responsible for paying the new Ontario Health Premium ("OHP"). These grievances are based on "old" collective agreement language obliging employers to pay the cost of OHIP. The old OHIP premiums were discontinued in 1989 and replaced by the Employer Health Tax. The new OHP was introduced in 2004. The cost of the OHP is significant. In 2004, it ranged from \$150 to \$450 depending on income. In 2005, the cost ranges from \$300 to \$900. In the last issue of *TALKING UNION*, we reported on 4 early arbitration decisions. In only one of these cases did the union's position prevail. Since last fall, there have been several more decided awards. And while a majority of these decisions have gone against the union, there is now a respectable body of cases going the other way.

As reported last fall, Arbitrators Teplitsky, Shime and Tims found that there was no employer obligation to pay the OHP. They have since been joined by Arbitrators Whitaker, Samuels, Brown, Keller, Fisher and Brent. On the other hand, Arbitrators Russell Goodfellow, Dan Harris and Ken Swan have all issued decisions reaching the opposite conclusion. They ruled that the collective agreements before them obligated the employer to pay the OHP, which they found to be similar in substance, if not in form, to the former OHIP premiums. In the most recent decision involving *Ontario Power Generation Inc.* (released May 26, 2004), Arbitrator Ken Swan explained his decision this way:

"I have come to the conclusion that reasonable parties in the position of the present Employer and Union, negotiating for the current collective agreement, must have intended that the language which they used would cover not just the particular OHIP premium in existence before 1989, but any materially and reasonably similar premium to be established in the future. In my view, the OHIP premium was a tax contributed to the consolidated revenues of the province with the intention that it be used to fund the OHIP health care system. I think that the Ontario Health Premium is materially and reasonably similar to that, and the distinctions which are made in how the amount is calculated and how deduction and payment take place are distinctions that do not create a sufficient difference between the two to render the collective agreement language inapplicable to the Ontario Health Premium."

Still more arbitration decisions are expected in the next few months. At the same time, the Courts will soon be pronouncing of the issue. So far, one application for judicial review has been heard (in the *Lapointe Fisher Nursing Home* case) and the Divisional Court reserved its decision. Other court applications are pending. It appears that the Court may well have the last word on this issue – at least until employers and unions deal directly and explicitly with payment of the Ontario Health Premium at the collective bargaining table.