



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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LABOUR RELATIONS AMENDMENT ACT - BILL 139

On November 2nd, 2000, the Ontario Government tabled Bill 139, the Labour Relations Amendment Act ("Bill 139"), which proposes several changes to the Labour Relations Act, 1995 (the "Act"). If enacted, the majority of amendments will have a significant impact on trade unions and the acquisition and maintenance of their collective bargaining rights.

The proposed amendments can be divided into the following categories:

- I. AMENDMENTS WITH RESPECT TO CERTIFICATION AND DECERTIFICATION APPLICATIONS
- II. AMENDMENTS AFFECTING FIRST CONTRACT SITUATIONS
- III. DISCLOSURE OF SALARIES AND BENEFITS OF UNION OFFICIALS OF \$100,000 AND OVER
- IV. NON-CONSTRUCTION EMPLOYER TERMINATION APPLICATIONS
- V. PROJECT AGREEMENTS
- VI. OTHER AMENDMENTS WITH RESPECT TO PROCEEDINGS AT THE BOARD

PART I

AMENDMENTS WITH RESPECT TO CERTIFICATION AND DECERTIFICATION APPLICATIONS

A. DISPLACEMENT APPLICATIONS

The amendments under Bill 139 propose to expand the opportunities for competing trade unions to apply for certification of employees already covered by a collective agreement.

- Where a collective agreement is in effect for a term of less than three years, a trade union will be able to apply to the Board to displace another trade union any time during the last three months of the agreement's operation, instead of the current two-month open period provided in section 7(4) of the Act.
- Similarly, where collective agreements are effective for more

than three years, or where agreements automatically continue in operation for one or more successive terms if neither party gives notice to terminate or bargain, the time period when a trade union can apply to displace another union would be increased from two to three months at the end of each year.

B. MANDATORY BAR IN CASES OF SUCCESSIVE CERTIFICATION APPLICATIONS

The Bill 139 amendments will make it more difficult, if not impossible, for any trade union to become certified for a group of employees where there already has been an unsuccessful attempt at certification, even if by another trade union.

(i) WITHDRAWAL BEFORE THE REPRESENTATION VOTE

- A proposed section 9.1 provides that where a trade union withdraws its application for certification before a representation vote and that same trade union had withdrawn a previous application for certification before the representation vote within the previous six months, the Board cannot consider another application from any trade union with respect to any of the employees proposed in the original application until one year after the second application was withdrawn. There is no discretion on the part of the Board to shorten the length of the bar after the second application has been withdrawn.
- Bill 139 proposes that despite section 9.1, the Board may consider a further application where the employee in the new application has a different position from his or her original position and the new application does not include in the bargaining unit the employee's original position.

(ii) WITHDRAWAL AFTER THE REPRESENTATION VOTE

- Under the current Act, when a trade union applies for certification and then withdraws the application after the representation vote, it is barred from applying again for a year. The proposed legislation greatly expands those affected by the bar. Bill 139 bars an application by any trade union with respect to any employee in the original application for a period of a year after the application is withdrawn. However, this will not apply where the employee has changed positions and the new application does not include the former position (ss.7(10)).

(iii) UPON THE DISMISSAL OF AN APPLICATION FOR CERTIFICATION

- Pursuant to the amendments, if an application for certification is dismissed pursuant to section 10 of the Act, the Board cannot entertain any other application for certification by any other trade union seeking to be bargaining agent for any employee in the bargaining unit proposed in the original application for one year after the original application was

dismissed. However, again this will not apply if the application is for an employee who is in a different position (ss.10.1).

C. DECERTIFICATION APPLICATIONS

Bill 139 encourages decertification applications by making the process more accessible and easier for unionized employees. Further the Bill allows the employer to be involved in the process (under the guise of legislating that the employer keep its employees advised and updated on the proper decertification procedure), and cloaks the employer with immunity in "fulfilling" this function.

- Under Bill 139, the timing for termination applications under section 63 is expanded from a two-month open period to a three-month open period.
- A proposed section 63.1 requires the Ministry of Labour, within one year of the day the Bill receives Royal Assent, to prepare and publish a document that details the process for making an application for decertification and to update this document to reflect any change in the legislation or regulations or any rules or decisions made by the Board or the courts in this regard.
- The document must explain who may make a decertification application, when it can be made, and the procedure to be followed.
- Bill 139 requires that employers use "reasonable efforts", once a trade union is certified or recognized as bargaining agent for their employees, to post and keep conspicuously posted in the workplace the Ministry's decertification document and to notify the employees that they may request a copy of the document from the employer. In addition, the Bill provides that the employer must provide a copy of the Ministry's document every year to the employees, or to an individual employee upon request.
- The legislation specifically provides that an employer is not in violation of the Act and shall not be found to have initiated the decertification application by taking any of the above-listed actions.

No doubt, many employers will be more than eager to ensure that their employees are aware of the decertification procedure. The question remains, at what point will an employer's actions cross the line from "reasonable efforts" to conduct which employees may perceive to be inducement or intimidation to apply for the termination of bargaining rights.

TERMINATION OF BARGAINING RIGHTS UNDER FIRST AGREEMENT IN THE CONSTRUCTION INDUSTRY:

- The proposed legislation extends the open period under section 132(2) for any employee in a bargaining unit in a first

agreement, where the union has not been certified, to apply to the Board for a declaration that the union no longer represents the employees to start from the 275th day of the agreement's operation (instead of the 305th day of its operation) to the 365th day of its operation.

- Further, Bill 139 proposes, for reasons that are not apparent, to repeal section 132(3) of the Act, such that sub-sections 63 (5) to (18), which require the Board to make a determination that 40% of the members of the bargaining unit support the application and to hold a representation vote in the matter, would no longer apply to an application to decertify a voluntarily recognized union.

D. CERTIFICATION IN THE CONSTRUCTION INDUSTRY

SECTION 8.1 APPLIES TO THE CONSTRUCTION INDUSTRY:

In June 1998, Bill 31 introduced section 8.1 into the certification process, under which an employer can disagree with the union's estimate of employees in the bargaining unit included in the application for certification, and require the Board to make a determination as to whether the union has 40% membership evidence in order to be entitled to a representation vote.

In the decision of Bayview-Wellington Homes Inc. [1999] OLRB Rep. Nov./Dec. 954, the Board, based on a comprehensive reading of the Act, found that section 8.1 of the Act did not apply to the construction industry.

Bill 139 has responded to this by clearly providing that sections 1 to 125, including section 8.1, apply to the construction industry.

As such, unions in the construction industry now join industrial unions in having to defend against this additional obstacle in their certification applications. This will only serve to make the certification process in the construction industry even more lengthy and litigious.

PART II

AMENDMENTS AFFECTING FIRST CONTRACT SITUATIONS

A. PROCEDURE IN DEALING WITH COMPETING FIRST CONTRACT ARBITRATION APPLICATIONS, DECERTIFICATION AND DISPLACEMENT APPLICATIONS

- Pursuant to section 43(23) of the Act, in cases where there is an application for first contract arbitration filed with the Board and a decertification and/or a displacement application is/are filed prior to the final decision being rendered in the application for first contract arbitration, the Board is given discretion to consider the applications in the order that it considers appropriate. If the Board grants one of the applications, the Board must dismiss the other application(s), which remain(s)

unconsidered. Therefore, the Board may choose to deal with the first contract arbitration application first, and if it grants this, the decertification and/or displacement application are dismissed.

- Under the proposed amendments, section 43(23) is repealed and replaced with a provision whereby the Board must decide any decertification applications and any displacement applications before it can consider or continue to consider an application for first contract arbitration. As such, there is no discretion left for the Board to first hear and determine the application for first contract arbitration.
- If the Board grants the decertification or displacement application, it must dismiss the first contract arbitration application. If the Board dismisses the decertification or displacement application, only then will it proceed to deal with the first contract application.
- This section is to apply to all such applications where no final decision has been made as of the date of the enactment of Bill 139.

B. RATIFICATION AND STRIKE VOTES

A new section (section 79.1) is proposed which prevents a union attempting to reach a first contract agreement from using a ballot which has the dual effect of conducting a ratification vote and a strike vote at the same time.

- The ballot for a vote to ratify a first collective agreement can only give voters a choice between ratifying or not ratifying. No direct or indirect reference to the calling of a strike can be made.
- A ballot for a strike vote in order to obtain a first collective agreement can only provide a choice between striking and not striking. No direct or indirect reference to the ratification of a collective agreement can be made on the ballot for the strike vote.

PART III

DISCLOSURE OF SALARIES AND BENEFITS OF UNION OFFICIALS OF \$100,000 OR OVER

Bill 139 proposes a new section 92.1 that would require trade unions to disclose, upon the request of any member, the annual salaries and benefits of any employees of the parent and local union that amount to \$100,000.00 or over.

Trade unions will also be required to provide to the Minister of Labour a written statement setting out the amount of salary and benefits totaling 100,000.00 or over that it paid in the previous year to

employees. In the alternative, trade unions are to provide the Minister of Labour with a written statement that it did not pay a total of \$100,000.00 or more in salary and benefits to any employee in the previous year.

Failure to provide this information could result in formal complaints to the Board. The Board would have the power to order that statements be provided and could also order that a trade union's financial records be audited. The costs for statements and any related audits would be borne by the trade unions.

There is no copyright with regard to the statements and according to section 92.1(16) under Bill 139, the disclosure of this information cannot be deemed a contravention of the Freedom of Information and Protection of Privacy Act.

PART IV

NON-CONSTRUCTION EMPLOYER TERMINATION APPLICATIONS

There are two changes proposed to these provisions which were enacted in 1998 under Bill 31.

(i) DEFINITION OF "NON-CONSTRUCTION EMPLOYER"

- Section 22(2) of the Bill repeals the definition of "non-construction employer" in section 126 of the Act (which requires a non-construction employer to prove it is not engaged in a business in the construction industry or that its only engagement in such a business is incidental to its primary business), and replaces it with a very different definition, namely, "...an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person."

(ii) THE PRE-CONDITION FOR SUCH TERMINATION APPLICATION

- Section 25 of the Bill repeals the prohibition under section 127.2(2) of the Act for bringing a non-construction employer application for termination if the employer employs any employees in the construction industry represented by the trade union on the day the application is made.

(iii) COMMENT

- These changes are obviously intended to promote and facilitate non-construction employer applications for termination in the construction industry. On the one hand, a non-construction employer will no longer have to prove that it is not engaged in a business in the construction industry or that its only engagement in such a business is incidental to its primary business. Under the proposed changes, an employer is a non-

construction employer so long as it does not sell construction services to a third party. By the same token, it will now be irrelevant whether the employer has employees represented by the trade union performing construction work on the date of application.

PART V

PROJECT AGREEMENTS

Sections 35 and 36 of Bill 139 clarify the scope of project agreements under section 163.1 of the Act by permitting multiple and future projects to be covered under a project agreement and, for that matter, non-construction work.

(i) A PROJECT AGREEMENT MAY APPLY TO MORE THAN ONE PROJECT

Section 35 of the Bill amends subsections 163.1(1)-(4), incl. of the Act to clarify that a project agreement may apply to a number of projects.

(ii) FUTURE PROJECTS

Section 35(6) of the Bill adds a new section 163.1(4.1) permitting a project agreement to apply to additional projects to be added to in the future/governed by the agreement. Section 36 of the Bill provides for a procedure under a new provision, section 163.1.1, for the adding of new projects to a project agreement along the lines of the procedures already set out in section 163.1 of the Act.

(iii) APPLICATION OF PROJECT AGREEMENTS TO NON-CONSTRUCTION WORK

Section 35(8) of the Bill repeals ss 163.1(15), (16) and (17) and substitutes new provisions, ss. 163.1 (15), (16), (16.1), (17) and (17.1), to clarify that the Board is also precluded from considering the employment of unionized personnel by non-union employers at a project in cases where the employees are engaged in non-construction work and similarly the fact that they are engaged in such work under the union security provisions of a project agreement is not tantamount to voluntary recognition by such employers.

(iv) DEEMED COMPLIANCE FOR EXISTING PROJECT AGREEMENTS WITH THE ACT

Section 36 of the Bill also enacts section 163.1(11), (12) and (13) which deem previous project agreements covering more than one project or permitting the addition of new projects to be valid.

(v) COMMENT

These new provisions codify the understanding in the labour relations community that project agreements may include provisions for

additional projects or new projects or, for that matter, cover non-construction work.

PART VI

OTHER AMENDMENTS WITH RESPECT TO PROCEEDINGS AT THE BOARD

A. SECTOR DETERMINATIONS

Section 38 of the Bill repeals section 166 of the Act enabling the Board to make sector determinations and replaces it with new provisions enabling the Board to dispose of these applications without a hearing and to issue interim orders with provision that any interim or final order may be filed/enforced in the courts. The new procedures are based on the Board's power to deal with jurisdictional dispute applications under section 99 of the Act.

B. DUTY OF FAIR REPRESENTATION APPLICATIONS

The proposed legislation provides that the chair shall sit alone, or shall authorize a vice-chair to sit alone, to hear and determine a duty of fair representation complaint, except when the chair considers this inadvisable.

C. THE TERMINATION OF DELAYED PROCEEDINGS AT THE BOARD

Bill 139 proposes to introduce a new section 115.1 that provides the following:

- Where the Board has commenced a hearing and six months or more have passed since the last day of a hearing, and a decision or ruling of the Board has not been made, a party to the proceeding may apply to the chair of the Board to terminate the proceeding. The chair has discretion as to whether or not to terminate the proceeding.
- Where the proceeding has been terminated, the chair shall re-institute the proceedings on such terms as the chair considers appropriate, and the re-instituted proceedings shall be heard by different panel members than those who heard the proceeding in the first instance.