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

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## **Liberal Government proposes changes to *Labour Relations Act***

On November 3, 2004 the Liberal Government tabled Bill 144 – the much anticipated package of proposed amendments to the *Labour Relations Act*. So far, Bill 144 has produced some controversy *within* trade union ranks, but has provoked little vocal employer criticism. Quite a number of trade unions, especially those in the construction industry, have expressed support for the proposed changes. Other trade unions have, 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. Bill 144 would:

- reintroduce a Board power to order unfair labour practice certification
- reintroduce a modified Board power to provide interim relief
- reintroduce card-based certification for the construction industry only
- 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 proposed changes, which are summarized below, deal with the certification process – which has been hard hit by various Tory labour law reforms enacted since 1995. Indeed, the number of newly unionized employees per year dropped by 57% between 1994-5 and 2002-3.

### **(i) Unfair labour practice certification**

The amendments would 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* would once again allow the Labour Relations Board to make substantive interim orders, but its jurisdiction would be more limited than it was under the Bill 40 version of the Act. First of all, interim relief would be available only with respect to reprisals that take place "at a time when a campaign to establish bargaining rights is underway". The Board would have the explicit power to reinstate in employment and to make other interim orders with respect to terms and conditions of employment where these have been altered, but there has been no dismissal. Equally important, the Board would have to apply a new "test" set out in the Act before making an order. There would have to be a "serious issue to be decided" in the main proceeding. The interim relief would 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" would have to weigh in favour of relief. (This, again, is the established labour board test applied since 1993.)

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

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

Construction unions would have a choice as to procedure. They could apply under the general provisions of the Act and get a quick vote. Or they could apply under the construction industry provision and potentially be certified without a vote based only on their membership evidence if the Board determined that the evidence established that the union had the support of at least 55% of the bargaining unit. There is no indication in the Bill as to how quick or slow a process this might be. That would largely be up to the Board and its rules and procedures. 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 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".

Where the union achieves at least 40% but not more than 55% actual membership support, the Board would be directed to hold a representation vote. Where actual support exceeds 55%, the Board would have the power to automatically certify or, if chose, 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 would 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) would 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 proposed section 128.1(3) might be interpreted as limiting the information to be considered by the Board in determining this question. It is hoped that this and other issues will be clarified, perhaps through amendment, before the Bill is enacted.

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

The Government has not said anything about when it hopes to pass these amendments. However, the Bill states that none of the changes would have retroactive effect. The changes to the unfair labour practice certification section would apply only to violations of the Act that occurred on or after the day that that section comes into force. The interim relief changes would apply only to reprisals that occur on or after the day that that section comes into force. The construction industry certification changes would apply only to certification applications that are made on or after the day that that section comes into force. Bill 144 contemplates that these different sections may come into force on different dates.

#### **Labour Board releases draft new Rules of Procedure**

The Ontario Labour Relations Board proposes to change its *Rules of Procedure* which have been in effect since 1999. To that end, the Board released its Draft New Rules of Procedure in October 2004 and it invited written submissions from members of the labour relations community by **November 5, 2004**.

The Board's *Rules of Procedure* are important because they determine, in large measure, how the Board receives, processes and disposes of applications filed with the Board. The Rules set out how the "rights" prescribed in the *Labour Relations Act* and other statutes will be vindicated by the Board. Bad or ineffective Rules can retard, rather than advance, trade union interests. Accordingly, quite a number of trade unions – some with the assistance of Koskie Minsky lawyers – have already taken up the invitation to comment on the Board's proposed Rules. The following proposed changes have attracted the most concern:

- changes that would make appeals under the *Occupational Health and Safety Act* harder and more complicated to file
- changes to the Board's interim relief procedures that would weaken the Board's ability to provide substantive, interim relief in an expedited fashion
- changes that would allow the Board to hold "written hearings" in every case and that would permit no hearings at all in other "expedited" cases
- changes that would give the Registrar of the Board increased powers to do things that only adjudicators at the Board are currently empowered to do, such as shorten or lengthen *any* time limits set out in the Rules, accept late filings, consolidate cases, change any filing or delivery requirement, and grant or withhold (contested) adjournments

In addition, a number of trade unions have taken the opportunity to recommend a series of *other* changes to the Rules, including:

- changes that would allow quick hearings in organizing-related unfair labour practice cases
- changes that would restore consecutive day scheduling in certification applications and treat construction industry applications like non-construction cases by assigning hearing dates "up front"
- changes that would allow the Board to "screen" DFR applications before respondents are required to respond to them

The Board has not announced any timetable for implementing new *Rules of Procedure*. Nor has it said whether it will involve the labour relations community further in this exercise – although several trade unions have made this request.

Copies of the Board's Draft Rules of Procedure can be obtained directly from the Board and are also accessible on the Board's website at [www.olrb.gov.on.ca](http://www.olrb.gov.on.ca).

### **The new Ontario Health Premium – Who Pays?**

It was not long after the Provincial Government budget speech last spring and the introduction of a new Ontario Health Premium that it became clear that there would be an issue in workplaces throughout the Province about who should pay the new health premium. It is not hard to figure why the issue has become important. The cost of the premium in the 2004 taxation year ranges from \$150 to \$450 depending on income. In 2005, the cost ranges from \$300 to \$900.

Notwithstanding the elimination of the old OHIP premium in 1990, many current collective agreements have retained "old" language obliging employers to make premium payments. Other collective agreements specifically contemplated that the provincial government might re-introduce OHIP premiums and provided for employer payment in that eventuality. Few, if any, employers embraced the obligation to pay. They have argued that the Ontario Health Premium is a tax under Ontario *Income Tax Act* and not really a "premium" at all (despite its name). They have also argued that the new tax is not dedicated to the Ontario Health Insurance Plan ("OHIP"), but rather to all forms of health spending. Hundreds of grievances all over Ontario were filed and referred to arbitration. By the end of September, decisions dealing with the Ontario Health Premium started to issue.

As of the beginning of November, there have been four (4) arbitration awards. In only one of these cases has the union's position prevailed. In three others, the arbitrators have found that the collective agreement did *not* oblige employers to pick up the cost of the new health premium.

In the *Lapointe Fisher Nursing Home* case, Arbitrator Anne Barrett upheld the union's grievance when she ruled that the new health levy was "dedicated solely to funding OHIP" and, further, that a premium collected through the tax system is still a premium. In the *Jazz Air Inc.* case, Arbitrator Martin Teplitsky came to the opposite conclusion. He concluded that at the time that the union and employer negotiated their collective agreement, "they could not have contemplated this new tax, which did not exist." He was also influenced by the fact that the tax fluctuates with income and his assessment was that no employer "would agree to pay the tax on income earned in outside employment." In the *Community Colleges* case, Arbitrator Owen Shime accepted and adopted the approach in the *Jazz Air Inc.* case. Mr. Shime was impressed by the fact that the levy is a "tax" and concluded that the parties

would "not have contemplated or bargained for an extraordinary charge such as occurred" under amendments to the *Income Tax Act*. Finally, and most recently, Arbitrator Mary Lou Tims ruled in the *Goodyear Canada Inc* case that because payment of the Ontario Health Premium is not a prerequisite to access OHIP benefits, it was not the type of payment contemplated by the collective agreement.

It is expected that there will be several more decisions in the next few weeks and months. In the meantime, the employer in the *Lapointe Fisher Nursing Home* case has initiated judicial review of the only case decided in favour of the union. 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.

### **Court rules that arbitrators may award punitive and aggravated damages**

Ontario's Divisional Court has ruled that a labour arbitration board has the jurisdiction to award aggravated and punitive damages against an employer. In *OPSEU v. Seneca College*, released November 1, 2004, the Divisional Court set aside a decision of an arbitration board in a discharge case where the majority of the board had ruled that the opposite was true.

In the *Seneca College* case, the grievor alleged that he had been unjustly discharged, that the action had been taken in bad faith and with malice and that the employer had been motivated, in part, by the grievor's trade union activity. He sought reinstatement and "damages for defamation, loss of dignity, and injury to personal feelings". After a 12-day hearing, the board allowed the grievance and reinstated the grievor with compensation for lost wages. On agreement, the board of arbitration dealt with the damages issue in a separate award after taking further submissions regarding the monetary claim. The grievor sought aggravated damages in the amount of \$5000 to compensate the him for the "special harm, including mental distress" that he suffered in the "egregious circumstances of his unwarranted termination" and a further \$5000 in punitive damages to deter the employer from similar conduct that the union claimed was motivated by the employer's "bad faith, malice and anti-union *animus*".

In its second award, the majority of the board of arbitration rejected the union's claim by concluding that it had no jurisdiction to award aggravated and/or punitive damages. It held that the collective agreement did not expressly prohibit tortious conduct and thus, the essential conduct giving rise to the dispute did not arise out of the collective agreement. Accordingly, it held that the rules set out in the decision of the Supreme Court of Canada in *Weber v. Ontario Hydro* were not applicable to the collective agreement and issues under consideration.

OPSEU challenged the second decision with respect to damages and the Divisional Court unanimously agreed that it should be set it aside. The Court made reference to a series of cases regarding the broad remedial authority of labour arbitrators and quoted from the long line of cases that followed the Supreme Court of Canada's 1995 decision in *Weber*. Ultimately, the Court accepted that the collective agreement "inferentially" included all aspects of the discharge grievance, found that the arbitration board had the jurisdiction to make the damages award sought, and then sent the matter back to the board for its decision.

TALKING UNION is not aware of any Ontario decisions where aggravated or punitive damages have been awarded, but the Divisional Court made reference to counsel's assertion that in British Columbia arbitrators have made damage award of this kind on "more than a few occasions".

**Criminal Code amendment prohibits reprisals against "whistleblowers"**

Important amendments to the *Criminal Code of Canada* providing protection for "whistleblowers" came into effect this fall. Bill C-13 was introduced last February, received Royal Assent last March and become effective on September 15, 2004. New section 425.1 of the *Criminal Code* makes it a criminal offence for an employer to take or to threaten an employee with disciplinary action, demotion, termination of employment or to adversely affect the employee's employment in order to force the employee to refrain from providing information to law enforcement officials about the commission of an offence by his or her employer or by an officer, employee or director of the employer.

A law enforcement official is a person whose duties include the enforcement of federal or provincial law and an offence includes an offence under any federal or provincial Act or regulation.

Section 425.1 also extends the criminal offence to threats or retaliation against an employee who has already provided information. Criminal proceedings for a section 425.1 offence can be initiated by way of indictment or summary conviction; if by indictment, the maximum term of imprisonment is five years. In the United States, the *Sarbanes-Oxley Act* creates similar whistleblower protection with a criminal penalty of up to 10 years. The U.S. law also gives employees of publicly traded companies the right to sue employers who retaliate against them – a feature that is not part of Canadian law.