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

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Construction unions use *Charter of Rights* to challenge Harris era labour law changes

In November of last year, the Ontario Labour Relations Board ruled on a constitutional challenge made by the Canadian Union of Skilled Workers and the Labourers' union to the "non-construction employer" provisions first introduced into the *Labour Relations Act* in 1998. The Board allowed the unions' challenge and dismissed the employer's application to terminate the unions' bargaining rights and collective agreements. This was the very first time that the labour board had ever declined to apply a section of the *Labour Relations Act* on constitutional grounds.

Under the *Labour Relations Act*, a "non-construction employer" is an employer who may work in the construction industry but who does no such work for which it expects compensation from an unrelated person. Construction industry bargaining rights that bind "non-construction employers" are not automatically extinguished under the Act. However, a "non-construction employer" may apply to the Board to terminate construction industry bargaining rights under s. 127.2 and the Board *must* grant such a declaration. In the *Independent Electricity Market Operator* decision released on November 23, 2009, the Board decided that these provisions deny the constitutional right to freedom of association under section 2(d) of the *Charter of Rights and Freedoms* of the unions and their members. The Board concluded that terminating the unions' bargaining rights would have "the effect of substantially impairing the capacity of the Unions' members to exercise their right to engage in a process of good faith collective bargaining contrary to the *Charter*." It found sections 127.2 and 127.3 of the Act "constitutionally inoperative" and terminated the proceeding. As expected, the Independent Electricity Market Operator has recently initiated an application to judicially review the Board's decision. Its court application was filed on February 11, 2010 and is likely to be heard next fall.

In February of this year, IBEW Locals 120, 402 and 586 initiated separate constitutional challenges to the "deemed abandonment" regulation (O.Reg. 105/01) made under s. 160.1 of the *Labour Relations Act* in 2001. The challenges arise in the context of grievance proceedings against EllisDon Corporation and Tom Jones Construction. Under the regulation, province-wide bargaining rights under 19 collective agreements in respect of twelve general contractors were automatically terminated (except for bargaining rights in Board Area 8). Although the initial version of s. 160.1 of the Act contained in Bill 69 provided for a "voluntary" scheme by which employee bargaining agencies (the provincial bargaining authority) could abandon bargaining rights, the final version omitted "voluntarism" completely. Under the final version, the affected unions were not expected or required to do anything. It was left to Cabinet to make a regulation – which it did – terminating the bargaining rights described in the regulation (without regard to the wishes of the trade unions of the employees). The unions will be arguing before the Board that s. 160.1 and the regulation made under it are "constitutionally inoperative" and that the unions' pre-existing bargaining rights, therefore, persist. The case is likely to be heard in April 2010.

Court upholds decision ordering Air Canada to offer voluntary separation packages

Employers often complain of “management by arbitrators” and seek to limit the exercise of their remedial powers. Typically, when they dislike a decision, they accuse the arbitrator of amending – rather than interpreting and applying – the collective agreement. In *Air Canada v. CUPE*, released on January 22, 2010, the Divisional Court rejected these very arguments. The Court unanimously held that the arbitrator reasonably concluded that Air Canada had violated the collective agreement and should, accordingly, offer “voluntary separation packages” to every denied applicant.

Air Canada’s collective agreement with its cabin personnel represented by CUPE contained provisions regarding a “Voluntary Separation Program” – a program of retirement incentives (known as VSPs) for senior eligible employees. The agreement obliged Air Canada to offer “at least 250 VSPs per year”. The agreement also provided that “a governing principle of this program is that the maximum number of VSPs will be granted”. In 2008, Air Canada offered 250 VSPs, but refused to offer any more. Ninety-nine employees had their applications denied. Air Canada asserted that it denied VSPs beyond 250 because it determined that granting them would “generate net costs rather than net savings”. And Air Canada presented certain financial information to the arbitrator to support the claim. But there was no evidence before the arbitrator that Air Canada actually analyzed the costs of denying the additional VSPs *before* it denied them. All of the employer evidence was generated *after* Air Canada’s decision was made.

In Court, Air Canada argued that it was not obliged to expose its decision-making process. The Court disagreed. Air Canada also argued that it had a discretion as to how many VSPs to offer (beyond 250) and that the arbitrator had no jurisdiction to second-guess the exercise of that discretion when that discretion was exercised in “good faith”. The Court disagreed with that proposition, as well. Instead, the Court held Air Canada to a standard of rationality and transparency – a standard not met on the facts of the case.

CUPE was represented in the Divisional Court and before the arbitrator by Koskie Minsky lawyer **Craig Flood**.

Expert panel to review Ontario’s health and safety prevention and enforcement system

The Ontario Government has appointed Tony Dean as chair of an Expert Advisory Panel to conduct a comprehensive review of the Province’s occupational health and safety prevention and enforcement system. Mr. Dean will lead a panel comprised of safety experts from labour groups, employers and academic institutions to recommend options for structural, operational and policy improvements. The other panel members have not yet been announced. The panel has a mandate to research “best-in-class” approaches to improving workplace safety in national and international jurisdictions and will look at a range of issues including:

- Continuum of safety practices in a workplace and entry-level safety training
- Impact of the underground economy on health and safety practices
- How existing legislation serves worker safety

The Expert Advisory Panel is to report back to the Minister of Labour in the fall of 2010.

Mr. Dean was formerly Secretary of the Cabinet and Head of the Ontario Public Service, a position that was preceded by appointments as Deputy Minister of Labour and Deputy Minister and Associate Secretary of the Cabinet responsible for Policy. He is currently a Fellow in Residence at the University of Toronto's School of Public Policy and Governance. In January 2010, he was appointed Senior Research Fellow at the Harvard Kennedy School's Ash Institute for Democratic Governance and Innovation.

Recent amendments to OHSA address workplace harassment and violence

The *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009 ("Bill 168") received Royal Assent on December 15, 2009 and will come into force on June 15, 2010. Bill 168 amends the *Occupational Health and Safety Act* to address issues of workplace harassment and violence.

Bill 168 provides definitions of both "harassment" and "violence":

"Workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome".

"Workplace violence" means

- (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

"Harassment" is broadly described and could include a range of unwelcome conduct such as bullying, personal abuse and psychological abuse. The definition of "violence" addresses physical, as opposed to psychological or emotional, injury and specifically does not address, for example, either emotional or psychological abuse or even attempted or applied force that causes psychological injury.

Employers will be required to develop written policies with respect to both workplace violence and workplace harassment and must review those policies "as often as necessary", but at least annually. Employers must also develop and maintain programs to implement the policies and to deal with incidents and complaints of workplace violence and harassment.

Employers must undertake an assessment of the potential for violence in the workplace, and report the results of the assessment to their health and safety committee, or a health and safety representative. The assessment is to consider the risks of violence that may arise from the nature of the workplace, the type of work and conditions of the work performed. In conducting the risk assessment, employers will be required to take into account circumstances that are common to similar workplaces, as well as circumstances specific to the particular workplace. The employer will be required to reassess the risk of workplace violence as often as is necessary to ensure that workers are protected from workplace violence and that the workplace violence policy and implementation program remains effective. Risk assessment, and re-assessment as and when necessary, are

considered cornerstones of good health and safety practice and are often cited as key elements in any strategy on workplace violence.

If an employer becomes aware or ought reasonably to be aware, that domestic violence that would likely to expose a worker to physical injury may occur in the workplace, the employer must take every reasonable precaution to protect the worker.

Employer duties in section 25 of the OHS Act, supervisors' duties in section 27 and worker' duties in section 28 apply, as appropriate, with respect to workplace violence. The Bill requires an employer to provide a worker with information and instruction on the contents of the workplace violence policy and program. The Bill also amends section 43 of the OHS Act, which deals with a worker's right to refuse work in various circumstances where health or safety is in danger, to include the right to refuse work if workplace violence is likely to endanger the worker. The Bill sets out rules governing the investigation of such work refusals.

For more information about Bill 168, contact **Craig Flood** at cflood@kmlaw.ca.

IBEW complaint leads OLRB to stop collecting GST

Following a complaint filed by Koskie Minsky on behalf of its client IBEW Local 586, the Ontario Labour Relations Board has stopped collecting the Goods and Services Tax ("GST") on filing fees for construction industry grievance referrals. The Board has also sought a ruling from the Canada Revenue Agency ("CRA") as to whether GST should be paid on construction grievance hearing fees. A decision is expected within two months.

The GST complaint was filed on February 1, 2010. It pointed out that the Ontario Labour Relations Board has been collecting the GST on hearing fees and on filing fees in referrals under section 133 of the *Labour Relations Act* for more than ten years – since August 1, 1999. The fees are set out in the Board's *Rules of Procedure* and in Order in Council 2024/2009 – although neither the *Rules*, nor the Order in Council refer directly to the GST. Local 586 argued that filing fees are properly GST exempt (under s. 20(b) of Part IV of Schedule V of the *Excise Tax Act*). It also submitted that the GST is not properly assessed against hearing fees (because a Board hearing is *not* a "supply that is made in the course of commercial activity").

The Board responded promptly to the complaint. It accepted Local 586's submission regarding filing fees and stopped collecting GST on these fees as of February 11, 2010. The Board has not yet been persuaded that hearing fees are also GST exempt. Pending a ruling by the CRA, the Board will continue to collect GST on hearing fees.

Refunds for GST paid in error can be claimed from the CRA, but only for a 2 year period. For more information on GST rebates, visit the CRA website (www.cra-arc.gc.ca) or contact Koskie Minsky lawyer **Ron Lebi** at rlebi@kmlaw.ca.