Update

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SEPTEMBER 1999

Ontario Labour Relations Board:
Recent Cases: July 1998 to August 1999

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In this paper we outline some recent cases of interest decided by the Board. We begin by looking at some of the jurisprudence that has emerged from the July 1998 amendments to the Labour Relations Act in Bill 31, which were the subject of much speculation last year. We will also review and share some preliminary thoughts on some notable decisions that have been issued in the past year.

IMPACT OF BILL 31

Two major changes introduced by Bill 31 were a) the creation of an opportunity for employer challenges to a union's evidence of entitlement to a certification vote, and b) the replacement of the Board's power to order remedial certification with a broad power to take steps to ensure the accuracy of a second representation vote. These amendments were widely seen as the government's response to specific Board decisions going against employers.

Section 8.1 - Employer Challenges to Certification Votes

Under Bill 31 employers were granted a right to challenge the basis on which a union claimed entitlement to a certification vote. Unions become entitled to a vote under the current LRA upon a demonstration that they represent 40% of the employees in a proposed unit that "could be" appropriate for bargaining.

Under the new section 8.1, where an employer objects to the union's estimate of the numbers in the proposed bargaining unit, or claims that the 40% is based on a proposed unit that could not be appropriate for bargaining, the vote still takes place within the five day window set by the Act, but the ballot boxes can be sealed until the dispute is determined. The application will be dismissed without counting the ballots if the union is subsequently held to represent less than 40% of a unit that could be appropriate.

Section 8.1(4) states that, if the Board receives an employer objection, the Board "shall direct that the ballot boxes from the representation vote be sealed unless the trade union and the employer agree otherwise". One concern that arose last year in connection with this amendment was that minor differences concerning the exact numbers in the unit would cause the Board to automatically seal the ballot boxes and introduce unnecessary delay into the

certification process. This issue has now been resolved. In *Toronto Star Newspapers* the Board held that section 8.1(4) must be interpreted consistent with the policy scheme and objects of the section as a whole. The Board found the statutory purpose of section 8.1 to be to prevent a union which does not actually have more than 40 percent support in its proposed bargaining unit from being able to enjoy the benefits of a representation vote. This statutory purpose does not require the sealing of the box in instances where there is a dispute about precise numbers, but no issue that the applicant union has the requisite support. Accordingly, the Board held that it will generally not seal the ballot box in cases where the difference between the union's estimate of the number of employees in its proposed bargaining unit and that provided by the employer is not numerically significant and if the union's proposed bargaining unit "could be" appropriate for collective bargaining: *Toronto Star Newspapers Limited*, [1999] OLRB Rep. March/ April 352 at para. 14.

In a subsequent decision in *Morrow Transport* the Board has also confirmed that, under section 8.1, the unit in which the union is required to show 40% support is the unit proposed by the union, as distinct from the unit that is ultimately held appropriate. The sole exception to this is where the Board accepts an employer's assertion that the proposed unit is not one that "could not be appropriate for collective bargaining". Only in this instance does the union have to show 40% support in the appropriate unit: *Morrow Transport Inc.* [1999] OLRB Rep. May 434

Ratification Votes after Bill 31

In the aftermath of the remedial certification that was one of the major spurs to Bill 31 (leading to the Bill's being commonly referred to as "the Wal-Mart Bill") litigation between Wal-Mart and RW-Steel has continued before the Board. One such case was Wal-Mart's challenge to the union's choice of a mixed ratification/strike vote question on the ratification vote ballot given to unit members. The question on the ballot read:

> YES I accept the Company offer
>
> NO I do not accept the Company offer & I instruct the Negotiating Committee to call a strike if necessary in order to attain a proper agreement

Wal-Mart objected to the question and argued before the OLRB that, now that Section 44 of the *Labour Relations Act* made ratification votes mandatory, the question had to be a straight yes/no option. The company also argued that Bill 31 embodied "principles of democracy" and that these principles required the presentation of a yes/no option.

The Union's position was that Bill 31 had not altered the Board's established jurisprudence confirming the legitimacy of mixed ballots. It further argued that the company's position represented a "direct intrusion into what has historically been a matter of internal union affairs" and that trade unions must be permitted to provide employees with the realistic choice: do you want what's on the table or are you prepared to authorize a strike to do better?

This issue is of great significance, as the mixed ballot question is one which has been used by many unions for decades to prevent the paralysis of the bargaining process caused by separate votes rejecting both a contract and a strike.

The OLRB released a lengthy decision in late December 1998 which upheld the legitimacy of this form of ballot in all respects. The Board decided that:

> In our view, there is absolutely nothing 'undemocratic' about a ballot that requires a choice between the 'realistic' options that the Board has said present themselves when collective bargaining has reached an impasse, i.e. to accept the proposed agreement or to reject it and authorize a strike to do better. These are the alternatives that can move the collective bargaining process forward; their presentation on the ballot is consistent with the central purpose of the Act; and the absence of the 'no-no option' ensures that the new statutory requirement of majority support for a proposed agreement or to go on strike will not be used to defeat the process of bargaining a collective agreement itself.

This decision was upheld on judicial review on August 9, 1999. A unanimous panel of the Divisional Court held that the Board's decision was in fact correct, and not merely immune to review by the Court as "not patently unreasonable". The Court found the Board's decision to be consistent with the specific provision of the Act and the scheme of the Act as a whole. This, however, is still likely not the final word. The employer is currently seeking leave to appeal the Divisional Court's decision, and the Ontario government has already stated its intention to pass legislation addressing this issue.

Section 11(5) Remedies for Unfair Labour Practices in Certification

Bill 31 deleted from the Act the Board's authority to issue certification without a representation vote where illegal employer conduct prevented the 'true wishes' of employees from being expressed.

Ontario's law in this area is therefore moving in an direction opposite to that being taken in the federal sector. On the recommendation of the Sims Task Force, the *Canada Labour Code* was amended effective January 1, 1999 to expressly permit the Canada Board to certify a trade union, despite a lack of evidence of majority support, if there is employer interference and the Board is of the opinion that, but for the unfair labour practice, the trade union could reasonably have been expected to have had the support of a majority of the employees in the unit [s.99.1].

In Ontario, Bill 31 has replaced the Board's power to order remedial certification with authority, under section 11(5) to "do anything to ensure that a new representation vote ordered under this section reflects the true wishes of the employees in the bargaining unit".

Last year it was anticipated that this section would be the subject of innovative arguments and remedial orders. Although these are still early days, the Board's recent decision in *K.L. Drywall & Acoustics* has given some indication of what might be available under this section. In this case the employer engaged in conduct that the Board held would have provided grounds for remedial certification under the old legislation (which had been amended after this complaint was filed). In order to ensure that a second representation vote would reflect the wishes of the employees, the Board ordered the following:

- a second representation vote within a year, with the timing at the union's discretion;
- various orders to cease and desist from specified conduct in contravention of the Act;

- a notice to be posted at work sites, to be included with the next pay checks, and to be provided to new employees;

- the employer was required to notify the union of all job sites up to the date of the vote;

- the employer was required to provide the union with a list of existing and new employees, including their addresses and phone numbers until application is finally disposed of;

- interim just cause provisions were put in place, enforceable by the union under section 96, with costs to be paid by the employer where no just cause is shown;

- the employer was required to pay the union's costs of the new campaign up to $5,000.00;

- the employer was required to permit meetings during working hours for up to one hour, with no management personnel present, to a maximum of twice a month, at the union's request on reasonable notice;

- copies of the decision were to be posted and sent to all employees within 5 days.

K.L. Drywall & Acoustics [1999] OLRB Rep. March/April 208.

Unfair Labour Practice Remedies

The Board showed a continued willingness to order unusual remedies where circumstances call for them in its recent decision in *Rapid Transformers Ltd.* (unreported, July 21, 1999). In this case an employer had relocated work away from a recently certified location to a non-union location. The employer was held to have initiated the relocation as a response to the unit's certification (and was also held to have engaged in a laundry list of other unfair labour practices aimed at undermining the union). The Board ordered the employer to return the work to its original location, and to reinstate and compensate all employees laid off as a result of its illegitimate relocation.

Statutory Freeze

A recent case likely to form the basis of a new arguments and jurisprudence at the Board is that in *Royal Ottawa Health Care Ltd*, (unreported, July 23, 1999). In this case the Board issued a decision that revisits the established jurisprudence in the area of statutory freezes and rethinks the matter from first principles.

The Board looked at the role played by the section 86(1) freeze in the regulatory framework as a whole, to find that the freeze in place once bargaining has begun has three purposes:

- bolstering the bargaining process;

- reinforcing the status of the union as bargaining agent;

- providing a firm starting point from which bargaining will take off.

Starting from these principles, the Board arrived at the conclusion that the inquiry should focus on the subject matter of a unilateral change, rather than on whether the change was "business as usual" or met employee expectations. The Board said that the question to be asked was whether the change was "the kind of thing" that is subject to bargaining in a collective bargaining regime. If so, then it should be subject to the

freeze:

The Board recommends that the following questions be asked:

- Is it the kind of thing that would typically be the subject of collective bargaining?

- Would changes of this kind, if implemented unilaterally... unduly disrupt, vitiate or distort the bargaining process... whether or not the changes would also be a breach of section 17?

- Is it the kind of thing about which the employer would normally be required to bargain by virtue of section 17?

- Does the employer action affect employees as a collectivity?, or, conversely, is it part of "the daily stuff of individual employer-employee interactions, that in large measure, are unrelated to the collective bargaining process?

In light of the fact that Canadian law provides for virtually no restrictions on the issues that may be made the subject of collective bargaining, it would seem that this approach has the potential to broaden the reach of the freeze, particularly in first contract situations (that is, after certification, but before the possible subjects of bargaining have been delineated to some degree in a collective agreement). Indeed, the Board seems to acknowledge this potential, stating:

> Does this approach tie the employers hands?... not much and not for long... For established collective bargaining relationships, it means no more than carrying on under the terms of the prior collective agreement - what the union has already bargained.... For a new collective bargaining relationship, it means only that the parties are obliged to get on with the bargaining, and if really pressed to effect change, to seek the required consent or put themselves in the position were they can resort to economic sanctions" (at 33)

The Board indicates that a primary goal of revisiting of the jurisprudence in this area is to provide a clearer test capable of giving the community more certainty about how the caselaw will apply in particular circumstances. However, given the unrestricted scope of bargaining and the considerable variation in the kinds of things that are actually bargained for in Canadian collective agreements, it may well be that the line between the "kinds of things" that are subject to bargaining and those that are not will itself be difficult to draw in practice. Further, it will likely be some time before it becomes clear how the Board will integrate this decision into its existing jurisprudence. While the Board in *Royal Ottawa* claims not to discard the established approaches of "business as usual" and "employee expectations" but rather to augment this jurisprudence with an additional approach, it also suggests situations in which the `new' approach would and should override what might have been a different outcome under the Board's established jurisprudence. First, the Board notes that, while "business as usual" test may be suited to pre-certification situations, it has the potential to be "misleading" in other circumstances. Second, the Board suggests that, while a focus on "employee expectations" might allow a unilateral change such as a lay-off in response to novel external economic pressures in a first contract situation, the approach it is recommending would not:

> "..... is this focus on `employee

> expectations' congruent with the language and collective bargaining purposes of section 86(1)? For having just voted in favor of trade union representation, would those same employees not reasonably expect that these sorts of issues (especially wages and benefits) would be bargained about by their trade union - which is to say, that the particular way in which savings were to be effected would reflect their input at the bargaining table?" 30

There is no doubt much more that can and will be said about this case. This is an innovative decision that puts the statutory freeze analysis in a sound theoretical context. However, any assessment of the potential of this approach to clarify the application of the law in difficult cases will have to await developments that show how the Board will go about classifying issues as proper subjects of collective bargaining, and whether and how the new `test' will interact with the Board's established jurisprudence on this issue.