Update
Cavalluzzo Hayes Shilton McIntyre & Cornish
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LABOUR RELATIONS LAW REFORMS INTRODUCED BY LIBERAL GOVERNMENT

BILL 144: *Labour Relations Statute Law Amendment Act, 2005*
Assented to June 13, 2005

The Labour Relations Statute Law Amendment Act, 2005, received Royal assent on June 13, 2005 and is now in force.

Bill 144 does not restore the labour relations regime that existed prior to the Tory amendments of the last decade. However, the Bill makes key changes to:

* reinstate the OLRB's power to order certification as a remedy for an employer's unfair labour practice during an organizing drive;

* introduce a new section setting out remedies where a union contravenes the *Act* in the course of an organizing drive;

* reinstate the OLRB's power to make substantive interim orders;

* reinstate card-based certification in the construction industry;

* extend interest arbitration in the residential construction sector.

The Bill also eliminates two of the more inflammatory amendments introduced by the previous Tory governments, repealing

* the mandatory posting of decertification information in workplaces; and

* the mandatory disclosure of union salaries over $100,000.

Finally, the Bill requires government to appoint "qualified" interest arbitrators in the ambulance sector.

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A. REMEDIAL CERTIFICATION

In 1995, the Tory Government repealed the OLRB's long-standing power to order certification to remedy an employer's unfair labour practice during the course of an organizing drive. Under s. 11 of the *Labour Relations Act, 1995*, the OLRB's remedial powers in this respect were limited to ordering another representation vote. By and large, a second vote did not provide an effective remedy.

Bill 144 proposes to repeal the existing s.11 and replace it with a new s. 11 which restores the remedial certification power.

Where a representation vote has taken place and, as a result of employer violations of the *Act*, the true wishes of the employees were not likely reflected, the new section would allow the OLRB to:

* order that a second representation vote be taken and do anything to ensure that the vote reflects the true wishes of the employees: **s. 11(2)(b)**; or

* certify an appropriate bargaining unit "if no other remedy would be sufficient to counter the effects of the contravention: **s. 11(2)(c)**.

If, as a result of employer violations of the *Act,* a union is unable to achieve the necessary 40% support to even hold a representation vote, the new section would permit the OLRB to:

* order a representation vote and to do what is necessary to ensure the employees' true wishes are reflected: **s.11(2)(a)**; or

* order a remedial certification where no other remedy would be sufficient: **s.11(2)(c)**.

Before making an order under this section the Board may consider the results of a previous representation vote and whether it appears that the union has sufficient support adequate for collective bargaining: **s. 11(4)**.

B. UNIONS VIOLATIONS AS A BAR TO CERTIFICATION

The proposed Bill 144 would add a new s.11.1 to the *Labour Relations Act* which addresses union contraventions of the *Act* during certification drives. While the existing legislation allows the OLRB to order a second representation vote where union contraventions of the *Act* interfere with employees' true wishes, the proposed section would make such contraventions a possible bar to certification: s. 11.1(4).

Section 11.1 states that where union contraventions of the Act occur during a certification drive such that employee true wishes were not likely reflected in a representation vote, the Board may:

* order a another vote and do anything to ensure the resulting vote reflects the true wishes of employees; **s. 11.1(2)(a)**; or

* dismiss the certification application if no other remedy would sufficiently counter the violations: **s. 11.1(2)(b)**.

Before making an order under this section the Board may consider the results of a previous representation vote and whether it appears that the union has sufficient support adequate for collective bargaining: **s. 11.1(3)**

A union whose application for certification is dismissed under this section is barred from reapplying with respect to any employee in the proposed bargaining unit for one year: **s.11.1(4)**.

Unlike s. 10(3) which bars *any* union from applying for certification for one year after an application is dismissed under s. 10, the prohibition in the proposed s. 11.1 would only apply to the offending union. Although it should be noted that for applications in the industrial, commercial and institutional sector, the one year bar would apply to the trade unions on whose behalf the application was sought.

The Board may consider an application despite s. 11.1(4) however, if: (1) an employee has changed positions; (2) the employee's original position was included in the original application's proposed bargaining unit; and (3) the new application is for a different bargaining unit which includes the employees new position but does not include the employees original position: **s. 11.1(5)**.

The proposed sections would only apply to contraventions that occur after the sections come into force. Contraventions that occur before coming into force are subject to the current s. 11: **s. 11.2**.

C. INTERIM POWERS OF THE BOARD

In 1992, the NDP government amended the *Labour Relations Act* to give the OLRB power to make interim orders. The Tory government amended this so that under the existing s. 98 the OLRB only has the power to make interim orders related to procedural matters in proceedings that are before it. The existing section specifically precludes the Board from reinstating an employee pursuant to this power.

Bill 144 would repeal the current s. 98 and replace it with a new s. 98 that authorizes the Board to make interim orders on procedural matters, to reinstate employees and to make interim orders with respect to terms and conditions of employment. While this does expand the Board's authority to make interim orders, it is not as broad as the authority that existed under *Bill 40*.

The revised section 98 would allow the Board to make an interim order:

* on procedural matters on such terms as it considers appropriate: **s. 98(1)(a)**;

* requiring that an employee be reinstated on appropriate terms: **s. 98(1)(b)**; or

* respecting the terms and conditions of an employee who, while not terminated, has had the terms and conditions of their employment altered or who has been subject to penalty, reprisal or discipline: **s. 98(1)(c)**.

Before the Board can make an order regarding reinstatement or terms and conditions of employment, the Board must determine that all the following conditions are met:

1. the circumstances giving rise to the pending proceeding occurred at a

time when an organizing campaign was underway;

2. there is a serious issue to be decided in the pending proceeding;

3. the interim relief is necessary to prevent irreparable harm or to achieve other significant labour relations objectives; and,

4. the balance of harm favours granting the interim relief pending a decision on the merits in the pending proceeding: **s. 98(2)**.

The Board cannot order interim relief in the form of reinstatement or in relation to terms and conditions of employment if it appears that the impugned actions of the employer are unrelated to the employee's exercise of rights under the *Act*: **s. 98(3)**.

Despite the reverse onus provisions in s.96(5) of the *Act*, the burden of proof under the new s. 98 will lie with the applicant: **s.98(4)**.

As with the remedial certification provisions, the new s. 98 will only apply to employer actions that take place after the coming into force of the amendments. Actions that took place prior will be subject to the existing provision: **s. 98(6)&(7)**.

D. CARD-BASED CERTIFICATION IN THE CONSTRUCTION INDUSTRY RESTORED

From 1950 to 1995 a card based certification system existed for organizing trade unions in the construction industry. The system, repealed by the Tories, is reintroduced by Bill 144. This is an important change and one that had been sought by construction unions. Card-based certification has only been reintroduced in the construction industry.

The card-based certification is set out in a new s. 128.1 to the *Labour Relations Act*. The proposed system will apply only to applications made after the section comes into force. **(s. 128.1(26))**

The *Act* requires that on the date a union files its certification application, it give notice in writing to the Board that it elects to have its application dealt with under s.128.1.

Within two days of receiving this notice, the employer must provide the Board with names of the employees in the proposed unit and the names of the employees in a unit as proposed by the employer if it so choses: **s. 128.1(3).**

Once the Board has received the application for certification under this section it must determine the bargaining unit and the percentage of employees in the bargaining unit who have joined the union: **s. 128.1(4).**

If the number of employees who have signed membership cards is:

- **less then 40%:** the Board shall dismiss the application: **s. 128.1(7)**
- **between 40 and 55%**: the Board must direct a representation vote: **s.128.1(12)**; or
- **greater then 55%**: the Board may either certify the union or direct a representation vote: **s. 128.1(13)**.

If a representation vote is directed by the Board it must be by secret ballot and take place within 5 days: **s. 128.1(14)(a) & (b)**.

If over 50% of the ballots are cast in favour of certification, the Board shall certify the union: **s. 128.1(14)(d)**. The new remedial certification and dismissal provisions, discussed below, will apply with respect to the representation votes and organizing drive.

In making a decision under this section the Board can hold a hearing **(s. 128.1(5))**, consider contraventions of the *Act* **(s. 128.1(5))**, and can remedially dismiss the membership evidence if it is not likely the cards reflect the true wishes of the employees **(s. 128.1(7)-(12))**.

If an application for certification is withdrawn, the discretionary and mandatory bars to reapplying apply:

Finally, for certification in the industrial, commercial and institutional sector, if the Board certifies the trade unions that on whose behalf the application is brought, either after on the basis of cards or after a vote, it shall issue one certificate for the ICI sector and another in relation to all other sectors. If the Board dismisses the certification application, the Board shall not consider another application for certification for employees of the proposed bargaining unit by the employee bargaining agency or the affiliated bargaining agents or agents to certify until one year after the dismissal: **s. 128.1(24)-(26)**.

E. INTEREST ARBITRATION IN THE RESIDENTIAL CONSTRUCTION SECTOR

In 2000, the *Labour Relations Act* was amended to provide for a mandatory three-year cycle for expiry and renewal of collective agreements in the residential sector of the construction industry. These changes placed limits on strikes and lockouts and created a system of interest arbitration in the sector. These changes were introduced on a trial basis which was extended in 2002. They are currently set out in ss. 150-1 to 150.3 of the *Labour Relations Act, 1995*.

Bill 144 would repeal and replace the existing ss. 150.1 - 150.3 of the *Act* effectively making the existing temporary regime a permanent one. The regime that is implemented by Bill 144 basically replicates the system that currently exists.

These provisions with respect to the residential sector would all come into effect on 1 May 2005.

As with the current section, under Bill 144 this system would apply to the residential construction sector in Toronto, and the municipalities of Halton, Peel, York, Durham, and the county of Simcoe: **s.150.1(1)**.

In these sections, “residential work” is defined to mean “work performed in the residential sector of the construction industry”: **s. 150.1(2)**.

Nothing in this section affects the validity of a collective agreement to which the section applies with respect to work other than residential work performed in the geographic areas specified above: **s.150.2(7)**.

All collective agreements that apply with respect to residential work and that are in effect on or after 1 May 2005 but before 30 April 2007, will be deemed to expire on 30 April 2007: **s. 150.2(1)**.

All subsequent agreements shall exist on a three-year term and parties are not permitted to extend the operation of the agreement beyond the relevant expiry date. Any provision that purports to extend the agreement shall be deemed to be void: **s.150.2(4)**.

A first collective agreement that applies with respect to residential work that comes into effect on or after 30 April 2007, shall be deemed to expire on the next 30 April, calculated triennially from 30 April 2007: **s.150.2(2)**.

Every renewal or replacement collective agreement shall be deemed to expire with respect to residential work on the next 30 April, calculated triennially from 30 April 2010: **s. 150.2(3)**.

Notice to bargain may be given on or after 1 January in the year of expiry: **s. 150.2(5)**.

Strikes and lockouts in this sector are limited to April 30 to 15 June of the year in which the agreement expires: **s. 150.3**.

If negotiations for a new agreement are unsuccessful, once it is the later of the legal strike or lockout deadline, 15 June, a party can give notice requiring the dispute be arbitrated. Notice to arbitrate can be given at any time after April 30 if notice of a desire to bargain was given and both parties agree that notice may be given: **s.150.4(1)-(4)**.

Parties can either jointly appoint an arbitrator or make a written request to the Minister to appoint one: **s. 150.4(5)-(7)**.

The Minister shall not appoint a conciliation officer, conciliation board or mediator; and the appointment of any previously appointed conciliation officer, conciliation board or mediator shall be deemed to be terminated. Except where the employer and union agree to alter a term or condition of employment, all terms and conditions that existed under the agreement that expired on 30 April of the relevant year shall apply from the period notice was given until a new collective agreement is achieved or the union's rights of representation are terminated: **s. 150.4(5)**

Parties continue to split the costs of arbitration: **s. 150.4(10)**.

As previously, the *Act* would authorize the government to make regulations regarding the procedures and powers of arbitration: **s.150.4(13)**. As a result, the current regulation on these matters would remain in effect.

The Director of Labour Management Services continues to have the power to convene meetings of employer and union representatives in this sector. While the current law provides that the Director must convene such meetings at least twice each year, under Bill 144 there is no such requirement. Instead, the Director "may, at his discretion" convene a meeting: **s. 150.5(1)**. In deciding whether or not to convene a meeting, the Director may consider "whether a meeting is necessary or would be beneficial and may consider a request made by a representative": **s. 150.5(2)**.

F. ELIMINATING POSTING OF DECERTIFICATION INFORMATION

Section 63.1 of the *Labour Relations Act, 1995* was one of the most inflammatory amendments the Tory government made to the labour relations regime. This provision requires all employers to make reasonable efforts to post information about decertification and to provide employees with decertification information on a yearly basis and upon request.

The existing section 63(16.1) and section 63.1(5) immunize the employer from being found in violation of the *Act* for providing and posting decertification information pursuant to s. 63.1.

Bill 144 would repeal all of s. 63.1 and would repeal s. 63(16.1).

In their place, Bill 144 includes a transitional provision that would immunize employers for only 30 days after Bill 144 comes into effect should the employer continue to post or distribute information about decertification: **transitional s. 63.1**.

This suggests that employers who do provide or post decertification information following this 30 day period will be subject

to unfair labour practice complaints for this arguably anti-union activity.

G. ELIMINATING DISCLOSURE OF UNION SALARIES

The existing s. 92.1 of the *Labour Relations Act, 1995* requires that unions disclose the salary and benefits of directors, officers and employees of the union where the salary and benefits are greater then $100 000. Disclosure must be made to the Minister of Labour and to any member who requests the information. The existing provision also has enforcement mechanisms for unions who do not provide the required information, and immunizes the information from copyright or privacy laws.

Section 6 of Bill 144 would repeal the existing s. 92.1 in its entirety.

H. INTEREST ARBITRATORS IN THE AMBULANCE SECTOR

Bill 144 proposes to amend the *Ambulance Services Collective Bargaining Act, 2001* by requiring the Minister to appoint an interest arbitrator who is "qualified" in the opinion of the Minster: **proposed s. 20(5).**

The Bill would repeal the existing s. 20(5) and s. 20(6) which presently permit the Minister to appoint an arbitrator who is not recognized as a person mutually acceptable to the parties or who does not conform to the parties expectations, and the Minister may do so without consulting the parties.