KOSKIE MINSKY
JUSTICE MATTERS

Labour Law

A newsletter highlighting matters of interest to the labour relations community.

Applications for Employee Lists: A Strategic Organizing Tool

Recent amendments to the *Ontario Labour Relations Act*, added after the passage of Bill 148, have created a new tool for trade unions to assist with their organizing campaigns. Unions can now make an application to the Labour Relations Board for an order requiring an employer to provide a list of its employees to the union. A number of successful applications for employee lists have already been made since the new provisions came into force on January 1, 2018, demonstrating the promise of this legislative development.

The new provisions are contained in section 6.1 of the *Act*. In order to obtain an employee list, the Union must demonstrate to the Board that the employees in question are not already represented by a union and that they can form a unit appropriate for collective bargaining.**[1]** The application to the Board must include a written description of the proposed bargaining unit, an estimate of the number of individuals in the unit, a list of the names of the union members in the unit and corresponding evidence of union membership, such as union membership cards (evidence of union membership is confidential and is not revealed to the employer).**[2]** If the Board determines that the employees are in fact unrepresented by any Union, that the proposed unit *could* be appropriate for collective bargaining and that twenty percent or more of the "estimated number of individuals" in the proposed unit "appear to be" union members, it will order the employer to provide a list of employees to the union.**[3]**

When the Board orders the employer to provide an employee list to the Union, the list must include the name of each employee and his or her phone number and personal email address, if the employer has this information.**[4]** The Board also has the discretion to direct the employer to provide additional information, including the job title or business address of each employee and any other means of contact that an employee has provided to the employer other than a home address.**[5]**

An employer faced with an application under section 6.1 can oppose the application by giving notice to the Board within two days of receiving notice of the union's application that it disagrees with the union's

proposed bargaining unit description or the union's estimate number of employees in the unit**[6]**, the Board is not required to hold a hearing or consult with the parties, and may determine the application based only on the written information provided by the union and employer**[7]** In every one of its reported decisions to date, the Board has determined section 6.1 applications on the basis of written submissions alone and in doing so has expressly recognized the need for quick decisions in 6.1 applications.**[8]**

A review of the Board's 6.1 applications to date show that the Board intends to take a more lenient standard in determining the appropriate bargaining unit for a section 6.1 application compared to an application for certification. In *Markham Stoufville Hospital*, the Board explained that the distinction comes down to the fact that a decision to grant bargaining rights triggers significant consequences for the union, the employer, and the affected employees, whereas an application under section 6.1 asks for something much more limited — a list of employees "and nothing more."**[9]**

The developing case law on this issue suggests the Board is not inclined to impose a heavy burden on unions who seek an order pursuant to section 6.1, and efforts made by employers to avoid being ordered to provide employee lists have, so far, met with little success. For example, in *Markham Stoufville Hospital*, where the union and the employer disputed the number of employees in the proposed bargaining unit, the Board went with the estimate that would result in a favourable outcome for the union, suggesting a permissive and flexible attitude toward section 6.1 applications.

It is important to note that section 6.1 does not apply to employers in the construction industry, a limitation found in subsection 6.1(17).**[10]** However, the new provision can still be useful to unions who represent workers who work in both the construction and non-construction sectors. In *Miller Paving Limited*,**[11]** the Board ruled that section 6.1(17) did not prevent a union from seeking an employee list for non-construction employees in circumstances where an employer performs both construction and non-construction work.

Employers will certainly continue to make creative arguments in an attempt to avoid being ordered to provide crucial information to unions who seek to organize their employees. In the meantime, unions should take advantage of the Board's permissive posture towards applications for employee lists under section 6.1 of the *Act*, and develop strategic uses of the new statutory provisions.

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[1] *Labour Relations Act, 1995*, section 6.1(1)

[2] *Labour Relations Act, 1995*, section 6.1(3)

[3] *Labour Relations Act, 1995*, section 6.1(6) and (7)

[4] *Labour Relations Act, 1995*, section 6.1(9)

[5] *Labour Relations Act, 1995*, section 6.1(10)

[6] *Labour Relations Act, 1995*, section 6.1(4)

[7] *Labour Relations Act, 1995*, section 6.1(8)

[8] *Markham Stoufville Hospital*, 2018 CanLII 1101 at para. 19.

[9] *Markham Stoufville Hospital*, 2018 CanLII 1101 at para. 18.

[10] *Labour Relations Act, 1995*, section 6.1(17)

[11] *Miller Paving Limited*, 2018 CanLII 2622

Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Govan Brown & Associates Limited et. al.

For decades, the Ontario Labour Relations Board has considered only the wishes of those persons employed in the bargaining unit on the date of application in construction industry proceedings. "Steady eddies", disabled employees, and others who are absent from work on the date of application for any number of reasons are thereby excluded from the determination of the Union's level of support.

In a lengthy Decision released on March 26, 2018, Chairperson Bernard Fishbein confirmed the Board's longstanding use of the date of application test, dismissing *Charter* challenges brought by the Employer and a Group of Objecting Employees. The Board issued certificates to Labourers' Ontario Provincial District Council.

The Decision in *Govan Brown* confirms that the date of application test continues to be a rational and proper approach to determining the relevant employee complement for representational proceedings in the construction industry. The Decision also provides a detailed overview of the jurisprudence on both freedom of expression, as guaranteed under Section 2 (b) of the Charter and freedom of association, as protected under Section 2 (b). The Board found that there was nothing in the date of application test which violated *the Charter*.

We will be providing a detailed review of the Board's Decision in *Govan Brown* in future editions of the Koskie Minsky Labour Blog in the near future.

Andrea Bowker, **Katherine Ferreira** and **Craig Flood** of Koskie Minsky represented the Labourers' Ontario Provincial District Council in this matter.

"Suspicionless" Drug Testing Policy Unreasonable

On January 23, 2018, a senior British Columbia arbitrator, John Kinzie, released a significant decision concerning random drug and alcohol testing in unionized workplaces. The decision, ***USW Locals 7884 and 9346 v. Teck Coal Ltd.[1]*** followed the ruling of the Supreme Court of Canada in *Irving Pulp and Paper**[2]***, and built upon on the arbitral jurisprudence regarding employees' privacy rights over their personal health information.

Teck Coal Ltd. operates five coal mines in British Columbia where employees work in safety-sensitive positions. In 1999, Teck's predecessor implemented a drug and alcohol policy that subjected employees to mandatory testing where the employer either had reasonable cause to believe the employee's work performance had been affected by a substance or where an employee's conduct contributed to a significant safety-related event. Teck's policy was upheld by an arbitrator in 2002.

In late 2012, Teck expanded those policies, imposing random drug and alcohol testing on all of its employees. The policy required employees to provide bodily fluids and breath samples. If an employee's result was positive, the employee was required to meet with an addictions specialist and to disclose personal health information.

Arbitrator Kinzie ruled that Teck's random drug and alcohol testing policy was unjustified and violated the collective agreement between the parties. In striking down the policy, Arbitrator Kinzie emphasized the importance of employees' right to privacy, and held that Teck's policy intruded on that right in "a very invasive manner." The arbitrator held that the policy's requirements that employees provide physical samples as well as personal health information to an addictions specialist touched upon employees' "biographical core". Notably, Arbitrator Kinzie dismissed Teck's argument that employees in safety-sensitive workplaces have no expectation of privacy with respect to illegal drug use. He ruled that the right to privacy in this context is akin to the protection against unreasonable searches and seizures in that it exists irrespective of legality of the drugs tested for.

Arbitrator Kinzie ruled that in order to justify such a serious intrusion on privacy rights, Teck must establish a systemic cause or the existence of a general or demonstrable workplace problem. Random testing, the arbitrator explained, requires such a high level of justification because it is a form of "suspicionless" testing, with no need to show cause. He held that Teck had failed to establish the existence of a general problem that would warrant this intrusion into its employees' privacy rights.

In arriving at his decision, Arbitrator Kinzie also considered the evidence of various experts regarding the information yielded from random tests and determined that they could not accurately establish whether an employee was actually impaired while on the job. While the test can establish whether an employee had used substances in the past, it cannot establish whether the employee was impaired at the time of

testing. In light of this evidence, Arbitrator Kinzie found that the random testing statistics cited by the employer did not establish that there was an abuse problem in the workplace, only that employees were using drugs.

Teck also argued that it would be harmful to set aside a policy which, it asserted, had been accepted by employees and had beneficial effects on them. The arbitrator rejected this argument and refused to shift the burden to the union to establish it would not be harmful to eliminate an unreasonable policy.

The 124-page decision, available **here**, provides a comprehensive review of the jurisprudence to date on the issue of random testing, and can be helpful to unions challenging random testing policies implemented on the basis of risk speculation. The decision further reinforces the value of employees' privacy rights in the workplace with respect to personal health information. As Canada inches towards the legalization and regulation of marijuana, it is likely a growing number of employers will turn their minds to performing drug testing in the workplaces and that unions will be faced with similar issues with increasing frequency.

[1] 286 L.A.C. (4th) 1; 2018 CanLII 2386 (BC LA)

[2] 2013 SCC 34

What Will the Provincial Election Mean for Labour and Employment Law?

Ontarians head to the polls on June 7th, and the results could mean big changes for labour and employment law.

While the Liberals are promising to maintain the status quo, the Progressive Conservatives are taking aim at future increases to the minimum wage and the NDP hopes to make sweeping changes to both the labour and employment law regimes.

The Liberal Party of Ontario

In 2017, the Liberals tabled the ***Fair Workplaces, Better Jobs Act*** ("Bill 148") which introduced **significant amendments** to the *Labour Relations Act*, the *Employment Standards Act* and the *Occupational Health and Safety Act*, effective January 1, 2018.

Bill 148 most notably expanded workers' entitlements under the ESA, increasing employees' minimum annual vacation days and Personal Emergency Leave days (including providing for pay on the first two PEL days). The Bill also raised the minimum wage to $14.00/hour, with a future increase to $15.00/hour set to come into effect January 1, 2019 and a plan to index the minimum wage to inflation.

Given that the Bill just came into effect on January 1, 2018, Premier Kathleen Wynne has not announced any further plans for labour and employment law.

The Progressive Conservative Party of Ontario

Doug Ford entered the race late in the game, and despite his earlier promises, it seems unlikely that he will release a comprehensive campaign platform. Instead, his various positions continue to be released piecemeal, leaving his intentions for labour and employment law unclear.

Ford has made one promise, however: freezing the minimum wage at its current level of $14. This would require repealing the sections of Bill 148 that are set to raise the minimum wage to $15 on January 1, 2019 and index the minimum wage to inflation.

The Ontario New Democratic Party

Unlike her fellow candidates, Andrea Horwath has made big promises for both labour and employment law.

The Labour Relations Act

The NDP has proposed a number of changes aimed at facilitating access to collective bargaining.

First, Horwath would allow for card-based union certification in a wider range of sectors, outside of the construction sector and the building services sector (to which card based certification was extended by Bill 148). Currently, outside those sectors where card based certification is available, in order for a union to be certified under the current Act, 40 per cent of the individuals in a proposed bargaining unit must sign union cards, and 50 per cent of those who participate in a subsequent vote must support unionization. Horwath proposes to make this process less onerous for workers by allowing workplaces to unionize after 55 per cent of individuals in a proposed bargaining unit sign union cards, eliminating the current requirement for a representation vote.

Second, Horwath hopes to broaden access to first contract arbitration. At present, a recently-certified union can apply for first contract arbitration if, after a certain period of time, the union and the employer have not reached an agreement. In most cases, however, the Ontario Labour Relations Board has the power to deny that application. This means that a recently certified union could be decertified if it does not reach an agreement with the employer. The NDP would remove the Board's discretion, so that every certified union is able to attain a collective agreement through arbitration.

Third, Horwath has promised to allow for broader-based bargaining. Sometimes called "sectoral bargaining," this model allows workplaces operated by different employers in the same industry to be certified in a single bargaining unit.

The Employment Standards Act

Horwath has also promised to make three changes to the ESA. First, she will require all employers to offer at least three weeks of paid vacation to all full-time employees. Under the current legislation, employees are only entitled to three weeks of paid vacation after five years of employment.

Second, Horwath plans to extend the $15 minimum wage to students under the age of 18 and to employees who serve liquor in restaurants and bars, who are currently subject to lower minimum wages.

Finally, Horwath plans to ensure that permanent employees are not misclassified as independent contractors, which excludes them from many of the ESA's protections.

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