MANAGEMENT
COUNSEL
Employment and Labour Law Update

Union Raids in the Ontario Construction Industry

The open period is here. Are you ready?

In Ontario many construction industry collective agreement negotiations take place every three years. On April 30th of this year, current ICI sector collective agreements will expire. A number of agreements in other sectors of the construction industry will expire on that date as well. Negotiations are therefore underway and it is important that every construction employer remain up to date on the progress of the negotiations in their respective sector.

It is also very important to be aware that during the "open period", the three months prior to the expiry date of the collective agreement, construction trade unions have the legal opportunity to raid or displace other construction trade unions and that construction employees employed under the expiring agreement have the legal opportunity to terminate the union's bargaining rights. For agreements that expire on April 30th the "open period" started on February 1st.

The decision whether or not to conduct a "raid" and file a displacement application lies solely with the trade union. However it is crucial that every employer know its rights and responsibilities should an application be filed. By all accounts it sounds as though there may be significant raiding activity during the current open season.

As a construction industry employer, do you know how to protect your rights if and when this happens at your workplace(s)?

A union that wishes to attempt to raid and displace an incumbent union must serve on the employer and the incumbent union an Application for Certification.

At this stage in the process the timelines become extremely short and meeting the Act's deadlines is critical.

Failure to respond, or to respond on time, can seriously affect a company's legal rights. If a response is not filed within the Labour Board's timelines the employer can lose all rights to participate in a union displacement application. This means that the employer can lose its opportunity to raise issues regarding which union will ultimately represent the employees.

So, what are the deadlines? Within two (2) business days of receiving an application, an employer is required to serve on all affected parties (including incumbent union) and file with the Labour Board a legal response. This means that the employer has only two (2) business days after receiving the application to make a number of important and strategic decisions, as well as complete, serve and file the response itself. There are extremely few reasons acceptable to the Labour Board that will result in extending these time limits, so as a rule a response on your behalf must be made within the time limits.

"If a response is not filed within the Labour Board's timelines the employer can lose all rights to participate in a union displacement application."

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The Labour Board will process the application and determine from the cards filed by the union and the number of employees if there is sufficient support for the application. If the cards filed show that 40% or more of the employees support the raiding union, the Labour Board will order a vote and the employees will cast a secret ballot indicating which union they support.

When a vote is ordered it is usually scheduled between 5 and 10 days after the application is served. Typically, a vote takes place at the affected worksite(s). The outcome is based **on 50% plus one of the employees who cast a ballot.**

An employer that intends to file a response will need to consider several critical matters and do so quickly.

Some matters are entirely factual. Others require careful consideration of company objectives and strategy. Either way, it is advisable to consider engaging the assistance of labour counsel experienced in the complex area of construction labour relations. Here are a few of the questions to consider:

1. To which employees does the application apply?
2. What trade or craft is affected?
3. Which geographic areas and worksites are affected?
4. Which employees were at work on the day of the application?
5. What kind of work were the employees performing for the majority of the day of the application? What proof will be required and under what circumstances?
6. Which, if any, other parties are affected by the application?
7. Where should the secret ballot vote take place?
8. On what date and at what time should the secret ballot vote take place?

At Sherrard Kuzz LLP we encourage all employers to know their rights. For more information, contact any member of our team.

Next in our series of employment and labour law updates:

HReview
Seminar Series

TOPIC: **Hiring and Firing: Do's and Don'ts**

In this refresher, learn about:

1. Job applications and interviews: what are the restrictions?
2. Employment offers: when and how to make them
3. Employment contracts: the key to protecting your business
4. Termination meetings: where, how and who?
5. Just Cause vs. Without Cause terminations: pros and cons
6. Termination offers: tips to limit your costs
7. Reference letters: reduce your stress

DATE: Wednesday, March 28, 2007, 7:30 a.m. — 9:00 a.m. Program to start at 8:00 a.m., breakfast provided.
VENUE: The Toronto Board of Trade, Airport Centre, 830 Dixon Road Toronto, ON M9W 6Y8 416.798.6811
RSVP: **416.603.0700 (Tel.) 416.603.6035 (Fax) or info@sherrardkuzz.com by Friday, March 16, 2007.**

DID YOU KNOW?

The Ontario Government recently extended family medical leave entitlements.

In addition to a family member, an employee may qualify for job protected leave to care for a gravely ill "person who considers the employee to be like a family member".

For more information, call us.

Revamping the *Canada Labour Code*

In our February 2005 *Management Counsel* we reported that Harry Arthurs, former dean of Osgoode Hall Law School, had been appointed by the federal Minister of Labour to conduct a review of the provisions of Part III of the *Canada Labour Code* (the "*Code*"). The *Code* governs employees who are under federal jurisdiction, including inter-provincial trucking, banking, aviation, rail, shipping, telephone, cable, broadcasting, nuclear and postal services. Approximately 840,000 employees across Canada are governed by the *Code*. Part III of the *Code* is principally directed to establishing minimum employment standards intended for the protection of employees. With certain exceptions, Part III covers both unionized and non-unionized employees.

While the *Code* has been revised in piecemeal fashion since its enactment in 1965, it has never been the subject of a comprehensive revision.

The Arthurs Commission released its 324 page report in the fall of 2006. The Commission made many recommendations for revisions to the *Code*. Some of the recommendations are summarized below.

EXPANSION OF THOSE COVERED UNDER THE *CODE*

At present, only individuals who are legally considered to be "employees" are covered by the *Code* and therefore "independent contractors" are not covered. It can be very difficult to distinguish whether a worker is an independent contractor or an employee. In general terms, employees tend to have less control over their work and independent contractors more. But these are generalizations. The Commission was concerned that many independent contractors are vulnerable, yet enjoy no statutory protection. The Commission's recommendations include:

- Defining an additional class of workers, which it calls “autonomous workers”
- “Autonomous workers” would occupy some of the space which previously fell within the concept of independent contractor
- The definition of “autonomous worker” be related to specific employment sectors
- Autonomous workers would not receive the full array of rights possessed by employees, but would have a more limited package of rights
- The process of defining autonomous workers and what rights they will have would first require consultation with the affected industries
- Any worker who is considered to be an independent contractor or autonomous worker would have to be advised by the hiring company in writing or would be presumed to be an employee. The written notice would not be determinative and the true substance of the relationship could override any written notice that was at odds with the facts.

HOURS OF WORK AND OVERTIME

No recommendations were made to change the status quo of 8 hour days, 40 hour weeks and a maximum of 48 hours per week. This includes maintaining the exemption whereby managers are not subject to specific limitations on working hours and are not entitled to overtime pay. The Commission’s recommendations include:

- An explicit stipulation that managers are not to be permitted to work hours which endangered their health
- Further study be given to adjustments to overtime and working hours rules which might be appropriate on a sectoral basis
- Current procedural requirements to obtain Ministerial permits for increased maximum work hours be streamlined.
- Increased flexibility in the calculation of overtime (similar to some provincial regulations)
- Paid time off in lieu of overtime pay
- Broadening the definition of emergency situations where hours of work may exceed the usual maximums

EXPANSION OF LEAVE ENTITLEMENT

Eight provinces make some provision for leave related to family responsibilities, but no provisions are currently in the *Code*. The commission recommends that 10 days per year be permitted for “family responsibility” leave.

The current bereavement leave provisions permit three paid days, which must be taken immediately after a death. The Commission’s recommendations include:

- Increased flexibility and duration of bereavement leave to seven consecutive days, the first three paid and the last four unpaid
- Improving the current sick leave provisions to permit leave to continue up to the full period of EI benefits eligibility
- Entitling employees with periods of service too short to be eligible for maternity/parental/sickness leave under current *Code* provisions, but who qualify for EI benefits, to claim leave
- Compassionate care leave be permitted for any serious illness and not restricted to imminent death situations

Currently, employees who are required to be absent from work in order to attend court, enjoy no protection of their employment. The Commission’s recommendations include:

- Permitting leave for employees required to be in court as jurors, witnesses or parties
- Provisions which would protect certain classes of employees’ positions during declared public emergencies, such as a pandemic

TERMINATION OF EMPLOYMENT AND STATUTORY SEVERANCE PAY ENHANCEMENTS

The Commission recommends increasing the amount payable for statutory severance pay from two to three days per year for employees with more than 10 years continuous service (while maintaining existing provisions for termination pay).

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Compensation is still substantially more generous for most employees regulated by Ontario employment legislation.

The *Code*, in contrast to most provinces, provides employees in certain types of terminations with rights similar to unionized employees, to challenge the decision to terminate their employment and to claim reinstatement ("Unjust Dismissal"). On average, 1,400 employees per year make Unjust Dismissal claims. The Commission's recommendations include:

- Specialized, permanently appointed hearing officers replace the current system of appointing adjudicators on an ad hoc basis. It also proposes that Unjust Dismissal complaints, which often proceed slowly, be prioritized
- A new position, Director of Application Services ("DAS"), be established in order to increase overall efficiency of complaints processed under the *Code*
- DAS be empowered to summarily dismiss unjust dismissal claims which on their face are frivolous and vexatious

WORKPLACE BULLYING

Public awareness of the issue of workplace bullying or general workplace harassment has been steadily on the increase over recent years. However, with the exception of Quebec, victims of harassment or abuse have no specific statutory protection. The Commission did look to Part II of the *Code*, which deals with occupational health and safety standards. The Commission's recommendations include:

- Part II of the *Code* be amended to include a definition for workplace abuse, harassment or bullying
- Part II of the *Code* be further amended to establish procedures for preventing workplace harassment

THE PROBLEM OF MULTIPLE PROCEEDINGS

At present, the *Code* provides protection against sexual harassment, augmenting jurisdiction which also resides under the Canada *Human Rights Act*. Employees who file complaints sometimes pursue claims in more than one forum. For example, an employee may file an unjust dismissal claim and proceed to file a complaint with the Canada Human Rights Commission ("CHRC") in respect of the same facts. This is highly inefficient and increases costs and expenditure of time for all involved. The Commission had no solution which would eliminate this problem altogether. The Commission did recommend:

- The CHRC and others in government jointly discuss the possibility of expanding the jurisdiction
- A process be established for consultation between tribunals such as the CHRC and the DAS
- The power for a matter to be transferred from the DAS to the CHRC, or from the CHRC to the DAS, if it appears that a complaint would be more appropriately dealt with by such a transfer

CURRENT STATUS OF ARTHURS REPORT

The Arthurs Report was only recently released and it is difficult to say what will become of its many recommendations, only some of which are reflected above. A report from a commission such as the Arthurs Report is a first step in the process of law reform. The Report contains recommendations only and it is up to Parliament whether to adopt any or all of them. As well, because some of the recommendations are very general and require further industry consultation to clarify their scope, it may be some time before a bill adopting any of the recommendations is tabled.

Employers who are governed by federal legislation may wish to participate in further consultations in order to ensure that any changes to the law which are incorporated into a bill have taken into account their concerns. Concerned employers should contact their industry associations or Sherrard Kuzz LLP to see what feedback is being provided in response to the Arthurs Report.

We will keep you posted in our newsletter if and when further developments occur.

155 University Avenue, Suite 1500
Toronto, Ontario, Canada M5H 3B7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

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