

The Conference Board of Canada:
Council of Industrial Relations Executives

The Future of the Legislative Regulation of Industrial Relations

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Agenda

- Pensions and pension reform
- Ban on cell phone use while driving
- *Accessibility for Ontarians with Disabilities Act, 2005*
- Workplace violence and harassment
- Temporary help agencies
- *Apology* legislation
- Replacement workers

Pensions and Pension Reform

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Pensions and Pension Reform Overview

- *Kerry v. Nolan*, 2009 SCC 39
- *Hydro One v. FSCO* 2010 ONCA 6
- Pension Reform:
 - Solvency Funding Relief
 - Federal *Pension Benefits Standards Act*
 - Ontario – Bill 236
 - British Columbia – Bill 11
 - Nova Scotia – Bill 48
 - *Public Service Superannuation Act*

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Kerry v. Nolan, 2009 SCC 39

- Supreme Court released its decision on August 7, 2009
- Facts:
 - DB pension plan established in 1954
 - Original trust agreement: contributions to be used for exclusive benefit of plan members, retirees and other beneficiaries
 - 1954 to 1984: Employer paid all plan expenses
 - Amendments in 1985 and 1987: third party expenses paid from the fund
 - Amendment in 2000: DC component for new employees
 - Also amended to allow surplus in DB component to satisfy employer contributions to DC component

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Kerry v. Nolan, 2009 SCC 39

- Judicial History:
 - FST: Upheld the employer's use of the fund
 - Div. Ct.: reversed many FST finding
 - Court of Appeal: restored FST ruling
 - Employer allowed to amend plan to permit use of the fund to pay administrative expenses
 - Contribution holidays permitted for both DB and DC component
 - Plan could be amended to introduce DC component

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Kerry v. Nolan, 2009 SCC 39

- Supreme Court considered four issues:
- 1) Plan Expenses:
 - Employer could amend the plan to permit the payment of expenses from the fund
 - Did not matter that the original plan did not explicitly permit the payment of such expenses
 - Rejected the members' argument that the payment of expenses was not for the "exclusive benefit" of members
 - Fund could be used to pay reasonable and *bona fide* expenses

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Kerry v. Nolan, 2009 SCC 39

- 2) Contribution Holidays:
 - Employer may take a contribution holiday unless plan wording or legislation prohibits it (*Schmidt v. Air Products Canada Ltd.*)
- 3) Funding DC Contributions with DB Surplus:
 - Reasonable for FST to conclude that there was only one plan for both DB and DC members and only one trust
 - Possible to have different classes of members within the plan
 - Majority: funding DC portion with surplus from DB portion did not contravene "exclusive benefit" provision
- 4) Costs:
 - Agreed that FST could not order costs from the fund as the fund was not a party to the litigation

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Kerry v. Nolan, 2009 SCC 39

- Implications for Employers:
 - Flexibility in the payment of expenses from a pension fund – even if original documents did not expressly allow for it
 - Flexibility in satisfying DC contributions with DB surplus
 - Decision is not an authority for paying all plan expenses from the fund – only reasonable and *bona fide* expenses

Hydro One v. Ontario (Financial Services Commission) 2010 ONCA 6

- Main issue was whether the number of terminations of employment of members of Hydro One's pension plan could be considered "significant" under the Ontario *Pension Benefits Act* to order a partial plan wind-up
- Ontario Financial Services Tribunal ordered partial wind-up of Hydro One's pension plan due to the terminations of 73 non-unionized management employees
- Upheld by Divisional Court and Court of Appeal
- Terminated employees representing 2% of total plan members was small, but 18% of subset of non-unionized management employees was "significant"

Hydro One v. Ontario (Financial Services Commission) 2010 ONCA 6

- Court of Appeal found that remedial provisions of PBA should be given a “liberal interpretation”
- Ontario’s Bill 236, discussed later in further detail, proposes to eliminate all partial wind-ups in Ontario with an effective date prior to January 1, 2012
- Partial wind-ups can have significant implications
 - Plan members affected by a partial wind-up whose age/service total at least 55 are entitled to “grow-in rights” (grow into enhanced early retirement provisions)
 - Ontario’s Bill 236 proposes to extend “grow-in rights” at issue in partial wind-up cases to all eligible plan members who are involuntarily terminated from employment

Solvency Funding Relief

- 9 provinces and federal jurisdiction have announced some form of temporary solvency funding relief
- Measures taken by each jurisdiction not identical
- Common relief measure – extension of solvency amortization periods

Change to Federal *Pension Benefits Standards Act (PBSA)*

- Changes announced October 27, 2009 to PBSA
- 5 principal objectives:
 1. Enhanced protections for plan members
 2. Reduce funding volatility for defined benefit plans
 3. Make it easier for participants to negotiate changes to their pension arrangements
 4. Improve the framework for defined contribution plans and for negotiated contribution plans
 5. Modernize the rules for investments made by pension funds

Pension Reform in Ontario

- Bill 236 – *Pension Benefits Amendment Act, 2009*
 - Response to recommendations of the Ontario Expert Commission on Pensions
 - Only the first step in the Ontario government's plan to reform pension law; another bill is expected in 2010
 - Changes to Bill 236 are expected
 - Some changes come into effect immediately upon receiving Royal Assent, other changes come into effect on future dates

Pension Reform in Ontario

- Bill 236 – *Pension Benefits Amendment Act, 2009*
 - Corporate Reorganization
 - Future partial plan wind-ups will be eliminated
 - Full plan wind-ups will be allowed where “all or substantially all” of employer’s business is discontinued or sold or where “all or substantially all” members of the plan cease to be employed
 - Superintendent can consent to payment of surplus to the employer on plan wind-up
 - Facilitates transfer of assets on sale of business

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Pension Reform in Ontario

- Bill 236 – *Pension Benefits Amendment Act, 2009*
 - Plan Member Rights
 - Immediate vesting of pension entitlements
 - Due to greater number of pension amounts, threshold for small benefit commutations is 4% of YMPE and not 2% of YMPE
 - Extension of grow-in benefits to all members whose employment is involuntarily terminated as of January 1, 2012
 - Allow phased retirement pensions for members of defined benefit pension plans who meet a number of conditions

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Pension Reform in Ontario

- Bill 236 – *Pension Benefits Amendment Act, 2009*
 - Plan Administration
 - Ability to transfer certain cash payments from pension fund to RRSP or RRIF
 - Superintendent given power to order plan administrator to have an actuarial valuation or report prepared, even if not required in *PBA*
 - Increased transparency and access to information for plan members and pensioners
 - Encourage establishment of Pension Advisory Committees (PAC)
 - Plan administrators must provide notice of all plan amendments
 - Notices, statements and other documents can be provided electronically

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Pension Reform in British Columbia

- Bill 11 – *Pension Benefits Standards Amendment Act, 2009*
 - Largely administrative/housekeeping changes
 - Definitions updated to take into consideration different characteristics of multi-employer plans
 - Substantively:
 - Unlocking a pension plan now allowed for members with a terminal illness that is likely to considerably shorten his or her life
- Received Royal Assent March 31, 2009

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Pension Reform in Nova Scotia

- Bill 48 – *An Act to Amend Chapter 340 of the Revised Statutes, 1989, the Pension Benefits Act*
 - Provision for payment of a phased retirement benefit
- Received Royal Assent November 5, 2009

Pension Reform – *Public Service Superannuation Act*

- Targeted for possible cuts:
 - i) to control deficit; and
 - ii) to minimize staff shortages that will worsen in coming years
- Currently:
 - Public servants can retire with a full pension at age 55, after 30 years of service
- Possibility options:
 - Modifying or removing early retirement for new recruits
 - Collecting partial pensions while continuing to work

Ban on Cell Phone Use While Driving

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Ban on Cell Phone Use While Driving

- Ontario ban: Effective October 26, 2009 with a 3-month education period (February 1, 2010)
- Restrictions on hand-held wireless communication devices (i.e. cell phones, blackberries) and electronic entertainment devices (i.e. iPods)
- Exemptions:
 - Hands free devices, GPS (if used for navigation purposes)
 - If vehicle is stopped, off the road and not obstructing traffic
 - Ontario Regulation 366/09 provides specific exemptions for persons and devices (i.e. enforcement officers, ambulance drivers, fire trucks etc.)
 - Time-limited exemptions for taxis, tow trucks, couriers etc. until January 1, 2013

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Other Provinces – Cell Phone Bans

- Newfoundland – 1st province to ban use of cell phones 2003
- Quebec 2008
- Nova Scotia 2008
- British Columbia – January 1, 2010
- Saskatchewan – January 1, 2010
- Manitoba – legislation received Royal Assent June 2009, in effect within 1 year
- Prince Edward Island – January 23, 2010
- New Brunswick, Alberta and Yukon at public consultation stage
- Northwest Territories and Nunavut – no known plans

Ban on Cell Phone Use While Driving

- Implications
 - Minimize liability, ensure compliance
- Assess risk and develop policies
 - Conduct review of policies for all positions that involve vehicle use
 - Develop policies and programs to address and prevent liability

Accessibility for Ontarians with Disabilities Act, 2005

Accessibility Legislation and Standards

- Ontario 1st jurisdiction in Canada to develop, implement and enforce accessibility standards
- *Accessibility for Ontarians with Disabilities Act, 2005*
 - Goal of creating standards to improve accessibility across Ontario by 2025
 - The Act requires creation of accessibility standards that apply to both public and private sector organizations that
 - provide goods, services or facilities to the public;
 - employ persons in Ontario;
 - offer accommodation to the public;
 - own or occupy a building, structure or premises that are open to the public; or
 - engaged in a business or activity specified in the regulations.

Accessibility Standards for Customer Service O. Reg 429/07

- Regulation came into force on January 1, 2008
- 1st standard issued under *Accessibility for Ontarians with Disabilities Act, 2005*
- Regulation requires that all organizations which provide “goods or services” to the public must meet certain accessibility standards for customer service
- The deadline for compliance was January 1, 2010 for designated public sector organizations, and January 1, 2012 for other organizations (private and not-for-profit)

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Accessibility Standards for Customer Service O. Reg 429/07

- Regulation requires that all providers of goods or services do the following before the deadline:
 1. Establish policies, practices and procedures
 2. Use reasonable efforts to ensure policies etc. are consistent with the core principles of independence, dignity, integration and equality of opportunity
 3. Set policy to allow people to use their own personal assistive devices
 4. Communicate in a manner that takes disability into account
 5. Allow people to be accompanied by guide dog or service animal, unless animal is excluded by another law

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Accessibility Standards for Customer Service O. Reg 429/07

6. Permit use of a support person
7. Provide advanced notice of admission fees for support person
8. Provide notice when services relied on by people with disabilities are temporarily disrupted
9. Train people who interact with the public on topics outlined in customer service standard
10. Train people who are involved in developing policies on topics outlined in customer service standard
11. Establish process to provide feedback on services to people with disabilities and how you will respond

Accessibility Standards for Customer Service O. Reg 429/07

- Additional requirements for designated public sector organizations and providers with 20 or more employees:
 1. Document in writing your policies for providing accessible customer service
 2. Notify customers that documents are available upon request
 3. When providing documents, provide the information in a format that takes into account the person's disability

Other Accessibility Standards

- Employment
- Information and communications
- Public transportation
- Built environment (buildings and other structures)
- Final standards have either been submitted for consideration as law or are being reviewed by Committee

Workplace Violence and Harassment

Bill 168:

OHSA, Workplace Violence and Harassment

- Amends the OHSA to address workplace violence and harassment
- Effective June 15, 2010
- Imposes new obligations on employers
 - Need to assess the risk of workplace violence
 - Develop policies and programs to address and prevent workplace violence and harassment
 - Conduct reviews of policies
 - If employer is aware that domestic violence may occur, the employer must take every precaution reasonable in the circumstances for the protection of the worker
- Expanded Right of Work Refusals
 - Includes right to refuse work where employee has reason to believe that workplace violence is likely to endanger him/herself
 - Certain occupations are afforded a conditional right to refuse work (i.e. police, health care professionals)

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Other Jurisdictional OHS Requirements re Workplace Violence

- Federally-regulated workplaces – Canada Occupational Health and Safety Regulation
- The following provincial OHS legislation or regulations address workplace violence:
 - Alberta
 - British Columbia
 - Manitoba
 - Newfoundland and Labrador
 - Nova Scotia
 - Prince Edward Island
 - Saskatchewan
- New Brunswick, Quebec and the Territories OHS legislation or regulations do not address workplace violence
 - Quebec's employment standards legislation addresses "psychological harassment"

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Temporary Help Agencies

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Temporary Help Agencies - Ontario

- Effective November 6, 2009
- Temporary Agency is the employer
- Temporary workers have increased rights:
 - Notice of termination and severance pay
 - Guaranteeing provision of job descriptions, pay schedules, information on assignments
 - Entitled to public holiday pay
- Any elect-to-work employee must now be provided with:
 - Public Holiday pay (January 2, 2009)
 - Notice of termination and severance pay (November 6, 2009)

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Temporary Help Agencies - Ontario

- Temporary Agencies no longer permitted to:
 - Restrict a client from providing permanent position to assignment employee
 - Charging client a temporary to permanent fee after 6 months
- Bill 212 – *Good Government Act, 2009*
 - Received Royal Assent December 15, 2009
 - Restricts the mass termination provisions of the *ESA* for temporary help agencies

Apology Legislation

Apology Legislation

- 7 provinces have Apology legislation
- Ontario *Apology Act* came into force on April 23, 2009
- Purpose is to ensure that an apology made by or on behalf of any person in relation to any matter would not be considered an admission of liability or fault
- Evidence of an apology is not admissible in any civil or administrative proceeding or arbitration as evidence of fault or liability
 - Exception: apology made while testifying

Provincial Apology Legislation

- British Columbia, Nova Scotia, Manitoba and Newfoundland all have versions of an *Apology Act* similar to Ontario
- Saskatchewan and Alberta contain apology sections in their respective *Evidence Act* legislation
- Yukon tabled an *Apology Act* but it did not pass second reading in April 2008

Replacement Workers

Replacement Workers

- Federally, prior to 1999 there was no legislation governing the use of replacement workers during strikes and lockouts
- The 1999 amendment the *Canada Labour Code* qualified the right of the employer to use replacement workers for the purpose of continuing business provided it did not undermine the union's pursuit of legitimate bargaining goals (s.94(2.1))

Replacement Workers

Recent Attempts at Federal Bans on use of Replacement Workers:

- 2006: Bill C-236 introduced by NDP and Bill C-257 introduced by Bloc Québécois
- 2009: Bill C-337 introduced by Bloc Québécois
- Proposed changes would have (except in cases of essential services):
 - Prohibited hiring of new replacement employees to do work of bargaining unit;
 - Prohibit re-deployment of non-bargaining unit employees including management to do work of bargaining unit
 - Prohibit any striking bargaining unit employees to cross the picket line and return to work

Provincial Replacement Worker Legislation

- Currently, only Quebec and British Columbia have legislation banning use of replacement workers
- Ontario – ban on replacement workers between 1993 and 1995. Repealed by Harris government

Questions?