

OHRPA 2005 LAW CONFERENCE
*What's New, What's Hot in Labour
and Employment Law 2004 In Review*

**ONTARIO LABOUR RELATIONS ACT AMENDMENTS:
BACK TO THE FUTURE**

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Labour Relations Statute Law Amendment Act, 2004

- Bill 144 received first reading November 3, 2004
 - Second reading debated April 5th
- Government's stated objectives
 - Promote workplace stability
 - Restore balance and fairness to labour relations
- Restoring powers to OLRB
- Specific amendments in the construction industry

Return of Automatic Certification

- Bill 144 restores OLRB's power to order automatic certification as a remedy for an employer's unfair labour practice during an organizing drive
- Power was removed by the Conservative government in 1998 following OLRB certification order of Wal-Mart store
- OLRB's remedial power is currently limited to ordering another representation vote

The Wal-Mart Decision

- Subtle but effective threat to close store led Board to automatically certify the union
- Board - three violations of the LRA:
 - Failure of company to distance itself from remarks of anti-union associate and its “silencing” of pro-union employees “has a chilling effect on the union’s organizing drive”
 - Four managers circulating among staff to solicit questions about the unionization drive – “an extremely effective tactic of intimidation or undue influence”, as well as designed to identify union supporters
 - Conduct that most concerned the Board was Wal-Mart’s refusal to respond to questions about a possible store closure. This was a key employee concern

The Wal-Mart Decision

- “If you adopt the approach of constantly soliciting questions in [this environment], you have to answer them.... By not reassuring people that the store would not close the managers knew what conclusions the associates would come to. Manipulating the circumstances in this fashion allowed the seed to be planted and grow in the minds of the associates that if they supported the union they might lose their jobs.”

Employer Actions Which Have Resulted in Automatic Certification

- Surveillance, interrogation, monitoring of union organizers
- Intimidation and harassment
- Captive audience meetings
- Threats to economic/job security
- Termination of union organizers
- Lay-offs not motivated by legitimate business reasons

Canac Kitchens Ltd.
[1994] OLRB Rep. August 972

- Board declined to certify – found true wishes of the employee could be ascertained by way of a vote
- Board considered a number of factors:
 - The absence of any direct threats to employees about job security, or about the involvement of the union
 - The fact that the interference with the union organizers was not substantial and was kept quite private
 - The fact that no dismissals or even serious discipline of union organizers or supporters were carried out

Canac Kitchens Ltd.
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- Most importantly, Board considered the availability of other remedial responses to redress the unfair labour practices and to restore an environment conducive to a free expression of wishes by way of a vote
 - Size of the workforce was one factor assessed

Employer Unfair Labour Practice Test to be met

- As a result of employer's contravention of the Act:
 - Employees' true wishes not reflected in a representation vote; or
 - Union unable to obtain necessary 40% support

Employer Unfair Labour Practice Board powers

- Order a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees
- Order a second representation vote; or
- Automatic certification
 - Granted where no other remedy sufficient to counter effects of employer contravention

Employer Unfair Labour Practice

- In deciding an application, Board may consider:
 - The results of previous representation vote; and
 - Whether union appears to have adequate membership support for the purposes of collective bargaining

Union Unfair Labour Practice

- New parallel provision provides for remedies for unfair labour practices by unions

Union Unfair Labour Practice

- Under Bill 144, Board would also have the power to dismiss union's application for certification if no other remedy would sufficiently counter the violation

Where Board Dismisses Union's Application for Certification

- Union barred from reapplying for one year
- LRA 1995, currently bars any union from reapplying for one year
- However, board may consider an application if:
 1. An employee has changed positions
 2. New application is for a different bargaining unit which includes the employee's new position but does not include the employees original position

Reintroducing OLRB's Power to Issue Interim Orders

- 1992, NDP amendments to LRA gave OLRB power to make interim orders, including reinstatement
- 1998, Conservative government amended the LRA – Board power to make interim orders on procedural matters only
- Current act precludes OLRB from reinstating employees

Bill 144 – Interim Orders

- Restores OLRB's power to issue interim orders in the following instances:
 - Procedural matters on such terms as the Board considers appropriate
 - Requiring employer to reinstate an employee on such terms as the Board considers appropriate
 - Respecting terms and conditions of employment of an employee that have been altered or who has been subject to reprisal, penalty or discipline by the employer during an organizing campaign
- Burden of proof is on the applicant (union)

Issuing Interim Orders

Conditions to be met

- Employer's action occurred during an organizing campaign;
- There is a “serious issue to be decided”;
- The interim relief is necessary to prevent “irreparable harm” or to achieve “other significant labour relations objectives”; and
- The “balance of harm” favours granting the interim relief pending a decision on the merits

No Interim Order Where

- Board determines that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was not related to the employee's exercise of his or her rights under the Act

Restoring Card-Based Certification in the Construction Industry

- Manner in which applications for certification are processed
- Union will have option of having its application processed under current vote-based system or card-based system similar to what had been in place prior to 1998

Restoring Card-Based Certification in the Construction Industry

- More than 55% - Board may either certify the union or direct a representation vote
- Between 40 and 55% - Board must direct a representation vote
- Less than 40% - Board shall dismiss the application

Other Amendments

- Ends mandatory posting of decertification information
- Eliminates union salary disclosure
- Makes permanent a dispute resolution regime in the residential sector of the construction industry in Toronto and surrounding area
- Interest arbitrators in the ambulance sector
 - Bill 144 requires Minister to appoint an interest arbitrator who is “qualified” in the opinion of the Minister
 - No requirement under current Act for Minister to consider the individual’s experience in making the appointment

Practical Tips and Strategies for Maintaining a Union Free Workplace

Overview

- Why employees join unions
- Consequences of unionization
- How to avoid becoming unionized
- The certification process
- Union organizing drive
 - Warning signs
 - Union strategies
 - What employers cannot do
 - What employers can do

Why Employees Join Unions

- Wages – particularly where the unionized competitors in the industry have higher wages/benefits
- Job security
- Safety - where unsafe working environment exist
- Inconsistencies in application of Company policies and procedures
- Favouritism – discrimination or unfair treatment

Why Employees Join Unions (cont'd)

- To change Company policies, and have a “say”
- To improve the working environment
- Concerns not listened to or acted on in the past
- To have a voice
- To get recognition and respect from management
- Ineffective front line supervisor
- Revenge

Why Employees Join Unions (cont'd)

- Automatic promotion based on seniority
- Mistrust, lack of confidence in management
- Vehicle for grievance resolution
- Benefits – health, pension, vacation
- Strict guidelines regarding job description
- Feeling of power and belonging to a group
- Previous good experience in a unionized workplace

Why Employees Join Unions (cont'd)

- For bargaining power and the right to strike
- To obtain seniority benefits ie. choice of shifts or postings
- Ignorance of the consequences of signing union membership card

Consequences of Unionization

- Lack of flexibility
 - Collective Agreement
 - Less management freedom to make changes
 - Union consultation
- Cost
 - Wages and benefits
 - Overhead to service bargaining unit
 - Negotiations
 - Grievances
 - Day to day

How To Avoid Becoming Unionized

- Remove the incentive for your employees to unionize
- Develop positive employee relations on an ongoing basis, a workplace where employee dissatisfaction is reduced
- Establish communication programs and channels

How To Avoid Becoming Unionized (cont'd)

- Have an open-door policy
- Establish an employee/employer committee to address issues of concern
- Communicate with staff on timely, regular basis
- Implement a Q & A Board, Suggestion Box, etc.
- Increased job satisfaction

The Certification Process: 5 Days from Application to Vote

- Day 0: Company receives Application for Certification from Union
- Day 1: Company receives Notice of Application for Certification from the Ontario Labour Relations Board
- Day 2: The Company files its Response
- Day 3: The Union and the Company will receive a Notice of Vote and Hearing
- Day 4: The day before the Vote
- Day 5: The day of the Vote

The Certification Process: Day 0

- Company receives the Application for Certification from union
- Union must send the Application directly to the employer prior to filing it with the Labour Relations Board
- Unless there are other warning signs of union organization, this will be the first notification
- Statutory “freeze” on terms, conditions, rights, benefits and privileges of employment: business as before/usual
- Company required to respond to Union Application

The Certification Process: Day 0 (cont'd)

- Company has two (2) business days to file their Response
- Secret ballot certification vote will normally be held within 5 business days of receipt of the Application for Certification
- Do not ignore the Application: Get advice immediately
- You have two (2) business days to file Response with the Ontario Labour Relations Board (OLRB)

The Certification Process: Day 1

- Company receives notice of an Application for Certification from the OLRB
- Company instructed to post the Notice and also post the Application received on Day 0 in the workplace
- Possible communications with employees: Company's general position only, as no specific information available re: date, time and place of vote

The Certification Process: Day 2

- The Company files its Response with the OLRB
- Response should include:
 - Identification of employer and its representatives
 - Employer view of appropriate Bargaining unit
 - Affected parties (ie. Other trade union)
 - Vote arrangements
 - List of employees names who fall within Union proposed bargaining unit
 - List of employees who fall within employer proposed bargaining unit (if different from union)

The Certification Process: Day 2 (cont'd)

- This is the first and best opportunity to raise the following issues:
 - Does the union have membership evidence representing 40% of your workforce?
 - Is the scope of the Union's proposed bargaining unit appropriate?
 - Managers, supervisors, employed in confidential capacity to labour relations
 - Examine duties and responsibilities to determine if exclusion applies
 - Do the individuals in the proposed bargaining unit share a community of interest.
 - Who is eligible to vote?
 - Employees in the bargaining unit described by either party

The Certification Process: Day 2 (cont'd)

- The Board has on many occasions ruled that parties who do not raise these issues or object now will not be able to raise them later
- This is your only opportunity to have input into the date, time and place of the vote, because the Labour Board will set that date, time and place based only on the Union's application and your response

The Certification Process: Day 3

- The Union and the Company receive notice of vote and hearing (date, time and place)
- The parties consult with a Labour Relations Officer (LRO) regarding the list of eligible voters, the scope of proposed bargaining unit, and other issues prior to the vote

The Certification Process: Day 3 (cont'd)

- Possible communication with employees: Company's position on union certification
- Ensure employees are aware of date, time and place of vote: "Get out to vote". Otherwise decision of whether to unionize or not will be decided by your co-workers who do vote

The Certification Process: Day 4

- Day before the vote
- Possible further communication with employees:
Respond to Union's message or communications
- Continue to ensure employees are aware of date, time and place of vote "Get out to vote"

The Certification Process: Day 5

- The day of the vote
- Secret ballot vote will be conducted by official from the Ministry of Labour usually at the employer's premises
- An employer representative can scrutinize the vote
- Employees whose right to vote is "challenged" have been identified: their ballots will be sealed and segregated

The Certification Process: Day 5 (cont'd)

- Must raise any objections to Union or union supporters' conduct before or during the vote **either** at conclusion of the vote during completion of worksheet **or** within 5 business days
- Ballots will be counted **unless** there are a high number of exclusions, allegations of unfair labour practices, or a challenge to the 40%
- If 50% + 1 of votes in favour of unionization, the Union will be certified

Union Organizing Drive Warning signs

- Pamphlets and flyers
- Employee discontentment or disgruntlement
- Closed door meetings
- Disappearances of employee lists and directories
- More inquiries than usual about benefits, wages promotions, and other HR policies and procedures
- Questions regarding management's opinions of unions
- An increase in the number or nature of employee complaints or grievances

Union Organizing Drive Warning signs (cont'd)

- A change in the number, composition and size of informal groups at lunch and coffee breaks
- Employee discussion about past and future group meetings
- The sudden cessation of employee conversation when a member of management approaches
- Obvious change in employees' behaviour toward members of management, expressed either formally or informally

Union Organizing Drive Warning signs (cont'd)

- The sudden popularity of certain employees (especially if they are informal leaders)
- The appearances of strangers in the parking lot
- The distribution of cards or flyers or pro-union buttons

Union Organizing Drive

- Union approaches employees – sign membership cards (40% support required for application)
- Membership cards must be signed within a reasonable period of time (typically 6 months)
- Campaign can be:
 - Quiet – management not aware until it receives an application
 - Open – organizers visible at entrances
- Often quiet until core support is shown

Union Organizing Drive (cont'd)

- Unfair labour practice to interfere in employee's right to organize
- *Labour Relations Act (LRA)* does not prohibit organizing during business hours on non-working hours (ie. lunch and breaks)
- *Labour Relations Act (LRA)* does not allow organizing on Company time

Union Organizing Drive Union Strategies

- Inside Organizing
 - The union receives an invitation from one of your employees
- Cold Organizing
 - Pamphlets or flyers in the parking lot or lunchroom

Union Organizing Drive Employers Cannot:

- Use coercion, intimidation, threats promises or undue influence
- Discriminate against union supporters
- Use power of dismissal to “freeze” an organizing drive
- Increase wages and benefits in a manner that could be perceived as a bribe for remaining non-union
- Threaten employees with job loss, reduction in wages etc...
- Threaten or imply if union certifies plant will be closed or moved

Union Organizing Drive Employers Cannot: (cont'd)

- Transfer employees from desirable to undesirable work
- Engage in preferential treatment towards non-union employees
- Discipline or discharge union supporters/organizers
- Make a work assignment for the purpose of causing an employee (union supporter) to quit job
- Lay off employees in hope of curbing union's strength or to discourage union activity
- Harass employees about whether they have signed a union card

Union Organizing Drive Employers Cannot: (cont'd)

- Ask employees how they are going to vote in secret ballot representative vote
- Ask employees when they are hired if they belong to a union, carry a union card, or have signed a union authorization card
- Ask employees about internal affairs of the union
- Urge employees to persuade other employees to oppose union or to vote against it

Union Organizing Drive Employers Cannot: (cont'd)

- Interview employees, individually or in small groups, in Company offices about the union
- Deny merit or automatic wage increases if the purpose is to discourage union activity
- Initiate a “not to have union” petition for employees to sign
- Solicit employees to withdraw or get out of the union
- Refuse to answer legitimate employee questions about the impact of unionization

Unfair Labour Practices: Consequences for the Company

- New vote
- Union meetings on Company premises during working hours
- Postings
- Union organizing costs
- * Automatic certification (certification without 50% + 1)
- * Interim reinstatement of employees

Union Organizing Drive Employers Can:

- Protect employees from undue harassment – *pestering* – from union organizers
- Prevent union solicitation during working hours
- Express in letter desire to remain non-unionized
- Convey to employees the good working relationship that exists at your Company

Union Organizing Drive Employers Can: (cont'd)

- Advise employees of the costs associated with unions (ie. initiation fees, special assessments and regular union dues)
- Advise employees of concerns regarding changes that may occur if union succeeds
- Let employees know that Company prefers to deal with them individually and directly and is willing to discuss any interest or problem they may have

Union Organizing Drive Employers Can: (cont'd)

- Advise employees that union promises may not be translated into employee gains during collective bargaining
- Express views in small or large group meetings
 - Not an unfair labour practice unless there is an aggressive message to a “captive audience” (workplace meeting during work hours where attendance compulsory or absences are obvious)