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CONSTRUCTION LAW SECTION | SECTION DU DROIT DE LA CONSTRUCTION

2. BILL 144 (AMENDMENTS TO THE *LABOUR RELATIONS ACT*)

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In Bill 144, which received first reading on November 3, 2004, the Ontario Government has introduced amendments to the Ontario *Labour Relations Act* that could have serious consequences for construction businesses and of which all counsel representing construction clients should be aware.

Positioning the changes as an attempt to 'rebalance' the *Act*, the McGuinty government has proposed changes that would enable construction industry trade unions to be certified without employees ever having expressed their views through a secret ballot vote, and would reinstate the possibility of remedial certification where an employer commits misconduct during a union organizing campaign.

The Impact of Unionization:

Where a construction company is unionized, the employer is no longer able to deal directly with its employees regarding terms and conditions of employment. It must, in most cases, negotiate a collective agreement with the union that represents the employees. If the employer and union cannot agree on terms, the ultimate result may be a strike or lock out of employees, either of which results in economic losses.

Companies operating in the Industrial, Commercial and Institutional ("ICI") sector of the construction industry do not even have the opportunity of *negotiating* a collective agreement. Instead, they automatically become bound to standard "provincial" collective agreements negotiated by industry committees over which that employer may have no influence. The terms and conditions (including wages) for its employees are set by someone else.

And for those contractors who believe that if their company becomes unionized they can simply shut down and start up a new non-union company, think again. The *Act* expressly contemplates moves like these (including starting a new company under a spouse or relatives' name), and contains provisions to prevent it from happening. In short, if someone is the "key person" in a company that becomes unionized, any construction company in which he or she is a "key person" after that will likely end up bound to the same union.

In short, many construction companies that are currently non-union have an interest in ensuring they stay that way.

Card-based Certification:

Currently, where any trade union makes an Application for Certification seeking to represent employees of a particular employer, if that union proves to the Labour Relations Board that it has the support of at least 40% of those employees (done through the collection of membership cards), the Labour Board will order a vote. At the vote, supervised by Labour Board staff and conducted by secret ballot, all employees of that employer have a chance to vote either for or against the union.

Under Bill 144, where a trade union files an Application for Certification and submits membership cards for more than 55% of employees, it will be certified without there ever having been a vote.

One of the major concerns with this type of scheme is that employees who sign membership cards do not always understand the consequences of what they are doing. They may sign a card believing it to mean something it does not, may sign out of embarrassment that they do not understand what they are being told, and may even sign a card just to appease the person asking them to sign it. Many employers have even heard of circumstances where employees have been actively misled about what signing a card means. Unions are under no obligation to ensure that employees understand the real ramifications of signing a card.

As it stands now, where any of these things have occurred the individual will still ultimately get the opportunity to mark a ballot either for or against the union in a secret ballot vote and to express their true wishes about unionization. If these amendments pass as they are now written, employees will lose that right.

Further, in the current scheme of the *Act*, the employer is given notice of the Application for Certification, and therefore has the opportunity to communicate with its employees its views about unionization. This often provides the employer with the opportunity to correct misinformation employees may have received elsewhere. Under Bill 144, unionization may occur without the employer ever being aware until it is too late.

Interestingly, the current amendments allowing "card-based certifications" will only apply to the construction industry (and not, for instance, in industrial settings).

Automatic Certification:

Currently, if an employer violates the *Act* during a union organizing campaign (for instance firing a union organizer or supporter, or threatening to close the business if it is unionized), the Labour Board can ignore the results of a vote and can order a *second* vote. In addition, the Labour Board can put in place any conditions it finds necessary to ensure that second vote will truly reflect the employees' wishes about whether or not they want to be unionized.

The conditions often include the union being permitted to meet with the employees on the employer's premises, and on the employer's paid time, to talk about all the benefits of belonging to a union. In one case, the

Labour Board even let the union have an office in the employer's facility during the period between the first and second votes, so that employee's could have easy access to union representatives.

However, none of that is as significant for non-union employers as the return of "remedial certification."

Under the new amendments, where an employer violates the *Act* during a union organizing drive one of the things that the Labour Board can do is to grant the union certification, regardless of the outcome of any employee vote, and regardless of how many membership cards the union was able to get signed by employees.

This would mean that, as a result of the employer's conduct, a union could become certified to represent employees, even where the employees have expressed no real interest in being represented by a trade union.

This means that everything an employer says and everything an employer does in the context of a union organizing drive will be under extreme scrutiny. As with the law in general, an employer's claim not to be aware of the boundaries is no excuse. If an employer does not understand where the lines are drawn between "free speech" and a violation of the *Act*, it may end up unionized regardless of the wishes of its employees. This can be potentially financially devastating, particularly for small contractors.

While these proposed changes are not yet law, they certainly indicate where the Government is headed (even though, in fairness, Bill 144 would make permanent the special bargaining and dispute resolution regime for residential construction in the Toronto area in place since 2001, to prevent consecutive strikes from paralyzing the homebuilding industry, as happened in 1998). Employers and their counsel must be aware of these potential changes, and what they mean to the ability to interact with employees. Non-union employers wishing to remain so must employ proactive strategies; a misstep may mean both costly litigation, and ultimately unionization.

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