

GUIDE TO BILL 139

AMENDMENTS TO THE

LABOUR RELATIONS ACT, 2000

ONTARIO FEDERATION OF LABOUR

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Summary and Analysis Of Bill 139

The Labour Relations Amendment Act, 2000

Introduction

1. On November 2, 2000 the Harris Government introduced Bill 139, the *Labour Relations Amendment Act, 2000*, which contains significant amendments to the *Labour Relations Act, 1995*. If enacted, Bill 139 would place significant new obstacles in the way of unionization and the bargaining of first collective agreements and would influence the choice of employees in favour of decertifying existing trade unions.

2. In summary, Bill 139:

- requires the Government to prepare, and employers to post and distribute information advising employees how to decertify their unions;
- targets particularly vulnerable employees in first agreement situations in order to encourage employers and any employees who are opposed to the union to undermine the union so that it cannot obtain a foothold in the workplace;
- limits the right of employees to choose to become unionized by penalizing them for previous unsuccessful efforts to unionize;
- extends the window in which termination and displacement applications may be brought from two months to three months prior to the expiry of a collective agreement;
- enacts a number of significant amendments relating to construction labour relations, including expanding the definition of so-called non-construction employers and the scope of project agreements;
- requires disclosure of salary and benefit information of union employees and officials where the combined total of benefits and salaries exceeds \$100,000.

Government Promotes Decertification

3. Bill 139 includes an unprecedented provision which would require the Minister of Labour to prepare and publish a document advising employees as to how to decertify a union. The document must explain who may bring a termination application, when the application may be made and the procedure for so doing under the *Labour Relations Act, 1995* and the Rules of the Ontario Labour Relations Board. The Minister is entitled to prepare a new document in the event the information in the original document becomes out of date. Bill 139 contains no parallel provision requiring the Minister to publish a document for non-unionized employees explaining how to join a union and to apply for certification.

See Bill 139, section 9; *Labour Relations Act*, sections 63.1(1) to (3)

4. Further, while employers are under no obligation to provide information to non-unionized employees regarding how they might unionize, they will be required to post the Minister's decertification information in the workplace and must distribute it to each unionized employee once every year. The obligation to post and distribute the decertification document applies to any employer with respect to whom a trade union has been certified or who has voluntarily recognized a trade union. Specifically, the employer is required to use reasonable efforts to:

- post and keep posted a copy of the Minister's decertification document in a conspicuous place in every workplace at which employees represented by the trade union perform work;
- post and keep posted with the decertification document a notice that any employee represented by the trade union may request a copy of the document from the employer;

- actually provide a copy of the decertification document to all employees represented by a trade union once in each calendar year;
- provide a copy of the decertification document to any employee upon request.

See Bill 139, section 9; *Labour Relations Act*, section 63.1(4)

5. Such an unbalanced provision will clearly and inevitably signal to employees that the Government of Ontario, the Ministry of Labour and employers in Ontario prefer that employers operate union-free, rather than sending a message that employees have and may freely exercise a statutory right to collective bargaining. Employees, who will be inundated with government sanctioned information from their employer about how to get rid of their union cannot help but conclude that both their employers and society would prefer that they not belong to a union. This approach is directly contrary to longstanding public policy in Ontario, as well as throughout Canada and other democratic countries, to encourage and promote collective bargaining. It also contradicts Canada's obligations under international law, including those contained in binding International Labour Organization Conventions, to promote freedom of association and to recognize the right to collective bargaining.

6. Bill 139 not only permits but **requires** employers to distribute information which directly impacts upon the right of employees to be represented by a bargaining agent of their choice. Currently, an employer providing such information would be guilty of committing an unfair labour practice. Indeed, Bill 139 recognizes this and includes a specific provision which provides that an employer who posts and distributes the decertification information will not be found to have violated the *Labour Relations Act*, 1995.

See Bill 139, section 9; *Labour Relations Act*, section 63.1(5)

7. These provisions will encourage employees to curry favour with their employers by requesting decertification information and will make it extremely difficult to ascertain whether a decertification application represents the true wishes of employees or resulted from employer initiatives. In this regard, it has long been recognized that, given the responsive nature of an employee's relationship with an employer and the employee's natural desire to want to appear to identify him or herself with the employer's interests and wishes, the employee is peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his or her rights under the *Labour Relations Act*. The provisions of Bill 139 institutionalize these improper influences. Indeed, the provisions are particularly unfair given that they do not place a corresponding obligation on an employer to advise non-unionized employees as to how to certify a union.

8. In addition to requiring employers to provide employees with Government sanctioned information regarding decertification, Bill 139 also expands the window for making decertification applications to the last three months of the operation of the collective agreement, rather than the existing two months. Where the term of a collective agreement exceeds three years, a decertification application may be brought anytime after the commencement of the 34th month of the agreement's operation and before the commencement of the 37th month of its operation **and** in the last three months of each subsequent year that the agreement continues to operate.

See Bill 139, section 8(1); *Labour Relations Act*, section 63(2)

9. Similarly, the period in which a displacement application (i.e. a raid by another union) may be brought has been lengthened from the last two months of the operation of the collective agreement to the last three months. Where a collective agreement is for a period longer than three years, a displacement application may be brought anytime after the commencement of the 34th month of its operation and before the commencement of the 37th month of its operation.

See Bill 139, section 2(1) to (3); *Labour Relations Act*, sections 7(4) to (6)

Encouraging Decertification in First Contract Situations

10. Bill 139 also contains two additional amendments which will encourage a minority of employees opposed to a newly certified trade union to continue to resist the union and will encourage employers to refrain from engaging in meaningful bargaining with the trade union.

11. Under the existing provisions of the *Labour Relations Act, 1995*, where the parties are unable to reach a collective agreement as a result, among other reasons, of the employer failing to recognize the trade union, taking an uncompromising position in bargaining or failing to make reasonable or expeditious efforts to reach an agreement, an application for a direction ordering first agreement arbitration may be made to the Ontario Labour Relations Board. Where an application for first agreement arbitration is brought, the Board has a discretion not to consider any termination application or displacement application until it has determined whether or not first collective agreement arbitration is appropriate. The Board's general practice has been to consider such applications in the order in which they were filed with the Board.

12. Under the proposed amendments, if a termination or displacement application is brought anytime before the Board issues a final decision in respect of an application for first contract arbitration, the termination application must take precedence such that the Board is required to deal with the termination application first. Where the termination application is successful, the first contract arbitration proceedings must be dismissed.

See Bill 139, section 5; *Labour Relations Act*, sections 43(23) and 43(23.1) to (23.4)

13. This provision will also apply to any application for first agreement arbitration in which a final decision has not been made by the Board prior to Bill 139 receiving Royal Assent.

See Bill 139, section 5; *Labour Relations Act*, section 43(23.5)

14. This proposed amendment will not only encourage employers to delay bargaining and to seek to lengthen and delay legal proceedings related to applications for a first agreement arbitration in the hope that employees will become dissatisfied and frustrated and bring a decertification application, but will reward employers for doing so.

15. Indeed, given that employees in first agreement situations are extremely vulnerable, the effect of this proposed amendment will be to frustrate the rights of employees who have selected collective bargaining as their preferred means to deal with their employer, rather than encouraging the democratic exercise of collective bargaining rights.

16. Bill 139 also provides that, in first collective agreement situations, the ballot question in a vote to ratify a collective agreement or a memorandum of settlement is restricted to a choice between ratifying or not ratifying the agreement or settlement; the question cannot contain any direct or indirect reference to calling a strike. Similarly, in a vote to call a strike, the ballot question must be restricted to a choice between authorizing or not authorizing the calling of a strike and cannot contain any direct or indirect reference to ratifying a collective agreement or memorandum of settlement.

See Bill 139, section 11; *Labour Relations Act*, section 79.1

17. The potential effect of these provisions would be to leave trade unions in a situation where a collective agreement has not been ratified but where employees have not authorized the union to engage in economic sanctions in order to obtain a collective agreement, thus leaving the union in limbo and with no effective bargaining power. This will encourage employees opposed to a trade union to engage in one of their favourite techniques - namely, to persuade other employees to reject the settlement as not being sufficiently favourable even though the employees may be reluctant to go on strike. This means a union can be placed in the untenable position of being unable to conclude a collective agreement and unable to exercise economic sanctions against the employer. Employees in such a situation are often more vulnerable to encouragement to seek decertification. Since this proposed amendment would not apply to votes conducted by

unions who have already negotiated their first collective agreement, it is clear that the true purpose of the amendment is to undermine the capacity of employees in the most vulnerable of situations to effectively bargain their first agreement.

Placing Obstacles in the Way of Certification

18. While the government has introduced Bill 139 under the banner of workplace democracy, the Bill's amendments to certification procedures are anything but democratic. A key change to the certification process would establish an automatic bar prohibiting **any** union from applying for certification for a period of one year where:

- a union withdraws its application for certification for the same group of employees before a representation vote is taken twice in a six month period;
- a union withdraws its application for certification after a representation vote;
or
- a union's application for certification is dismissed by the Ontario Labour Relations Board.

See Bill 139, sections 2(5), 2(6) and 4; *Labour Relations Act*, sections 7(9.1), 7(10) and 10(3)

19. Currently, a one year bar is imposed where an application for certification is dismissed by the Board following an unsuccessful representation vote or where a union withdraws its application following a representation vote. The Board has a discretion to impose a bar in situations where an application for certification is withdrawn prior to a vote being held. However, these bars apply only to the trade union which brought the application (although the Board also has a discretion under section 111(2)(k) of the Act to refuse to entertain any subsequent application for up to one year). The bar provided for in Bill 139, on the other hand, is automatic and will apply not only to the union which brought the application, but also to any other union.

20. Further, the bar imposed under Bill 139 will apply not only in respect of the same bargaining unit but to a different bargaining unit if there is any overlap of employees. However, no overlap is deemed to exist where an employee who was the subject of the first application no longer occupies the same position and the employee would not have been in the new proposed bargaining unit if he or she continued to occupy his or her old position.

See Bill 139, sections 2(5), 2(6) and 4; *Labour Relations Act*, sections 7(9.3), 7(10.1) and 10(3.1)

21. Therefore, in situations where employees are faced with the choice of two or more unions competing for the right to represent them, and one union applies for certification early and is unsuccessful, the second union, which employees may wish to represent them, will be barred from bringing an application for certification for a period of one year. Thus, rather than strengthening the democratic choice of employees, Bill 139 unfairly and arbitrarily restricts it.

22. Further, the legislation permits the very real possibility that a minority of employees opposed to unionization will form an employee association and apply for certification in order to lose a representation vote (or, alternatively, continuously apply and withdraw applications every six months) so as to bar any other legitimate union from applying for a period of one year or longer. As trade unionists are aware, a bar for a period of one year in the labour relations context can be critical, since key employees who are supportive of a union can be effectively weeded out by the employer and new employees opposed to the union can be hired so as to undermine any subsequent certification attempt. The legislation will encourage this type of manipulation and frustration of employees' true wishes.

23. While Bill 139 provides that the bar will not be imposed where the union which withdrew or lost the representation vote is an employer-dominated union, establishing employer domination may not be possible in many cases. Further, the provisions

respecting employer-dominated unions would not apply where a minority of employees who are opposed to unionization purposefully spoil the opportunity of legitimate trade unions and the democratic wishes of employees.

See Bill 139, sections 2(5), 2(6) and 4; *Labour Relations Act*, sections 7(9.2), 7(10.2) and 10(3.2)

24. The Minister of Labour has sought to justify these amendments by claiming that successive applications for certification may cause disruption for employers. However, there is simply no evidence to indicate that successive applications for certification occur very often, much less that they have been the norm. Indeed, this Government's previous amendments to the *Labour Relations Act, 1995* have significantly reduced the number of certification applications being brought by trade unions.

25. Moreover, the unbalanced and undemocratic nature of the Bill 139 amendments is demonstrated by the fact that, while bars on certification processes will be required allegedly on the basis that it is disruptive to an employer's enterprise, no automatic limitations are placed on the number of successive decertification applications which may be brought. Indeed, as discussed above, Bill 139 actually goes so far as to seek to instruct employees on how to decertify a union.

Salary Disclosure for Union Officials

26. Bill 139 would also amend the *Labour Relations Act, 1995* to require unions to disclose the salaries and benefits of union officers, directors and employees, whose total annual income including salary and taxable benefits is \$100,000 or more. Once again the Government has opted for an unfair and unbalanced approach in enacting these disclosure provisions: no similar requirement has been placed upon private sector employers to disclose the salaries of managerial employees, officers or directors. This information would be of at least as much interest to employees and would be useful to have for collective bargaining purposes.

See Bill 139, section 12; *Labour Relations Act*, section 92.1

27. Equally egregious is the fact that the rules for reporting the income of union officers and employees are not the same as those governing the disclosure of salaries of public officials. Under the *Public Sector Salary Disclosure Act*, public officials must report the value of their salaries and benefits only where their **salaries** are in excess of \$100,000. Bill 139 requires unions to report this information where the **combined total of salaries and benefits** is in excess of \$100,000. This means that public sector union officers will be required to disclose their income, even where they earn significantly less than their management counterparts. The only explanation for this unfair treatment is that the Government must have realized that a parallel provision would not have captured very many union employees and officers.

28 The term “salary” is defined in Bill 139 to mean the amount required by section 5 of the *Income Tax Act* to be included in the employee’s income as remuneration from an office or employment, any additional amounts received pursuant to an agreement made either during the time or immediately after the individual was an employee under section 6(3) of the *Income Tax Act* and any amount received as part of a salary deferral arrangement under subsection 6(11) of the *Income Tax Act*. The term “benefits” is defined to include the total of each amount that the employee is required by subsection 6(1) of the *Income Tax Act* to include in income from an office or employment and certain amounts required by section 6 of the *Income Tax Act* to include as income from an office or employment as a benefit.

See Bill 139, section 12; *Labour Relations Act*, section 92.1(1)

29. Where an officer or employee is employed by both a parent and a local union, the disclosure requirement is based on the combined income.

See Bill 139, section 12; *Labour Relations Act*, section 92.1(11)

30. The disclosure requirement would not only apply to trade unions under the *Labour Relations Act, 1995*, but would also apply to:

- bargaining agents for employees under the *Crown Employees Collective Bargaining Act*,
- teachers' associations designated as bargaining agents under the *Education Act*,
- employee organizations under the *Colleges Collective Bargaining Act*,
- police associations under the *Police Services Act* and under the *Public Service Act*,
- bargaining agents for firefighters under Part IX of the *Fire Protection and Prevention Act, 1993*; and
- any other prescribed organizations that represent the interests of trade unions or employees.

See Bill 139, section 12; *Labour Relations Act*, section 92.1(1)

31. Beginning in 2001, trade unions would be obligated to provide statements to the Minister, as well as to individuals represented by a local trade union who make written requests to the trade union, setting out the amount of salary and benefits paid in the previous year to every employee to whom it paid salary and benefits totaling \$100,000 or more. Such statements must:

- indicate the year to which the information relates;
- list employees alphabetically by surname;
- show for each employee the employee's name, the office or position held;
- set out the amount of salary the trade union paid;

- set out the amount of benefits reported under the *Income Tax Act*.

See Bill 139, section 12; *Labour Relations Act*, sections 92.1(2) and (13)

32. The information contained in the statement may be published by the Minister or anyone who receives a copy of it. The disclosure of such information is deemed not to constitute a contravention of the *Freedom of Information and Protection of Privacy Act* and is deemed not to be a breach of any agreement which would otherwise restrict or prohibit the disclosure.

See Bill 139, section 12; *Labour Relations Act*, sections 92.1(15) and (16)

33. Trade unions will be required to keep a list of the names and addresses of the individuals to whom it provided a statement.

See Bill 139, section 12; *Labour Relations Act*, section 92.1(14)

34. Local trade unions that have parent unions with offices in Ontario are required to give the parent union a statement disclosing salary information no later than March 15th of the following year. Where an individual makes a request to a local union for salary information, the local trade union must convey the individual's request to the parent union within ten days after the request was made. The parent union then has an obligation to comply with the requirement to provide salary disclosure statements as if the request had been made directly to the parent union.

See Bill 139, section 12; *Labour Relations Act*, sections 92.1(3), (7) and (12)

35. Prior to providing the salary disclosure statement to the Minister, trade unions are required to give every employee who will be listed in the statement two weeks advance written notice that the union intends to disclose his or her salary information in the statement.

See Bill 139, section 12; *Labour Relations Act*, section 92.1(5)

36. Where a trade union does not pay any employee more than \$100,000 dollars in salary and benefits, the trade union must still provide both the Minister and any requesting employee a written statement signed by the union's highest ranking officer attesting to the fact that no such payments were made.

See Bill 139, section 12; *Labour Relations Act*, section 92.1(6)

37. Trade unions are required to provide salary disclosure statements to the Minister by April 1st of the year following the year in which the salary was paid. Where a request is made by an individual, the information must generally be provided within 60 days.

See Bill 139, section 12; *Labour Relations Act*, sections 92.1(8) to (10)

38. Where a trade union fails to provide a statement, or the statement is inaccurate or incomplete, the Minister of Labour or the individual making a request would be able to file a complaint with the Ontario Labour Relations Board. The Board can order the union to provide an accurate and complete statement to every individual represented by the trade union and to the Minister. The Board may also order the trade union to have its financial records audited and its statement certified by a public accountant before it is provided to the complainant and/or the Minister. The trade union is required to bear the costs of any audits or certifications required.

See Bill 139, section 12; *Labour Relations Act*, sections 92.1(18), (20), (22), (23) and (25)

39. Bill 139 also provides for a complaint to be made by a parent trade union against a local union where the local has failed to provide statements to the parent in accordance with the requirements of the Act or has provided a list that is inaccurate or incomplete.

See Bill 139, section 12; *Labour Relations Act*, sections 92.1(19), (21), (24) and (25)

Amendments to Construction Industry Provisions

Project Agreements

40. In 1998, the government introduced amendments to the *Labour Relations Act, 1995* which allow an industrial project owner and affected local unions to negotiate working conditions for a specific project which differ from those contained in a provincial agreement. Bill 139 makes two significant changes to the Act's provisions governing project agreements. Firstly, under Bill 139, a proponent may include several different projects in the same application. This would enable a proponent to put a more enticing project up for consideration at the same time as it seeks more concessions on smaller projects. By presenting it as a package, a proponent is given an advantage in pressuring for acceptance of the group of projects.

See Bill 139, section 36; *Labour Relations Act*, section 163.11

41. Secondly, the new provisions include non-construction (that is, maintenance) work in the project agreement framework so that non-union contractors working on the project cannot be certified for either construction or non-construction work, and will not be deemed to have voluntarily recognized a trade union by performing work pursuant to the trade union's collective agreement. The language is designed to ensure that non-union contractors can work on these projects, apply the collective agreement, and not be bound by collective agreements when they are off the project.

See Bill 139, section 35(8); *Labour Relations Act*, sections 163.1(16), (16.1) and (17)

Non-Construction Employer Provisions

42. Bill 139 also significantly changes the Act's definition of "non-construction employer". Currently, a non-construction employer is defined in the Act as "a person who is not engaged in a business in the construction industry, or whose only engagement in such a business is incidental to the person's primary business". The definition of non-construction employer under Bill 139 is "an employer who does no work in the construction

industry for which the employer expects compensation from an unrelated person". The new definition may capture owners of construction projects who employ construction workers to perform construction work, but who are doing so for their own benefit and without compensation from unrelated parties, such as municipalities, school boards, oil companies and banks.

See Bill 139, section 22(2); *Labour Relations Act*, section 126

43. Bill 139 also makes it easier for a non-construction employer to terminate a trade union's bargaining rights. Currently, a non-construction employer may apply to the Board to terminate a trade union's representation rights and the Board must grant the application provided the non-construction employer did not employ any construction industry employees on the day the application is made. Bill 139 will remove the requirement that no construction industry employees be employed on the date of the application, which means that a non-construction employer will be able to obtain a declaration that a trade union no longer represents construction industry employees merely upon application to the Board. Taken together, these amendments greatly increase the scope of employers who can make application to rid themselves of collective agreements in the construction industry.

See Bill 139, section 25; *Labour Relations Act*, section 127.2(2)

Other Amendments to Construction Industry Provisions

44. Bill 139's amendments respecting decertification and bars, described above, also apply to the construction industry. It also appears that the provisions respecting first contract arbitration apply to the construction industry as well.

45. Bill 139 also provides that section 8.1 of the Act will apply to applications for certification in the construction industry. Introduced by the Government in 1998, section 8.1 allows an employer to challenge the union's estimate of the number of individuals in the appropriate bargaining unit for the purposes of deciding whether to direct a

representation vote. Where a challenge is made, the ballot box is sealed unless the parties agree otherwise. The Board must then determine whether the union's description of the bargaining unit could be appropriate for collective bargaining. If so, the Board must determine the number of individuals in that unit. If not, the Board must determine what the appropriate unit is and the number of individuals in that unit. Then, having regard to the union's membership evidence, the Board must ascertain whether 40% of the individuals in the union's proposed unit or the appropriate unit appear to be members of the union. If it does, the ballots will be counted. If it does not appear that 40% of persons in the bargaining unit are members of the union, the application for certification will be dismissed, even though the union may have won the representation vote. If the ballot box was sealed, the ballots will be destroyed without being counted.

46. Following its introduction to the Act, the Board determined that section 8.1 did not apply to applications for certification in the construction industry. Bill 139 would legislatively reverse this decision, making section 8.1 applicable to construction certification applications. Therefore, if a construction trade union wrongly estimates the number of persons in the unit, the application for certification may be dismissed, even where the union may have won the representation vote. This will cause significant problems for unions, given that the transient nature of the construction industry makes it difficult to accurately measure the number of persons in a proposed bargaining unit. Moreover, the Government has once again introduced amendments to the Act under the guise of workplace democracy which in fact allow a union to be denied certification even where employees have voted in favour of the union.

Bill 139, section 3; *Labour Relations Act*, section 8.1(5)

47. In addition, sector disputes will now be dealt with as "consultations", rather than hearings, in the same manner as jurisdictional disputes are now conducted.

See Bill 139, section 38; *Labour Relations Act*, section 166

Other Amendments

Duty of Fair Representation Complaints

48. All duty of fair representation complaints filed with the Ontario Labour Relations Board will be heard by the Chair or a Vice-Chair sitting alone rather than three-member panels. However, the Chair of the Board would still be entitled to order a three-member panel if the Chair considers that it is inadvisable that the matter be heard by the Chair or a Vice-Chair alone.

See Bill 139, section 17; *Labour Relations Act*, section 110(14.1)

Delay in Release of Board Decisions

49. Where a hearing has been commenced before the Ontario Labour Relations Board and the Board has not issued a decision, order, direction, declaration or ruling within six months of the last hearing date, the Chair of the Board may, upon the application of a party, terminate the proceeding and re-institute the proceeding on such terms and conditions as the Chair considers appropriate. The re-instituted proceeding would be heard by different member(s) than those who had previously dealt with the matter.

See Bill 139, section 18; *Labour Relations Act*, section 115.1

Compellability of Witnesses

50. Currently, the Act specifies persons who cannot be called as witnesses in any court or tribunal proceeding to give evidence respecting information or material they received when endeavoring to effect a collective agreement. These persons include the Minister, a Deputy Minister Employed in the Ministry of Labour, an Assistant Deputy Minister of Labour, the Director of Labour Management Services, the Chair or member of a conciliation board and any other person appointed by the Minister under the Act who is endeavoring to effect a collective agreement. Bill 139 extends the Act's protections against

being called as a witness to any person authorized in writing by the Director of Labour Management Services to endeavor to effect a collective agreement.

See Bill 139, section 19; *Labour Relations Act*, section 120(1)