

Shaking up labour laws

Ontario is looking at wide-reaching amendments to the statutes governing workplaces, but how far will they actually go?

by Shannon Kari



When the Ontario government announced a review earlier this year of the provincial Employment Standards Act and Labour Relations Act, the terms of reference were very broad. The Changing Workplaces Review is to consider possible amendments to both statutes in light of “trends and factors” that include globalization, trade liberalization, technological change, the growth of the service sector,

and changes in “standard” employment relationships.

Appointed as special advisers to oversee this challenging task were Michael Mitchell, a former partner at the union-side firm Sack Goldblatt Mitchell LLP (now Goldblatt Partners LLP), and John Murray, a retired Superior Court judge and former senior employer-side labour lawyer. Since the initial public announcement in February, though, the review has conducted its work in virtual anonymity. Province-wide public consultations, which wrap up Sept. 18, have received only occasional local media cov-

erage. The review does not have its own dedicated web site within the Ontario Ministry of Labour, although submissions by interested parties are permitted by e-mail or fax. Anyone seeking to obtain copies of these submissions from the province would likely have to file a Freedom of Information request, says a spokeswoman for the ministry.

The relatively low profile of the review does not mean that, when its preliminary report is issued early in the new year, it will not be closely read by those who practise in the labour and employment fields. “It will have a widespread impact,” says Hugh Dyer, a partner at Miller Thomson LLP, who represents employers in labour relations and employment-related matters. While there have been changes over the years to both statutes, depending on who has been in power in Ontario, the basic framework of the Labour Relations Act, for example, has been in place since it was enacted in 1950, notes Dyer.

In announcing the review, the provincial Liberal government focused on the need to do more to protect “precarious workers,” those who perform duties on a part-time, contract, or casual basis that were previously carried out by permanent employees. Premier Kathleen Wynne has also been involved in very public disagreements with the largest unions in the province, including those that represent teachers.

The appointment of Mitchell and Murray to lead the review has been widely praised by both the employee and management side. Given the political dynamics at play in this field, any recommendations for legislative change must “strike the right balance,” says Dyer. “Employers do not want major change,” adds Dyer, who describes the

PETERWAN



existing legislative framework in Ontario “as pretty much in the mainstream,” compared to most other provinces in Canada.

Lynn Harnden, a partner at Emond Harnden LLP in Ottawa, also urges caution in the review. “It is true that the LRA and ESA show signs of wear. Some of the terminology evokes another era and seem particularly dated in the context of the changes in demographics in the last 20 years. What is needed, however, is a considered review, which is tempered by an appreciation of the impact of amendments in workplaces in the province,” says Harnden.

The major unions have been the most vocal in their position, calling for significant changes to the statutes. The Ontario Federation of Labour, for example, has posted its submissions online and is calling for measures to make it easier to form a union, including card-based certification and “neutral” locations for votes. The organization also wants the province to enact anti-replacement-worker rules.

The Canadian branch of the United Food and Commercial Workers union welcomes the review. At the same time, it says the existing Labour Relations Act is too skewed toward employers. “Balancing the playing field is essential in his

“WHAT IS NEEDED ... IS A CONSIDERED REVIEW, WHICH IS TEMPERED BY AN APPRECIATION OF THE IMPACT OF AMENDMENTS IN WORKPLACES IN THE PROVINCE.”

LYNN HARNDEN, Emond Harnden LLP

as a police officer?” he asks.

Another public submission to the review was made by Dr. Penny Sutcliffe, the medical officer of health for the Sudbury & District Health Unit. She called for similar working conditions, such as benefits, for all classes of worker and to make it easier for non-permanent employees to receive sick pay. As well, Sutcliffe suggested an amendment to increase the minimum two weeks of annual vacation pay that is now set out in the ESA, which she said was equal to that currently in place in Haiti.

While he describes it as “early days” in the overall review process, Dyer says it appears that, so far, unions have been more public in putting forth their views on the changes they are seeking. On the non-unionized side, lawyers who represent these employees say they hope the review leads to a less complicated process for clients to navigate, especially the growing number of non-permanent workers. “I think there is a general feeling that a review is good,” says Ellen Low, a lawyer at Whitten & Lublin in Toronto.

She was encouraged by some of the changes the province enacted last fall in what it called the Stronger Workplaces for a Stronger Economy Act, which included increased rights for people who obtain work through temporary employment agencies. “The Employment Standards Act is a really confusing piece of legislation, with a lot of exemptions and regulations,” says Low. She hopes the review will also clarify the intent of some aspects of the statute and its regulations, which are not currently clear.

Given the increase in temporary positions, the review might also more closely examine areas such as the rules around vacation pay for these workers. As well, there is conflicting case law in the area of severance pay for employees who have worked for a company for more than five years, says Low.

Jason Beeho, a partner at Rubin Thomlinson LLP in Toronto, notes that statutory holidays are likely to be part of the review. “Our religious holidays are all Christian holidays. That will be a point of discussion given the diversity in the workplace,” says Beeho.

Littler, the world's largest employment and labour law practice representing management, takes pleasure in announcing our expansion into Canada with a new office in Toronto.

(former offices of Kuretzky Vassos Henderson)

Littler LLP
Employment & Labour Law Solutions Worldwide

littler.com | Littler LLP

Suite 1404, Yonge Richmond Centre, 151 Yonge Street, Toronto, Canada, M5C 2W7

T (416) 865-0504 | F (416) 865-9567

The regulation around overtime pay is another area that should be clarified, especially with an increase in a non-traditional workforce, says Beeho. "Employers need to be nimble to be competitive," he says. The current framework for overtime "presents quite a few challenges" for employers and employees who are willing to work more hours when they are available, says Beeho.

The one area where there appears to be agreement among employee and employer-side lawyers is that a streamlined Employment Standards Act should be a priority of the review. "The regulation of employers [in Ontario] is very intricate. It is a burden," says Dyer.

Any suggested changes that would make the statutes easier to navigate is something Harnden also welcomes. "Small employers in Ontario are overwhelmed with the complexity of [the] regulatory regime created by the ESA and its regulations. In many instances, they attempt in good faith to compensate employees in accordance with the myriad rules relating to holiday pay, vacation pay, and overtime, but face prosecution by reason of a misunderstanding," says Harnden. Instead, there should be a framework that employers, especially small businesses, are able to follow and comply with, without the need for a lawyer and accountant, he says.

Whatever recommendations are made by Mitchell and Murray, it will then be in the hands of the province to decide whether to implement the changes. And when it comes to rules regarding the workforce, there is a long history of politi-

cization of these statutes in Ontario, in some ways, similar to what the federal Conservative government has been accused of doing with the Criminal Code.

Michael Fitzgibbon, a partner at Watershed LLP in Oakville, Ont., says he does not expect the same level of amendments in this area that were put in place by Bob Rae's NDP government in the 1990s and then repealed by Mike Harris' Conservatives later in the decade. For the current provincial government, "it is hard to balance" the competing positions, says Fitzgibbon. "Everyone has a vested interest," he notes.

Various amendments to employment and labour legislation in Ontario "have very much been a product of their times," depending on who is in power in government and the prevailing public view on the balance between employer and employee rights, says Beeho. In comparison to areas such as health care, making changes to the employment sector "is relatively inexpensive," says Dyer. "At the same time, there is nothing which is more significant to individuals than employment. It is an attractive way for governments to appeal to a certain segment of the public."

The impact of the review on the legal community in this field in Ontario will depend on the decisions ultimately made by the province and any amendments to the existing statutory scheme. "If you expand the catchment of the ESA and the LRA, it will potentially create issues, which will generate interpretation problems," says Dyer. ■

Ball Professional Corporation

Excellence in Employment & Labour Law

- Counsel in Leading Cases •
- Author of Leading Treatise •

- Wrongful Dismissal
- Employment Law
- Human Rights
- Post Employment Competition
- Civil Litigation
- Appellate Advocacy
- Disability

Referrals on behalf of employees
and employers respected

82 Scollard Street, Toronto, Canada, M5R 1G2

Contact Stacey Ball at
(416) 921-7997 ext. 225 or srball@82scollard.com

web: www.staceyball.com

Canadian Employment Law

Stacey Reginald Ball

Also available online on
WestlawNext™ Canada EmploymentSource™

More than 6,145 cases cited

Canadian Employment Law is a one-stop reference that provides a thorough survey of the law and analysis of developing trends, suggesting potential avenues of attack as well as identifying potential weaknesses in the law.

Canadian Employment Law has been cited by the Supreme Court of Canada, in superior courts in every province in Canada, and is used in law schools throughout Canada.

Order # 804218-65203 \$426
2 volume looseleaf supplemented book
Anticipated upkeep cost
- \$319 per supplement
4-6 supplements per year
Supplements invoiced separately
0-88804-218-3

*Shipping and handling are extra.
Price(s) subject to change without
notice and subject to applicable taxes.*
00227VI-A48890

Available risk-free for 30 days

Order online: www.carswell.com

Call Toll-Free: 1-800-387-5164 In Toronto: 416-609-3800

CANADA LAW BOOK.



THOMSON REUTERS