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Raj Anand
T: 416-947-5091
ranand@weirfoulds.com

File 13119.00011

VIA EMAIL

James Barry
IBEW, Local 586
1178 Rainbow Street
Gloucester ON K1J 6X7
james@ibewcco.org

Dear Mr. Barry,

Re: Review of Bill 70, Sch. 17

I write further to our discussion last week to provide my comments and critique of Bill 70, Sch. 17.

OVERVIEW

The government has chosen a drastic method, in terms of both legislative process and substantive result, to weaken the public protection mandate of the College of Trades beyond recognition. Schedule 17 of Bill 70 will essentially reverse or neuter the regulation of the trades just a few years after its need was first recognized and implemented.

In terms of process,

1. The government has hidden the proposed amendments from public scrutiny by attaching them as Schedule 17 to an omnibus budget bill;

2. The Bill does not say it is modifying sections 2 and 4 of the Act, which purport to protect public safety by restricting the work of compulsory trades to skilled tradesmen, yet it proposes several other new legislative provisions that override those sections; and;

3. Most prominently, the Bill contradicts basic principles of constitutional law by giving an administrative tribunal – the Ontario Labour Relations Board (OLRB) – the authority to overrule provisions of the legislation. This practice has been disparaged for the last 100 years by courts and commentators as a “King Henry VIII provision”.

In terms of substance,

1. The College is being stripped of its regulation-making authority to classify trades as compulsory or voluntary, even with the approval of the Lieutenant Governor in Council.

2. The judicial appeal under the Provincial Offences Act from enforcement decisions is being removed, and an administrative process with no guarantees of procedural fairness and natural justice is being substituted.

3. Sections 2 and 4 of the Act, which constitute the core of the public protection mandate of the College, will be rendered meaningless or unenforceable in a variety of ways. Any violation of the scope of practice of a compulsory trade is permitted

> (a) if a classification committee undermines those sections by determining that part of a compulsory trade's scope of practice should be voluntary, which the Minister is required to implement by regulation;
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> (b) if the inspector, Registrar or OLRB determines that the "risk of harm" justifies overruling sections 2 and 4; or
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> (c) if the OLRB, in its apparently unlimited discretion, chooses to rely on any other factor it considers relevant, whether or not that factor relates to the purpose of this public protection statute.

LEGISLATIVE PROCESS CONCERNS

1. The omnibus bill

The federal Conservatives were rightly criticized as undemocratic when they adopted a practice of burying significant legislative initiatives in hundreds of pages of appendices to completely unrelated bills – often budget implementation bills like Bill 70. Such bills normally require expeditious passage. It is unclear at this point whether there will be any opportunity to hold committee hearings into the various schedules to this bill.

This secretive process is surprising in light of the history of the College of Trades and Apprenticeship Act. The Act was passed in October 2009 and most of its provisions only came into force as of April 2013. Mr. Tony Dean's report and the current bill represents a wholesale reversal of the regulatory initiatives as articulated by Mr. Tim Armstrong, Q.C. and Mr. Kevin Whitaker in their seminal reports. Mr. Chris Bentley conducted a consultation and submitted a report to the Minister in 2016, but the government has chosen not to distribute that report or disclose Mr. Bentley's recommendations.

Instead, there has been radio silence since the summer, even as the government was evidently drafting a lengthy and detailed bill that removes the underpinnings of the College of Trades' creation and short existence. No advance notice was provided by the Ministry to the unions and employers, or their association, which have devoted considerable time and resources in responding to the Dean Report and its aftermath.

2. A lack of transparency

The legislative drafting continues the theme of non-disclosure. As stated earlier, the seminal provisions of the Act, in sections 2 and 4, remain unchanged. On its face, no person is permitted to engage in the practice of a compulsory trade, and such persons cannot be employed to do so, unless they have a valid certificate of qualification. It is obvious that if Schedule 17 is enacted, these prohibitions, which represent the public protection foundation of the 2009 Act, will no longer mean what they say. Quite simply, the protections they promise are rendered worthless by a series of amendments that follow. We discuss those substantive amendments below.

3. The King Henry VIII provision

This bill takes another surprising and questionable direction: the proposed legislation is giving an appointed administrative body the power to overrule the Legislature. The proposed s. 59.2(10) allows the OLRB to reverse a finding of violation of this public protection statute based on "any other factor [beyond those stipulated in the Act] it consider relevant." In other words, it can give effect to objects outside the legislative intent of this Act. The factors it can rely on can be based on the objectives of another statute (unspecified, but some hints are stated below when we discuss the substantive difficulties with the bill); or indeed, the factors can be completely outside any legislative objective.

Basic constitutional principles of supremacy of the Legislature dictate that even the Cabinet, much less an appointed subordinate administrative body, should not be permitted to overrule the will of the Legislature as expressed in the terms of the statute. In the seminal 1968 Report of the Royal Commission of Inquiry into Civil Rights, which forms the backdrop to Ontario's administrative justice system, the Honourable Justice J.C. McRuer wrote:

> ….Powers of definition or amendment should not be conferred unless they are required for urgent and immediate action. Such exercise of power to alter the scope or operation of an Act may vitally affects rights of individuals or classes of individuals coming within its purview.

> The rule should be that the normal constitutional process of amending the parent Act should be followed so that the amendment may be publicly debated in the Legislature.[1]

To similar effect, Justice Campbell of the Ontario Superior Court described a Harris government school boards regulation that gave the executive the power to override a legislative provision.

> 42. This breathtaking power, to amend by regulation the very statute which authorizes the regulation, is known to legal historians as a "King Henry VIII" clause because that monarch gave himself power to legislate by proclamation, a power associated since the 16th century with executive autocracy…
>
> 43. This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority.[2]

Precisely the same is true here, except it is worse. An independent tribunal is given the power to override sections 2 and 4 of the Act based on factors known only to itself, without supervision by either the government or the legislature.

SUBSTANTIVE CONCERNS

1. Removal of the College's essential regulation-making authority

The College of Trades is stripped of its core regulation-making authority: to designate compulsory trades. The College's present mandate in this regard is itself subject to review by the Minister and approval by the government, yet the new subsection 1(4) would give that power to the Minister alone and take away the College's authority to issue Certificates of Qualification until the Minister classifies a trade as voluntary or compulsory.

Even then, the inherent bias in the legislation is entrenched in a very complicated series of hurdles that must be overcome before a trade is designated as compulsory. Under the new s. 63.4, the Minister can only prescribe a trade as voluntary or refer it to the new Classification Roster, whose membership is dramatically distanced from the College by a series of

[1] J.C. McRuer, *Report: Royal Commission Inquiry into Civil Rights* (Toronto: Queen's Printer, 1968-1971) at pp. 345 and 348.
[2] *Ontario Public Schools Boards' Association v. Ontario (Attorney General)*, [1997] O.J. no. 3184, 151 D.L.R. (4th) 346, at paras. 42-43 (reversed on other grounds).

prescriptions under s. 63.2. That section even makes the extraordinary statement that association with a compulsory trade or the College would "bias their decisions". If a classification question is referred to the Roster, the Minister is obliged to issue a regulation implementing its determination.

2. The privatization of enforcement

As we noted earlier, the delegation of appellate enforcement authority to a quasi-judicial tribunal outside the regulatory scheme of the Act is unprecedented. The Legislature will weaken its designated regulator in a variety of ways. Just a few years ago, the Legislature created the College of Trades using a regulatory model that has served a wide array of health and other professions over several decades. Central to those public interest frameworks has been the independence of the statutory regulators from the professionals and tradespeople that they regulate.

The proposed legislation is incoherent in its adoption of an ungainly mix of regulators. The authority of the College, the supposed public interest body, has been diluted in a number of ways that we detail throughout this letter. But in addition, the enforcement of the central prohibitions in sections 2 and 4 of the Act has been assigned to a body which is not a policy maker or a regulatory authority at all. It is an adjudicative body, appointed by consensus of the trade union and employer community for an entirely different purpose: to facilitate the interests and workings of that community. While the OLRB has adjudicative functions under many statutes, it is beyond debate that its appointment, its procedures and its functioning are understandably dominated by the need to carry out the objectives of Ontario labour relations statutes.

The result is a system of broken telephone that impedes only this regulator. While policy is intended to be developed and maintained by the College, and inspectors and the Registrar are to issue their notices of contravention in accordance with their public interest mandate under this Act, only this regulator stands to be overruled by a body that has no relationship with the College or its work. Unlike the courts, which will always have a supervisory jurisdiction over administrative bodies including statutory regulators, the Board has a different public interest mandate from the College. Indeed, it is obvious from the positions of the compulsory and voluntary trades, and the College itself, during the events of the past two years, that the OLRB's jurisdictional dispute jurisprudence is significantly at cross-purposes with the public safety objectives of the College.

In sum, the bill proposes a peculiar and erratic public policy: that a regulator that functions under one set of legislative objectives in the public interest be appealable to an adjudicator that operates under an inconsistent set of legislative objectives.

3. The core sections of the Act will be rendered meaningless

The bill is very comprehensive, indeed redundant, in choosing many different means to strip the meaning and significance of compulsory trades in sections 2 and 4 of any importance, when this designation should be central to the public protection mandate promoted by the Act.

(a) Creation of mixed compulsory and voluntary trades

Under s. 63.4, the Board can propose a regulation to enact the scope of practice of a trade, and make submissions as to whether the trade should be voluntary or compulsory. Under s. 63.3(2), "A particular practice may be included in more than one trade's scope of practice," and under subsection (7), the Board is "to consider the extent to which the scopes of practice of one or more trades overlap and the nature of the overlap."

The Minister can create a regulation designating it as voluntary, or send it to the Classification Roster. The classification panel "shall determine" under s. 63.6(3)

> Whether or not engaging in any practices within the scope of practice of a compulsory trade, whether or not the practice was referred to the classification panel, should constitute engaging in the practice of the trade for the purposes of sections 2 and 4.

At that point, the Minister shall issue a regulation under s. 74(3)(b.8) implementing the classification panel's determinations.

The result is that sections 2 and 4 are diluted by the creation of a new concept: some aspects of a compulsory trade will be considered compulsory, while other aspects will be treated as voluntary. The prototype situation is one that appeared repeatedly in the discussions and submissions in the Dean process, and in Board jurisdictional dispute cases: while the installation of conduit comes within the scope of practice for an electrician, it does not constitute engaging in the practice of the electrician for purposes of sections and 4 of the Act.

(b) "Risk of harm"

While the bill does not amend sections 2 and 4 on their face, a series of amendments enact the "risk of harm" concept in a manner that effectively excuse a violation of those provisions unless it creates a "risk of harm" as described. An inspector must consider what the enforcement policy

that the College must approve says about risk of harm, and in addition the inspector must determine whether the particular contravention of section 2 or 4 involves a risk of harm before issuing a notice of contravention.

The same limitation is grafted onto the College's enforcement policy (s.11.1(1)(a)), as noted, and also the authority of the classification panel (s. 63.6(13)) and the OLRB (s. 59.2(10)).

The result, again, is that the prohibitions in ss. 2 and 4 of the Act do not mean what they say on their face.

(c) The OLRB override

It is here that the OLRB's King Henry VIII clause operates. In determining a review of a notice of contravention under s. 59.2, the Board is to consider the same three factors as the inspector or Registrar - the scope of practice, the College's compliance and enforcement policy, and risk of harm – but also an opaque "any other factor it considers relevant".

The OLRB is therefore given the authority in s. 59.2(10) to determine rights based on factors beyond those specified in the regulatory statute. It is given the mandate of deciding what those factors will be. It is not constrained by the objectives of the Act. It is not limited by the College's policy, or even by risk of harm.

While the bill is anything but transparent in this crucial respect, the basket clause seems to give the OLRB the right to apply its jurisdictional dispute jurisprudence. Its case law was fashioned in applications by private parties, often on consent of those parties, to serve completely different objectives, including local area practice, employer practice, collective agreement bargaining goals, none of which relates in any way to public safety or any public interest other than an economic one. As we know, health and safety requirements receive little weight, and are often not even mentioned, in the Board's jurisdictional dispute cases.

This appeal mechanism has serious damaging impacts on the regulatory scheme of the Act. The OLRB is entitled on its face to overrule the statutory prescriptions of sections 2 and 4, and indeed any other provision of the Act, which means that it can – indeed will, if it adheres to its jurisdictional dispute jurisprudence, as expected – routinely rule on the basis of factors different from, indeed contrary to, the regulatory objectives as expressed in the statute.

To be clear, it appears that the bill intends to give the OLRB the right to overrule the intent of the Act based on (a) the objectives of another Act (for example, the Labour Relations Act), or (b) a factor that it considers relevant that is completely outside any legislative objective.

The case law and commentary that disapproves King Henry VIII clauses concerns legislation that gives the government the power to override the will of the legislature. In this respect, the OLRB is one step further removed than the executive from the constitutionally guaranteed, elected representatives in the legislature. It is not the executive, but a body appointed by the executive.

The right to a true appeal, with guarantees of natural justice, is taken away by the bill. The protections of the *Statutory Powers and Procedures Act* are removed. There need not be a hearing of any kind, and there is specific mention of a "consultation", which is used by the Board in duty of fair representation complaints, where (and perhaps because) about 97% of such complaints by unionized employees against their unions are dismissed by the Board.

The judicial review provision in subsections 59.2(12) and (130 is interestingly phrased. While the Supreme Court's jurisprudence would give OLRB decisions great deference because of its specialized expertise in interpreting and applying its home statute, subsection (13) says "a decision of the Ontario Labour Relations Board concerning the interpretation of this Act shall not be overturned unless the decision is unreasonable." It is questionable whether the OLRB, in importing jurisdictional dispute or other extraneous principles into its decisions, will be interpreting "this Act" rather than the OLRA.

CONCLUSION

In the short time available since the tabling of Bill 70, I have not attempted to provide a comprehensive review of Schedule 17. Suffice it to say that in the areas of both process and substance that characterize the bill, there is reason to be very concerned from the standpoint of public protection and regulation.

I would be pleased to discuss these matters further.

Yours truly,

Raj Anand

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