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TRANSIT LAW UPDATE

The Transit Law Update is a quarterly newsletter devoted to assisting Trade Unions and workers in the transit sector.

For several years, transit sector Trade Unions have faced new challenges. Transit workers across Canada have had to battle employers and governments keen to attack their rights and roll back their bargained victories.

Transit sector Trade Unions are now called upon to stand up for their rights, the rights of their fellow public sector workers and the rights of the public that they serve. Transit Law Update will provide the tools you need for the battles you fight every day.

We will bring you:

- Arbitration decisions of interest,
- Trends in transit collective bargaining,
- Changes to relevant legislation,
- Successful campaigns across the country

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On January 1, 2012, our firm began a new chapter of its history as Green & Chercover became Ursel Phillips Fellows Hopkinson LLP

Ursel Phillips Fellows Hopkinson LLP draws on a rich history of long-standing labour relations and social justice practices. We are honoured to be able to trace our history back to the original union-side labour relations firms in Ontario: Joliffe, Lewis and Osler, and Golden Levinson. We are dedicated to carrying on the fine standards established by our predecessors.



Ursel Phillips Fellows Hopkinson LLP is a full service labour relations and employment law firm located in Toronto. It provides legal services to trade unions, employee associations, progressive organizations and employees.

The partners and associates of Ursel Phillips Fellows Hopkinson LLP have a demonstrated commitment to the interests of our clients and to progressive movements throughout Ontario, Canada and the world.

We have a proud history of representing transit unions and are proud of the many accomplishments we have secured for our clients.

New name...
Same Commitment to Excellence

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Jail for Those who Assault Transit Workers

BY DEAN ARDRON

Assaults on operators, a long-standing issue for the transit sector, are on the rise. A recent study by Local 1505 of the ATU and the Winnipeg Labour Council found that there had been a four-fold increase in operator assaults from 2005 to 2012, across the country. The assaults leapt from 17 in 2005, to 63 in 2011, with Winnipeg transit operators on track to face over 70 assaults in 2012. In Toronto it is estimated that two employees are assaulted every day, ranging from slapping and spitting to a Collector who was shot in the neck and shoulder in February 2012 during a failed robbery attempt.

In response, politicians are calling for tougher sentences for those who assault transit operators. British Columbia NDP

MP Peter Julian introduced a private members bill that would create stiffer penalties for transit operator assaults. Similar private member bills in 2007 and 2009 did not make it past first reading.

In addition, court advocates working for transit workers seek the toughest sentences possible for individuals convicted of assaulting operators. For instance, in 2012:

A woman who yelled racial slurs and pepper sprayed a Toronto Transit Commission operator and three others on a bus was jailed for 46 days. Two men also received jail sentences for assaulting TTC operators. One was sentenced to 60 days in jail and 18 months probation after he threatened to shoot a bus operator and other TTC customers. The other, 6 months in jail and two years probation following an assault on a bus operator that left this operator permanently disabled and no longer able to drive TTC vehicles;

In Vancouver, one man threatened to slash the throat of a bus driver, and another a woman spat at a bus driver. The individuals were convicted and received 15 and 17 day jail terms.

More must be done to protect transit workers across Canada. ■

Smelling of Alcohol is not Impairment

BY CARLO DI GIOVANNI

In a recent arbitration in which Ursel Phillips Fellows Hopkinson LLP represented ATU, Local 113, Arbitrator Slotnick found that a grievor who attended at work smelling of alcohol was not impaired under the specific penalty clause of the collective agreement, which provides for the discharge of employees found to be impaired while on duty.

The Grievor had about 5 years of service and a clean discipline record when the TTC discharged him from his position as a spare, non-clerical employee in the Revenue Operations Department for being impaired while on duty. The Union grieved and Arbitrator Slotnick allowed the grievance and ordered that the TTC re-instate the grievor with compensation and no loss of seniority.

The arbitrator held that impairment requires a change in functioning that affects the employee's ability to perform his duties, and that, in this case, while there was an odour of alcohol, there was no evidence that the Grievor's job performance was affected.

Arbitrator Slotnick stated that, even in safety-sensitive positions that involve driving, there must still be evidence of some change in functioning that affects job performance to support a finding of impairment, and there was no such evidence in this case. He held that, while an employee doesn't have to be "falling-down drunk" to be considered impaired, there was no evidence that the Grievor showed any direct indicator of impairment, such

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Ian Fellows and
Dean Ardron

as slurred speech, belligerence, poor balance, rambling, incoherent speaking, or boisterousness.

The arbitrator did note, however, that in his opinion the TTC was justified in relieving the Grievor of duty for the remainder of the day when he attended at work smelling of alcohol. The Grievor was about to take out a company vehicle with potential contact with members of the public and it made sense, according to the arbitrator, to send him home that day rather than take any risks. ■

Drug and Alcohol Testing

BY IAN J. FELLOWS & DEAN ARDRON

While Transit Operators who travel into the United States on the job have been the subject of testing for some time, an increasing number of transit employers are seeking to test bargaining unit members. This represents a significant attack on the privacy rights of members across the country. Ursel Phillips Fellows Hopkinson LLP is proud to be assisting trade unions in the ever expanding battle.

The Toronto Transit Commission introduced a drug and alcohol testing program in 2010. The policy permitted testing following significant incidents and where supervisors believed they had just cause. The TTC has since announced its intention to randomly test members. Local 113 immediately grieved the policy as a breach of privacy rights, the collective agreement, and the Charter of Rights and Freedoms. The matter is being heard by Arbitrator Saltman, with Ian J. Fellows and Clayton Ruby representing Local 113. The arbitration continues.

This arbitration will be of significance across the country as it will be the first time a Union has challenged the ability of an oral swab test to determine if a member is currently impaired. In other words, will a person who used marijuana several days before fail the test, even though they are not impaired? This will be a very significant finding that could affect members across the country and will significantly impact arbitral jurisprudence.

In December 2012, the Supreme Court of Canada heard an appeal regarding random alcohol testing in an ultra safety sensitive workplace. The grievance relates to the Employer's implementing a comprehensive workplace policy on "Alcohol and Other Drug Use" which included "random alcohol testing". The Union successfully challenged the random alcohol testing at arbitration. However, on appeal, the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal allowed testing in any inherently dangerous workplace.

Josh Phillips of Ursel Phillips Fellows Hopkinson LLP represented the Canadian Civil Liberties Association at this hearing. Stay tuned for future updates, as this Supreme Court of Canada decision will set the background to all future drug and alcohol testing cases across the country.

Also of interest, in December 2012 the Alberta Court of Appeal upheld a lower court decision which prevented Suncor from implementing random drug and alcohol testing until the completion of the grievance arbitration. Any local facing the implementation of random alcohol testing will want to carefully consider seeking an injunction pending arbitration. ■



Transit Industry Bargaining Update

BY SIMON BLACKSTONE

GTA Transit Locals Fight for Success

It has been a busy bargaining season for transit Unions in the Toronto area. Following a round of hard bargaining, ATU Local 1587 secured significant wage and other improvements for the GO Transit bargaining unit members.

In the York Region, members of ATU Locals 113 and 1587, working for the private bus contractors that run York Region Transit, were out on strike for three months to secure fundamental improvements to their working conditions and lives. The members remained strong and secured important gains. Also, this was an important fight in the battle against further privatization of transit services.

At Local 113, the union forced the Toronto Transit Commission to Interest Arbitration, where Ian Fellows & Dean Ardrone of Ursel Phillips Fellows Hopkinson LLP secured wage increases for the members while maintaining the contracting out protections the local had fought for over the previous thirty years. Given the TTC's un-

wavering commitment to contracting out, saving the contracting out protections will save thousands of jobs in the years to come.

The Fight Continues in Moncton

Transit workers in Moncton are engaged in a prolonged fight to protect their jobs. The members of ATU Local 1290 were locked out over 4 months ago by the City.

In an effort to get the buses moving again Local 1290 had sought to refer the dispute to interest arbitration, but the City steadfastly refused, preferring instead that the strike continue and the people of Moncton, many of whom rely on transit, go without.

Lethbridge wins wage gains for Para-Transit Operators

ATU Local 987 in Lethbridge, Alberta have negotiated significant gains for their unit of Para-Transit operators. Going into bargaining these operators made 16% less than their brothers and sisters operating regular service for the same employer – the City of Lethbridge. Local 987 was able to negotiate wage increases that will ensure wage parity between all Para-Transit and regular service operators within the life of their newly negotiated collective agreement.

Bargaining Roundup

In an era of wage freezes, transit locals have engaged in hard bargaining to significant success:

	2011	2012	2013	2014
ATU, L. 113	2%	2%	2%	-
ATU, L. 1587	2%	2%	2.3%	-
ATU, L.1573	2%	2%	2%	2%
ATU, L.1572	2%	2%	2%	-
ATU, L.616	-			-

Toronto Transit An Essential Service

As of March 30, 2011 members of ATU Local 113, the people who make Toronto move, were made an essential service by the government of Ontario and have lost their fundamental right to strike. The provincial government stripped them of this right, replacing it with binding interest arbitration.

The move to make the TTC “essential” is yet another front in the war on public sector unions. It deprives workers of their fundamental right to strike in order to secure better working conditions. Also, it could well be a pre-cursor to a broader definition of what is an essential service, a further attempt to limit members legal right to strike.

Halifax Transit Strike

Metro Transit Workers in Halifax struck for 40 days in the dead of winter to secure important improvements to their collective agreement. The contract included a \$4,000 signing bonus and a two per cent raise in each of the next four years

Ontario Conservatives Attack Trade Unions

BY IAN J. FELLOWS

This summer Tim Hudak, the leader of the Ontario Progressive Conservative Party, announced the next phase of the Conservative attack on working people and trade unions. His plan is a clear threat to every Ontario trade union, and trade unions across Canada.

The title of the Conservative White Paper is “Paths to Prosperity”. The question is prosperity for whom. Clearly, the Conservatives wish to continue to enrich the wealthiest segment of society at the expense of everyone else.

Time and time again in their White Paper, the Conservatives point to the Southern United States as the example it would like to see Ontario emulate. That is not a path to prosperity for working people. The average annual household income in Mississippi is less than \$37,000 – in Ontario it is more than \$71,000. There is nothing Mississippi can teach Ontario about greater prosperity for working people.

The proposed changes include:

1(a) Eliminate the Rand Formula

This proposal would allow bargaining unit members to choose not to pay union dues and thereby enjoy the benefits of a collective agreement for free.

1(b) Ban Closed Shops

The Conservatives propose to make it illegal to bargain a closed shop. The Conservative designed this provision to dilute

trade union membership and to prevent trade unions from bargaining agreements to protect their own structures.

2. Stop Payroll Deduction of Union Dues

The Conservatives propose that the Provincial government immediately stop collecting and remitting union dues and that private sector employers have the option to do so as well.

3. Require Unions to Open their Books to their Enemies and Rivals

Under the guise of transparency, the paper calls for legislation that will require full disclosure to employers of union revenues and how they spend their funds. Since trade unions already disclose their finances to their members this proposal is completely unnecessary. This proposal is similar to the Federal Conservatives’ Bill C-377 requiring that trade unions make their financing public rather than just to the members who pay the union dues.

4. Ontario Labour Relations Board Supervised Secret Balloting

The Conservatives propose that the Ontario Labour Relations Board supervised secret ballot votes be mandated for all certification, strikes and ratification matters

This proposal would roll back the last of the card-based certification, which still exists in the construction industry.

These proposals go to the heart of the trade union movement. Were the Conservatives to enact them, they would pose a serious threat to trade unions and their ability to fight for their members.

Conservatives all over the world are trying to roll back workers’ rights. They are using the crises their own policies created as a justification to do so.

The Conservative White Paper complains

that labour laws dating back to the 1940’s are outdated and need to be replaced to allow for greater flexibility. These are code words for lower wages and less job security.

The Conservatives in Ontario and the rest of Canada have already had a go at returning us to a 1930’s style economic crisis, now they want to bring back 1930’s style labour law. We must not allow the Conservatives to turn Ontario into Mississippi or Alabama, not only for the sake of trade unions in Ontario, but because likeminded politicians and groups will use it as a blueprint to attack trade unions across the rest of Canada.



Featured UPFH Lawyer Profile:

Ian J. Fellows

Ian attended the Faculty of Law at the University of Toronto and obtained his Bachelor of Laws in 1992. While at law school he worked at one of the legal clinics associated with the school, eventually holding the position of co-director. As well, while at law school Ian was employed on contract for the Legal Department of the Ontario Information and Privacy Commission.

Ian is a partner with Ursel Phillips Fellows Hopkinson LLP. He commenced his articles with the firm in 1992 and returned to the firm as an associate once he was called to the Bar. His practice involves acting on behalf of unions and employees in all areas of labour and administrative law.

This includes working on matters such as labour arbitrations, Labour Board hearings, human rights, unemployment insurance, and employment standards. Ian's practice includes appearing in court on matters such as labour injunctions, applications for judicial review, and in respect of criminal matters which are related to the workplace. Ian has also conducted numerous educational seminars for clients on current issues of interest to unions.

Ian has represented transit unions across Canada for the last twenty years and is proud of the hardfought victories his clients have obtained.

Ian is a member of the Canadian Association of Labour Lawyers and the Canadian Bar Association. His professional activities have included appearing as a panelist for the Canadian Bar Association Labour Relations Section and contributing to the Education and Law journal.

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