School Board Update

School Boards Exposed To Construction Collective Agreements

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In a recent decision, the Ontario Labour Relations Board ("OLRB") held that key non-construction employer provisions of the *Ontario Labour Relations Act*, 1995 (the "*Act*") were unconstitutional. In this *FTR Now*, we discuss how the decision could have an impact on school boards' ability to tender construction work.

Background

The construction industry labour relations regime provides for a series of provincial collective agreements in the industrial, commercial and institutional sector (which includes construction work on school board buildings) for each construction trade. These provincial collective agreements preclude the contracting out of any construction work to contractors who are not bound by the provincial collective agreement. One of the effects of this regime was that public sector employers such as municipalities and school boards who became certified by construction trade unions were unable to tender construction projects to non-union contractors.

The Ontario legislature recognized this concern when it introduced provisions in 1998 and 2000 which required the OLRB to terminate the bargaining rights of a construction trade union if the employer could establish that it was a "non-construction employer", most recently defined in the *Act* as "an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person". At least two school boards have been successful in obtaining non-construction employer declarations from the OLRB.

Impact of the OLRB Decision

In *Independent Electricity Market Operator v. Canadian Union of Skilled Workers*, the OLRB found key non-construction employer provisions of the *Act* inoperative on the basis that they are contrary to the freedom of association rights guaranteed by the *Canadian Charter of Rights and Freedoms*, and consequently declined to issue non-construction employer declarations thereunder.

As a result of the OLRB's decision, school boards presently in collective bargaining relationships with construction unions will no longer be able to obtain a declaration terminating the bargaining rights of a construction union and relieving them from obligations under a provincial collective agreement.

Accordingly, we might expect an increase in certification activity from construction trade unions *vis-a-vis* school boards. A construction union can bring an application for certification at any time that a school board employs construction trades, even if it only does so for a day. This means that school boards should monitor their correspondence carefully, particularly over the holiday season, to ensure that they are able to respond to an application for certification within the mandatory two-day time frame. If no response is filed, the OLRB will certify the union without hearing from the board, which would preclude the board from challenging the union's majority support (usually established by union membership cards rather than a vote) and affect the board's ability to rely on the remaining non-construction employer provisions. Once the union is certified, a school board will no longer be able to apply for the termination of bargaining rights under the non-construction employer provisions.

If you would like to discuss how this decision may impact your workplace, contact your regular Hicks Morley lawyer.

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