

School Board Update

School Board Update – ECE Representation Disputes: OLRB Sidesteps Arbitration Award

Date: January 12, 2011

In [York Region District School Board](#), the Ontario Labour Relations Board (“OLRB”) considered an application for certification by the Elementary Teachers’ Federation of Ontario (“ETFO”) to represent the Board’s designated early childhood educators (“DECEs”). In this case, an arbitrator had already determined that the Board’s DECEs were included in an office, clerical, technical and educational assistant bargaining unit represented by the Canadian Union of Public Employees (“CUPE”). A majority of the OLRB relied on the concept of “parallel jurisdiction” in determining it could proceed with the issue of timeliness of the ETFO certification application. This School Board Update discusses this award and its implications.

The Board and CUPE had objected to ETFO’s application for certification on the basis that the DECEs were included in CUPE’s bargaining unit. In response, ETFO took the position that CUPE’s collective agreement did not cover DECEs and that the arbitrator’s decision could not interfere with the OLRB’s duty to determine whether its application for certification was timely (i.e., filed at a time when the DECEs were not represented by a union). The Board and CUPE argued that the arbitrator had already interpreted the CUPE collective agreement and that the OLRB should therefore not permit ETFO to re-litigate the issue of the scope of the CUPE collective agreement.

In a decision dated January 4, 2011, a majority of the OLRB panel rejected the approach of the Board and CUPE, holding that it would come to its own conclusion concerning the timeliness of ETFO’s application for certification. Relying on the concept of “parallel jurisdiction”, the majority of the panel held that “the fact that an Arbitrator has, in resolving a difference between the parties to the collective agreement, made his or her own finding of fact and/or law concerning the collective agreement’s scope clause in a collective agreement, cannot preclude or otherwise fetter the Board from making a determination of the timeliness question.”

According to the majority of the panel, while a determination that the ETFO application for certification could proceed would put the parties, particularly the Board, in a difficult position, it would not be insurmountable because the jurisdictional dispute process under the *Labour Relations Act* could be used. According to the majority, the OLRB’s consideration of whether employees in the bargaining unit are already bound by a collective agreement would permit the participation of all of the interested parties, while adopting the arbitrator’s findings “effectively deprives ETFO of any meaningful right of participation on a key issue in the application for certification.” As a result, the

issue of whether the DECEs were already covered under the CUPE collective agreement was left open for determination by the OLRB after it heard evidence and arguments.

In a strong dissent, OLRB Member Richard O'Connor held that the OLRB is "precluded from sitting on appeal of an arbitration award", as this was a power given only to the Divisional Court on judicial review. According to Member O'Connor, the arbitration award had been issued and the Board and CUPE (as well as the employees) were bound by it, pursuant to section 48(18) of the *Act*. He concluded, based upon the findings in the arbitration award, that there was a collective agreement covering the DECEs at the point in time when ETFO applied for certification.

The OLRB's decision in *York Region District School Board* has wide-reaching implications for other school boards that have operated under the assumption that an arbitration award resolves the issue of DECE representation rights. The decision could also open the door to challenges to voluntary recognition or other agreements between school boards and unions, because it could be characterized as standing for the proposition that only the OLRB can determine whether a trade union has pre-existing rights to represent DECEs.

If you have any questions about this decision, please contact [John-Paul Alexandrowicz](#), who argued the case on behalf of the Board, at 416.864.7292, or your regular [Hicks Morley lawyer](#).

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