FTR Now

Non-Construction Employer Declaration Provision in LRA Constitutional

Date: April 6, 2011

On February 18, 2011, the Ontario Divisional Court held that the "non-construction employer" declaration provision in section 127.2 of the Ontario *Labour Relations Act, 1995* (*LRA*) is constitutional and does not contravene the freedom of association guarantee found in section 2(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*). As a result, the Court held that the Ontario Labour Relations Board (OLRB) had erred in finding that the challenged provision violated the *Charter* and was inoperative in the circumstances of the case before it.

This *FTR Now* discusses the implications of this decision for employers who employ construction trades.

BACKGROUND

The *LRA* contains special provisions regarding the construction industry. Amendments to the legislation in 1998 and 2000 introduced the concept of a "non-construction employer". Section 127.2 specifically permits a non-construction employer to bring an application before the OLRB for a declaration that a construction trade union no longer represents "those employees of the non-construction employer employed in the construction industry." Upon that declaration being made, any collective agreement "ceases to apply with respect to the non-construction employer in so far as the collective agreement applies to the construction industry." As noted by Swinton J. for the Court, the purpose of the provision "is to remove certain places of employment from the regime for the construction industry labour relations because the employer is not engaged in the construction business for profit."

The Independent Electricity System Operator (IESO) applied for a declaration as a "non-construction employer" so that it would no longer be bound by a construction collective agreement, which limited its ability to contract work out to non-union contractors. The IESO did not have any employees of its own who worked under the collective agreement in question. Before deciding the issue of the constitutionality of section 127.2, the OLRB found that IESO met the conditions of being a non-construction employer, as it did not do any construction work from which it expected compensation from an unrelated person.

In its subsequent decision, the OLRB applied the decision of the Supreme Court of Canada in *Health Services* to hold that the challenged provision was contrary to the freedom of association

right guaranteed by the *Charter*. It declined to issue a non-construction employer declaration and the IESO subsequently brought an application for judicial review.

THE ONTARIO DIVISIONAL COURT DECISION

Swinton J. found that the OLRB erroneously applied *Health Services* by extending the protection of section 2(d) of the *Charter* to a "preferred bargaining structure and the particular outcomes of bargaining." She noted that *Health Services* had held that it must be demonstrated that "the interference with collective bargaining comprises the essential integrity of the process of collective bargaining;" in other words, that there was a substantial interference with the *process* of collective bargaining, which was not the case here.

Swinton J. also found that there was no evidence in this case to support the conclusion that any employee of the IESO would be "denied access to the process of collective bargaining or lose the benefits of terms of collective agreements were a declaration made under s. 127.2."

Finally, Swinton J. stated that *Health Services* found that even if substantial interference with collective bargaining was established, section 2(d) would not be violated "if there were good faith negotiations or consultations with the unions before the legislation was enacted." Here, the acquired rights of unions and their members could only be terminated by a declaration of "non-construction employer" through a rigorous OLRB hearing process. This was further evidence that rather than substantially interfering with the collective bargaining process, the legislation "regulates the process of bargaining and allows some employers to move into the general provisions because of the nature of their business."

IMPLICATIONS

The decision of the Divisional Court is very helpful to municipalities, school boards and other employers with a tenuous link to the construction industry, but which are bound to a construction industry collective agreement as a result of a previous certification or voluntary recognition. It is clear from this decision that section 127.2 does not violate the *Charter*. Therefore, these employers will not be subject to the onerous provisions in provincial construction collective agreements (including provisions that prevent the use of non-union contractors) if they can establish that a significant period of time has passed in which the employer has only performed construction work for itself. The Divisional Court decision is also helpful in clarifying the extent of the freedom of association guarantee as it applies to collective bargaining: it makes clear that the Supreme Court of Canada did not go so far as to guarantee a "preferred bargaining structure."

Independent Electricity System Operator v. Canadian Union of Skilled Workers, 2011 ONSC 81

If you would like to discuss the implications of this decision for your organization, please contact John-Paul Alexandrowicz at 416.864.7292 or your regular Hicks Morley lawyer.