School Board Update

Court of Appeal Affirms Non-Construction Employer Declaration does not Infringe the *Charter*

Date: May 24, 2012

On May 8, 2012, the Ontario Court of Appeal found that the "non-construction employer" declaration in section 127.2 of the Ontario *Labour Relations Act, 1995* ("*LRA*") is constitutional. The Court of Appeal upheld the Divisional Court's February 2011 ruling, finding that section 127.2 does not contravene the freedom of association guarantee found in section 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

This *FTR Now* discusses the implications of this decision for school boards and other employers who are covered by construction collective agreements that affect their ability to tender or subcontract work for construction projects.

BACKGROUND

The *LRA* contains special provisions regarding the construction industry. Section 127.2 specifically permits a "non-construction employer" to bring an application before the Ontario Labour Relations Board ("OLRB") for a declaration that a construction trade union no longer represents "those employees of the non-construction employer employed in the construction industry."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 receiving a declaration from the OLRB, 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."

The Independent Electricity System Operator ("IESO") had applied for a declaration as a non-construction employer under section 127.2 of the *LRA*, 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.

The OLRB found that the 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. However, in a subsequent decision, the OLRB applied the Supreme Court of Canada's decision in *Health Services* to hold that the challenged provision was contrary to the section 2(d) freedom of association right guaranteed by the *Charte*r. The Divisional Court overturned this decision and the affected unions appealed that decision.

THE ONTARIO COURT OF APPEAL DECISION

The Court of Appeal affirmed that the freedom of association right protected by section 2(d) of the *Charter* is enjoyed by individuals, *not* unions. The Court agreed with the Divisional Court that section 2(d) protects "the right of employees to associate in a process of collective action to achieve workplace goals, but does not ensure a particular outcome in a labour dispute or guarantee access to any particular statutory regime."

In order for there to be a breach of section 2(d), there must be "substantial interference" with associational activity. The threshold for establishing substantial interference is a high one and the question is "whether the law or state action has the effect of making it impossible to act collectively to achieve workplace goals."

The Court found that in this case, there was no substantial interference with associational activity. Although a non-construction employer declaration terminates the collective agreement and bargaining rights acquired under the construction industry provisions, these rights are terminated because the employer is no longer a construction employer. In addition, although there is some negative effect on union members who are not IESO employees due to the loss of future employment opportunities, the Court found that section 2(d) does not protect employment opportunities.

The Court further found that employees of non-construction employers are still free to seek certification or voluntary recognition under the general provisions of the *LRA*. They are also free to continue bargaining with their construction employers and to seek to organize more construction employers. Being precluded from the construction provisions of the *LRA* is not a violation of the *Charter*, because section 2(d) does not guarantee access to a particular statutory regime.

Accordingly, the Court found that a non-construction employer declaration does not constitute substantial interference with associational activity and held that section 127.2 of the *LRA* is constitutional. In reaching this conclusion the Court noted, "It is difficult to see why a constitutional obligation should be placed on the IESO to bargain workplace issues with the Unions on behalf of its members who are not employed by the IESO and who are employed by other employers."

IMPLICATIONS

The decision of the Court of Appeal is very helpful to school boards and other employers with a tenuous link to the construction industry, but who, as a result of a previous certification or voluntary recognition, are bound by a construction industry collective agreement. 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 Court of Appeal's decision is also helpful in clarifying the extent of the freedom of association guarantee as it applies to collective bargaining. It makes clear that section 2(d) of the *Charter* does not guarantee a "preferred bargaining structure" nor will it protect access to future employment opportunities. Also of significance is the Court's affirmation that section 2(d) rights are enjoyed by individuals and not unions.

Independent Electricity System Operator v. Canadian Union of Skilled Workers, 2012 ONCA 293 (CanLII)

If you would like to discuss the implications of this decision for your organization, please contact John-Paul Alexandrowicz at 416.864.7292, Stephanie N. Jeronimo at 416.864.7350 or your regular Hicks Morley lawyer.
