Case In Point

Activities of a School Board Found to be Construction Activities for the Purposes of the *Labour Relations Act*

Date: November 26, 2012

The Court of Appeal for Ontario has upheld a decision of the Divisional Court which found the Ontario Labour Relations Board ("OLRB") was reasonable in its conclusion that the Greater Essex District School Board ("School Board") was **not** a "non-construction" employer for the purposes of the *Labour Relations Act* ("LRA").

The School Board had an employee who supervised contractors performing construction work at the Essex County Civic and Education Centre, jointly owned and operated by the School Board and three other parties. All parties shared in the costs of the repair and maintenance operations. An employee of the School Board supervised contractors in their work at the Centre, for which the School Board charged an administration fee and which was approximately one-half of the employee's salary. On these facts, the OLRB found that the School Board did not meet the test for a "non-construction" employer with respect to the Centre.

That finding was upheld on judicial review. The Divisional Court held that the OLRB was reasonable in its conclusions that the construction provisions of the LRA applied: the School Board was doing work for an unrelated person from whom it received compensation, the employee was performing the work of a general contractor for which compensation was received and the three parties with which the School Board operated the Centre were not related parties.

The Court of Appeal dismissed the School Board's appeal. Among other things, it made the following findings:

- it was reasonable to include the construction management activities of an employer within the definition of "construction employer" as those activities were akin to those carried out by a general contractor;
- the receipt of fees by the School Board for construction management activities constituted the operation of a business within the definition of an "employer" for the purposes of the construction industry provisions of the LRA;
- the finding of the OLRB that the School Board and the other parties were "unrelated persons" within the definition of a "non-construction employer" was reasonable;
- the reasons of the OLRB were sufficient.

Going forward, if parties are seeking to fall within the "non-construction" employer section of the LRA and thus not be subject to the obligations that come with construction collective agreements, it will be necessary to show that not only did you not actually perform construction work for an unrelated party for which compensation was paid, but also that you did not arrange for and manage construction work for an unrelated party for which compensation was paid