Case In Point

OLRB Dismisses Related Employer Application Involving an Employer and its Sub-Contractor

Date: November 27, 2012

A recent decision of the Ontario Labour Relations Board may be of significance to employers who retain sub-contractors on a regular basis. The Board found that York Region and York BRT, an operation which contracted with York Region to provide it with transit services, were not related employers under subsection 1(4) of the *Labour Relations Act*. The Board also declined to overturn its established "upstream" related employer jurisprudence, finding that it had been correctly decided.

This was a related employer application brought by Amalgamated Transit Union Local 113, the bargaining agent for York BRT, involving York Region and York BRT. As noted by Vice-Chair Hayes, the Union in this case sought to "extend bargaining rights, achieved and exercised with a subcontractor, to the principal with which the subcontractor has a commercial relationship."

Local 113 alleged that York Region was the "ghost in the room" at the bargaining table. It asserted that the detailed control the Region exercised over the transit operations established its control over York BRT. While conceding that it had known about the nature of the relationship for years, it argued that the extent of the Region's control only became apparent in the last bargaining round which led to a strike.

York Region and York BRT asked the Board to dismiss the application without a hearing. They conceded that they were under common direction and control, but indicated that the focus should be on whether or not the Board should exercise its discretion under subsection 1(4) in this case. York Region submitted, among other things, that the relationship between it and York BRT was known to the union long before the strike, they were separate entities and should the York BRT contract end, the operation would go to another contractor. Moreover, it argued that "the application speaks to bargaining power. Bargaining rights are not synonymous with bargaining power. A related employer declaration would extend bargaining rights rather than preserve them."

Both parties relied on the Board's "upstream" related employer jurisprudence, and submitted that "the Board does not generally exercise its discretion where a union acquires bargaining rights in a subordinate operation and then seeks to flow 'upstream' to secure bargaining rights in the principle operation."

Vice-Chair Hayes noted that this case was one of the exceptional cases in which the motion to dismiss a related employer application should succeed. The critical issue here dealt with the exercise of the Board's discretion. Stating that the "upstream" jurisprudence had been correctly decided, he noted Local 113 had bargained with the subcontractor York BRT as a single employer through several rounds of bargaining: "the union had no difficulty in identifying what it believed to be the real employer in the first instance. It is difficult to accept that there is serious difficulty now." Vice-Chair Hayes stated:

49. […] it is inevitable that there will be functional interdependence between a customer and a subcontractor. Extensive controls, or demands made, by a customer over the conduct of a subcontractor may be the natural product of commercial leverage. It does not *ipso facto* make a legitimate subcontractor the creature of the principal. […]

He accepted York Region's argument that 'bargaining rights' is not the same thing as 'bargaining power' and stated there was no evidence to establish a scheme to defeat bargaining rights. Subsection 1(4) is not designed to protect against market forces: "If a subcontractor loses a contract to a *bona fide* competitor, unionized employees of that subcontractor may well lose their bargaining agent along with their employment."

The case is an important affirmation of the Board's reluctance to apply the related employer provisions of the Act to a legitimate contracting out arrangement.

York Region and York BRT were represented by Hicks Morley's Simon Mortimer