FTR Now

Changing Workplaces Review – Interim Report Issued

Date: July 27, 2016

Since May 2015, two government-appointed Special Advisors – Mr. Justice John Murray and Mr. Michael Mitchell – have been undertaking the Changing Workplaces Review (Review) to consider the changing nature of the workplace, the causes behind those changes, and whether the *Labour Relations Act, 1995* (LRA) and the *Employment Standards Act, 2000* (ESA) need to be amended to meet challenges created by the changes.

As reported in our *FTR Now* of May 15, 2015, *Ontario Begins Consultations on Labour and Employment Reform*, the Special Advisors were tasked with considering non-standard working relationships, the expanding service sector, globalization and trade liberalization, technological change and workplace diversity.

Earlier today, the Special Advisors released their long-awaited Interim Report. In this *FTR Now* we discuss some key issues identified by the Special Advisors. We will be providing further updates on the Interim Report by next week.

The Interim Report is a wide-ranging document, over 300 pages in length. After reiterating the context of the Review mandate, the Special Advisors emphasize that their recommendations will focus primarily on vulnerable workers engaged in precarious employment. The Interim Report does not generally identify specific recommendations. Rather, it serves several purposes:

- identify the substantive areas of the LRA and ESA that are being considered as part of the Review;
- outline the current state of the law and employee entitlements in each of those areas, drawing on context from other jurisdictions within Canada, as well as differing approaches in foreign jurisdictions, including the United States, the European Union and Australia;
- summarize the submissions made to the Special Advisors, identifying areas where submissions may have been lacking;
- identify the key options for recommendations that the Special Advisors are considering; and
- seek further input on those key options.

The range of options being considered by the Special Advisors is very broad and potentially far-reaching.

Labour Relations Act, 1995

A wide range of options are canvassed that have the potential to fundamentally alter the current labour relations landscape.

One option canvassed is a return to a card-based certification process. This would mean the end to the current fast vote, secret ballot process (in all sectors save for the construction sector) and the return to a process that hasn't existed in Ontario since 1995. Under a card-based certification process, an employer could find itself unionized if a defined percentage of employees in the union's proposed bargaining unit signed a membership card.

Beyond the Interim Report's analysis of the certification process, many other options are explored that were once a part of Ontario's labour relations laws in the 70s and 80s:

- requiring employers to provide an organizing union with a list of their employees before an application for certification is filed thus enabling the union's organizing efforts;
- expanding the basis upon which the Ontario Labour Relations Board could issue a penalty certification in the event of

a breach of the LRA during a union organizing campaign;
- reintroducing the Bob Rae government's Bill 40 notion of automatic first contract interest arbitration; and
- prohibiting an employer's current ability to utilize replacement workers in the face of a strike.

Employment Standards Act, 2000

With respect to the ESA, the Special Advisors are considering options related not only to the substantive employment standards, but also the ESA's scope of application and how it is enforced. Some key issues identified by the Special Advisors include:

- whether the ESA should be extended to independent contractors and dependent contractors;
- an expanded scope of who is an employer – for example, making franchisors liable for ESA violations of their franchisees, or implementing an expanded joint employer test;
- a recommendation to review the ESA's various exemptions, with an anticipated recommendation that certain hours of work and overtime exemptions be narrowed or eliminated (e.g. IT professionals, and managers and supervisors);
- whether changes should be made to the ESA's leave provisions, with a special focus on Personal Emergency Leave, and whether there should be an introduction of paid sick days; and
- further amendments to the regulation of Temporary Help Agencies, including potential restrictions on the use of assignment employees and potential increased entitlements for assignment employees.

Next Steps

As noted above, one of the purposes of the Interim Report is to solicit further input on the key options identified by the Special Advisors before a final decision is reached on the recommendations. The government has announced two (2) separate timelines for making submissions:

- **August 31, 2016** for submissions on the Personal Emergency Leave options canvassed in the Interim Report; and
- **October 14, 2016** for submissions on all other options on all other topics canvassed in the Interim Report.

We are in the process of reviewing the Interim Report in detail, and will be providing further updates by next week, including how submissions may be made to the Special Advisors. In the meantime, if you have any questions related to the Interim Report, please contact your regular Hicks Morley lawyer.

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