FTR Now

Changing Workplaces Review – Focus on the *Labour Relations Act, 1995*

Date: August 3, 2016

In our third client update related to the Interim Report of the Special Advisors under Ontario's Changing Workplaces Review (Review), we focus on the options identified by the Special Advisors as potential changes to the *Labour Relations Act, 1995* (LRA). While some of the key issues we identify in our discussion overlap with issues relating to the *Employment Standards Act, 2000* (ESA), the ESA sections of the Interim Report will be the subject of a subsequent *FTR Now* to be distributed later this week.

The Interim Report – LRA Issues

As discussed in our *FTR Now* of July 27, 2016, the Interim Report does not identify specific recommendations for amending the LRA. Rather, the LRA-related sections of the Interim Report (LRA Interim Report) identify those areas of the LRA that are being considered in the Review, and identify options for recommendations that the Special Advisors are considering, and on which they now seek further input.

The potential options being canvassed by the Special Advisors include many returns to the past, some very novel developments and a series of changes in the balance of labour relations that are frequently discussed with each change in the political wind. When viewed in its entirety, however, the LRA Interim Report is focused on increasing access to unionization and increasing the collective bargaining power of unions, once certified. Many areas of the LRA are left without comment including the provision allowing for free speech by employers, access to and transparency of union financial information and any aspect of employee rights to fair representation by unions.

Scope and Coverage of the LRA

The Special Advisors are seeking input on a potential return to the NDP era, which would allow collective bargaining by dentists, doctors, architects, land surveyors and lawyers. However, more focus is placed on exploring options that would allow domestic workers employed in a private home to unionize. Given that collective bargaining requires multiple employees working for a single employer – which is a significant barrier to domestic workers accessing union certification – the Special Advisors have proposed the possible creation of a system of some form of sectoral bargaining across multiple employers. This model would be novel and raises many issues.

In a sector of the workforce that has been subject to significant litigation under the *Canadian Charter of Rights and Freedoms* (*Charter*), the Special Advisors seek input on broadening the LRA certification rights or creating some form of interest arbitration regime for agricultural and horticultural workers. While remaining cognizant of the unique time-sensitivity of seasonal crop production, this expansion was stated to be the focus of "significant attention" in the Review.

Related Employers and True Employer

The options for change proposed for discussion here are significant and novel. They are posited on a theory that the case law for related employer applications under section 1(4) of the LRA has not kept pace with changing business models and has prevented unions from effectively certifying and bargaining with the true financing and decision-making entity.

The Special Advisors speak to the history and purpose of other sections of the LRA in their Review and yet here do not engage in such reflection. The introduction of related employer provisions allowed labour boards the extreme remedy of

overriding the very core principle of privity of contract to prevent erosion of union bargaining rights through improper business restructuring. The provisions were about neither rebalancing bargaining power nor allowing for ease of certification, yet these novel uses are the focus of this section of the LRA Interim Report.

The options for discussion include the broad possibility of the Ontario Labour Relations Board (OLRB) having the power to declare that two or more businesses are joint employers where this is required for collective bargaining to be effective, or where an entity has the power to carry on related activities even if it does not use that power (i.e. even in the absence of actual common control and direction). These would be significant changes to and expansions of the OLRB's powers.

On a more targeted basis, the LRA Interim Report speaks to the potential for a novel model whereby employees of temporary help agencies could be considered *de facto* related employers with their clients, without explaining how that model might work with a transient workforce, with existing collective agreement scope clauses which exclude agency employees and where an agency has multiple clients.

Furthermore, and with potentially sweeping consequences, the Special Advisors speak to the potential creation of an entirely new regime, undefined but perhaps including sectoral bargaining, to allow greater access for unionization and greater bargaining power for unions in the franchise sector. There is no discussion of the inability of unions to gain majority support at the individual franchisee level, no evidence of franchisees acting in concert to defeat unionization, and no discussion of how the core principles of section 1(4) are not effective in their original purpose of preserving, rather than expanding, acquired bargaining rights.

Access to Unionization

The LRA Interim Report uses this subheading, which could encompass the majority of its proposals, to discuss a possible return to a card-based certification system, the use of electronic membership evidence and a possible obligation to provide private employee information to unions that can demonstrate certain threshold levels of support.

The potential removal of the secret ballot vote and elimination of direct workplace democracy is a political football. In all Canadian jurisdictions, this change is frequently discussed and made with the change of political party in power. For example, the *Canada Labour Code* (CLC) currently provides for a secret ballot vote introduced by the Conservatives, and yet one Liberal platform in the last federal election was to return to card-based certification.

In defining the existence of a problem requiring legislative change, the Special Advisors have sought research on this issue and state as a preliminary finding that a secret ballot vote system brings with it a statistically significant reduction in both certification activity and success due, in part, to delay and a greater opportunity for unfair labour practices by employers. This is stated despite the commonality of card gathering activity under both models (arguably it should be easier to obtain card support when all that is sought is consent for a vote), and the very limited voting period of only five business days which provides little opportunity for employers to communicate with their employees about the pending vote.

The proposed use of electronic membership evidence as opposed to paper membership cards is also identified as an option and, where protected by a secret ballot vote as it is in the United States, is something which ought be achievable with certain safeguards. However, if card-based certification is implemented, this reliance on electronic membership evidence may raise significant concerns over the determination of true employee wishes. The LRA Interim Report contains no discussion of the duration or validity of membership evidence nor on the right of an employee to revoke his or her membership, although these may be significant issues if membership evidence is to be used for a card-based certification.

The LRA Interim Report also speaks to the use of alternative voting procedures including off-site votes or Internet and phone votes. The underlying premise that on-site votes (which make it easiest for employees to vote) are subject to undue employer influence is unproven and worthy of scrutiny. However, many employers already have experience with electronic and telephone voting federally and have focused on maximizing voter turnout coupled with safeguards for fraud and misconduct.

Also introduced is a novel concept of requiring the disclosure of employee lists to a union at an as-yet undefined threshold of support. This option, and its potential employee personal privacy breach, appears to be based on a union practice – which is considered improper by many employers – of applying for certification with limited support solely to obtain an employee list and then withdrawing the application pre-vote so as to prevent a bar on subsequent applications. The Special Advisors do not comment on the inappropriate and potentially unlawful applications made where a union does not have the appearance of 40 percent support, but instead suggest that provision of employee lists would eliminate this activity.

Remedial Certification

Currently, where employers significantly breach the LRA in a certification drive such that the true wishes of employees with respect to unionization cannot be determined, the LRA allows for remedial or penalty certification.

The Special Advisors have asked for comment on removing the requirement that a remedial certification only occur in cases where a second vote will not be able to provide a true statement of employee wishes, as well as on removing the current requirement that the OLRB determine if there is support amongst the employees for the union as their representative before imposing a union on a workplace. There is no discussion of the potential impact of either of these changes on either employer free speech or employee free choice and the related *Charter* rights.

First Contract Arbitration and Renewal Contract Arbitration

The Special Advisors seek comment on a range of extensions and expansions of the use of interest arbitration to resolve collective bargaining disputes rather than strike or lockout. Currently under the LRA, first contract interest arbitration is available in limited circumstances and, in subsequent rounds of negotiations, interest arbitration only occurs with the consent of both parties.

The options for discussion include an extension of the current first contract provision to all subsequent renewal agreements, and the possibility of interest arbitration as an automatic model in every instance where a first contract negotiation results in a strike or lockout of a certain duration. The Special Advisors also refer to the potential use of a “managed mediation” board which, despite its “mediation” name, has the same effect as interest arbitration, with third party control of the outcomes.

Unrelated, but included under the first contract discussion, is the suggestion that employees should not have the legal ability to decertify the trade union where a first contract arbitration application is pending. This would further limit the already narrow employee windows for exercising employee choice.

Successor Employer

Just as the options being considered in the related employer sections of the LRA Interim Report focus on increasing access to certification and greater consolidation of bargaining power, the Special Advisors are also looking for input on the extension of the sale of business provisions so as to have them apply in cases of true contracting out where there is no “sale” to speak of. The concept of awarding successor rights to the successful proponent in a contract for services situation, such as building services or the provision of home care services, could fundamentally alter the market-driven bidding model currently utilized.

An alternative option provided for comment would not transfer the entirety of the collective agreement to the successor, but proposes instead a flow through of certain benefits or conditions of employment to employees of the new service provider. This latter option appears more akin to an amendment to the ESA’s successor provisions, rather than the LRA, as it provides for maintenance of terms and conditions but does not transfer the union rights.

Consolidation of Bargaining Units

In another return to the 1993-1995 NDP era, the LRA Interim Report asks whether the OLRB ought to have the power to

consolidate or reconfigure bargaining units – whether for individual unions or multiple unions – and under what circumstances. As a general rule under the current LRA, once a bargaining unit has been certified, any changes to the composition of the bargaining unit are voluntary.

The basis for providing consolidation or reconfiguration power to the OLRB is to allow for the expansion of union representational rights in industries or sectors where there are multiple small locations (e.g. retail) and also perhaps to be used in a proposed new model where there is sectoral or multi-employer bargaining (discussed in the next section).

Broader-Based Bargaining Structures

One of the most novel areas that the Special Advisors have raised is the possibility of the introduction of what they refer to as "broader-based bargaining." This is a sectoral-based approach to unionization which would allow for multi-employer bargaining agencies to address sectors of the economy which are historically underrepresented by unions, and would allow for an increase in union density.

The LRA Interim Report discusses this possibility by reference to the sectoral approach in the construction trades industry and as used in portions of the Arts sector (under federal law). The collective bargaining in these sectors developed out of the old guild or trade model, and are generally accompanied by a central hiring hall and union placement of workers. The LRA Interim Report also references the model of a "Master Agreement" with local agreements, as used in the nursing home sector.

The options being considered under this head are not yet fully formed, and cover a broad gamut of possibilities. Common to them all is that they would provide for greater access to certification in traditionally unorganized areas of the economy and greater bargaining power by consolidation of smaller certified work groups. They also provide for the possibility of multi-employer agencies which would be engaged in a central bargaining regime.

These provisions should draw significant attention given the potential impact that they could have on a broad section of the Ontario economy. Furthermore, they ought be read in conjunction with the proposals on related employers and successor rights, discussed above, as another set of options which would be designed to both increase access to unionization and to provide enhanced bargaining power to union groups.

Replacement Workers

This area, a traditional flashpoint of political dispute as it has the potential to shift the power in negotiations, has three proposals – status quo, a ban on replacement workers or the introduction of the CLC model. While the first two are self-explanatory, the final option is not. The CLC provision, which allows replacement workers to be used to the point of "undermining a trade union's representational capacity" has no case law and no established meaning. Furthermore, this federal rule comes with related, and potentially offsetting, provisions such as continuing employment of essential workers during a work stoppage, which is not discussed in the LRA Interim Report.

Right to Return From Strike

In Ontario, employees have a right to return to work unilaterally during the first six months of a strike, subject to very limited exceptions. Following that time, any return to work right is governed by the general law on unfair labour practices and bargaining in good faith. As a general rule, employees are returned to work following a strike, yet the hypothesis for possible change is that the existence of this six-month limitation may be causing employees to request to return to work at that point in time to ensure job protection. No evidence of this is provided in the LRA Interim Report.

Refusal to Reinstate Post-Strike or Lockout

This section addresses the specific circumstance of an employee terminated for alleged misbehaviour during a labour dispute and proposes as options for consideration either a guaranteed reinstatement for the employee or some form of arbitration provision with just cause protection.

Currently, when a labour dispute is underway, a collective agreement is not in force and there is therefore no just cause protection or arbitration provision. An employer's actions are instead regulated by its obligations not to discriminate based on union activity and to bargain in good faith. Furthermore, the parties to the labour dispute may self-regulate and address these issues, should they arise, through negotiations.

Remedial Powers: Interim Orders and Expedited Hearings

The Special Advisors propose the status quo or one or more of five proposals which each would have the effect of expanding the power of the OLRB to make interim orders, including remedial orders pending a decision on the merits.

These options could be significant in the manner and means by which the OLRB could regulate both organizing and bargaining activity. By way of example, the OLRB currently has the ability to reinstate an employee terminated during a union organizing campaign pending a decision on the merits as to whether that termination was appropriate. The options might extend that power to all unfair labour practice allegations, perhaps allowing for an order to remove or withdraw an employer communication to its employees pending a decision on whether that communication was a breach of the LRA.

Extend Just Cause Protection from Date of Certification

Once a union is certified, the employer is subject to a freeze on terms and conditions of employment while it negotiates a first collective agreement. Termination of employees who are on contract, defined term and task or where business demands justify it, are acceptable subject only to the proviso that these actions may not be taken with anti-union *animus* or in breach of the LRA.

The LRA Interim Report provides as an option that all employees should have just cause protection from the moment of certification. This option is provided by reference to the short-lived 1993 to 1995 LRA amendments implemented by the NDP, and to address a union concern that absent such express protection employers will "clean house."

Expand OLRB Prosecutorial Powers and Penalties

The Special Advisors made a general comment and provided several options for change in this area.

As a general comment, the LRA Interim Report suggests that there is a "widespread disregard for the law as evidenced by allegations of non-compliance," and yet there is no data to support this nor indication of how many of these allegations of non-compliance are substantiated.

In terms of the options being considered, the Special Advisors suggest some potentially far-reaching changes including increased penalties, allowing private prosecutions to be brought in court, providing solely for state prosecutions or for removing the courts altogether and allowing the OLRB to "prosecute" and impose substantial administrative monetary penalties (akin to the powers of the Ontario Securities Commission).

These options are paralleled, and are perhaps driven by, similar options being considered in the ESA-related sections in the Interim Report, where the Special Advisors have identified ineffective enforcement as a particular concern. Applied in a labour relations context, several of the options have the potential to significantly transform the role and perception of the OLRB in regulating labour relations and the parties to collective agreements.

Employee Voice: Minority Unionism

In the LRA Interim Report, the Special Advisors made the following observation:

There is little doubt that effective employee voice can make workplaces function better. In our many years as practitioners we have seen, directly, that the most successful workplaces are those in which the parties work together, embracing opportunities for voice by fostering open dialogue, problem-solving and innovation.

While making no provision for employee voice and democracy within unions, the LRA Interim Report proposes instead options for a greater voice for employees within their workplace including the possibility of some form of minority unionism, or an institutional mechanism for employee interests to be engaged in the development of plans and policies of employers, or some form of protection of non-unionized employees who engage in concerted activity in respect of their working conditions.

For employers who are not unionized, these options are worthy of serious reflection and comment. The notion of minority unionization or protected concerted activity brings with it the potential for a divisive workforce.

Summary and Next Steps

The LRA Interim Report is an important document and the current window for discussion and feedback offers a great opportunity for participation. Even if only the most limited of options outlined above were introduced into law, all employers, whether unionized or not, would be faced with significant workforce and business changes. Most notably, franchisees, temporary help agencies, retailers, building service providers and those engaged in contracts for services (e.g. security services) all face the possibility of structural changes to their core business models by virtue of these LRA discussions.

We note that, in several areas of the Interim Report (both in the LRA and the ESA sections), the Special Advisors specifically note the absence of employer submissions on a subject. This absence has perhaps helped to shape the content of the Interim Report, but there is still one more opportunity to participate and provide submissions to the Special Advisors.

Submissions on the LRA options canvassed in the Interim Report must be made by **October 14, 2016**. The government has provided the following contact information for this purpose:

Email: CWR.SpecialAdvisors@ontario.ca

Mail: Changing Workplaces Review

ELCPB 400 University Ave., 12th Floor

Toronto, Ontario M7A 1T7

Fax: 416-326-7650

If you are considering making submissions, please note that because the Review is a public consultation process, all submissions may be made available to the public or to other persons or parties participating in the process.

If you have any questions related to this *FTR Now* or would like to discuss making submissions to the Special Advisors, please contact your regular Hicks Morley lawyer.

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