FTR Now

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

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In this update related to the Final Report of the Special Advisors under Ontario's Changing Workplaces Review (Final Report), we focus on the recommendations made by the Special Advisors regarding changes to the *Labour Relations Act, 1995* (LRA). While some of the key issues we identify in our discussion overlap with recommendations relating to the *Employment Standards Act, 2000* (ESA), the ESA sections of the Final Report will be the subject of a subsequent *FTR Now* to be published tomorrow.

The Final Report – LRA Issues

The Final Report outlines several recommendations that, if adopted, will have a significant impact on labour relations in the province. While the Special Advisors have not recommended a card-based certification process, they have done so while stating this forbearance is contingent upon five other recommendations regarding organizing, certification and first contracts which support increased union activity. Their recommendations also include expanding the scope and coverage of the LRA by eliminating a number of exclusions, expanding the application of successor rights to building services industries, deeming persons assigned by temporary help agencies to perform work for clients of the agency to be employees of the clients for purposes of the LRA, and giving the Ontario Labour Relations Board (OLRB) broad powers to consolidate bargaining units and implement sectoral bargaining among franchisees.

Scope and Coverage of the LRA

The Special Advisors recommend that agricultural and horticultural employees should be included in the LRA along with the traditionally excluded professions of architecture, law, dentistry, medicine and land surveying. In addition, they recommend that the LRA be amended to provide the OLRB with authority to prohibit or limit a strike by employees in these sectors in certain circumstances, and to require the parties to participate in "intensive" mediation. Along with this, the Special Advisors propose that the LRA be amended to grant to the OLRB broad authority to impose a dispute resolution mechanism to resolve first contract collective bargaining impasses up to and including binding interest arbitration.

Related Employers and True Employer

Although the Special Advisors do not recommend any changes to the existing law governing related employers or the manner in which the OLRB identifies the true employer, they do make a significant recommendation regarding employees of temporary help agencies.

Specifically, they recommend that persons assigned by temporary help agencies to perform work for clients of the agency be deemed to be employees of the client for purposes of the LRA.

The recommendations discussed below on sectoral frameworks, consolidation of bargaining units and franchisees would also provide a new avenue for the OLRB to bind distinct employers together for labour relations purposes.

Access to Unionization

The Special Advisors have recommended preservation of the secret ballot process for certification but have noted that their support of the status quo stands so long as there are appropriate remedies for employer misconduct and other changes supporting both union organizing and first contract negotiations. To that end, the Final Report includes a package of recommendations that the Special Advisors contend should be adopted in their entirety. This package includes the following changes:

- If the OLRB finds that the true wishes of the employees are unlikely to be ascertained because of employer misconduct, the OLRB would be required to order that the applicant union be granted bargaining rights at that workplace. This is known as “remedial certification.” Where remedial certification has been ordered, first contract arbitration would be available as of right unless the union has bargained in bad faith or is uncompromising without reasonable justification.
- The LRA should be amended to enable an “intensive mediation” approach for all first contracts in which the OLRB would have much bigger role in guiding negotiation, including limiting access to the remedy of strike and lockout (and to decertification or displacement of the union) and which could include first contract arbitration.

Where an organizing campaign is underway and the applicant union demonstrates the appearance of the support of approximately 20% of the employees in a bargaining unit, the OLRB would be given the authority to require the employer to disclose to the union the list of employees in the union’s proposed bargaining unit, together with each employee’s work location, address, phone number and personal email address. The same information would also be made available to an employee representative in a decertification application who demonstrates 20% support.

Successor Employer

The Special Advisors recommend that “successor rights” should be applied to the building services industries (i.e. security, food services, cleaning) and home care funded by the government. If adopted, this would mean that when building services or home care work is tendered or put out to a Request for Proposal, any existing bargaining rights and collective agreements applying to that work and the ongoing employment relationships would transfer to, and be binding on, the successful bidder.

In addition, the Special Advisors recommend that a regulation-making authority be added to the LRA to allow for the possible expansion of coverage to other services or sectors in the future.

Consolidation of Bargaining Units

The Special Advisors recommend that the OLRB be given the broad powers to consolidate and vary existing bargaining units, both before and after a collective agreement is in place, as it considers appropriate.

In addition, the Special Advisors recommend the LRA be amended in a manner similar to section18.1 of the *Canada Labour Code* to give the OLRB the ability to review the structure of bargaining units where a union has been certified for a group of employees and the same union is certified for a unit of employees in a separate location of the same employer, or for an additional bargaining unit at the same location. The OLRB would also have the power to apply, with or without modification, the terms of an existing collective agreement between that employer and the union, to the newly constituted unit.

Although not defined, the Special Advisors stipulate that this portion of their recommendations is intended to apply in sectors or industries where employees have been historically underrepresented by unions.

The basis for providing consolidation or reconfiguration power to the OLRB is to allow for the expansion of union representation 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).

Franchising in Restaurants, Fast Food and Similar Specified Sectors / Industries

The Special Advisors have concluded that the LRA should be amended to treat a grouping of franchisees of a common franchisor as if it were a single large employer with multiple locations.

They have recommended a model wherein certified or voluntarily recognized bargaining units of different franchisees of the same franchisor by the same union in the same geographic area could be required by the OLRB to bargain together centrally, with representatives of the franchisee employers in that area. The OLRB could require the formation of an employer bargaining agency and set its terms, if necessary.

The Special Advisors have concluded that collective bargaining in industries or sectors with franchisees can likely only be viable if units can be certified on a smaller basis, such as at a single location, and then varied or consolidated afterwards with additional locations. The Special Advisors further propose that the OLRB have the authority to create central bargaining and, if requested by a party involved, to direct that the terms of an existing collective agreement between a franchisee and a union be extended to apply, with or without modifications, to a newly certified bargaining unit involving the same union and a different franchisee (within the same franchise organization).

The Special Advisors did not recommend that the franchisor itself should be named as an employer with its franchisees (unless it is already a related employer within the meaning of section 1(4) of the LRA).

Publicly-Funded Home Care

The Special Advisors recommend that the government commission a special and expedited inquiry to consult with all the relevant parties and to make recommendations as to whether and how centralized bargaining in the home care industry could be established within a reasonable timeframe. It should also include the issue of dispute resolution.

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.

The Special Advisors have recommended that the LRA be amended to eliminate the six-month time period for striking employees to make an application to return to work.

Refusal to Reinstate Post-Strike or Lockout

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.

The Special Advisors have recommended that the LRA be amended to provide for arbitration of the refusal to reinstate an employee at the conclusion of a strike or lock-out, or of any discipline by an employer during the course of a legal strike or lockout or after the expiry of a collective agreement.

Remedial Powers: Interim Orders and Expedited Hearings

The Special Advisors have recommended that the current power of the OLRB to make interim orders be replaced with a broad power to make substantive interim orders on all matters that come before it, pursuant to the *Statutory Powers Procedure Act*.

Extended 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 Special Advisors have decided not to recommend that all employees have just cause protection from the moment of certification to the commencement of a first collective agreement. However, this position ought to be read in conjunction with the proposed guided mediation process and the proposal to increase remedial powers above – both of which would arguably provide increased flexibility for the OLRB in managing unfair labour practice complaints during this period.

Ability of Arbitrators to Extend Arbitration Time Limits in the Arbitration Procedure

The Special Advisors recommend that section 48(16) of the LRA be amended to include the arbitration procedure, as well as the grievance procedure. Under this proposal, an arbitrator would have the power to relieve against time limits if he or she is satisfied that there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced.

For the most part, this would simply amend the legislation to reflect the current practice of many arbitrators to relieve against time limits in the grievance procedure if they believe that there are reasonable grounds to do so and the opposite party will not be substantially prejudiced.

Additional Recommendations

We have intended in this *FTR Now* to provide a brief overview of the more significant recommendations of the Special Advisors. We note that there are additional recommendations related to prosecution and penalties, electronic membership evidence and voting, and the establishment of an Ontario Workplace Forum that we will discuss in further detail in the future.

We remind readers that the Final Report contains the recommendations of the Special Advisors that have been made to the Minister of Labour. It will now be up to the government to consider the recommendations that have been made and to determine which recommendations, if any, it will adopt and pass into law. This review process may take some time to fully run its course, and we may well see some recommendations being adopted more quickly than others (particularly with respect to those recommendations that may require more complex legislation or regulations to implement). Hicks Morley will continue to monitor the progress of this file and will be seeking to ensure that employer voices are being heard and considered by the government throughout this process.

If you have any questions related to this *FTR Now*, please contact your regular Hicks Morley lawyer.