FTR Now

Ontario Proposes Legislative Overhaul of *Labour Relations Act, 1995* in Bill 148 – Are you Prepared?

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The provincial government has wasted little time in responding to the Final Report of the Special Advisors under Ontario's Changing Workplaces Review (Final Report). On June 1, 2017, the government introduced Bill 148, the *Fair Workplaces, Better Jobs Act, 2017,* legislation that if passed, will implement significant reforms to both the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995* (LRA). Bill 148 has passed first reading and has been referred to the Standing Committee on Finance and Economic Affairs. In this *FTR Now* we focus on the proposed legislative changes to the LRA.

The proposed legislative changes to the *Employment Standards Act, 2000* will be the subject of a subsequent *FTR Now*.

Background on Bill 148

As we previously reported, the proposed *Fair Workplaces, Better Jobs Act* (Bill 148) does not address all of the recommendations outlined in the Final Report. However, it does respond to many of the more substantial recommendations and proposes additional changes that were not recommended by the Special Advisors. If passed into law, Bill 148 will have a significant impact on labour relations and unionization in Ontario.

Notably, Bill 148 proposes to introduce an alternate card-based process under the LRA for the certification of trade unions as the bargaining agent of employees of specified industry employers – in particular, employers in the building services industry, the home care and community services industry, and the temporary help industry. This change was not proposed by the Special Advisors. The extension of a new certification process in these industries must also be read in conjunction with the proposed new successor rights provisions, which will make it easier for unions to subsequently retain bargaining units when service work is re-tendered and a new provider chosen.

In addition, the certification process will be made easier, as a trade union may apply to the Ontario Labour Relations Board (OLRB) for an order directing an employer to provide it with a list of employees of the employer if it can demonstrate that 20 per cent or more of the individuals in its proposed bargaining unit are members of the union. Bill 148 also eliminates certain conditions for remedial union certification, makes access to first contract arbitration easier and adds an intensive mediation component to the process.

The changes also impact currently unionized employers, as the OLRB would also be given power to review and change the structure of bargaining units within a single employer where the existing units are no longer appropriate, and to consolidate newly certified bargaining units with other existing bargaining units under a single employer where they are represented by the same union. If passed, this would mirror a process already available to unionized parties regulated by the *Canada Labour*

Code.

Scope and Coverage of the LRA

The Special Advisors recommended that agricultural and horticultural employees be included in the LRA along with the traditionally excluded professions of architecture, law, dentistry, medicine and land surveying. These recommendations have not been implemented. Rather, the government has committed that the Ministry of Labour will work with affected ministries to consult with stakeholders to review these recommendations.

Requirement of Employers to Provide Union with List of Employees

Where no trade union has been certified for a bargaining unit the union believes is appropriate for collective bargaining, and no collective agreement is in place, a trade union will be able to apply to the OLRB for an order directing the employer to provide it with a list of employees in the bargaining unit. In making its application, the union must provide to the OLRB a written description of the proposed unit and the number individuals in the proposed unit and evidence of membership in the union. If the employer disagrees with the description of the proposed bargaining unit or with the estimate of the number of individuals in the union's proposed unit, it may give the OLRB notice of its disagreement within two days.

If there is no disagreement, or the OLRB determines that that the proposed bargaining unit could be appropriate, and the OLRB determines that 20 per cent or more of the individuals in the proposed bargaining unit appear to be members of the union at the time the application was filed, it shall direct the employer to provide to the union a list of employees of the employer. The list must include the name of each employee in the proposed bargaining unit and a phone number and personal email for each employee, if the employee has provided that information to the employer. The disclosure of this personal information is deemed to be in compliance with relevant freedom of information and protection of privacy legislation.

The proposed legislation contemplates limits on the proper use of this information and states that the union is only entitled to use the information for purposes of a campaign to establish bargaining rights, and must maintain confidentiality. Where the union has been provided a list and subsequently brings an application for certification, the description of the bargaining unit in the certification application must be the same as the description of the proposed bargaining unit in its application to obtain the list, except in very limited circumstances. The legislation will also impose time limits after which the list must be destroyed.

This amendment does not apply to employers in the construction industry.

Although the Special Advisors recommended that the same rules apply in decertification or termination applications, Bill 148 does not address decertification or displacement applications and would therefore only apply where there is no union in place.

Remedial Certification

Currently, where an employer has breached the LRA resulting in a union being unsuccessful in a representation vote, or in being unable to secure 40 per cent support to obtain a vote, the OLRB generally imposes remedies and then orders that a certification vote or second certification vote occur so long as it believes that the vote will be capable of reflecting the true wishes of the employees. The OLRB will certify a union as the bargaining agent without a vote only if it is satisfied that no other remedy would be sufficient to counter the effects of the contravention.

Under the framework outlined in Bill 148, the OLRB would no longer have that option. Where it is satisfied that an employer has contravened the LRA, and as a result the union was not able to obtain 40 per cent support, or if the true wishes of the employees were not likely reflected in a representation vote, the OLRB would be required to automatically certify the union as the bargaining agent of the employees in the bargaining unit.

Card-Based Certification Option in Certain Industries

As noted above, Bill 148 would amend the LRA to give unions that are applying for certification of a bargaining unit in certain industries the option to choose a card-based certification process. These industries include the building services industry, the home care and community services industry, or the temporary help agency industry.

The building services industry has been defined to mean, “businesses engaged in providing services directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.” The home care and community services industry means, “businesses engaged in providing community services under the *Home Care and Community Services Act, 1994*.” Temporary help agency industry means, “businesses engaged in employing persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer.” The LRA will also be amended to provide the government with the ability to make regulations further defining the meaning of the building services industry, home care and community services industry, and temporary help agency industry.

When seeking to certify a bargaining unit of an employer in one of these industries, the union can elect to have its application proceed by way of card-based certification instead of the existing vote-based certification process. Under the card-based process, the OLRB will dismiss the application if it is satisfied that fewer than 40 per cent of the employees in the bargaining unit are members of the union. If the OLRB is satisfied that at least 40 per cent but not more than 55 per cent of the employees in the bargaining unit are union members, it shall direct a representation vote. If it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the union, it may certify the union as the bargaining agent, or direct that a representation vote be taken. It is not clear what factors the OLRB is meant to take into consideration in deciding whether to certify the union or order a vote when support is more than 55 per cent.

First Collective Agreement Arbitration

The current provisions in the LRA provide for first contract arbitration in only very limited instances. Under Bill 148, these would be repealed and replaced with a process whereby parties could apply for the appointment of a first collective agreement mediator and an OLRB-managed mediation process in every case. The party applying for first contract mediation would submit a list of the issues in dispute and its position with respect to those issues. The other party would then have five days to respond with its list of issues in dispute and its position with respect to those issues. Within seven days of receiving the application, the Minister would appoint the first contract mediator, who would then meet with the parties to assist them in bargaining.

For a period beginning 20 days from the time the Minister makes the appointment, employees cannot strike and the employer cannot lockout any employees. In addition, the OLRB will not deal with any decertification or displacement applications that have been filed until the 20 days has elapsed.

At any time on or after the 20th day after the appointment of the mediator, if the parties have not entered into a collective agreement, either party may apply to the OLRB to direct the settlement of a first collective agreement by mediation-arbitration. Within 30 days of receiving such an application, the OLRB would then decide whether to order the parties to engage in further mediation, dismiss the application, or direct the settlement of a first collective agreement by mediation-arbitration.

The OLRB will direct mediation-arbitration unless it is satisfied that the applicant has not bargained in good faith, or it appears that bargaining has not been successful because of the uncompromising nature of any bargaining position adopted by the applicant without reasonable justification, or it believes that further mediation would be appropriate.

Where a trade union has been certified because the employer contravened the LRA (i.e. remedial certification, discussed above) the OLRB will direct that the first collective agreement be settled by mediation-arbitration unless it is satisfied that the

applicant has not bargained in good faith, or it appears that bargaining has not been successful because of the uncompromising nature of any bargaining position adopted by the applicant without reasonable justification. Thus, as long as the party seeking to have the first contract settled by mediation-arbitration has bargained in good faith following a remedial certification, it will be able to obtain an order that the first contract be settled by mediation-arbitration.

The LRA will be amended to include a detailed mediation-arbitration process. Once it has been directed, the parties could agree on a single mediator-arbitrator, or apply to the OLRB to do it. The mediator-arbitrator shall determine their own procedure, but the parties must be given full opportunity to present evidence and make submissions. The date of the first hearing shall not be later than 21 days after the appointment of the mediator-arbitrator, and they shall release their decision within 45 days of the commencement of the hearing, although time limits can be extended by mutual agreement or by the Minister.

There shall be no strike or lockout where a direction has been given to settle the collective agreement by mediation-arbitration, and any such strike or lockout that has already commenced must cease. Further, once a direction has been given for mediation-arbitration, the rates of wages and all other terms and conditions of employment and all rights, privileges and duties of the employer, the employees and the trade union in effect at the time notice to bargain was given shall continue in effect until the first collective agreement is determined, unless a change was agreed to by the employer and trade union.

A first collective agreement settled under this process would be required to be effective for a period of two years from the date on which it is settled.

Successor Employer

Bill 148 includes proposed changes to the LRA that would make “successor rights” apply to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services. A sale of business will be deemed to have occurred if employees perform services at premises that are their principal place of work, if their employer ceases, in whole or in part, to provide the services at those premises, and if substantially similar services are subsequently provided at the premises under the direction of another employer.

If passed as drafted, this would mean that when building services 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. This may have a significant impact on the willingness of new service providers to bid on such work, and at the very least will require a much more rigorous due diligence process on the part of a new service provider before bidding.

In addition, the legislation would leave it open for the government to pass regulations making this apply to other types of service providers that directly or indirectly receive public funds.

Review and Consolidation of Bargaining Units

The government has followed through with the recommendations of the Special Advisors to amend the LRA to give broad powers to the OLRB to review and consolidate bargaining units in order to make it easier for collective bargaining in industries where one employer may have different bargaining units with the same union.

Bill 148 would give the OLRB the power to review the structure of a bargaining unit if it has certified a trade union as bargaining agent, provided certain conditions are met:

(i) the application requesting the review is made at the time of the certification application or within three months after the certification

(ii) no collective agreement has been entered into

(iii) the same trade union that has been certified already represents employees of the employer in another bargaining unit at the same or a different location.

After conducting its review, the OLRB will have broad powers to consolidate bargaining units, amend any certification order or description of a bargaining unit contained in any collective agreement; order which collective agreement applies, with or without modification to an existing bargaining unit that is consolidated, declare the employer no longer bound by a collective agreement that applied before the consolidation, amend the provisions of collective agreements respecting expiry dates or seniority rights, or other such provisions, or authorize a party to give notice to bargain.

Bill 148 also directs that the OLRB shall take into consideration all factors that it considers relevant, including whether consolidating bargaining units would contribute to the development of an effective collective bargaining relationship, and contribute to the development of collective bargaining in the industry.

In addition, the OLRB may review the structure of the bargaining units if an employer or trade union that represents a bargaining unit of employees of an employer makes an application to the OLRB requesting a review and the OLRB is satisfied that the bargaining units are no longer appropriate for collective bargaining.

These changes will have a significant impact on the certification process, making it more likely that the OLRB will be willing to certify smaller fragmented units that it would normally not consider appropriate since it can address fragmentation issues through a subsequent review or consolidation.

These powers to review and consolidate would not apply to employers in the construction industry.

Right to Return from Strike

Bill 148 will amend the LRA to remove the time limit during which an employee on strike can apply to return to work. Currently, an employee must make an application to return to work within six months of the strike commencing in order to be reinstated. The six-month time limit will be removed. Employees shall be reinstated to employment following a strike or lockout on terms that the employer and trade union may agree upon, and this right may be enforced through the grievance and arbitration procedure.

In addition, an employer cannot discharge or discipline an employee in a bargaining unit without just cause during the period that begins on the date on which a strike or lockout became lawful and ending on the date a new collective agreement is entered into.

The LRA will also provide for arbitration of any refusal to reinstate an employee at the conclusion of a strike or lockout, or of any discipline by an employer during the course of a legal strike or lockout or after the expiry of a collective agreement.

Thus, employees will have protection against discipline or termination without just cause during a strike or lockout, and will have the right to reinstatement at the conclusion of the strike or lockout. Further, they will have the right to access the grievance and arbitration procedure in order to determine whether the discipline or termination was for just cause and to address an employer’s refusal to reinstate them to employment following the strike or lockout.

Just Cause Protection

Although the Special Advisors advised against extending the “just cause” protection to all employees in a bargaining unit from the date of certification to the date of the first collective agreement, Bill 148 does, in fact, amend the LRA to provide such protection. Under the proposed changes, employers will not be able to discipline or terminate an employee except for just

cause once the union has been certified as the bargaining agent. This protection will continue until a new collective agreement is entered into. Of course, since most collective agreements provide for such protection, in effect this change, combined with the change referred to above regarding just cause protection during a strike or lockout, means that once a union has been certified, employees will have just cause protection whether there is a collective agreement in force or not, or if the employees are on strike or in a lockout situation.

Remedial Powers: Interim Orders and Expedited Hearings

The current power of the OLRB to make interim orders will be replaced with a broad power to make interim decisions and orders in any proceeding.

Logistics of Votes

The LRA will be amended to allow the OLRB to conduct votes outside the workplace and to conduct votes electronically or by telephone.

Fines

Bill 148 would increase maximum fines under the LRA to $5,000 for individuals and $100,000 for organizations from the current $2,000 for individuals and $25,000 for organizations.

Next Steps

If the proposed legislation is passed, all labour relations proposals would be in effect six months after the Act comes into force.

Hicks Morley will continue to monitor the progress of this legislation 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.
