Case In Point

Divisional Court Confirms Non-Construction Employer Provisions in *Labour Relations Act* Do Not Infringe *Charter* Rights

Date: February 3, 2023

In *Carpenters' District Council of Ontario v. City of Hamilton*, the Divisional Court dismissed an application for judicial review of an Ontario Labour Relations Board (Board) decision in which the union challenged the amendments to the non-construction employer (NCE) provisions in the *Labour Relations Act* (*LRA*).

Specifically, the union challenged the constitutionality of Bill 66, *Restoring Ontario's Competitiveness Act, 2019* (Bill 66) on the basis that it contravened the right to freedom of association protected by section 2(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*). Bill 66 was important because, among other things, it amended the *LRA* to deem certain public sector entities (including municipalities and universities) as NCEs to whom the construction provisions of the *LRA* will not apply.

Background and Board Decision

Previously, municipalities were subject to the construction industry provisions of the *LRA,* which is a specialized regime with a specific bargaining scheme, including certain province-wide collective agreements. As a result of Bill 66, the province-wide collective agreements were no longer binding on municipalities or universities, among others.

The union's constitutional challenge arose in the context of grievances it filed against each of the respondent municipalities under the collective agreement. The municipalities responded that because of Bill 66, the collective agreement was no longer binding on them. The grievances were referred to arbitration where the union challenged the constitutionality of section 127 as amended by Bill 66.

The Board dismissed the union's grievances indicating that it was bound by the Court of Appeal decision, *Independent Electricity System Operator v. Canadian Union of Skilled Workers* (*IESO)*, where the Court held that section 127.2 of the *LRA* did not infringe on section 2(d) of the *Charter*. The Board found the factual distinctions between this case and *IESO* were insignificant and that there were no developments in the law that would render *IESO* distinguishable. The Board further concluded that it would in any event still find that section 127 did not violate the *Charter*. The union's subsequent request for reconsideration was denied by the Board.

The Divisional Court's Analysis and Dismissal of the Application

In its application for judicial review, the union submitted that the Board erred in its treatment of *IESO*. It argued that *IESO* was decided on the specific facts before it, which differed from those in the present case. The union also submitted that the Court of Appeal in *IESO* applied the wrong test under section 2(d) of the *Charter.* Finally, the union alleged that the Board erred in otherwise finding that section 127 did not violate section 2(d) of the *Charter,* as it failed to appreciate the "cumulative impact" of Bill 66. The Divisional Court disagreed.

First, the Court found the Board did not err in concluding that it was bound by *IESO* as the factual differences raised by the union did not render *IESO* distinguishable. Rather, the Board properly concluded that there was no change in the circumstances or evidence between the cases that would fundamentally "shift the parameters of the debate."

Second, the Court found the Court of Appeal in *IESO* applied the correct test for a section 2(d) *Charter* infringement on the basis that the test has been and remains "substantial interference" with the right to a meaningful process of collective

bargaining. The Court of Appeal applied this test in *IESO*.

Finally, the Court held that even if not bound by *IESO*, there was still no infringement of section 2(d) of the *Charter* on the facts of this case. The Court agreed with the Board that there is no constitutional entitlement to the specialized construction provisions in the *LRA* and the union's members still have a general collective bargaining process available to them under the *LRA*.

In sum, the Board did not err on any of the grounds raised by the union. The Board properly interpreted and applied the binding decision, *IESO,* and nonetheless, was correct in finding section 127 did not breach section 2(d) of the *Charter*. The application for judicial review was therefore dismissed.

Key Takeaways

This decision affirms that the amendments to section 127 of the *LRA* are constitutional and do not infringe section 2(d) of the *Charter*. As such, municipalities are properly classified as non-construction employers and thus, are not bound by the province-wide collective agreements for the construction industry.

The intervenor, the Governing Council of the University of Toronto, was represented by Hicks Morley's Frank Cesario.