Freedom of association enjoyed by individuals, not unions: Court

Union challenged finding that employer was a non-construction employer, preventing them from representing the employees

| BY ASHLEY BROWN |

LABOUR RELATIONS

A RECENT decision of the Ontario Court of Appeal provides reassuring news for employers about the scope of the right to freedom of association under the Canadian Charter of Rights and Freedoms. And this scope may not extend as far as some might think.

In *Independent Electricity System Operator v. C.U.S.W.* (I.E.S.O.), Ontario's Highest Court confirmed the charter does not extend to guarantee employees work, nor does it operate to assure trade unions of their preferred collective bargaining regime.

The central issue before the Court of Appeal was the constitutional validity of section 127.2 of the Ontario Labour Relations Act. The section permits an employer that does not actively carry on business in the construction industry for profit, but that avails itself of construction industry services, to bring an application to the Ontario Labour Relations Board for a declaration it is a "non-construction employer."

The significance of a non-construction employer declaration is two-fold. First, any trade union that represents (or may represent) construction employees of the employer no longer represents them. Second, any collective agreement ceases to apply to the employer insofar as it relates to the construction industry.

Non-construction declaration hurts right to freedom of association: Unions

The crux of the argument advanced by the trade unions was that the non-construction employer provisions of the act constituted a substantial infringement of their members' right to freedom of association under section 2(d) of the charter. In particular, the trade unions asserted the impugned section of the act deprived their members of guarantees of future work to which they would have otherwise had access.

The matter was initially heard by the board, which ruled that the act, in operating to terminate existing bargaining rights and nullifying negotiated agreements, amounted to an unjustifiable infringement of the collective bargaining process. However, the board's decision was later overturned by the Ontario Divisional Court and subsequently appealed to the Ontario Court of Appeal.

The court affirmed that while the charter protects the right of employees to associate collectively to effect change in the workplace, this protection does not extend to ensure a desired outcome in a labour dispute.

In a unanimous decision, the Ontario Court of Appeal affirmed the constitutional validity of the non-construction employer provisions, finding that the provincial legislature was entitled to exempt non-construction employers from the industry-specific provisions of the act. In coming to this conclusion, the court specifically noted section 127.2 did not prevent employees from availing themselves of the general provisions and protections of the act, but simply limited their access to the statutory scheme specific to the construction industry.

Significance for employers

The Court of Appeal's decision represents an important development for employers to which the non-construction employer provisions apply. More importantly, the court's commentary regarding the scope of charter rights in labour relations generally has implications for all employers. In particular, the court affirmed that while section 2(d) of the charter protects the right of employees to associate collectively to effect change in the workplace, this protection does not extend to ensure a particular or desired outcome in a labour dispute, guarantee access to any particular statutory scheme or preferred bargaining regime, or provide job security or protect future employment opportunities. In reaching these conclusions, the court also confirmed "that freedom of association, as guaranteed by s. 2(d), is enjoyed by individuals, not by unions."

The union has sought leave to appeal the decision to the Supreme Court of Canada. As such, the exact breadth of the right to freedom of association is far from settled. For now the *I.E.S.O.* decision provides helpful and reassuring guidance to employers on this evolving issue.

For more information see:

- *Independent Electricity System Operator v. C.U.S.W.* , 2012 CarswellOnt 5596 (Ont. C.A.).

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