

Preparing for the 2016 Construction “Open Period” in Ontario



By: Keith Burkhardt, Sherrard Kuzz, LLP

April 30, 2016 marks the expiry of the vast majority of Ontario’s construction industry collective agreements, and negotiations for new collective agreements are already underway for many construction trades.

As many construction employers know, the Ontario Labour Relations Act, 1995 provides for a two month “open period” at the end of each collective agreement term. During this open period an incumbent union can lose its right to represent employees in one of two ways:

1. Employees governed by an agreement may apply to decertify the union; or
2. A rival union can apply to displace the incumbent union through a process known as a raid.

For agreements that expire on April 30, 2016, the “open period” will start on March 1, 2016.

Under the Labour Relations Act an employer is not permitted to initiate a decertification application or facilitate a raid by another union. However, that does not mean an employer does not play an important role if a decertification or raid application is filed. To the contrary, a proactive employer can participate in the process with a view to achieving a result in the best long-term interests of the company.

UNDER THE LABOUR RELATIONS ACT AN EMPLOYER IS NOT PERMITTED TO INITIATE A DECERTIFICATION APPLICATION OR FACILITATE A RAID BY ANOTHER UNION. HOWEVER, THAT DOES NOT MEAN AN EMPLOYER DOES NOT PLAY AN IMPORTANT ROLE IF A DECERTIFICATION OR RAID APPLICATION IS FILED.

Actions An Employer May Take Prior to an Application Being Filed

Prior to an application being filed, an employer is permitted, within certain legal limitations, to answer questions from employees and make statements about existing terms and conditions of employment and the current bargaining relationship. An employer or an employee is not obligated to speak with a union representative and representatives of a rival union are not granted unfettered access to jobsites. Further, an employer is well within its legal rights to request that employees and unions not address decertification or raid issues during work time or on the jobsite.

Actions An Employer May Take Following an Application Being Filed

Once an application has been filed, an employer is placed under very tight timelines to file with the Ontario Labour Relations Board a response and full legal submissions. The response to a raid or decertification application is due two (2) business days after the application is served on the employer. If not filed, or not filed in a timely fashion, the employer can lose its ability to participate in the process.

An employer that intends to file a response will need to consider several critical matters and do so quickly. Some are entirely factual, while others require careful consideration of company objectives and strategy. For example:

- To which employees and to which trade or craft does the application apply?
- Which geographic areas and jobsites are affected?
- Which employees were at work on the day of the application?
- What proof is available to illustrate employees were working that day and the jobsite was active?
- On what date, at what time and where should the secret ballot vote take place?
- Who will represent the company at the secret ballot vote?

Following the filing of a response, it is likely the Labour Board will order a secret ballot vote be conducted within a few days (often five (5) business days after the application was served on the employer). The secret ballot vote, which is overseen by a representative of the Labour Board, will usually be held at the employer’s office or jobsite. If there is disagreement between the employer and union over matters such as whether an employee should ‘count’ for the purposes of voting, the scope of the bargaining union, timeliness, etc. it is possible (and in fact likely) some or all of the ballots will be “segregated” and not counted until the Labour Board has addressed the outstanding issues.

In the weeks following the filing of an application, the employer must file comprehensive submissions and legal argument with the Labour Board. Failure to file complete submissions (including the information and documents noted below) could result in the Board making a decision without considering the employer’s position. Submissions must include the following information and documents:

- Information about when each employee was first hired, including whether they were direct hired or referred by a union, and the manner in which the employee is paid (hourly, piecework, etc.).
- Details of precisely where each employee was working on the date the application was filed and what work they performed that day.

Continued ▶

“Open Period” in Ontario

► *Continued from page 15*

- Copies of payroll records, time sheets, invoices and any other documents relating to the payment of money for work performed by each employee for the period of one month before the application date, the week of the application date and one week after the application date.

If the Labour Board holds a hearing to address employee status or other issues, it will occur in Toronto approximately two (2) months after the application is filed. At the hearing, a representative of the employer may be required to testify or produce additional documents in support of its position.

What An Employer Can Do Now To Prepare

The complexity of the process and speed at which it moves means it advisable that any response to an application or the subsequent submissions be undertaken with the assistance of labour counsel experienced in the area of construction labour relations.

It is also prudent to take steps now to ensure that record keeping is complete and easily accessible (e.g., payroll is properly administered, daily site records provide meaningful and useful

information, etc.), and site supervisors and managers are trained on the decertification and raid processes and an employer's legal obligations and limitations.

In this delicate framework in which every minute counts, it is important to do everything possible to ensure those minutes count for the employer, not against it. ☹

The lawyers at Sherrard Kuzz LLP are recognized experts in construction labour relations. To learn more and for assistance, contact any member of our team.

Keith Burkhardt is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing management. Keith can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.

The information contained in this article is provided for general information purposes only and does not constitute legal or other professional advice. Reading this article does not create a lawyer-client relationship. Readers are advised to seek specific legal advice from Sherrard Kuzz LLP (or other legal counsel) in relation to any decision or course of action contemplated.