5 Key Implications Of NS Union Certification Based On “Industry” Dependence

Recently, the NS Court of Appeal confirmed that a union can be certified as the bargaining agent of employees based merely on their dependence on the employer’s “industry”– even when those “employees” may have worked for the employer for a single day.

The Supreme Court of Canada’s (SCC) September 2014 refusal to hear the employer’s appeal of this decision means the certification stands, and Egg Films Inc. – and all NS employers – must live with its significant impact. McInnes Cooper lawyers Jack Graham QC and Michael Murphy represented the employer Egg Films Inc. throughout.

Here’s the story – and 5 key implications of the certification decision to NS employers.

PROLOGUE

Egg Films produces television, radio and web-based advertising and corporate videos. Egg shoots about 15 – 20 commercials/year, with each shoot lasting only one or two days.It hires “motion picture technicians” (local technical workers to handle lighting, electrical and camera work, and sometimes wardrobe specialists, caterers and hair and makeup artists) on an as-needed basis, and rarely hires the same person more than once per year. Workers on average earn 3.3% of their annual income producing commercials for Egg; their primary employment is on film/television shoots that last weeks or months.

On March 5, 2011, the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 849 (IATSE) applied for certification as the bargaining agent for all “motion picture technicians” working for Egg based on a single day of work: the filing date. On March 5th, 11 technicians worked for Egg, but Egg didn’t employ any of them in the weeks before or after the application date. Egg disputed the certification at the NS Labour Board.

CERTIFICATION STORY

The Board certified IATSE as the bargaining agent for all “motion picture

technicians." Ultimately, the NS Court of Appeal reviewed the Board's certification decision and decided it was reasonable:

"Employees". The Board decided the NS labour relations legislation applies to one-day workers like those whom Egg engaged on March 5, 2011 – and they could unionize. The Board called them "non-self-dependent employees", comparing them to construction industry workers governed under another part of the legislation: they don't depend on Egg to make a living, but they (like construction workers) depend on multiple employers in the film/television industry. The Court agreed they are "employees", noting that in the "new economy" many workers depend on multiple employers in an industry to make a living.

Appropriate Bargaining Unit. Egg also hires other set workers (directors, actors, camera operators and various technical workers) with a similarly fleeting connection to the workplace – but whom the union didn't represent. The Board decided that an all-inclusive bargaining unit including these other set workers may be best or better – but not necessary. The Court decided the weighing of the criteria for the appropriateness of the proposed unit is for the Board – not the Court.

Craft Unit. The Board decided that the NS *Trade Union Act*'s Craft Unit provisions only apply to construction unions certifying non-construction industry employers – not to IATSE (but if they did, IATSE satisfied the certification criteria). The Court decided this was reasonable.

Procedure. The Board required Egg to post standard form notices in its offices even though none of the affected workers worked there; it didn't recommend any other form of notice. Only five of the 11 workers engaged on March 5, 2011 voted – but the Board refused to order a second vote. The Court confirmed that only those workers employed on the application date could vote – even though Egg had hired about 150 such workers in the 15 months before that date.

EPILOGUE

On September 25, 2014 the SCC refused Egg's request to hear its appeal of the NS Court of Appeal's decision, leaving all NS employers to live with the Court's decision – and its impact. Here are 5 key implications of the certification decision for NS employers:

1. **New Category of "Employee".** Only "employees" can unionize under NS (and most) labour relations legislation, so typically a labour board considering a certification application first decides if the workers are "employees" or "independent contractors". "Employee" is traditionally defined as one who depends on a particular employer to make a living. Without this relationship, there's no unequal bargaining power and arguably labour relations legislation has no role. The Board decided Egg's workers are "employees" even though they: were non-exclusive; had no continuing interest in the workplace; weren't employed by Egg on the vote date; didn't depend on Egg to make a living; and didn't have regular working hours or any guarantee of continued employment. The Board referenced the vulnerability of non-self-dependent workers in the new economy, but its definition of "employee" is inconsistent with the purpose of labour relations legislation and allowing them to unionize doesn't level the playing field – it tilts it toward the workers. For example, Egg's workers could strike, making Egg unable to shoot commercials – but without risk to the workers because they don't depend on Egg to make a living.
2. **The "Industry".** The Board decided Egg is an employer in an industry upon which these workers depend – even though it's exclusively a commercial production company, the workers earned negligible income from commercial production and

there was extensive evidence distinguishing between the commercial production and television/film industries.

3. **Substance v. Form.** The Board created a new category of employees ("non-self-dependent employees") – but didn't modify its standard procedures for providing them with notice of the application and the certification vote.
4. **Narrowing Craft Unit Provisions.** Deciding that the Craft Unit provisions apply only to construction unions certifying non-construction industry employers significantly narrows the NS Craft Unit provisions. It's also surprising: IATSE purports to represent "allied crafts," and other provincial boards and courts have decided that craft unit rules and regulations govern other IATSE locals.
5. **Multiplication of Unions.** Deciding that the proposed bargaining unit is appropriate could lead to a different union representing each different group of employees, resulting in workplace fragmentation. In Egg's case, the director's union, actor's union, and camera operator's union could each apply for certification – and force Egg, a small employer, to simultaneously negotiate contracts with four different unions.

Last Updated: December 1 2014

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