

Changing Workplaces Review could change construction

by Angela Gismondi Oct 26, 2016

Ontario's review of the changing nature of the workplace had many in construction under the impression the industry would be excluded from the review, but now stakeholders are realizing that may not be the case.



Changes to main components of the Labour Relations Act (LRA) and the Employment Standards Act (ESA), as proposed in the Changing Workplaces Review interim report, could in fact have significant impacts on the construction sector.

Andrew Pariser, vice-president of the **Residential Construction Council of Ontario** (RESCON), said after the release of the report at the end of July, it became clear that construction was not exempt.

"The sections specific to construction are excluded, but the main part that applies to everyone, if you make changes there, it will obviously impact construction and that wasn't widely understood," explained Pariser, adding the report was released with a tight turnaround time for feedback submissions. The deadline was Oct. 14.

"We're trying to communicate with our membership. We want to help get the word out that construction is not excluded," he said. Patrick McManus, stakeholder relations and services manager at the Ontario Sewer and Watermain Construction Association (OSWCA), agreed when the review was initially announced, there was a misunderstanding that the construction industry

would not be considered, but really what was excluded was specific provisions pertaining to construction in the LRA.

"There seems to be this idea or intent that they want to alter the base legislation of the LRA and the ESA, both of which will have pretty significant impacts on construction," said McManus.

"The potential exists for a profound impact as a result of what may come out of this."

In February 2015, the provincial government announced it would review issues that affect employers and workers in the modern workplace. Two special advisors — lawyer Michael Mitchell and former Ontario Superior Court Justice John Murray — were appointed to lead the public consultations. The 300-page interim report identifies 50 issues and about 225 options to amend Ontario's LRA and ESA.

The industry should have been consulted, Pariser noted.

"Construction is a very large part of the economy. If you're going to have a consultation and it's going to involve construction, you need to make sure that you're reaching out to all the construction partners," said Pariser.

He also commented on the scope of the review. Historically, labour relations reviews are very focused with a limited number of issues examined, but this report is extensive.

"Because ESA and LRA are base pieces of legislation, they create almost a spider web of labour law," said Pariser.

"Labour laws are complex just by their nature and so if you're going to examine or propose changes, you're going to need to look at a small number of changes because the unintended consequences are vast."

For example, the report speaks to potentially changing the definition of what an employer is.

"That definition has implications throughout the (Labour Relations) act," said Pariser.

"It could change how people are hired. It could change how businesses are organized. It could change how bargaining is conducted. It could essentially change how workplaces are organized on site."

Modifying the definition of employer is OSWCA's main issue as well.

"Specifically, there's been discussion around what a 'related' and 'joint' employer are, what these provisions are under the Labour Relations Act and the potential exists for that to impact existing construction collective agreements and also just how the contractor/subcontractor relationship works as the result of changing a definition in the base legislation," McManus explained.

On a broader note, he said the industry is concerned with some of the things being proposed under the ESA part of the review. The sewer and watermain sector, he explained, has a limited annual work cycle and because of that the sector is afforded different exemptions related to work schedules, hours of work, overtime pay, working on public holidays, severance and termination pay.

"We don't work 40 or 44-hour weeks, we work 50-hour weeks and that's allowed under the ESA. That's done because of the fact that we only work for seven, maybe sometimes eight months of the year," McManus stated.

Michael Sherrard, of Sherrard Kuzz Employment and Labour Lawyers, pointed out the terms of reference for the review stated consultations would not consider "the construction industry provisions of the LRA."

But the base provisions and the construction provisions are inter-related.

"If you make changes in the base part or the first part of the LRA, if you're not careful, it can have an impact on construction without you intending it to," explained Sherrard.

Of particular concern is whether or not the review will impact the definition of an employee and how employees are treated in construction and whether or not it will impact the current "related employer" provisions of the act. The report references concepts from the book "The Fissured Workplace" by a U.S. author David Weil. Sherrard used the example of a general contractor contracting out work to subcontractors and those subcontractors contracting out work to other subcontractors.

"The concept is that the general contractor is the beneficiary of some of that labour and should therefore have some of the liability for that person," said Sherrard.

"If they go so far as to make this recommendation to change the related employer (definition), they're looking at concepts to ensure the general contractor becomes responsible, potentially jointly and severally for employment law compliance as it relates to a subcontractor."

RESCON has put forward a submission to the province identifying the issues and voicing concerns. As part of a larger construction coalition, OSWCA met with reviewers and put together a submission as well.

"Rather than making these broad, sweeping changes to the ESA and the LRA, one of the things we propose is making sector-specific legislation," said McManus.

"If there is a sector that's been identified as the problem sector, then focus in on that sector with specific legislation rather than upsetting the applecart here with broad sweeping changes to the base act."

The special advisors are expected to provide a final report to the government by Dec. 31.