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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April issue of the OLRB Reports. The full text of recent OLRB decisions is now available on–line through the Canadian Legal Information Institute at www.canlii.org.

Change in Working Conditions – Practice and Procedure – Unfair Labour Practice – The CAW asked whether the Board had jurisdiction over civil proceedings launched by it and some of its members against a Health and Welfare Trust – The Trust, which provided benefit coverage for employees of a number of organizations, was engaged under a collective agreement between Auto Warehousing and the former bargaining agent for the employees, the Teamsters – When the Teamsters were displaced by the CAW, the Trust gave notice that it was ending benefit coverage for Auto Warehousing's employees even though the employer continued to make remittances on behalf of the employees – Both the CAW and Auto Warehousing argued that the Board had no jurisdiction to hear this matter – The Board agreed: this is not a labour relations dispute and it does not require an interpretation of a collective agreement or the Act – Application dismissed

AUTO WAREHOUSING COMPANY CANADA LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA); OLRB File No. 2206-12-U; Dated March 18, 2013; Panel: Matthew R. Wilson (11 pages)

Bargaining unit – Certification – Security Guards – The employer objected to the union seeking to represent a bargaining unit of security guards on the basis that it would create a conflict of interest, pursuant to section 14 of the Act – The Campus Safety Officers' (CSOs) routine work included responding to calls, enforcing laws and regulations, investigating incidents and protecting University property (which included monitoring strikes and picketing) – The evidence supported the conclusion that CSOs were directly and independently involved in investigations of incidents, some of which involved trade union members; CSOs had the power to characterize an offence and use their discretion to decide whether to arrest without first consulting a superior or the police – The employer argued this was a conflict of interest under subsection 14(5)2 of the Act which lists "other duties and responsibilities" as a criterion for consideration – The Board held that the CSOs' powers to investigate and arrest placed them in a conflict of interest in respect of employees represented by CUPE; security guards should not be put in a position of divided loyalties between the interests of the employer and the interests of the individual facing arrest – Application for certification dismissed

CANADIAN UNION OF PUBLIC EMPLOYEES; RE CARLETON UNIVERSITY; OLRB File No. 3730-09-R; Dated March 15, 2013; Panel: Patrick Kelly (15 pages)

Practice and Procedure – Unfair Labour Practice – CUPE alleged that Arnprior violated s. 86 of the Act when it refused to process a discharge grievance to arbitration while the parties were negotiating their first collective agreement – Arnprior denied the violation and asserted that CUPE should have framed its s. 86 complaint as a termination without just cause, rather than a refusal to refer the grievance to arbitration – The

Board held that s. 86(1) does not grant a union a substantive right to refer disputes to arbitration; what it does is grant the Board jurisdiction to determine what rights, duties and privileges are caught by the "freeze" provisions of the Act and what remedies may be available for breaches of the rights, duties and privileges – Although there was an arbitration procedure in place in the earlier collective agreement with a different union, that was not a right that carried over once the original union was displaced (and its collective agreement ceased to operate) – Arbitration is a process of dispute resolution (guaranteed by s. 48 of the Act); it is not a term of employment, a right, duty or privilege that must be maintained to ensure the scheme of collective bargaining is meaningful; whatever the result of collective bargaining, the right to arbitration continues to exist – Application dismissed

CORPORATION OF THE TOWN OF ARNPRIOR; RE CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB File No. 3071-11-U; Dated March 18, 2013; Panel: Jesse M. Nyman (17 pages)

Order for Productions – Practice and Procedure – The union learned of an alleged "captive audience" meeting; it sought production of (1) copies of briefing or speaking notes used by management at the meeting; (2) copies of minutes, notes or recordings of the meeting; and (3) copies of any notes or memoranda pertaining to the planning of the meeting, including materials directed at the employees re the meeting itself, their attendance and/or the content of the meeting – The employer argued that the material was irrelevant or that, because of its lawyer's involvement in all aspects of the meeting, all of the material sought was subject to either litigation or solicitor-client privilege – The Board held that since there is a relatively low threshold for "arguable relevance", the materials the union was seeking were arguably relevant – However, because of the lawyer's involvement in planning the meeting, drafting speaking notes, and his attendance at the meeting, and because there were two applications before the Board at the time the meeting was held (the certification and an unfair practice complaint), preparations for the meeting and communications between counsel and the employer during the period leading up to the meeting should be held in a "zone of privacy" and should be protected by litigation and/or solicitor-client privilege – The Board did find that the audio recording of the meeting was not subject to privilege: it was an open meeting; the employees were not seeking legal advice; they were not counsel's clients, the employer was; if any privilege attached to the content of the meeting, it was waived by the employer when it invited the employees to the meeting – Audio recording to be produced – Matter continues

CS WIND CANADA INC.; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS; OLRB File No. 2488-12-R; 2526-12-U; 2536-12-OH; Dated March 22, 2013; Panel: Gail Misra (9 pages)

Certification – Representation Vote – Unfair Labour Practice – LIUNA applied for certification of the employees of Bronnenco and also filed an unfair labour practice complaint, requesting remedial certification following a representation vote that ended in a two-to-two tie – The Board found the following to be violations of the Act: (1) the interrogation by a member of management regarding an employee's union membership; (2) threats by a member of management that labourers' work may be contracted out; (3) the removal of an employee's lead hand duties, despite there being no loss of pay; (4) the presence of a member of management at an off-hours, off-site, meeting where heavy "union bashing" occurred; (5) management condoning, and sometimes facilitating, the spread of anti-union sentiment – The Board found that all violations were committed by a junior member of management with limited authority but most anti-union sentiment was spread by a bargaining unit member opposed to the union – The Board held that senior management did nothing to dissociate the employer from the actions of employees opposed to the union, and it could not escape liability for the actions of a junior member of its management (even one with acknowledged limited authority) – However, the Board determined that remedial certification was not appropriate in the circumstances: since all violations took place in the first week of the organizing campaign and were followed by two years of labour relations peace before the representation vote was taken, it was possible that the employees' true wishes could be reflected in a second vote – Unfair labour practice complaint upheld; second representation vote ordered

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; RE BRONNENCO CONSTRUCTION LTD.; OLRB File No. 3650-06-R; 3823-06-U; Dated March 5, 2013; Panel: Jack J. Slaughter (25 pages)

Certification – Conciliation – Termination – Timeliness – In three representation applications (two displacement applications for certification by the Cement Masons; one termination application), the Board had to determine the effect of the extended period of time following the appointment of a conciliation officer who (for no apparent reason) failed to report on his activity to the Minister – The passage of time (20 months since the appointment of the

officer) and the lack of a report directly affected the timeliness of the applications – The Board considered various provisions in the Act that speak to time lines, bars and mandatory duties of public officers – It noted in particular that a third party (like a displacing bargaining agent, or the employees themselves who might be seeking to terminate a union's bargaining rights) would have no access to information about, or the reports of, the conciliation officer – The Board held that any interpretation of the Act that would provide for an indefinite period of conciliation that bars all representation applications is inconsistent with the purposes and values of the legislation – Applications allowed to proceed – Votes to be counted

SIGNATURE CONTRACTORS WINDSOR INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA UNION LOCAL 598; OLRB File No. 3315-12-R; 3316-12-R; 3317-12-R; Dated March 28, 2013; Panel: David A. McKee (11 pages)

Certification Where Act Contravened – Unfair Labour Practice – The SEIU sought remedial certification when it failed to win a clear majority in the representation vote (33 ballots in favour of the union; 34 against; 12 segregated and not counted) – The union submitted that Sunrise mounted a significant leadership campaign, importing various senior staff from across its international workplace to meet with employees, conduct town hall meetings, draft and circulate memos, all in an effort to dissuade employees from casting votes in favour of certification – The employer argued that its campaign was aimed at re-establishing lines of communication with staff; the memos, meetings and visits were intended to repair strained relations, not to "bust" the union – The Board found otherwise; looking at Sunrise's efforts cumulatively, the unusual attention paid to Sunrise staff amounted to "undue influence" and violated s. 70 of the Act – Further, communications which threatened job security violated s. 72 – The union's threshold support in its original application (well over 50%) was not reflected in the outcome of the representation vote – In addition to granting the union remedial certification, the Board set out explicit direction for Sunrise to afford the SEIU access to its workplace and workforce to counteract Sunrise's contraventions of the Act – Orders accordingly

SUNRISE OF AURORA O/A PRP SENIOR LIVING INC.; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA; OLRB File No. 0076-12-U; Dated March 26, 2013; Panel: James Hayes (53 pages)

Consent to Prosecute – The UFCW brought this application citing the following facts: (1) the union gave notice to commence negotiations for a renewal of the collective agreement; (2) an arbitrator had found in favour of the union in a grievance alleging the employer's failure to remit union dues and to make certain contributions required under the collective agreement; (3) the employer did not comply with the arbitrator's award; (4) the union was successful in an unfair labour practice complaint filed with the Board; (5) the employer failed to file a response to the present application – The Board found there was nothing more that the union had to do other than initiate this application – Consent to prosecute granted

QUALITY HOTEL AND CONFERENCE CENTRE NIAGARA FALLS, ONTARIO; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA) LOCAL 102; OLRB File No. 1561-12-U; Dated March 18, 2013; Panel: Matthew R. Wilson (5 pages)

COURT PROCEEDINGS

Related Employer – Judicial Review – The employer sought to judicially review the Board's positive finding in a related employer application – The Board made its ruling in the absence of a response from the employer(s), even though they had been granted an extension to file a response – The employer raised two issues in the judicial review: (1) that the Board's denial of its request for reconsideration was unreasonable, and (2) that the Board breached procedural fairness and natural justice when it refused to set aside the default judgment in light of the lack of notice to employees – The Court held, first, that the employer could not raise issues of natural justice or procedural fairness on behalf of its employees; furthermore, the employer could not rely on its own failure to post notice to its employees – The Court reviewed the Board's refusal to reconsider on a standard of reasonableness and upheld the Board's decision: there was no reasonable reason why the employer did not file its response on time and any prejudice that resulted from its own inaction was outweighed by its cavalier attitude to the Board's process – The Court also held that the Board did not err in not addressing the employer's assertion regarding the expansion of the union's bargaining rights: the Board is not required to address every issue raised and the Court will give deference to how the Board uses its discretion to weigh various relevant factors in reaching its decision – Application for judicial review dismissed

2130869 ONTARIO LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183; RE BAYWOOD CARPENTRY &

GENERAL CONTRACTING LTD.; RE ONTARIO LABOUR RELATIONS BOARD; (Court File No. 359/12); Dated March 14, 2013; Panel: Molloy, Herman and Edwards JJ. (5 pages)

Judicial Review – Unfair Labour Practice – The employee sought judicial review of the Board's decision that there was no anti-union animus in his discharge as a referee in the National Hockey League – Applying a standard of reasonableness, the Court held that the Board did not apply an incorrect test or ask itself the wrong question in assessing the circumstances of the dismissal – Similarly, the Court did not accept the employee's submission that the Board had misunderstood or misapplied the test in relation to the burden of proof – The Board's findings were properly based on direct evidence and reasonable inferences – Application dismissed

DEAN WARREN; RE ONTARIO LABOUR RELATIONS BOARD; RE NATIONAL HOCKEY LEAUGUE (Court File No. 587/10); Dated March 5, 2013; Panel: Hackland R.S.J., Aston and Lederer JJ. (8 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Defence Contract Management Agency Americas (Canada) (No. 2) Divisional Court No. 86/13	0955-11-R	Pending
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	June 6, 2013
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	Heard, Reserved
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	April 17, 2013
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	May 22/13
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	Dismissed
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al ' '(Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	May 22/13
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	April 8/13
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Dismissed Reasons to follow
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	May 13, 2013
John McCredie v. OLRB et al Divisional Court No. 1890/11 **London**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	Dismissed
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Supreme Court No. 34915	3322–03–R 2118–04–R	See above
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above