ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Leonard Marvy, Solicitor
Aaron Hart, Solicitor

September 2017

ALTERNATE CHAIR

The Board is very pleased to announce that **Matthew Wilson**, a full time Vice-Chair of the Board for the past five years, has been appointed the Alternate Chair of the Board.

SCOPE NOTES

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

Certification – Construction Industry – Practice and Procedure – Representation Vote – The applicant originally filed a certification application under section 128.1, but subsequently requested that the Board exercise its discretion to convert it to one filed under section 8 to enable access to section 11 relief – The response form to the original application did not require the responding party to check off the box indicating whether they were giving notice under section 8.1 – The applicant separately filed a section 96 application requesting remedial certification under section 11 based on alleged unfair labour practices – In determining whether to grant the requested conversion, the Board assessed the two factors: whether there is a good reason for seeking the amendment, and whether granting it would prejudice the responding party – The applicant asserted the responding party "padded" the employee list with employees who were not performing bargaining unit work on the day of application, and that the alleged unfair labour practices compromised its ability to prove this – The responding party denied all of the allegations and argued the request was vexatious – The responding party noted the applicant was aware of many, if not all, of the alleged unfair labour practices prior to filing the original application, and could have filed under section 8 at that time – The Board accepted there was a good reason if the applicant was correct in its assertions, and the applicant was not required to apply under section 8 if they believed they had sufficient support at the time – The responding party asserted that allowing a conversion to a vote-based application would prejudice them as this would waste their significant preparations for status disputes – The Board found that the responding party's preparations may be useful for resolving voter eligibility disputes, and that a representation vote would result in any case if insufficient employee support was determined – The Board further found that a notice of the representation vote would be posted in the workplace and the responding party would be able to explain the underlying reasons to its employees – The responding party also asserted prejudice by being precluded from filing a timely section 8.1 objection as required within two days of receiving a section 8 application – The Board adopted the reasoning in *Abcott Construction Ltd*., 2007 CanLII 36374 and determined the responding party fulfilled the requirements of section 8.1, despite not checking it off, by giving notice it disagreed with the applicant's estimate of number of employees in the proposed bargaining unit – The Board exercised its discretion to grant the requested conversion – The Board ordered a representation vote with the ballot box sealed and the ballots of disputed individuals segregated – Matter continues

BRANT DOYLE PLUMBING LTD.; RE: ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; OLRB File No. 0677-17-R; 0720-17-U; 0721-17-R; Dated August 4, 2017; Panel: Lee Shouldice (18 pages)

Certification – *Colleges Collective Bargaining Act, 2008* – Representation Vote – OPSEU applied for certification for part-time academic staff on June 23, 2017 and the Board, in a previous decision, determined that the representation vote would be held on October 2, 2017 – The temporal scope of the voting constituency remained in dispute between the parties – OPSEU's position was that the voting constituency should include those at work from January 1, 2017 until October 2, 2107, whereas the Council's position was that it should be those at work at the start of voting on October 2, 2017 – The Board found neither extreme to be appropriate – The Board reviewed the statutory language, previous case law, and noted some unique factors that should be considered – First, the vote is being held several months after the application date, so the Board must consider the lapse in time and large variance in the bargaining unit – Second, the semester system means that some of those working in the Fall semester (when the vote is scheduled) were not necessarily working in the Spring semester (when the application was filed) and vice versa – Third, the Board noted that the organizing drive took place in a markedly different time period than the application and the vote and that OPSEU was in control of when to conduct its organizing campaign and when it chose to file the application – After considering these factors and balancing the interests of the parties, the Board decided that the voting constituency should include any employee in the bargaining unit who had an employment relationship with the employer on or after June 23, 2017 up to and including October 2, 2017 – Matter continues

COLLEGE EMPLOYER COUNCIL; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION ("OPSEU"); OLRB File No. 0805-17-R; Dated August 30, 2017; Panel: Matthew R. Wilson (9 pages)

Duty of Fair Representation – Remedies – The union chose not to proceed to arbitration with a grievance (concerning taking Sick Pay Gratuity as vacation pay prior to retirement) it had filed on behalf of the applicants – The union relied upon a legal opinion regarding the merits of the grievance opining that the grievance was not likely to succeed – The issue before the Board was whether the applicants' ought to have been provided with access to the legal opinion in order to argue their appeal before the union's Grievance Committee – The Board noted that while a grievor does not generally have a right to appeal a union's decision not to proceed to arbitration, when a union does provide such a right it is a meaningful one; and in such circumstances a grievor may even be able to convince the Grievance Committee to take a grievance to arbitration in the face of a legal opinion indicating it would be unlikely to succeed – The Board found that where a legal opinion is secured by Local 79, and the Grievance Committee relies upon that legal opinion to not refer a grievance to arbitration, fairness dictates that an opportunity ought to include access to the legal opinion in question – The Board further noted that if solicitor client privilege is an issue then providing the grievor with a summary that provides sufficient information regarding the basis of the legal opinion such that the grievor is able to understand the case that he or she must meet may be satisfactory in any given situation – Concerning remedy, the Board found the applicants lost an opportunity, not a certainty, and directed that the applicants be given the opportunity to appear before the Grievance Committee for the purpose of appealing the decision not to refer their grievance to arbitration – Declaration that s. 74 was violated

COREY BROSTER & DAVID MARKLE; RE: CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 79; OLRB File No. 3288-16-U; Dated August 15, 2017; Panel: Lee Shouldice (12 pages)

Remedies – Unlawful strike – The Board issued reasons for its August 11, 2017 decision declaring, among other matters, that the employees at Heligear had engaged in an unlawful strike, and directing, among other directions, that Unifor Local 112 cease and desist from calling, authorizing, or threatening to call or authorize an unlawful strike – The Board found that Unifor had occupied the Milton location and stopped all production at that location and that this was an act in concert to reduce output and production which was not timely and therefore not lawful under the Act – After noting its status as a specialized administrative tribunal with expertise in labour relations and allegations of unlawful strikes, its power under s. 111(1)(e) [accepting evidence whether admissible in a court of law or not] and that the Board will perform its statutory mandate notwithstanding attempts by one litigant insisting that matters that are not (or realistically cannot be) in dispute must be "strictly proven," the Board concluded that an unlawful strike was made out on the evidence before it (e.g., the union's press release stating "we have stopped production at this facility") – The Board rejected the union's argument that it ought to exercise its discretion to decline the relief sought by Heligear in these circumstances – The Board could not characterize Heligear's conduct as so "reckless" or "excessive" as being unworthy of the statutory protection it otherwise

enjoys, particularly where the union's conduct was ongoing at the time of the hearing – Finally, the Board considered the exercise of its discretion in light of Charter values, pursuant to the decision in *Doré* – It found that *Doré* required the Board, in exercising its discretion, to balance in a similar way the proportionality exercise Chair MacDowell performed in *General Motors* – In this instance the Board found that the havoc that the Union's argument would lead to on any system of orderly collective bargaining or any stability in any peaceful labour relations regime outweighs the restriction on strikes in the midst of the collective agreement—even if the plant is closing during the collective agreement – Reasons given for Declarations and Directions

HELIGEAR CANADA ACQUISITION CORP D/B/A NORTHSTAR AEROSPACE MILTON; RE: UNIFOR LOCAL 112, JERRY DIAS, SCOTT MCILMOYLE; OLRB File No. 1201-17-U; Dated August 24, 2017; Panel: Bernard Fishbein (31 pages)

Certification – Construction Industry – *Ontario College of Trades and Apprenticeship Act* – Status – In order to finally determine the status of these two individuals, the Board had to consider the effect of *OCOT* in the determination of a bargaining unit under the *LRA* – The Board noted that its task on an application for certification in the construction industry is to determine whether an employee is in a particular bargaining unit, by examining the work performed by the disputed employees on the application date pursuant to the policy articulated in *Gilvesy* and *Seegmiller* – After an extensive review of *Quadracon*, where the Board reviewed a long line of cases and held that the absence of a certificate of qualification (C of Q) could not stand in the way of membership in a bargaining unit, the Board addressed the Sheet Metal's submission that with the passage of *OCOT*, the analysis in *Quadracon* no longer applies – The Board concluded that the only real difference is that the Board now has the power to review a Notice of Contravention, which was previously performed by the Ontario Court of Justice (criminal division) – The Board did not accept that this change to reviewing the inspectors' decisions undermines the analysis in *Quadracon* – In interpreting and applying the *LRA*, the Board must and does bring the objects and the purpose of the *LRA* to bear in making a decision and no matter what the Board's role may be on a review of an inspector's order, the *OCOT* is simply collateral to the *LRA* – After rejecting a number of other arguments the Board makes it clear that the *Quadracon* approach does not license breaking the law – A certificate would permit the Sheet Metal Workers to bargain on behalf of all sheet metal workers employed by the employer, but it does not require or permit any particular work assignment – The Board concluded that it will not limit the bargaining unit in this application to only those persons who were in possession of a C of Q or contract of apprenticeship – Application dismissed

O'BRIEN FABRICATIONS LTD.; RE: SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; OLRB File No. 1536-16-R; Dated August 10, 2017; Panel: David McKee (36 pages)

Health and Safety – The complainant, an OPP officer, appealed the Inspector's decision not to order the OPP to install a gate restricting public access to the employee parking lot at the Ottawa detachment – The Board reviewed the incidents of encounters over a five year period, and additional evidence including a threat risk assessment performed by the Security Assessment Unit of the OPP – The Board referred to its extensive case law on section 25(2)(h) [take every precaution reasonable in the circumstances for the protection of workers] and noted, referring to *Glencore Canada Corporation*, that the obligation is not to eliminate hazards, but to take reasonable precautions to protect workers from them – The Board also noted that a precaution which does not achieve its goal is not a reasonable one – After assessing the factors the Board typically balances in determining whether a proposed course of action is a precaution reasonable in the circumstances, the Board found that none of the factors supported the applicant's appeal – Most importantly, there was an absence of any history of violent encounters between employees and unauthorized individuals in the employee parking lot and the proposed solution of a sliding gate and perimeter fencing would be ineffective, in any event, to guard against future encounters – Application dismissed

ONTARIO PROVINCIAL POLICE, AND A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; RE: SGT. MARK RADKE; OLRB File No. 0507-16-HS; Dated August 28, 2017; Panel: Mary Anne McKellar (16 pages)

Practice and Procedure – **Reasonable Apprehension of Bias – Reconsideration** – S. & T. Industrial Inc. ("Industrial") requested reconsideration of a decision dismissing an application alleging that the Iron Workers District Council of Ontario ("Ironworkers") breached Minutes of Settlement ("MOS") arising from a certification application, and determining Industrial was bound to a collective agreement with the Ironworkers – The MOS required that the parties try to negotiate a collective agreement to cover non-construction work, with the Provincial Collective Agreement to prevail in the event of failure – Industrial requested the appointment of a conciliation officer, leading to the Ministerial Reference, and alleged surface bargaining by the Ironworkers – Industrial asserts it was denied

procedural fairness because the Board in its decision considered the actual question posed by the Minister of Labour, which was not directly communicated to either party and was different from the issues identified in the Confirmation of Filing – The issues identified in the Confirmation of Filing were whether an arbitrator/mediator should be appointed and whether a "No Board Notice" should be issued, whereas the question posed by the Ministerial Reference was whether Industrial is bound to the collective agreement – The Ironworkers argued the question was essentially the same as the issues identified in the allegation of a breach of MOS – Industrial also argued a different panel of the Board should adjudicate its request due to a reasonable apprehension of bias – The Board concluded an error by Board staff in preparing the Confirmation of Filing has no impact on the impartiality of the panel – The Board determined the issue of credibility had no connection to the issues identified or question posed – The Board further determined the same panel was best positioned to determine whether Industrial was prejudiced based on its familiarity with the issues, and that reconsideration by the same panel was a longstanding practice of the Board – The Board concluded the core issue of whether a collective agreement came into effect and obviated the need for a conciliator was the same regardless of how the issues were framed – The Board determined Industrial identified no specific evidence it would have tendered had it been aware of the exact question posed – The Board noted the pleadings of both parties demonstrated awareness of the core issue – The Board declined to vary or revoke its decision

S&T ELECTRICAL CONTRACTORS LIMITED, S&T INDUSTRIAL INC.; IRON WORKERS DISTRICT COUNCIL OF ONTARIO; RE: OLRB File No. 1598-14-U; 1806-14-MR; Dated August 8, 2017; Panel: Matthew R. Wilson (16 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
Across Canada Divisional Court No. 244/17	3673–14–R	Pending
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Pending
TTC Divisional Court No. 262/17	1995–16–HS	Pending
Myriam Michail Divisional Court No. 624/17 **(London)**	3434–15–U	Pending
Peter David Sinisa Sesek Divisional Court No. 93/16 **(Brampton)**	0297–15–ES	Pending
Women's College Hospital Divisional Court No. 24/17	0830–15–M	Pending
Innovative Civil Constructors Divisional Court No. 611/16	0142–16–R	Pending
Yuchao Ma Divisional Court No. 543/16	2438–15–U	Pending
Anishinabek Police Service Divisional Court No. 455/16	0319–13–R & 1629–13–R	September 11, 2017
946900 Ontario Limited Divisional Court No. 239/16	3321–14–ES	October 2, 2017
Carpenters (*Riverside*) Divisional Court No. 363/16	0630–16–R	October 10, 2017
Labourers' International Union of North America, Local 183 *(Alliance Site Construction Ltd.)* Divisional Court No. 133/16	3192–14–JD	October 26, 2017
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615–15–UR 2437–15–UR 2466–15–UR	Pending
Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 095–16	0668–15–ES	Pending

David Houle Divisional Court No. 1021–16 **(Sudbury)**	0292–15–U	Week of October 10, 2017
Qingrong Qiu Divisional Court No. 669/15	2714–13–ES	October 5, 2017
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621–14–ES	November 8, 2017
Valoggia Linguistique Divisional Court No. 15–2096 (**Ottawa)**	3205–13–ES	Pending