

*H*IGHLIGHTS

Ontario Labour Relations Board

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July 2018

SOLICITORS' OFFICE

Leonard Marvy, our friend and colleague, retired from his position as Board Solicitor on July 6, 2018. During his 16 years as solicitor, Len represented the Board at the Divisional Court and Court of Appeal, appearing more than 100 times. Len provided advice to the Chair, Vice-Chairs, Director, managers and staff on all types of issues. The Board benefitted greatly from his wisdom, care and thoughtfulness.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/June 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 – Application for certification under section 128.1 – Union sought to add MA to list, and challenged MD – Employer then asserted that MD and MA were, in fact, the same person, that “MA” was a fake name, and that MD sought to withdraw his card from consideration – Union accepted that MD and MA were the same person, based on documents filed with Board – No dispute that this individual was at work in the bargaining unit on the application filing date – Union argued that apparent change of heart after application filed should not be considered and that card should be accepted despite apparently bearing a fake name – Board found

nothing to suggest that Union was aware of fake name on card, there was nothing obviously fake about the name on the card, and it was not practical to require a union to formally verify the identity of every card signer – Union’s organizer engaged in no improper conduct that might otherwise undermine the card – Board rejected argument that there was no membership evidence in the name of MD given that MD had, in fact, signed the card (albeit with a fake name) – Board accepted card – Certificates issued

2279667 ONTARIO INC. O/A NEW AMHERST HOMES; RE: LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: NEW AMHERST HOMES; RE: NEW AMHERST LTD.; OLRB File No. 3254-17-R; Dated June 6, 2018; Panel: Michael McFadden (12 pages)

Certification – Constitutional Law – Construction Industry – Amec and joint venture partner had contract to construct new facility for storage of low level radioactive waste and the relocation of low level radioactive waste from the old facility to the new facility – Contract was one part of a broader remediation project at Port Granby – LIUNA and IUOE sought certification for their respective bargaining units – Amec asserted that it was subject to federal jurisdiction – Board’s analysis confirming that labour relations are presumptively within provincial jurisdiction – Amec subject to federal jurisdiction only if it is a federal work or undertaking or if it is vital or integral to a federal undertaking – Board reviews nature of project at Port Granby, and nature of Amec itself, in detail – Applying analysis

developed in *Construction Montcalm, Tessier* and Board's own jurisprudence, Board concludes that Amec itself is not a federal undertaking – Amec was large company engaged in broad range of activities in construction industry – Section 71 of *Nuclear Safety and Control Act* does not constitute Amec as a work or undertaking for the general advantage of Canada – Board reviews nature of construction and determines that while the project is subject to extensive specifications, it remains a construction project with which Amec will have no further involvement once construction is complete – Board further determines that Amec is not vital or integral to a federal undertaking – “Ongoing character” of Amec is not defined by work at Port Granby, as that work is only one of a large number of projects undertaken by Amec – Further, Amec only one of many contractors and subcontractors involved in broader remediation project, so cannot be said to be “vital or integral” – Amec has no ongoing involvement in operation of the federal undertaking – Need for clear, easily ascertainable and predictable criteria to establish constitutional jurisdiction underlined – Presumption of provincial jurisdiction not overcome – Certificates issued

AMEC FOSTER WHEELER AMERICAS LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 2743-16-R & 3025-16-R; Dated June 27, 2018; Panel: Bernard Fishbein (105 pages)

Certification where Act Contravened – Remedies – Union brought an application for certification – Union alleged that the Employer committed unfair labour practices in the days leading up to the vote – Union lost vote 45-44 and sought certification under s. 11 or a second vote and additional remedies in the alternative – Union's allegations related to documents circulating in the workplace prior to the vote and certain statements made to employees – One document was created by a bargaining unit member, S, who opposed unionization – S copied document using Employer's copier and sought approval of Employer's administrator, M, to distribute it – M gave approval but told her to not distribute during working hours – No previous pattern of allowing documents of this nature to be circulated in workplace – Document clearly linked unionization and lost jobs – Another anonymous document was posted in the staff room, also attributing job loss to unionization – A third document was signed by M and posted in the staff room expressing preference

to remain non-union – Another manager, H, told an employee, D, that if the Union “came in”, she and another employee would be “the first to go” – Multiple employees related D's experience to Union organizer – Union lost approximately one-third of its apparent pre-vote support – Employer argued that statements linking job loss to unionization were simply characterizations of real trade-offs, and also that the statements were not attributable to the Employer – Board rejected argument that collective bargaining was a “zero-sum game” in which pay increases lead inevitably to job losses – Board found that for employee statements to be “on behalf of the employer” within the meaning of sections 70 and 72, employee perception alone is insufficient but that evidence is required of employer permission or support of the statements – Board had no evidence from the Employer, particularly M, explaining Employer's actions or motivation in relation to the statements being posted and circulated with its explicit or implicit consent – In view of the reverse onus set out in section 96(5), and the absence of evidence, the Board drew adverse inferences against the Employer and concluded that the Employer's motivation was to allow threats to job security for the purpose of avoiding unionization – In respect of H's statement, the Board preferred the Union's evidence to the Employer's and accepted that a threat to job security was made to D, and that it was repeated to many other employees thereafter – Board concluded that the statements and their effect, together with the unusual loss of one-third of the Union's support, indicate that the vote did not likely reflect the true wishes of the employees – Section 11 (since amended but the amendments were not applicable to this application) required certification only “where no other remedy would be sufficient to counter the effects of the contravention” – Employer's contraventions, while serious, were not severe and widespread in comparison to other cases where certification was ordered – Threat made to D was not demonstrated to be known to all employees – Union seriously underestimated the number of employees, such that it was not in contact with a substantial group of voters – Permitting Union contact with these voters, along with other conditions, could lead to vote where the true wishes of the employees can be ascertained – Union did maintain significant core support in the vote – In the unique circumstances of this case, the Board was not satisfied that certification was the only sufficient remedy – Board directed a second vote to be held – Other remedies ordered including paid meetings with Union, contact information to be provided to Union and postings

BAYFIELD MANOR; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; RE: UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 175; OLRB File No. 0905-17-R & 1119-17-U; Dated June 20, 2018, Panel: C. Michael Mitchell, Lori Bolton & Jawara Gairey (38 pages)

Certification in Specified Industries – Concurrent Applications – Union applied under s.15.2 for certification without a vote – Employer responded that it was not operating in the home care and community services industry such that s. 15.2 had no application – Union then filed s. 8 application without prejudice to its position that the Employer was operating in a specified industry – Board ordered vote in s. 8 application, but that ballot box be sealed – Parties agreed to count ballots without prejudice to the Employer’s position – Union successful in vote – Employer argued that by filing s. 15.2 application, Union had “elected” to proceed under s. 15.2 and therefore could not file a s. 8 application – Board reviewed decision in *Modis* in which the Board outlined difficulties with concurrent applications for certification, including the potential for inconsistent results and the unnecessary use of Board resources – The Board reiterated likelihood that it will be reluctant to allow applications to proceed simultaneously where there is no dispute regarding the applicability of s. 15.2 – In the unique circumstances of this case, where the vote had already been held and counted, there was no reason to not give effect to the results of the vote, and Board declined to exercise its discretion under s. 111(3) of the *Act* – In the future, Board will address issues concerning simultaneous applications prior to a vote being ordered in a second application under s. 8 – Remaining disputes in application not affecting the Union’s right to be certified – Interim certificate issued

SUMMIT HOUSING AND OUTREACH PROGRAMS; RE: SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA; OLRB File No. 0020-18-R & 0123-18-R; Dated June 1, 2018; Panel: Matthew R. Wilson (10 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – The applicant sought judicial review of the Board’s

decision dismissing his duty of fair representation complaint – The applicant filed a grievance asserting that his employer had failed to schedule him for certain shifts discriminated against him on the basis of gender and age – The Grievance Settlement Board dismissed his grievance – The applicant asserted that the Union violated its duty of fair representation when it declined to pursue judicial review of the GSB’s decision in respect of his grievance – The Board dismissed his duty of fair representation complaint, finding that the Union was not biased in its decision to not pursue judicial review of the GSB’s decision, fairly considered the relevant facts before it and explained these to the applicant, and the Union’s expression of an opinion different from that of the applicant did not constitute bad faith – The applicant asserted before the Court that the Board was biased and denied him natural justice in the conduct of the consultation – Court found no merit to these assertions as the consultation proceeded on the basis of full and detailed submissions and the applicant’s counsel had cross-examined all of the Union’s witnesses – No evidence in support of claim of reasonable apprehension of bias – Application dismissed

CECIL COORAY; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; Divisional Court File No. 324/16; Dated June 20, 2018, Panel: C. Horkins, Conway and Sheard JJ. (4 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
D. Andrew Thomson Divisional Court No. 238/18 (Sudbury)	1070-16-ES	Pending
Tomasz Turkiewicz Divisional Court No. 262/18	2374-17-R	Pending
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	Pending
Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	Pending
Provincial Employers' Bargaining Agency - Labourers Divisional Court No. 141/18	2221-15-U	Pending
Trisect Construction Corporation Divisional Court No. 087/18	2553-15-R	Pending
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	Pending
Brookfield Multiplex Ltd. Divisional Court No. 025/18	1368-15-R	October 1, 2018
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	Pending
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	Pending
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	Pending
Highcastle Homes Inc. Divisional Court No. 7/18	3196-15-R 3282-15-U	Pending
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Rouge River Farm Inc. Divisional Court No. 637/17	0213-16-ES	Pending
Sheet Metal Workers' International Association Divisional Court No. 613/17	1536-16-R	September 12, 2018
Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	Dismissed

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S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1806-14-MR	May 15, 2018
Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	June 7, 2018
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Pending
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Pending
Kevin Mackay Divisional Court No. 466/17	2972-16-U	Dismissed
LIUNA (Pomerleau Inc.) Divisional Court No. 257/17	3601-12-JD	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
Yuchao Ma Divisional Court No. 543/16	2438-15-U	October 4, 2018
Byeongheon Lee Court of Appeal No. M48402	0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403	0015-15-U	Pending
R. J. Potomski Divisional Court No. 12/16 (London)	1615-15-UR 2437-15-UR 2466-15-UR	Pending
Qingrong Qiu Court of Appeal No. M48451	2714-13-ES	Pending
Kognitive Marketing Inc. Divisional Court No. 51/15 (London)	0621-14-ES	Pending
Valoggia Linguistique Divisional Court No. 15-2096 (Ottawa)	3205-13-ES	Pending