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Ontario Labour Relations Board

HIGHLIGHTS

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NOTICE TO THE COMMUNITY

E-FILING

Over the past several months, the Board has introduced new forms and made e-filing available. Effective April 17, 2018, another large group of new forms will be launched on the Board's website.

New forms for Termination of Bargaining Rights under sections 64, 65 and 66 (Forms A-11 and A-12) and 127.2 of the Act (Forms A-83 and A-84) may be e-filed. All other forms related to Certification and Termination of Bargaining Rights and Lists of Employees are not expected to be made available for e-filing at this time.

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 www.canlii.org.

Constitutional Law – Employment Standards – Applicant filed an application under section 122(1) of the *Employment Standards Act, 2000* for review of a notice of contravention finding the Applicant had contravened section 26(1) and section 38 of the Act – Applicant provides driver training, safety compliance training, and loss prevention services to commercial trucking businesses, and alleged its business falls under federal jurisdiction – Main issue was whether the services provided by the Applicant are "vital, essential or integral" to its federally regulated customers or falls under "derivative jurisdiction" – The Board applied the test for determining derivative jurisdiction set out in *Ramkey Communications Inc.* – The test for derivative jurisdiction should be flexible and attentive to the facts of each case – Relying on *Tessier Ltée v Quebec (Commission de la santé et de la sécurité du travail),* the Board held it is insufficient for a business to be important to a federal undertaking, to come under federal jurisdiction by virtue of derivative jurisdiction the effective performance of the federal undertaking must not be possible without the provincial company – The evidence showed a number of the Applicant's customers no longer relied on the Applicant's services but continued to engage in interprovincial and international trucking, either party could cancel the contract at any time, the Applicant had no physical presence at the customers' premises, the Applicant provided few hours of service a week, and there was no evidence the Applicant and its customers had a corporate relationship – Therefore, the Applicant was not vital, essential or integral to its customers and the interprovincial and international trucking companies could operate without the services of the Applicant – Application dismissed

1413734 ONTARIO INC. OPERATING AS TEN FOUR TRAINERS; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0689-17-ES; Dated March 23, 2018; Panel: Adam Beatty (22 pages)

Constitutional Law – Cablecan Corporation ("Cablecan") filed a Notice of Constitutional Question in response to three grievances referred to the Board under section 133 of the *Labour Relations Act, 1995* claiming its work is "vital, essential, and integral" to a federal work or undertaking and its employees are subject to federal regulation and not subject to the Act – The Union argued Cablecan is a utilities contractor which performs construction services and does not fall under federal jurisdiction – Cablecan performs installation of buried underground cables exclusively in Ontario, majorly for Rogers Cable, and Expercom Telecommunications; it does not own or operate a telecommunications network – The Board agreed with and adopted the reasoning in the recent decision *Ramkey Communications Inc.* which confirmed the reasoning in *Construction Montcalm Inc. v Minimum Wage Comm.* – Construction work, which includes building infrastructure such as pipelines, railroads, airport runways or telecommunication networks, is within provincial jurisdiction – Constructing, building, or repairing a federal undertaking is not equivalent to operating a federal undertaking and the volume of work performed for a federal undertaking is not determinative of jurisdiction – Similar to *Ramkey Communications Inc.*, Cablecan is a local contractor and while it specializes in telecommunications, the essential nature of its work is construction – A local operation is not a federal undertaking unless the contractor is indispensable to the federal undertaking or the federal undertaking is dependent on the contractor – Since Rogers Cable and Expercom Telecommunications can operate without Cablecan, it is not vital, essential, or integral to a federal work or undertaking – Grievances referred

CABLECAN CORPORATION; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 3139-15-G, 3176-15-G & 0006-16-G; Dated March 22, 2018; Panel: Gita Anand (30 pages)

Termination of Bargaining Rights – Applicant filed an application for termination of bargaining rights under section 63(2) of the *Labour Relations Act, 1995* – Issue was whether the Employer's conduct should cause the application to be dismissed regardless of the vote results – Union argued the Employer either initiated the application and threatened, intimidated or coerced employees into filing an application or it created an atmosphere conducive to bringing an application by tacitly supporting the termination through its actions, violating section 63(6) of the Act – Employer argued there was no sufficient evidence to conclude it initiated the application and argued any antagonistic behaviour towards a specific union representative did not occur publicly and further, employees were not aware it was withholding union dues – "Initiation" has been interpreted as significant or influential employer involvement giving rise to the application – If the Board is satisfied the employer initiated the application, compelling labour relations reasons is required to not dismiss the application – Board found the Employer either initiated the application or created a climate where the employees believed a termination application was desirable because a manager was openly antagonistic towards the union's chosen representative, permitted the termination campaign to be conducted publicly in the workplace, during working hours, and a manager directed employees to the Applicant for the purpose of signing the petition and its fax machine was used to deliver the application – Application dismissed

COPPER RIVER INN AND CONFERENCE CENTRE; RE: CHARLEEN RUTH MALLORY; RE: UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; OLRB File No. 0040-17-R; Dated March 9, 2018, Panel: Mary Anne McKellar (18 pages)

Interim Order – Termination – Unfair Labour Practice – Applicant filed an application for an interim order under section 98 of the *Labour Relations Act, 1995* for the immediate interim reinstatement of an employee who was allegedly terminated for union activity – Responding Party argued it had just cause to terminate the employee because he had a lengthy disciplinary history of lateness and attendance issues and further claimed it did not know the employee was organizing for the union – Parties agreed that the appropriate test to determine whether to grant an interim order was set out in *810048 Ontario Ltd. (Loeb IGE Highland)* was met 1): *prima facie* or arguable case and 2) the balance of harm favours the Applicant – The Board was satisfied both elements of the test were met – The Board will not determine factual disputes in an application for interim relief, instead it will determine whether there is an arguable case that the termination was tainted by anti-union motive – The employee's termination was suspicious because despite previous warnings about his attendance, it was only after the Employer had knowledge of the organizing drive that the employee was terminated – The Responding Party tolerated the employee's misconduct for many months, suggesting its harm does not outweigh the harm to the Union if the

employee was not reinstated – The Board has consistently held the discharge of a known union supporter causes labour relations harm and has a chilling effect on employees which cannot be cured by findings and awards of damages – After the employee's termination the Applicant had difficulty signing members because employees refused to speak with union representatives – The Board declined to award the employee compensation for lost wages because the primary purpose of an interim reinstatement order is to address the harm to the union's organizing campaign that resulted from the termination of a key insider, not to compensate the employee – Furthermore, the Board has only found the Applicant established an arguable case, not a violation of the Act – Immediate reinstatement ordered

DIRECT COIL INC.; RE: UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175; OLRB File No. 3141-17-IO; Dated March 15, 2018; Panel: Paula Turtle (24 pages)

Certification – Charter of Rights and Freedoms – Construction Industry – Applicant filed an application for certification under section 128.1 of the *Labour Relations Act* – Only two employees in the proposed bargaining unit were at work on the date of application which was a Sunday (Father's Day) – Govan Brown & Associates Limited ("Govan Brown") and the Intervenors argued the Board's discretion to use the date of application test is contrary to the values of section 2(b) (freedom of expression) and section 2(d) (freedom of association) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") – In particular, they argued freedom of association has been expanded to include freedom of choice and majoritarianism and the right to vote or sign union membership cards in a card based system is a form of expression – As a result, they argued the date of application violates these *Charter* values as it permits two employees to bind the larger group and gags employees who were not present from expressing their preference – The Attorney General and the Applicant argued the *Charter* affords administrative tribunals latitude to choose among a wide range of policy options and the date of application falls within that range – The Board relied upon the Supreme Court of Canada's decision in *Mounted Police Association of Ontario v Canada* which stated section 2(d) does not mandate any particular model of labour relations, as long as employees have access to meaningful collective bargaining and there is a sufficient level of choice over the workplace – However, choice and independence are not absolute, they are limited by the context of collective bargaining – Any model requires drawing a line that will exclude some employees; the date of application test does not reject majoritarianism but rather is used to quantify the majority and employee choice – The Board disagreed that the Supreme Court of Canada has expanded the right to association, therefore section 2(d) was not violated – The Board also adopted the reasoning in *Haig v Canada (Chief Electoral Officer)* that section 2(b) of the *Charter* only protects negative interference and does not provide positive rights or a platform for individuals to express themselves – Therefore section 2(b) of the *Charter* was not violated – Employees not present on the date of application have not been left without a voice, opinions can be vocalized through campaigns or petitions and employees can decertify the union when appropriate – In the event the Board was wrong and there was a violation of the *Charter* it applied the principles outlined in *Doré v Barreau du Québec* and *Loyola High School v Quebec (Attorney General)* – The Board found the objectives of the statute to resolve certification matters expeditiously outweighed the *Charter* values of section 2(b) and (d) – The date of application test facilitates orderly, consistent, clear and a well understood expeditious access to certification and is applied equally to all parties – A move to an undefined test would affect the Board's ability to meet the Act's statutory objective of an expeditious resolution – Certificate issued

GOVAN BROWN & ASSOCIATES LIMITED; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 0838-16-R; Dated March 26, 2018, Panel: Bernard Fishbein (121 pages)

Certification – Representation Vote – Applicant filed an application for certification under section 128.1 of the *Labour Relations Act, 1995* – Responding Party argued the representation vote was not conducted fairly for two reasons: the Responding Party was not permitted to respond to the Applicant's last-minute leafleting campaign which violated the parties' Minutes of Settlement, and the leaflets distributed by the Applicant were misleading and false – The Board found the Minutes of Settlement was violated because the Applicant distributed leaflets in the dark and did not notify an employer representative two hours in advance contrary to the agreement – The purpose of a remedy is to place the injured party in the same position he or she would have been in had the breach not occurred – Since there was no evidence

of vehicle obstruction or delay to employees causing injury or harm to the Responding Party, no remedy was appropriate – Furthermore, a vote officer has the ability to make decisions to ensure an orderly secret ballot vote and the Board is reluctant to second guess a vote officer's judgement – The Board is only interested in whether the ability of an employee to freely cast a ballot was affected – The leaflets were not misleading because the Board believes the average employee is reasonable, sensible and can think for him or herself – While the Applicant's messages were an aggressive interpretation of facts, it did not constitute coercion and did not undermine the employee's confidence in the efficacy of a secret ballot vote – Complaint about the conduct of the representation vote was dismissed – No remedy ordered for the violation of the Minutes of Settlement – Request for second representation vote dismissed

KIRKLAND LAKE GOLD INC.; RE: UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS); OLRB File No. 2218-15-U & 1874-17-R; Dated March 5, 2018; Panel: David A. McKee (18 pages)

Employment Standards – Related Employer – Termination – Arbitrator referred two cases to the Board under section 101(3) of the *Employment Standards Act, 2000* to determine if Silverstein's Holdings Inc. ("Silverstein's Holdings") was a related employer to Silverstein's Bakery Limited ("Silverstein's Bakery) for the purpose of awarding termination pay and severance pay to employees of Silverstein's Bakery after its operations were ceased by Silverstein's Holdings' private receiver under *the Bankruptcy and Insolvency Act* – The unions argued the two companies should be treated as one employer as they carried on associated or related activities and in effect defeated the intent and purpose of the Act – Silverstein's Holdings did not dispute the two companies were owned, directed, and financially controlled by the Silverstein family nor that it owned the property that Silverstein's Bakery carried out business, instead, it argued a property holding company that collects rent from an operating business is not a "business" under subsection 4(1)(a) of the Act – In addition, Silverstein argued that if the two companies did carry on related activities, it did not have the effect of defeating the intent and purpose of the Act – The Board held "business" under subsection 4(1)(a) should not be interpreted the same as section 69 of the Act – Subsection 4(1)(a) includes both "activities" as well as "businesses", therefore Silverstein's Holdings is captured under the Act and there was no question the two entities were associated or related – The Board held the intent and purpose of the Act is defeated when employees do not receive the termination notice or pay and severance pay to which they are entitled – In a bankruptcy and insolvency case, the defeat of the intent and purpose of the Act will always be an indirect effect of the relationship of the parties, either the bankruptcy is orchestrated by the other entity or it is due to the existence of the relationship between the two entities – Silverstein's Holdings was integral to Silverstein's Bakery, therefore there was only "one pocket" and the carrying on of related activities or business by the two entities had the effect of defeating the intent and purpose of the Act – Entities treated as one employer

SILVERSTEIN'S BAKERY LIMITED; RE: UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, LOCAL 175; RE: SILVERSTEIN'S HOLDINGS INC.; RE: BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS INTERNATIONAL UNION, LOCAL 181; OLRB File No. 1717-16-R, 1860-16-ES & 2335-16-ES; Dated March 9, 2018; Panel: Kelly Waddingham (24 pages)

Application for Employee List – Bargaining Unit – Applicant filed an application under section 6.1 of the *Labour Relations Act, 1995* requesting an order directing the Responding Party to provide a list of employees in the bargaining unit – The Responding Party gave notice under section 6.1(4) of the Act disputing the estimated number of employees in the Applicant's proposed bargaining unit and proposed a different bargaining unit – The Board held that determining if a proposed bargaining unit could be appropriate under section 6.1(7)(1) is intended to be expeditious and a low threshold is applied because the only purpose of the exercise is to determine whether the Board should direct production of an employee list to facilitate an organizing drive, it does not establish the bargaining unit to be applied if an application for certification is successful – A responding party will have an opportunity to argue the appropriateness of the bargaining unit description if an application for certification is filed – The Applicant's proposed bargaining unit was standard in the hospital sector and therefore could be an appropriate bargaining unit – Responding Party ordered to file submissions confirming the number of individuals in the bargaining unit – Applicant ordered to file

submissions to show it met the 20% threshold required by the Act – Matter Continues

UNIVERSITY HEALTH NETWORK - TORONTO WESTERN HOSPITAL; RE: CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB File No. 3181-17-R; Dated March 8, 2018; Panel: Matthew R. Wilson (6 pages)

COURT PROCEEDINGS

Certification – Judicial Review – Status – Stay – Applicant sought an interim order to stay an interim decision of the Board determining the circumstance in which drivers of the Employer were dependent contractors – Applicant argued that the proper test for a stay is whether there is "a serious issue" to be determined on appeal – The Divisional Court held that the determination of status is one step in the certification process and a judicial review of an interim decision is premature because it would interrupt the Board's ongoing proceedings – The Applicant did not identify any exceptional circumstances other than continued participation in the certification process, which the Court held does not amount to irreparable harm – Delaying the certification process is against labour relations purposes and the Applicant could raise its concerns with the Board – Motion dismissed

CANADA BREAD COMPANY LIMITED; RE: ONTARIO LABOUR RELATIONS BOARD; RE: MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL 647, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; Divisional Court File No. 11/18; Dated March 5, 2018, Panel: Swinton J. (4 pages)

Duty of Fair Representation – Judicial Review – Unfair Labour Practice – Applicant filed an application for judicial review of three Board decisions – The first two decisions dismissed two unfair labour practice complaints, against the City and Union, and a duty of fair representation complaint against the Union – The third decision rejected a new application seeking consent to prosecute the City and the Union – Applicant requested the Court review the Board's decisions because the Board wrongly focused on Minutes of Settlement entered into by the Union and the City to resolve the grievance regarding the Applicant's termination and failed to consider a recent arbitration decision as new evidence proving he was falsely accused of sexual harassment – The Court's role is to determine whether the Board reached an unreasonable decision or denied the Applicant procedural fairness, not to determine the merits of the underlying allegations – Applicant sought to have the Court determine the merits of the issue and provided no evidence to support he was denied procedural fairness – The Board's decisions regarding the unfair labour practice complaints and the duty of fair representation complaint, as well as its reasons provided for rejecting three requests for reconsideration, were reasonable and carefully explained why it dismissed the applications – Dissatisfaction and regret over a settlement is not a basis for intervention by the Court – Application dismissed

REUBEN GOODEN; RE: ONTARIO RELATIONS LABOUR BOARD; RE: THE CITY OF BURLINGTON; RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2723; Divisional Court File No. 556/17; Dated March 14, 2018, Panel: Swinton, Parayeski and Matheson JJ. (3 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
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	Pending
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	Pending
Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 20, 2018
S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1806-14-MR	May 15, 2018
Reuben Gooden Divisional Court No. 556/17	1113-16-U 1114-16-U 1213-17-U	Dismissed
Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending

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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	Pending
Across Canada Divisional Court No. 244/17	3673–14–R	Discontinued
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	Pending
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