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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 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 – Respondent argued the application for certification should be dismissed because it was untimely – Respondent argued the proposed bargaining unit was already represented by an Employee Association and the application was filed during the life of a collective agreement, not during an open period – Applicant's position raised the issues of determining if the Employee Association is a trade union under the *Labour Relations Act, 1995*, and if there was a valid, operating collective agreement at the time the application was filed – Board found the Employee Association to be a trade union within the meaning of the *Act* – Evidence established a group of employees formed an organization and one of its purposes was to regulate relations with the employer - Employee Association had a lengthy demonstrable history representing the employees and the Employee Association's guidelines form what might be considered a formal constitution - Failure to follow the letter of the guidelines did not undermine the conclusion reached – The 2015-2018 Agreement entered into between the Respondent and Employer was not put to a ratification vote - In accordance with subsection 79(7) of the *Act*, the collective agreement was deemed to be no force or effect – Board determined the most recent valid collective agreement was for the period of 2007 to 2010 - Board determined the Applicant's certification application was filed during an open period, and therefore the application was timely – Applicant's certification voting ballot did not ask employees to choose between representation by the Employee Association and the Union - Board concluded the ballot was not sufficiently clear to ascertain the will of the employees – Board directed the Registrar to hold another vote asking the employees whether they wish to be represented in employment relations by the Employee Association or the Union

1198070 ONTARIO INC. O/A CHAMPLAIN MANOR RETIREMENT RESIDENCE; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB Board No. 1396-17-R; Dated August 3, 2018, Panel: Adam Beatty (17 pages)

Unfair Labour Practice – Applicant alleged a violation of the *Labour Relations Act, 1995* section 86 freeze provisions after the termination of a police officer – Union originally obtained bargaining rights under the federal legislation and negotiated a collective agreement in accordance with a certificate issued by the Canada Industrial Relations Board ("CIRB") – Subsequently, the Responding Party challenged the constitutional jurisdiction of the CIRB to have initially issued a certificate – The Responding Party's challenge gave rise to the Union filing an application under provincial jurisdiction with the Board creating a freeze period pursuant to section 86 of the Act – In a related case, the Courts found that labour relations of the employer were governed by provincial and not federal law – Responding Party argued that the collective agreement negotiated under the federal

jurisdiction is of no effect under the provincial *Act* and the Union acquired no rights, privileges or duties applicable to section 86 – Responding Party further argued that at the time of termination, the employee had an individual contract of employment which did not include the right to challenge the discharge for cause – Applicant argued that the Responding Party continued to abide by the terms and conditions of employment contained in the collective agreement even after it expired, and preserves the rights to be terminated only for just cause during the certification freeze – Issue was whether the Board could or should take jurisdiction to inquire into the freeze complaint – Board found the relevant freeze provision is the freeze that was in effect at the time the employee was terminated, *i.e.,* section 86(2) – Board found that terms and conditions of the collective agreement pursuant to the federal certificate were observed and in place at all material times and formed the *status quo ante* prior to the provincial application – The collective agreement terms became a part of the individual contract of employment – If termination only for cause was not a right, Board alternatively found the term as a privilege, and remained protected by section 86 – Board found the purpose of the freeze section not limited to its impact on bargaining – The Board held that a refusal to inquire into termination complaints on discretionary grounds amounts to refusal of the Board to exercise its jurisdiction in circumstances where there is no effective alternative remedy – Accordingly, the Board found that the complaint was timely and properly the subject of an application under section 96 – Matter Continues

ANISHINABEK POLICE SERVICE; RE: PUBLIC SERVICE ALLIANCE OF CANADA; OLRB Board No. 0362-17-U; Dated August 28, 2018, Panel: C. Michael Mitchell (43 pages)

Interim Relief – Unfair Labour Practice – Application for interim relief filed under section 98 of the *Labour Relations Act, 1995* relating to allegations the responding parties violated numerous sections of the *Act* – Applicants challenged the integrity of the ratification vote to displace the Responding Union with the Applicant Union as the bargaining agent and sought an order for the preservation and production of documents relating to its allegations, a cease and desist in the Responding Employer providing preferential access to the Responding Union, as well as other relief – Applicant Union's displacement application was dismissed on the basis it was untimely given the closing of the "open period" after a collective agreement was ratified – Board endorsed and adopted the section 98 analysis in the *National Judicial Institute* decision as extended by the *Original Cakerie* decision – Board held that it is essential that there be a logical and functional link between the pleading of an arguable breach of the *Act* and the remedies being requested on an interim basis – Board was not persuaded to order a production of documents as the Applicant Union had not established an urgency to substitute the normal production process – Board declined to order a cease and desist in the Respondent Employer providing preferential accesses to the Responding Union – The access to the workplace provided to the Responding Union is consistent with obligations in the collective agreement – To grant this relief would cause labour relations harm – Applicant must establish the request is necessary to achieve the purposes of interim relief, and consider delay, urgency and the balance of labour relations and other harm – Request for Order that representatives from the Responding Union cease and desist from attending at the houses of employees dismissed as the Board was not satisfied that the order requested would achieve the purposes of interim relief – Application Dismissed

FAIRMONT ROYAL YORK HOTEL; RE: UNIFOR; RE: MICHELLE WILLIAMS; RE: GRACE GUANZON; RE: GEE MANALASTAS; RE: MYLEEN PIANSAY; RE: JORGE JUNIO; RE: CAROL TULOD; RE: UNITE HERE LOCAL 75; OLRB Board No. 1006-18-IO; Dated August 7, 2018, Panel: Gita Anand (16 pages)

Practice and Procedure – Non-party requested copies of application for certification and any other related document and decision in the an active Board file – Applicant objected to disclosure of any documentation that may reveal union membership pursuant to Section 119 of the *Labour Relations Act, 1995* – Responding party objected to disclosure of the response to application and any correspondence to the Board regarding the matter – Responding party argued there was no indication the Response and documents could be produced to a third party – Responding party also argued there is an implied undertaking the confidentiality of documents would be maintained until it was entered into evidence and the non-party has not provided an explanation for its request – Board noted that Application and Response forms contain a notice stating information received in written or oral submissions may be used and disclosed for the proper administration of the Board's legislation and processes – Proceeding had adjourned and only the issue of election was argued – Only the pleadings

relating to the issue of election had entered the public domain at a hearing – Board held that the application, response and pleadings relating to the election issue would be released to the requesting non-party – Documents related to union membership were not ordered to be released – Board ordered any document that may raise privacy issues of individuals in dispute would not be released

MODIS CANADA INC.; RE: PUBLIC SERVICE ALLIANCE OF CANADA; OLRB Board No. 3432-17-R & 3433-17-R; Dated August 28, 2018, Panel: Bernard Fishbein (6 pages)

List of Employees – Constitutional Law – Applicant filed under section 6.1 of the *Labour Relations Act, 1995* for an order directing the Responding Party to provide it a list of employees from the bargaining unit that it claims to be appropriate for collective bargaining – Responding Party challenged section 6.1 of the *Act* as being contrary to the *Canadian Charter of Rights and Freedoms* – Applicant and Attorney General of Ontario asserted that section 6.1 did not violate the *Charter*, and that the Responding Party Employer had no standing to make such an argument on behalf of its employees – Board concluded that the Responding Party did not have standing to raise the *Charter* question on behalf of its employees – The Board has taken consistent approach and is wary of permitting an employer to argue the interests or issues on behalf of its employees – Applicant argued that past decisions must be reconsidered in view of the *Charter* – Board was not persuaded that section 6.1 is more significant, or raises more serious questions, implications or consequences than other *Charter* infringements which employers have consistently been precluded from arguing on behalf of employees – Exception for employer being precluded from giving standing in *R v Big M Drug Mart Ltd.* is a criminal or *quasi*–criminal matter. Expansion of this exception in *Canadian Egg Marketing Agency v Richardson* in civil proceedings whereby a corporation is permitted to attack an unconstitutional law when it is involuntarily brought before the courts pursuant to a regulatory regime set up under an impugned law – Board held that there is no exception applicable to this case – Board found that the Applicant failed to make out a case for public interest standing, even when adopting a liberal and generous approach to the *Downtown Eastside Sex Workers* factors for determining standing – Board found that the Employer did not have a genuine interest in the outcome of the of the constitutional question and found no reason to assume the employees were incapable of asserting their privacy rights on their own – Application Granted

THE ORIGINAL CAKERIE LTD.; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); OLRB Board No. 3454-17-R; Dated August 13, 2018, Panel: Bernard Fishbein (39 pages)

Bargaining Unit – Applicant filed an application pursuant section 15.1 of the *Labour Relations Act, 1995* seeking to combine three bargaining units into a single consolidated unit – Applicant argued the three bargaining units have a similarity of interest, a single collective agreement would create efficiencies, and it is a norm in the university sector to have the groups bargain together – Applicant asserted there is prior Board jurisprudence which prefers a larger bargaining unit when determining the most efficient bargaining unit – Responding Party asserted that the existing bargaining structure has resulted in effective collective bargaining and that there are no issues with its administration of the collective agreement – Responding Party argued that the bargaining units do not have the same interests, that the larger bargaining unit would override the interests of the smaller unit if consolidated, and that the application did not satisfy the requirements of subsection 15.1(6) – Board concluded that its prior jurisprudence on combination applications under the old section 7 provided a useful approach to applications under section 15.1, particularly when the consideration of the impact on the development of collective bargaining in the industry is of little importance – Board considered impact of consolidation on matters such as efficiency and convenience in collective bargaining and contract administration, industrial stability, jurisdictional disputes, employee mobility and risk of strikes – Board determined that consolidation would contribute to the development of an effective bargaining relationship and directed the three bargaining units be consolidated under subsection 15.1(6) – Board determined consolidation would decrease the burden of time and money in the collective bargaining process, establish efficiencies since the collective agreement provisions had many duplicated provisions, and remove fragmentation amongst similar bargaining groups – Application Allowed

UNIVERSITY OF ONTARIO INSTITUTE OF TECHNOLOGY; RE: UNIVERSITY OF ONTARIO INSTITUTE OF TECHNOLOGY FACULTY ASSOCIATION; OLRB Board No.

0353-18-R; Dated August 7, 2018, Panel: Elizabeth McIntyre (38 pages)

Employment Standards – Employer application to review a decision of an Employment Standards Officer's finding that the Applicant contravened section 38 of the *Employment Standards Act, 2000* for failure to pay the Respondent accrued vacation pay – ESO ordered the payment of the accrued vacation pay, an administrative fee, and issued a Notice of Contravention – Applicant asserted the Respondent improperly received paid sick leave and took the position no vacation pay remains owing – Respondent argued that the set off claimed by the Applicant is not permitted by section 13 of the *ESA* – Applicant argued that section 13 should be interpreted to distinguish overpayments from other deductions and therefore allow an employer to deduct overpayments –Procedural issue of if the Board can determine a motion of the Responding party to dismiss on a *prima facie* basis even though the issue raised by the motion is a legal one, and not jurisdictional. – Relying on *Shaw et al. v McLeod et al.* and section 116 of the *ESA*, Board determined it has the power to hear and determine the motion – Section 13 of the *ESA* does not apply to the motion as there is no statutory authorization, court order, or written authorization from the employee allowing for the employer to deduct from the employees' wages – Narrow exceptions to allow an employer to deduct an over payment without the employee's written authorization involve circumstances of unpaid time taken and paid in advance conditional on a subsequent reconciliation – Board found that these exceptions do not apply in this case – There was no evidence of a policy on overpayment or reconciliation process being brought to the attention of the employee – Board dismissed application for review and reaffirmed the ESO orders – The Board noted that the decision does not disentitle the Applicant from attempting to seek recovery of the overpayment in the proper forum – Application dismissed

YORKTOWN CHILD AND FAMILY CENTRE OPERATING AS YORKTOWN CHILD AND FAMILY CENTRE; RE: HEIDI SERIO; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Board No. 3064-17-ES; Dated August 17, 2018, Panel: Elizabeth McIntyre (25 pages)

COURT PROCEEDINGS

Certification – Constitutional Law – Construction Industry – Judicial Review – Applicant sought judicial review of a Board decision that found the Applicant subject to the jurisdiction of provincial labour laws and granted certification as a provincially regulated unit with the Union as exclusive bargaining agent – Applicant's construction company installs, maintains and repairs portions of telecommunications networks. Applicant does not do construction work other than in conjunction with its telecommunications and networking work – Applicant relied on section 93(3)b of the *Constitution Act* and argued that its construction technicians are engaged derivatively in work that is vital, essential or integral to a federal undertaking and therefore under federal jurisdiction – Parties agreed the standard of review is correctness as the decision under review involves constitutional questions regarding the division of powers, questions of jurisdiction, and jurisdictional lines between competing specialized tribunals – Divisional Court noted that there is a presumption the Applicant is provincially regulated unless it is associated with a core federal undertaking, the habitual operation of its employees services the federal undertaking or there is a vital, essential or integral relationship with the federal undertaking – Court found that the Applicant's construction work is specific to telecommunications and not general construction – Applicant is an ongoing part of the telecommunications business and when looking at the past and present work of the Applicant, almost all of the work was done for telecommunications companies – Applicant's work is important and integral to the services offered by cable companies and their ability to offer their service – Therefore Divisional Court held that the Applicant is subject to derivative federal jurisdiction and quashed the Board's decision – Judicial Review Allowed – Decision Quashed

RAMKEY COMMUNICATIONS INC.; RE: LABOURER'S INTERNATION UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: UTILITY CONTRACTORS ASSOCIATION OF ONTARIO; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 539/17; Dated August 13, 2018, Morawetz RSJ, Gordon RSJ and Thornburn J. (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
Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	Pending
The Daniels Group Inc. Divisional Court No. 535/18	0279-16-R	Pending
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	January 24, 2019
Sheet Metal Workers' International Association Divisional Court No. 613/17	1536-16-R	September 12, 2018

(September 2018)

Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1806-14-MR	Dismissed
Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	Allowed
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
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