ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

March 2015

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February of this year. These decisions will appear in the January/ February 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.

Bar – Certification Application – Construction Industry – Practice and Procedure – At the request of the applicant the Board clarified its finding that it may impose conditions on an applicant seeking to withdraw a certification application under s. 128.1 – The Board found, reading sections 7(8), 7(9) and 128.1(21) together, that an application for certification may be withdrawn "upon such conditions as the Board may determine" regardless of whether the application is being dealt with under section 8 or section 128.1 – This power relates only to the certification application that is being withdrawn – The Board also draws a distinction between the powers in section 7(9) and in s. 111(2)(k): The power of the Board to bar an applicant from filing a subsequent application arises only from section 111(2)(k) when an application is dismissed and must be based on the circumstances that existed before and at the time of the dismissal – The power of the Board to refuse to entertain a subsequent application within a period of up to one year from the date an application is dismissed [section 111(2)(k)] or is withdrawn [section 7(9)] arises only after that subsequent application is made and must be based on the circumstances that existed before and at the time that subsequent application was made – Application withdrawn with leave of the Board

955140 ONTARIO INC. O/A PICKARD CONSTRUCTION; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Northern Employees Association; OLRB File No. 3527-10-R; Dated February 17, 2015; Panel: Harry Freedman (10 pages)

Certification – Construction Industry – Sector Determination – Status – The issue common to both certification applications was a sector determination involving construction of two condominium towers being built in conjunction with the restoration of a historic brick building for use as a restaurant – The employer only performed restoration work on the historical building which was to be joined with one condominium where the restaurant footprint would extend into ground floor – The union asserted it was one integrated project and as the majority of the work related to construction of condominiums, it was in the residential sector of the construction industry – The historic building contained control room with systems related to both building and condominiums – Certain piping and electrical services also passed between structures, however the only entrance to the restaurant was through the historic building and the elevators in the building did not service condominiums – Overall management of project was carried out by one developer and one architect on a single construction site under a common construction schedule – The Board noted there is no single test

for determining sector, it is a fact-specific analysis and necessary to look at end-use of project, work characteristics, and bargaining patterns – Work characteristics and collective bargaining patterns were neutral – The Board noted real issue was the appropriate end-use of project – The Board had to determine whether it was a single integrated project with single end-use, or whether it had multiple and distinct components with more than one use – The Board noted promotional materials, press clippings and signage offered as evidence was of little assistance in sector determination – The Board found historical building had "no meaningful connection" to condominiums and restoration work was "inherently distinct" from new construction occurring on site – Although the project was carried out by a single developer, this did not change the fact that responsibility for restoration work was clearly severable from responsibility for residential construction – The Board found the overwhelming use of historic building was commercial and took place in industrial, commercial and institutional sector of construction industry – Declaration made

EMPIRE RESTORATION INC.; RE: Operative Plasterers' and Cement Masons' International Association of the United States and Canada Union Local 598; OLRB File No. 0661-14-R and 0685-14-R; Dated February 20, 2015; Panel: Eli A. Gedalof (14 pages)

Certification – Construction Industry – The OPDC sought to carve out an ICI sector bargaining unit of construction labourers from an existing ICI sector bargaining unit of masonry restoration employees represented by Local 598 – The matter turned on where there exists an overlap between the two relevant ministerial designations at issue – The OPDC asserted that the Board's previous decisions (*Clifford Restoration* and *S.S.T. Contracting*) were distinguishable because in both the applicant attempted to displace the entire bargaining unit of masonry restoration employees, whereas here they are only attempting to carve out their own designated trade (ICI sector construction labourers) from the broader unit – The Board notes that since 1978 a single trade, province wide bargaining scheme has been in place in the ICI sector and that this scheme was intended to reflect recognized traditional patterns of collective bargaining and trade union representation which had evolved over the years – This bargaining structure, which provides building trade unions with representational control of the trades or crafts that they have historically represented in the ICI sector, also limits the ability of any particular building trade union to represent workers in the ICI sector to those crafts or trades that it historically represented – With these purposes in mind, the Board continued that it was appropriate to strictly construe the ministerial designations in order to limit overlaps between them, that *Clifford* and *S.S.T. Contracting* had already found there was no overlap in the designations; that the Board agreed with these interpretations and that it did not make practical, labour relations sense to interpret the two designations as overlapping if a reasonable interpretation of those designations exists that is consistent with the underlying purposes of the Act – Accordingly the Board rejected the position asserted by the OPDC, since if there is no overlap it cannot matter whether the OPDC attempts to displace the whole or only certain masonry restoration employees – Finally, the Board listed other reasons that supported its conclusion: a carve out could potentially sweep in other individuals not represented by Local 598, none of whom could cast a ballot, which would be inconsistent with one of the stated purposes of the Act; the position was premised upon a flawed characterization of the group carrying out the work tasks – what occurs is that the work tasks overlap, not the designations; and to accept OPDC's position would undermine the designation provided to Local 598 by the Minister, which would be inconsistent with the purposes of the Act – Application Dismissed

HERITAGE RESTORATION INC.; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Operative Plasters' and Cement Masons' International Association of the United States and Canada, Local 598; OLRB File No: 0082-13-R; Dated: February 6, 2015; Panel: Lee Shouldice (23 pages)

Collective Agreement – Construction Industry Grievance – Employee – The grievor was denied a subsistence allowance meant to compensate employees for the cost of securing accommodation when working at a site remote from their "regular residence" – A regular residence is defined as "…a self-contained, domestic establishment (a dwelling house, apartment or similar place of residence where a person generally eats and sleeps… in contrast to a boarding house facility which is not self-contained…" – The grievor lives in a one-room unit on the second floor of a former hotel – The unit is a private space accessed using a key – Inside the unit are all of the normal things associated with domestic life, save for a bathroom and shower, which are instead located adjacent to

the unit and shared with the occupants of four other units – The grievor pays rent on a monthly basis, inclusive of utilities – All of the units on the first floor and all but five of the units on the second floor include their own bathrooms and showers – There are no shared kitchen facilities or common areas – The issue before the Board was whether or not the grievor's unit was self-contained – Hydro One asserted a unit is not self-contained unless all the elements of sleeping, eating, and bathroom facilities are included – The Board determined it must consider the facts of each individual case, the applicable contractual language, and the context of the situation – The grievor does not live in a boarding house, which would include the provision of meals and the consuming of those meals in a common area – Viewing the situation in its entirety, and having regard to the purpose of the article, the Board determined the grievor's unit meets the definition of a "self-contained domestic establishment" – It is a *bona fide*, albeit extremely basic, apartment – It is not mandatory that there must be an ensuite washroom and shower for a unit to be a "self-contained domestic establishment" – It would be manifestly inequitable and contrary to the intent and language of the article to find the unit does not meet the definition, as other units in the same residential building would clearly meet the definition – Hydro One violated the collective agreement – The Board directed Hydro One to compensate the grievor for damages arising from the violation

HYDRO ONE NETWORKS INC.; RE: Carpenters' Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on its own behalf and on behalf of Local 93; OLRB File No. 0611-14-G; Dated February 3, 2015; Panel: Jack J. Slaughter (15 pages)

Bargaining Unit – Certification – Construction Industry – Status – The main issue before the Board was whether an off-site mechanic was properly included in the bargaining unit – The Board had previously determined the appropriate bargaining unit encompassed all employees engaged in operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in repairing or maintaining same – The mechanic worked in the equipment repair shop adjacent to the construction site and repaired construction equipment as well as other vehicles and equipment from time to time – The mechanic never repaired equipment on-site, but occasionally attended the site to bring equipment back to shop – To include off-site employee in construction bargaining unit, it must be established the employee is commonly associated in work or bargaining with on-site employees in accordance with s.126(1) of the *Act* – The Board determined the mechanic was not to be included in the bargaining unit – Because the mechanic never engaged in the repair of equipment on-site, the Board rejected the employer's assertion he was commonly associated in work with on-site employees – Individuals who are not on-site employees or employees within the meaning of s.126(1) cannot come within a construction industry bargaining unit for the purposes of an application for certification

QUALITY HAULAGE AND FARMING LTD.; RE: International Union of Operating Engineers, Local 793; OLRB File No. 3319-13-R; Dated February 20, 2015; Panel: Harry Freedman (13 pages)

Delay – Discharge – Health and Safety – Practice and Procedure – Reprisal – An employee, L, claimed the termination of his employment constituted a reprisal for his exercise of rights under the *Occupational Health and Safety Act* – SNC brought a preliminary motion that the Board exercise its discretion to decline to inquire into the application due to delay – Approximately one month after L's termination, L's counsel wrote to SNC alleging the discharge was a result of a workplace injury and a violation of the *Human Rights Code* because of L's age – An ESA claim was later filed, denied and appealed – In the course of proceedings related to the ESA appeal, L gained a better understanding of the various statutory regimes and filed the present application with the Board approximately 17 months after his termination – L asserted his initial notice to SNC of potential legal challenges to his termination rebutted any presumption of prejudice suffered by SNC due to delay –SNC asserted it suffered presumed and actual prejudice, and that L failed to provide a sufficient explanation for the delay – The Board's discretion to decline to inquire into a matter under section 50(3) of this Act is analogous to its discretion under section 96(4) of the *Labour Relations Act* and its approach is consistent – Where an application is filed more than six months after the events upon which it is grounded, the Board may decline to hear it where the responding party provides good reason why that should occur and the applicant does not provide a compelling explanation for the delay – Where an application is filed more than 12 months after the events upon which it is grounded, a presumption of prejudice arises and the applicant is required to rebut that presumption – Although SNC knew shortly after L's termination that L alleged his discharge was related to his age and to the fact that he had

suffered a compensable workplace injury, those allegations are not actionable before the Board under either the ESA or the OHSA – There was no suggestion of reprisal until the present application was filed – SNC's approach to defending this application may or may not have been the same as its approach to proceedings in other forums, particularly because L's allegations were only ever raised in a forum (a claim under the ESA) where there was clearly no jurisdiction to entertain them – Further, where an applicant has proceeded in multiple forums the Board has often found such conduct favours declining to inquire into the matter so as not to encourage parties to engage in forum shopping – The Board could not determine that SNC's ability to defend the application had not been impaired – Further, in assessing prejudice the Board also considers how the impact of the requested relief has been affected by the delay and whether the employer has already had to defend its actions in other proceedings – The Board determined L had not rebutted the presumption of prejudice – Application dismissed

SNC LAVALIN OPERATIONS AND MAINTENANCE INC.; RE: Paul LaPointe; OLRB File No. 3314-13-OH; Dated February 4, 2015; Panel: Mary Anne McKellar (13 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
Toran Carpentry Inc. Divisional Court No.49/15	0229-13-R	Pending
Sentry Electrical (Canada) ULC Divisional Court No. 041/15	0505-14-R	Pending
Charles Zubovits Divisional Court No. 3/15	1368-04-U	Pending
Royal Ottawa Hospital Divisional Court No.14-62782 **(Ottawa)**	2461-14-IO	Pending
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	Pending
College Employer Council Divisional Court No.397/14	1143-14-CV	May 22, 2015
Dean Warren Divisional Court No.345/14	2336-13-U	September 22, 2015
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Koscik Divisional Court No. DC-14-000636-00JR (**Newmarket)**	0956-13-U	March 4, 2015 Reserved
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015 Reserved
Mary McCabe Divisional Court File No.14-2012 (**Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	April 27, 2015
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton**)	2872-12-ES	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
EllisDon Corporation Court of Appeal No. C58371 (EllisDon seeking leave to SCC)	0784-05-G	Allowed Board Decision restored

Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
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
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above