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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 June of this year. These decisions will appear in the June/July 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.

Duty to Bargain in Good Faith – Unfair Labour Practice – As a part of negotiating a renewal collective agreement the employer agreed to resume administration of the employees' health and welfare benefits plan, which the union had agreed to administer in the previous round of bargaining – The employer alleged the union's failure to advise the employer that the benefit plan was running at a deficit and was being subsidized amounted to bargaining in bad faith – With a strike deadline looming and the parties negotiating with the assistance of a mediator, a number of outstanding issues remained: wage increases and the union's proposals to increase the employer's contribution towards benefits, to increase travel allowances and to double the employer's contribution to the pension plan – The employer believed it could save money by taking the benefits plan back thereby increasing the travel allowance, thereby rendering moot the union's request for a benefits contribution increase – The Board noted that at no time during the negotiation process did the union inform the employer about the deficit in the benefit plan or that it had been subsidizing it; and similarly, at no time during the process did the employer request information from the union about the funding of the plan or advise the union that its proposal to increase travel allowance benefits was tied to its assumption that it would also find cost savings in the benefits plan – The Board also noted that among the outstanding proposals which remained on the table until the end was a union proposal to double the employer's contributions to the benefit plan and that the employer did not ask the union about this proposal or inquire as to why it remained on the table up to the eve of a strike – The Board accepted that silence could be "tantamount to a misrepresentation," but found that did not happen in this case – The Board found that absent any communication by the employer about the assumption underlying its proposal and in the absence of any request for information by the employer or any misrepresentation by the union upon which the employer relied, the union was not obliged to volunteer information about the subsidy – The union's silence in these circumstances did not demonstrate bad faith such that it could trigger the duty to provide unsolicited disclosure – Lastly, the Board concludes that the concept of due diligence is present in the law of collective bargaining and that the employer did not advise the union of its rationale, ask for information about the financial circumstances of the plan or even ask the union why it was proposing to double employer benefit contributions – Application dismissed

CARE PARTNERS; RE: SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 1 CANADA; OLRB file No. 0568-15-U ; Dated June 29, 2016; Panel: Brian McLean, P LeMay and Edward Chudak (16 pages)

Certification – *Colleges Collective Bargaining Act, 2008* – Practice and Procedure – Representation Vote – OPSEU applied for certification for part-time support staff in May, requesting a representation vote in June – The Council asserted the appropriate time to hold the vote would be October – The Board decided to hold the vote in June for the following reasons –

First, the Board noted that part-time, student employees will be able to participate in the collective bargaining process, whether they have voted or not, and that was the central point of the excerpts put to the Board about the legislative reform – Second, the Board found that the words "held in a timely manner" in section 30(4) meant that the representation vote should be held at a suitable time as quickly as possible when the persons eligible to participate in the vote are substantially representative of those likely to be substantially affected by the result of the representation vote – Third, the Board found that since more than 50% of employees who will eventually be at work were currently working, that this met the Board's "build-up" case law which determined when a substantially representative number of employees were in the ultimate bargaining unit – Fourth, the Board noted that in almost every application for certification there will be employees who cannot vote for one reason or another and the rights of future employees to participate is not treated as more important than the right of current employees to choose whether they want a union – Finally, the Board noted that the vast majority of employees who are clearly substantially affected by the results of the vote (the permanent part time employees) are currently present at work and that it was difficult to understand how a vote held in June among such an employee complement would be inappropriate – The Board concluded that the employees currently at work were "substantially representative of the employees likely to be substantially affected by the vote" in accordance with s. 30(5) of the CCBA – Matter continues

COLLEGE EMPLOYER COUNCIL; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION ("OPSEU"); OLRB Board No. 0625-16-R; Dated June 13, 2016, Panel: Brian McLean, (16 pages)

***Charter of Rights and Freedoms* – Construction Industry – Practice and Procedure – Termination –** The unions asserted that section 63 of the Act is contrary to section 2(d) of the *Charter* because it provides that the Board will direct a representation vote if it is satisfied that at least 40% of the employees in the subject bargaining unit appear to have expressed a desire to not be represented by the subject trade union without first satisfying itself that the expression of desire was voluntary – The Board found that there was not substantial interference with the process of collective bargaining as a result of s. 63 – First, the Board did not agree that s. 63 presumed the voluntariness of employee choice as the combination of the holding of a secret ballot representation vote along with the presence of section 63(16) [employer initiation] was a sufficient and contrary answer to the unions' case – That is, the mere taking of the representation vote does not mean that the application will not be dismissed if the Board decides as a result of the litigation that the representation vote should not have been held or the ballots should not be counted (or not be considered) because of employer conduct within s. 63(16) – Next the Board rejected the unions' proposition that because the onus was on the union under s. 63(16), there was no way for the Board to satisfy itself of the voluntariness of the employees' choice – Neither the fact that it may be difficult for the union to prove employer initiation nor that the procedures are different pre and post Bill 7 leads the Board close to finding substantial interference to ground a *Charter* challenge – Finally, the Board noted that no evidence was called to show any deleterious consequences as a result of any changes after Bill 7 – The Board was not prepared to presume, in the absence of proof of voluntariness, that in each case an application for termination is not voluntary – Section 63 did not impugn section 2(d) of the *Charter* – Matters continue

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 804; RE: EMPLOYEES OF RAMROCK ELECTRIC, ET AL; OLRB File No. 3198-15-R, 3229-15-R, 3242-15-R, 3278-15-R, 3328-15-R3340-15-R, 3384-15-R, 3435-15-R, 0101-16-R, 0110-16-R, 0113-16-R, 0121-16-R, 0149-16-R, 0210-16-R, 0237-16-R, 0248-16-R, 0280-16-R, 0281-16-R, & 0300-16-R; Dated June 27, 2016; Panel: Michael McFadden (24 pages)

***Hospital Labour Disputes Arbitration Act* – Reference –** The question posed by the Minister was whether the employees of Riverside Health Care Facilities (Riverside) employed in the Rainycrest Home Care/Home Support services were covered by the HLDAA – The Board found that Riverside was a direct provider of health care services not simply a back office operation that provides central payroll, finance and management functions – Riverside existed for the purpose of delivering various healthcare services which it owns and operates: a general hospital, Long-Term Care Home and Community Home Support, Health Centres, Supportive Housing, and Mental Health and Addiction programs – Its head office and operations were all run out of the general hospital – The Board found there was no real dispute that Riverside (including Home Care/Home Support Services) satisfied two of the three criteria for an entity to be a "hospital": all the services it provides are operated for the observation, care or treatment of persons who are afflicted with or suffering from physical or mental illnesses, diseases or injuries, or are persons who are convalescent or chronically ill – The

only real question was whether Riverside was an "institution" – The Board found that Riverside operated out of "premises" being the hospitals and the long term care home, for the purpose of providing its services and the fact that it also provides services in clients' homes does not diminish that fact – Accordingly it met the definition of "hospital" – The Board therefore concluded that the Home Care / Home Support employees employed by the Riverside were covered by HLDAA

RIVERSIDE HEALTH CARE FACILITIES INC.; RE: CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 65-10; OLRB file No. 0369-15-MR; Dated June 7, 2016; Panel: Jesse M. Nyman (23 pages)

Remedies – Sale of Business – Industrial acknowledged it was a successor employer to Seneca, but asserted, as the successor employer, it was not responsible for the liability found against Seneca in arbitration proceedings that occurred before the sale took place – Relying upon earlier Board case law (*Chandelle Fashions* and *Emrick Plastics Inc.*) the Board found that a sale of business within the meaning of s. 69 means more than that the successor must prospectively abide by the written terms of the collective agreement – Being bound to the collective agreement as if it had been a party thereto also makes the successor liable for any unpaid obligation of the predecessor employer that arose under the collective agreement prior to the sale, whether or not the successor has agreed to assume such liabilities – Declaration made

SENECA; RE: UNIFOR AND ITS LOCAL 199; RE: INDUSTRIAL MANUFACTURING GROUP INC., OLRB file No. 2720-15-R; Dated June 28, 2016; Panel: Owen V. Gray (14 pages)

Employment Standards – The employer, which offered general accounting services, appealed an ESO's order for termination pay and unpaid wages – The Board upheld the order for termination pay (finding the employee, a Certified General Accountant (CGA), had worked more than three months entitling her to termination pay) – The Board then addressed the question of unpaid wages – The Board found that the employee's regular work week was 37.5 hours per week, and since she was a salaried employee, when she worked over this amount her hourly rate still was significantly above the minimum statutory requirement – Consistent with an earlier Board decision (*Re: University of Ottawa*) the Board concluded that since her employment contract provided her with an annual salary far exceeding the Act's minimum, the contract applied – Finally, the Board determined whether the term "public accounting" in s. 2(1)(a)(iv) of O. Reg. 285/01 included all three accounting designations in Ontario (Certified General Accountant, Certified Management Accountant and Chartered Accountant) – After a careful statutory analysis the Board found that "public accounting" is simply a reference to an accountant holding out his or her services to perform the normal accounting functions for members of the public; its intent was to be a reference to the accounting profession and not just to those accountants who were licensed to sign an audit or assurance agreement – Accordingly the regulation exempted the employer from having to pay overtime rates to the employee – Appeal allowed in part

STAN SEIDENFELD PROFESSIONAL CORPORATION; RE: HUIHUA (LINDA) PENG, AND DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 2100-15-ES; Dated May 6, 2016; Panel: Maurice A.Green (26 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
Lee Byeongheon Divisional Court No. 16-2220 **(Ottawa)**	0015-15-U	Pending
College Employer Council Divisional Court No. 308/16	0625-16-R	Pending
Ajay Misra Divisional Court No. 176/16	1849-15-U	Pending
Delores Grey Divisional Court No. CV-16-1127-00 **(Brampton)**	0317-15-U	Pending
Labourers' International Union of North America, Local 183 ***(Alliance Site Construction Ltd.)*** Divisional Court No. 133/16	3192-14-JD	Pending
Public Service Alliance of Canada Divisional Court No. 115/16	0119-13-R	Pending
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615-15-UR 2437-15-UR 2466-15-UR	Week of November 21, 2016
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	Pending
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	Pending
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15 **(London)**	3151-14-G 3716-14-R	Pending
IBEW Electrical Power Council of Ontario ***(Crossby Dewar Inc.)*** Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
Labourers' International Union of North America, Local 1059 ***(McKay-Cocker)*** Divisional Court No. 384/15	0883-14-R	June 17, 2016 Reserved
Universal Workers Union, Labourers' International Union of North America, Local 183 ***(Maystar)*** Divisional Court No. 368-15	1938-12-R	September 12, 2016

Carlene Bailey Divisional Court No. 173/15	0480-13-U	Pending
Valoggia Linguistique Divisional Court No. 15-2096 (**Ottawa)**	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No. 49/15; Court of Appeal No. M46308	0229-13-R	Dismissed March 8, 2016, LIUNA seeking leave to CA
Dean Warren Divisional Court No. M-45870	2336-13-U	Allowed Leave to CA dismissed March 30, 2016 NHL seeking leave to SCC
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Request for extension to file leave application dismissed by CA