

*H*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.

the inclusion of that position in the bargaining unit – Board reconsiders and varies its interim certificate – Matter continues

CITY OF MISSISSAUGA; RE: CANADIAN UNION OF PUBLIC EMPLOYEES; RE: ANIMAL SERVICES; OLRB File No. 0883-16-R; Dated August 10, 2016; Panel: Matthew R. Wilson (6 pages)

Certification – Practice and Procedure – Reconsideration – Status – The Board issued an interim certificate on the understanding that an issue over whether two positions were included or excluded would not affect the outcome of the vote – CUPE advised that it was agreed on the day of the vote to count the ballot of the Team Leader and accordingly the position was in the bargaining unit – The City argued its representative was not experienced enough in the voting process to understand that an agreement to count the ballot was an agreement to include the person in the unit – The City also took issue with the Vote Officer's explanation of the legal test for management exclusions – The Board found the experience of the City's representative was not a relevant factor: the City chose to send this representative and there was no claim that the representative made a decision beyond his authority or that he was precluded from seeking counsel throughout the process – It was the City's responsibility to send an informed representative to the vote who could either seek advice when needed or make decisions if the City sought to resolve outstanding matters – Finally, the Board noted that, in the absence of an agreement to the contrary, when a party agrees to count a ballot cast by a person occupying a disputed position that party is no longer disputing

School Boards Collective Bargaining Act – CUPE filed an application pursuant to s. 28(5) of the SBCBA requesting the Board to determine whether the terms of the Memorandum of Agreement on Central terms between the parties permitted CUPE to negotiate provisions addressing the utilization of the casual employee seniority lists at the local level – The Board noted its task was to interpret the parties' MOA in the context of a new statutory scheme that establishes a two-tier system of negotiations—a provincial central table and local tables – To arrive at an interpretation of what the parties intended, the Board was required to take into account the purposes of the SBCBA together with the context of the exchange of proposals that led to their final agreement – The Board found, notwithstanding that CUPE's initial specific proposal was rejected, that the parties had agreed in negotiations that the matter (or topic) of seniority rights for casual/temporary employees was to be negotiated at the central table – While that was enough to dispose of the issue the Board went on to find that the language utilized (by the parties in paragraph 13 of the MOA) resulted in the same outcome – The ordinary and grammatical meaning of the language used unquestionably meant that whatever rights are to be attached to the

recognition of seniority are to be negotiated centrally – Finally, to read the other clause at issue as proposed by CUPE would lead to a result which would have some locals negotiating the utilization of seniority lists locally, while others could not – This would undermine the Act's principles and concepts – The Board declared accordingly

COUNCIL OF TRUSTEES ASSOCIATIONS (CTA); RE: CANADIAN UNION OF PUBLIC EMPLOYEES; RE: THE CROWN IN RIGHT OF ONTARIO; OLRB File No. 0567-16-M; Dated August 29, 2016; Panel: Maurice A. Green (14 pages)

Certification – Construction Industry – Non-Construction Employer – To determine whether De Beers was a non-construction employer the Board had to decide whether government grants or the waiver of mining royalties could constitute “compensation” within the meaning of the definition of non-construction employer – The Board reviewed its jurisprudence and noted that from its earliest decisions following the enactment of the current definition of “non-construction employer,” it has interpreted that section to encompass compensation from an unrelated third party for work in the construction industry performed on behalf of, or for the benefit of, a third or unrelated party – The Board then noted that what the legislative provision seeks to exclude, from the unique features and scope of the construction provisions of the Act, are entities that do not perform construction work with the same economic considerations as employers operating construction businesses – Turning to the specific issue of compensation, the Board found that there must be a direct nexus between the construction work and the alleged compensation – Here however the Board found that any grants received or waiver of royalties provided from Government were given to De Beers as an inducement to establish the mine in return for benefits to be derived by the First Nations communities in the area – Any grants or waiver of royalties were not being given to De Beers *qua* constructor, and were not “compensation” for construction even if some or all of the grant or waiver of royalties was used by De Beers for the construction of the mine – The Board concluded that grants and/or waivers of royalties from the Governments of Canada and/or Ontario to De Beers to construct and operate the mine do not constitute “compensation” for the purposes of the non-construction employer definition in the Act – Matter continues

DE BEERS CANADA HOLDINGS INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL

DISTRICT COUNCIL; OLRB File No. 1972-15-R; Dated August 15, 2016; Panel: Yvon Seveny (28 pages)

Certification – Construction Industry – Practice and Procedure – Representation Vote

– In this displacement application a ballot in dispute was marked with a “No” in each choice – The employer took the position that since the voter marked “No” for the applicant union that was sufficient for the Board to decide that the clear intention of the voter was not to vote in favour of the applicant trade union – The Board found that a ballot with “No” in each choice is no different from a ballot with “Yes” in each choice or a ballot with nothing on it; the result is the same, in that the intention of the voter is not clear – The Board found that the ballot was spoiled and cannot be counted for or against any party and cannot be considered a ballot cast – Matter continues

INTERIOR DRYWALL DESIGN INC.; RE: CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0187-16-R; Dated August 5, 2016; Panel: John D. Lewis (9 pages)

Employee – Employment Standards – Iris Blu, an event management company helping clients host and run events, appealed an order obliging it to pay overtime and vacation to Irwin, a “Brand Ambassador” for a Program operated by the client – The issue raised by the appeal was whether Irwin was an employee or independent contractor – The Board found that Irwin did not secure the client; she did not contract with the client; she did not negotiate with the client regarding the rate she was to receive, her hours, or the location at which she was to work; and, significantly, the client complained to Iris Blu regarding Irwin's deportment rather than to directly to Irwin – Furthermore, Irwin contributed nothing more to the Program than her time and effort, that is to say her labour; she provided no tools; tablets and booths were used in the Program, but there was no suggestion that those were furnished by the Brand Ambassadors – Additionally, there was no evidence or suggestion that Irwin was at liberty to engage others to work for her in the performance of her role in the Program or elsewhere had she continued with Iris Blu – Finally, she had no ability to influence decisions that critically affected her work life: she had no control over whether she was chosen, the compensation to be paid; her hours; the work location; the applicable dress code; and how long she would be retained at the site – The Board found she was an employee

of Iris Blu for the period in which her complaint applied – Application dismissed

IRIS BLU EVENT STAFFING LIMITED; RE: TAYLOR IRWIN; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 3199-15-ES; Dated August 25, 2016, Panel: Derek L. Rogers (23 pages)

Public Sector Labour Relations Transition Act, 1997 – Practice and Procedure – Settlement – Unfair Labour Practice – The Board addressed complaints by CFNIU that OPSEU had breached sections 96(7) and 76 of the LRA in the context of representation votes to determine which trade union would represent the service and clerical unit at issue – The parties had entered into a pre-vote settlement which included an Access Agreement, which set out parameters concerning the campaign period leading up to the vote – Concerning the breach of the Access Agreement, the Board noted that for an agreement to limit a trade union's ability to lawfully communicate its messages to anyone outside of a workplace, and in particular a trade union that has existing rights and obligations to represent the employees in the workplace, there must be clear language in the agreement – Since the Access Agreement contained no such restrictions the allegations of a breach respecting conduct outside of the workplace could not be sustained – The Access Agreement made it clear that the parties would first attempt to resolve any dispute about the interpretation or application of the agreement amongst themselves and, if unsuccessful they would bring the dispute to the Board Officer, which dispute would be resolved expeditiously by the Board Officer – Although the parties had used the Board Officer to resolve a variety of issues, CFNIU did not engage this process concerning its allegations of a breach of the Access Agreement – The Board made it clear that its approach to the enforcement of agreements will be no different in PSLRTA matters than in other Board matters – Were the Board to entertain disputes about conduct that occurred during the period covered by the Access Agreement that were not raised in accordance with that Agreement, the effect would be to undermine the parties' agreement – When the parties agree to do something, the Board expects the parties to fulfill their agreement – The Board declined to inquire further into these complaints by CNFIU – Complaints dismissed

PROVIDENCE CARE; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE: CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE: ONTARIO NURSES' ASSOCIATION; OLRB File No. 1554-

13-PS; Dated August 3, 2016; Panel: Matthew R. Wilson (16 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
946900 Ontario Limited Divisional Court No. 239/16	3321-14-ES	Pending
S & T Electrical Contractors Divisional Court No. 406/16	1598-14-U	Pending
Carpenters (Riverside) Divisional Court No. 363/16	0630-16-R	Pending
Lee Byeongheon #2 Divisional Court No. 16-2219 (Ottawa)	0095-15-UR	Pending
Lee Byeongheon #1 Divisional Court No. 16-2220 (Ottawa)	0015-15-U	Pending
College Employer Council Divisional Court No. 308/16	0625-16-R	December 9, 2016
Ajay Misra Divisional Court No. 176/16	1849-15-U	October 27, 2016
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	December 19 & 20, 2016
R. J. Potomski Divisional Court No. 12/16 (London)	1615-15-UR 2437-15-UR 2466-15-UR	Pending
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
Cotton Inc. Divisional Court No. 554/15	3254-13-U 3255-13-R	Dismissed May 30, 2016 Seeking leave to CA

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 SCC 37019	2336-13-U	Allowed Leave to CA dismissed March 30, 2016 NHL seeking leave to SCC