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Ontario Labour Relations Board

HIGHLIGHTS

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January 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.

Unfair Labour Practice – Interference with Trade Unions — Union alleged that Employer lied in the status submissions filed in respect of the Union's earlier application for certification – Union asserted that intention and result of alleged lies was to delay certification of Union, resulting in interference in a trade union contrary to s. 70 of the *Act* – Union sought monetary damages and declaratory relief on the basis that Union would have been in a certifiable position and bargaining unit would have enjoyed benefits of collective agreement months earlier – Board held that s. 70 was broad enough to apply to an Employer's conduct and pleadings during the certification process – Board found that Union pleaded sufficient facts to establish a *prima facie* breach of the Act – Board followed *Wal-Mart Canada Corp.* in determining whether there was a labour relations purpose in inquiring further into the matter – In this case, damages claim was more speculative than is typical – Board rejected Employer's argument that short time lines might lead to difficulties in ascertaining facts, in view of precise and specific facts pleaded by Employer together with documents filed in support - Even if damages could be quantified, Board will not conduct hearings to engage in the public flogging of a party – Potential also exists for extending litigation further by adding additional stream of complaints about parties' submissions themselves – In these circumstances, where the Union did not rely on a false employer representation to change its position or other comparable harm, the Board exercised its discretion to not inquire further into the complaint as it served no labour relations purpose in the specific circumstances of this case – Matter dismissed

2373512 ONTARIO CORPORATION O/A RRCR CONTRACTING, NEIL CHALMERS AND MICHAEL PIERCEY; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 105; OLRB File No. 2530-18-U; Dated January 7, 2019; Panel: Matthew R. Wilson (9 pages)

Employment Standards – Bankruptcy – Stay – Employer filed application for review under s. 116 of the *Employment Standards Act* – Employer paid money into trust as required by s. 116(1) – Employer later declared bankruptcy – Trustee in Bankruptcy sought return of money paid into trust on the basis that this money was part of bankrupt's estate – Director of Employment Standards opposed, indicating that funds could only be paid out of trust pursuant to a decision of the Board – Board adjourned matter to allow parties to seek a lifting of the stay to allow the matter to proceed, failing which the application would be deemed abandoned – No party sought lifting of the stay – Trustee again sought return of money paid into trust – Board determined that Trustee only had a contingent interest in the funds in trust – Money would only be paid to Trustee in the event of a

successful application for review – As matter was deemed abandoned, there was no successful application for review – Board found that a situation whereby an Employment Standards Officer's Order To Pay would be effectively defeated by bankruptcy, without any requirement that the Employer demonstrate that the Order was incorrect, was an absurd result – Matter deemed abandoned in accordance with earlier decision and Director directed to release funds to employee

6813038 CANADA INC. O/A FV FOODS; RE: GIO LAXAMANA; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1045-14-ES; Dated January 24, 2019; Panel: Roslyn McGilvery (6 pages)

Employment Standards Act – Exclusions – Co-Op Students – Review of Employment Standards Officer's decision denying applicant's claim for various payments under the *Employment Standards Act* on the basis that he was employed as a co-op student and therefore excluded from the scope of the *Act* – Applicant argued that many duties given to him by Employer were irrelevant to his course of study, in violation of the co-op agreement, and thus for the hours spent performing those duties, he was covered by the *Act* – Board found that s. 3(6) of the *Act*, which provided that where a person otherwise excluded by s. 3(5) performed "other work", nothing in s. 3(5) precluded the application of the *Act*, was applicable – Board rejected argument that the existence of the co-op agreement precluded a review of the actual duties performed – Board found that work such as cleaning chairs and tables, attending at the front desk, serving water, watering plants and signing for deliveries was not work contemplated by the co-op agreement entered into – Position taken by the Employer would have allowed a contracting out of the protections of the *Act* preserved by s. 3(6) – Applicant entitled to minimum wage, overtime pay, holiday and vacation pay in respect of time spent performing "other work" – Application allowed

ARCTIC POLE BUSINESS DEVELOPMENT LIMITED; RE: KIRANDEEP SINGH; OLRB File No. 1475-18-ES; Dated January 24, 2019; Panel: Derek L. Rogers (13 pages)

Certification – Ambulance Services – Federal or Provincial Jurisdiction – Employer, a First Nation, created an ambulance service to provide land ambulance service and community health services to residents and visitors of First Nation Reserve – Catchment area extended to population which included individuals who were not band members – Employer argued that the paramedical services formed part of one, single federal undertaking – Union argued that a band providing a service to band members and non-band members in an exclusively provincially regulated system falls within provincial jurisdiction – Board extensively reviewed case law concerning questions of jurisdiction as they relate to First Nations and undertakings operated by First Nations – Board found the following principles emerged from the relevant authorities – The federal government has exclusive power in respect of "Indians and Lands reserved for the Indians", whereas each province has the exclusive power in respect of property and civil rights in the province – Labour relations are presumptively under provincial jurisdiction pursuant to the provincial power over property and civil rights in the province – Parliament has jurisdiction over labour relations only by way of exceptions which are narrowly interpreted – The federal power in respect of "Indians and Lands reserved for the Indians" is not to be treated differently from other federal powers in terms of labour relations issues, and the fact that a First Nation is involved is not determinative of the jurisdictional issue – The functional test is to be applied first to determine whether the nature, operations and habitual activities of the undertaking, service or business constitute a federal undertaking, service or business – If functional analysis is inconclusive, the Board must determine whether provincial regulation of the entity in question would impair the "core" of a federal head of power (the "ancillary test") – An undertaking, service or business can be partly under federal jurisdiction and partly under provincial jurisdiction – The band council is entitled under the *Indian Act* to regulate the health of residents on the reserve – Ambulance services and paramedics who work for an ambulance service are comprehensively regulated by the Province of Ontario (pursuant to the *Ambulance Act* and regulations) – Ambulance service providers operate within a balanced and integrated system of ambulance services – After considering the applicable jurisprudence, Board held that the presumption of provincial jurisdiction was not displaced in this matter – Essential character of undertaking is an ambulance service, despite its being operated by a First Nation – Provincial regulation and funding affect the essential character of the undertaking far more significantly – No substantial difference between the Employer's ambulance service and other ambulance services that are provincially regulated that would oust provincial jurisdiction – No need to consider application of "ancillary test" – The Board

found that it had jurisdiction to entertain the application for certification – Matter continues

CHIPPEWAS OF RAMA FIRST NATION; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No. 0025-18-R; Dated January 4, 2019; Panel Patrick Kelly (32 pages)

Certification – Federal or Provincial Jurisdiction – Union sought, among other things, remedial certification under s. 11 – Employer provides various environmental services to clients, including cleaning and collection, storage and transportation/disposal of industrial waste – Employer asserted that its labour relations were federally regulated as it was in the business of inter-provincial and international transportation – Union argued that the company is in the waste management business, that the transportation of waste was incidental to its core business, such that its labour relations were subject to provincial jurisdiction – Board discussed the "functional test" with respect to the division of federal and provincial powers as they pertain to labour relations – The "functional test" required the Board to examine the nature of the operation and its normal or habitual activities to determine whether it was an interprovincial or international transportation operation – Board determined that the true characterization of the Employer's core business was environmental cleaning and waste management services Employer offered a service to businesses to rid them of waste, including on-site collection and/or unloading, storage and bulking as well as transportation out of Ontario – Employer not a common carrier hauling clients' products to locations determined by client – Waste not the property or concern of the client once in Employer's possession – Employer therefore not in the interprovincial or international transportation business – Employer subject to provincial jurisdiction – Matter continues

ENVIRONMENTAL SERVICES INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 625; RE: U.S. ECOLOGY TILBURY; RE: STABLEX CANADA INC.; RE: U.S. ECOLOGY, INC.; OLRB File No. 0101-18-R & 0234-18-U; Dated January 11, 2019; Panel Patrick Kelly (16 pages)

Construction Industry Grievance – Settlement – Union filed a grievance alleging that Employer breached collective agreement by miscalculating Employee's seniority date and incorrectly interpreted a memorandum of settlement – In first settlement, parties agreed that Employee would not be referred to construction division for a period of 2.5 years (while retaining the right to be referred under a different collective agreement) – In second settlement, parties settled a group grievance relating to the wrongful layoff of several employees, including Employee – Second settlement specifically adjusted other grievors' seniority dates, but not Employee's, although she did receive a monetary settlement as did other grievors – In current grievance, Union alleged that Employee was wrongly laid-off because her seniority date should also be adjusted and she was therefore laid off out of seniority order – No evidence before Board that Employee was, in fact, laid off out of seniority – Further, Board held that *maxim expressio unius exclusio alterius* applied when interpreting minutes of settlement – There is no reason to not apply the maxim to minutes of settlement as such documents are simply another species of contract – It was logical to conclude that the Union and Employer were both aware that the effect of the first settlement would be to create a new seniority date for Employee if and when she returned to the construction division after the 2.5 year period – Settlement language was unambiguous – Board accepted that *expressio unius exclusio alterius* is to be applied sparingly and only when facts support its application – This was a circumstance where the maxim should be applied – If the parties had intended that the seniority date was to be maintained when settling the other grievances, they could have done so – Grievance dismissed

HYDRO ONE INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 2699-17-G; Dated January 31, 2019; Panel Maurice A. Green (11 pages)

Certification – Appropriate bargaining unit – Union applied for certification of a bargaining unit of employees employed as principal and assistant conductors – Conductors employed within university's extracurricular club setting – Employer argued that bargaining unit not appropriate because of undue fragmentation – Club structure within university consists of numerous clubs, each with numerous sub-sections, and bargaining unit applied for consisted of two classifications within one sub-section – Union argued that bargaining unit applied for did not create any of the concerns about fragmentation that normally concern the Board – Union argued that no serious labour relations

problems would be created by adding an additional bargaining unit and collective agreement to the 23 already in place at the university – Board referred to its jurisprudence, including in the university sector, which generally avoids granting bargaining units that are limited to a single department or classification – Board found that creating a pattern of fragmented bargaining units was to be avoided – Application for certification dismissed

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE: CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB File No. 3324-17-R; Dated January 14, 2019; Panel: Robert W. Kitchen, Heino Nielsen, William Cook (13 pages)

***Canadian Charter of Rights and Freedoms* – Duty of fair representation –** Applicant in section 74 application filed application more than one year after his grievance was formally withdrawn - Conflict between Union and Applicant concerning the conduct of his grievance had arisen almost as soon as the grievance was filed in 2014 – Applicant had alluded repeatedly to the possibility of filing a complaint under s. 74 – Union had invited him to do so more than a year before formally withdrawing his grievance – Applicant asserted that circumstances of complaint were exceptionally complicated such that additional time was warranted – Board concluded that circumstances were not exceptional and there was no basis for the Board to allow the complaint to proceed when it had been filed so long after the grievance was withdrawn (and several years after an application under s. 74 was first threatened) – Applicant asserted that Board's approach to delay in s. 74 applications violated s. 15 of the *Charter* and that s. 15 of the *Charter* also required s. 74 of the *Act* to be interpreted in such a way as to require trade unions to take all grievances to arbitration – Argument founded on an argument that "workers", "unionized workers" or "workers unable to afford legal representation" should be considered analogous grounds under s. 15 – Board analyzed previous jurisprudence finding that "unionized worker" or "worker" were not analogous grounds under s. 15 and that economic capacity was also not an "immutable personal characteristic or quality" protected by s. 15 – Further, on a *Doré* analysis, even if these were analogous grounds protected by the *Charter*, the Board's approach to delay in filing s. 74 complaints was consistent with the statutory objectives of the *Act* and permits the proportionate balancing of parties' respective interests (which a strict limitation period does not) – Application dismissed

TODD ELLIOTT SPECK; RE: ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE, AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO ("AMAPCEO"); OLRB File No. 1476-18-U; Dated January 25, 2019; Panel: Caroline Rowan, (22 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
AB8 Group Limited Divisional Court No. 052-19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 789/18	2375-17-G	Pending
Audio Visual Services (Canada) Corporation Divisional Court No. 732/18	2694-16-R	June 25, 2019
Kelly White Divisional Court No. 671/18	2032-17-ES	Pending
Tomasz Turkiewicz Divisional Court No. 601/18	2375-17-G	Pending
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	March 19, 2019
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	May 22, 2019
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	April 3, 2019
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	June 18, 2019
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	June 13, 2019

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Highcastle Homes Inc. Divisional Court No. 7/18	3196-15-R 3282-15-U	March 11, 2019
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
Dennis McCool Divisional Court No. 566/17	0402-16-U	March 7, 2019
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	Pending
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
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