ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

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September 2013

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 at www.canlii.org.

Construction Industry – Termination – Timeliness – Unfair Labour Practice – Two employees sought to terminate the bargaining rights of the Painters – The Painters argued that the Labourers and Biggs had violated s. 86 of the LRA when Biggs entered into Minutes of Settlement with the Labourers while the Painters' 2010 application for certification was pending: the MOS meant that the employees performing asbestos work were in the Labourers' bargaining unit; alternatively the employees were "*April Waterproofing*" employees – Biggs argued that it was caught in a struggle between two unions competing for the same bargaining unit work, therefore it made a business decision to enter into an agreement with the Labourers because of an existing relationship with respect to other work performed by other employees – The Board rejected Biggs' argument, stating that an employer has the right to make a choice about work assignment as between two unions, but the employer does not have the right to dictate to a group of employees which union they are to join – The Board held further that the employees in question—because of the Minutes of Settlement between the Labourers and Biggs—were members of the Labourers bargaining unit and not members of the Painters unit, thus they could not be proper applicants in a termination application – In the alternative, the Board found that the employees had been hired improperly under the Labourers' collective agreement, therefore the *April Waterproofing* principle applied – Application for termination of bargaining rights dismissed; remedy for Biggs' violation of s. 86 remitted to Registrar for hearing

BIGGS & NARCISO CONSTRUCTION SERVICES INC.; RE: THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506; RE: JEFFERSON MENDONCA AND LEONEL CESPEDES-PEREZ; RE: THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1590; OLRB File Nos. 2146-10-U; 0006-13-R; Dated August 6, 2013; Panel: David A. McKee (15 pages)

Certification – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Carpenters applied for certification, conceding that they could not demonstrate support of 40% of the individuals in the proposed bargaining unit, and seeking remedial certification in the face of unfair labour practices committed by the employer – In an earlier decision, the Board had determined that the union had in fact filed membership evidence on behalf of more than 40% of the proposed bargaining unit; moreover, the employer's s. 8.1 objection was not material; a vote was ordered and the union won a clear majority (reconsideration of the vote decision denied) – During the course of the Case Management Hearing, the employer argued that the Board had no jurisdiction to order the vote because it could not conclude on the basis of the union's information that a vote was

warranted – The Board rejected the employer's position, holding that the tight timelines for voting do not allow for resolution of some threshold issues; the Board's practice is to "vote now, ask later" – It may be that the results of a representation vote can never be given effect if the threshold issues are not satisfied – Furthermore, the Act contemplates the Board giving consideration to the employer's response in fashioning a voting constituency – There are instances when the Board will order a vote despite a finding of less than 40% support in the applicant union's proposed unit – Section 8.1 is part and parcel of what the Board considers when deciding whether there should be a vote and what the vote will look like – In most instances, the Board relies on a s. 8.1 objection to establish the union does not have sufficient support to warrant the ordering of a vote (or opening the ballot box); in the present case, however, the Board was able to establish, based on the employer's s. 8.1 objection, that the applicant did indeed have the requisite 40% support – Accordingly, the vote was ordered – The Board has the authority to conduct representation votes in connection with certification applications, and its power to do so has been recognized as procedural and administrative rather than jurisdictional in nature – Certificate issued

LES FONDATIONS BRISSON INC.; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93; RE: FRATERNITÉ UNIE DES CHARPENTIERS ET MENUISIERS D'AMÉRIQUE (FUCMA), SECTION LOCALE 93; OLRB File Nos. 2641-12-R; 2642-12-U; 2837-12-U; Dated August 6, 2013; Panel: Mary Anne McKellar (24 pages)

Construction Industry Grievance – Practice and Procedure – Stay – The IBEW complained that the employer was refusing to comply with the terms of the ICI Agreement following its successful certification – The employer argued that the certification decision was under reconsideration and it should not be required to pay its employees union rates until the determination of the reconsideration request – The Board observed that had the union decided to respond to the employer's refusal to pay rates and remittances by picketing or commencing a work-to-rule campaign, the employer would no doubt have made haste to avail itself of the Board's remedies – It could not, in the present circumstances, unilaterally stay the consequences of the successful certification pending the reconsideration or even an application for judicial review – Grievance allowed – Employer ordered to pay difference between ICI rates and wages actually being paid to employees to union counsel's firm, in trust

NADALIN ELECTRIC COMPANY (ONTARIO) INC.; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 105; OLRB File No. 1276-13-G; Dated August 20, 2013; Panel: Maurice A. Green (4 pages)

Certification Where Act Contravened – Discharge – Interference With Trade Unions – Unfair Labour Practice – In the context of an application for certification and related unfair labour practice complaint, the union alleged that an employee was wrongfully discharged for his role as lead organizer, thereby undermining the union's campaign – The employer alleged just cause, claiming that the employee failed to carry out his quality control duties and caused a slow down in production – The Board found that the employee was wrongfully dismissed: the employer failed to meet its burden that the discharge was not tainted by an anti-union motive – In particular, the Board noted the following: 1) the employer failed to have "shop floor" managers with firsthand knowledge of events surrounding the termination testify, leading the Board to draw an adverse inference; 2) the employer took no action to correct the employee's alleged deficiencies for over five months, suggesting that it either did not blame the employee or had no idea why the work was faulty in the first place; 3) the discharge letter referenced previous warning letters and failed to outline the actual cause for dismissal, suggesting reasons other than what the employer alleged; 4) the employer sent a warning letter expressing concern over "info" collected by the employee from other employees via a lottery form and confiscated the lottery form; 5) the employee's locker, which contained blank union cards, was broken into and the employer failed to call evidence to rebut the employee's suggestion that a company manager was responsible for the break-in; and 6) a manager who the employee believed had been "watching him closely" during his last weeks of employment was not called to testify – The Board ordered the reinstatement of the employee with compensation for lost wages and granted the Union remedial certification

QUEST WINDOW SYSTEMS INC. RE: UNITED BROTHERHOOD OF RETAIL, FOOD, INDUSTRIAL & SERVICES TRADES INTERNATIONAL UNION; OLRB File Nos. 0926-12-R; 0927-12-U; Dated August 8, 2013; Panel: Maurice A. Green (20 pages)

Practice and Procedure – Representation Vote – In post-vote submissions, the union complained that the presence of a camera in the lunchroom where the vote took place compromised the true wishes of the voters – The Board held that, notwithstanding the allegedly limited functioning of the camera, the employees' awareness of the presence of the camera (with no

objection) and the acknowledged presence of the camera during an earlier certification vote, the mere fact that a camera was there gives rise to the possibility that one or more employees may have thought their choice in the vote was being recorded – Original ballots destroyed; new vote ordered

SARATOGA POTATO CHIP COMPANY; RE; MOHANRAM PAUL; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; OLRB File No. 1273-13-R; Dated August 12, 2013; Panel: Patrick Kelly, R. O'Connor, C. Phillips (2 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
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Pending
Charles W. Colhoun Divisional Court No. 293/13	0260-12-U	Pending
Robert Pardy Divisional Court No. 2004/13 (**London)**	0501-12-ES	Pending
Signature Contractors Windsor Inc. Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	January 30. 2014
Weihua Shi Divisional Court No. 158/13	0273-10-ES	November 8. 2013
Rail Cantech Divisional Court No. 127/13	1506-12-U	November 21. 2013
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Allowed (Seeking Leave to CA)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 417/12	0356-12-R	Dismissed (Seeking Leave to CA)
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Heard, Reserved
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al ''(Flynn) Divisional Court No. 325/12	2730-11-JD	Abandoned August 7, 2013
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	December 9. 2013
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Heard, Reserved
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 **(Sudbury)**	2692-06-ES	Week of October 7. 2013

Landmart Building Corp. Divisional Court No. DC 12-346JR (**Hamilton)**	2519-11-R	Week of September 30. 2013
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
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above