ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

June 2013

VICE CHAIRS

The Board is pleased to welcome back **Janice Johnston, Bram Herlich, Owen Grey and Ken Petryshen** as part-time occasional Vice-Chairs for one-year terms to assist with "open period" adjudication.

Scope Notes

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

Failure to Comply – Settlement – Unfair Labour Practice – The applicant complained that his employer had breached Minutes of Settlement of his original reprisal complaint when it discharged him following an allegation of harassment – The original reprisal was settled with the applicant's non-active reinstatement to the workplace, pending an investigation into an outstanding harassment complaint – A new complaint of harassment was levelled against the applicant one day after his return to the employer's payroll; he was suspended without pay and criminal charges were laid; as a condition of his release, he could not be within 500 metres of his workplace – The Board held there was no breach of the settlement of the reprisal: the conduct complained of occurred after the settlement had been entered into – Unfair labour practice complaint dismissed

BROSE CANADA INC.; RE: ADAM JEFFERY; OLRB File No. 2545-11-OH; 3906-11-U; Dated May 30, 2013; Panel: Brian McLean (4 pages)

Employee – Practice and Procedure – Status – Canadian Blood Services asked the Board to determine whether Clinic Supervisors were employees for purposes of the Act – ONA argued that the Board ought either to defer the question to a pending arbitration, to dismiss the application for delay, or to dismiss it as an abuse of process – The Board held that, unlike s. 96 of the Act where the Board has discretion to inquire into an application, it appears the Legislature intended the Board to have exclusive jurisdiction over employee status with no ability to delegate the issue to another body – The status of the Clinic Supervisors is a real issue; the fact that the dispute may arise from an underlying grievance over the boundaries of the bargaining unit is not a good reason to defer – The Board further held that it may be counter-productive and counter-intuitive to assess the characteristics of a newly-created position prematurely; accordingly, the application is timely – Finally, the Board did not consider the earlier filing and subsequent withdrawal of the status question to be an abuse of process in the circumstances – Preliminary motions dismissed; application proceeds

CANADIAN BLOOD SERVICES; RE: ONTARIO NURSES' ASSOCIATION (ONA), Local 074; OLRB File No. 2664-12-M; Dated May 15, 2013; Panel Jesse M. Nyman (22 Pages)

Trusteeship – The Board ruled that it has the authority to extend a trusteeship even where the extension is sought after the original term has expired – The alternative could leave the local in a state of disorder

and would not be in the interests of the local or its members – Extension granted

CUPE, LOCAL 2191; RE: Canadian Union of Public Employees; OLRB File No. 0407-12-T; Panel: Brian McLean (2 pages)

Employment Standards – Fraud – Settlement – The employee sought to overturn a settlement effected by an employment standards officer, asserting that he agreed to the settlement only because the employer threatened to pursue criminal charges if he did not withdraw his claim – The Board rejected the employer's arguments that the ESO did not react to the employer's threats of criminal charges (the ESO was not called to testify); secondly, the Board refused to accept the employer's contention that the employer could give the police a "green light" to lay charges (and the employee would have known this to be the case); thirdly, the Board would not accept that all of the employee's evidence was to be disbelieved because one of his witnesses had testified falsely – Ultimately, the Board found fraud because the employer knowingly included references to criminal charges in the settlement document, when in fact no investigation or charges were being pursued – Settlement declared void – Matter referred to Registrar for scheduling

GOLDY METALS INCORPORATED o/a STANDARD AUTO WRECKERS; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0247-12-ES; Panel Brian McLean (7 pages)

Construction Industry Grievance – Kiewit-Alarie A Partnership (KAP) challenged the referral of this grievance to arbitration, arguing that the type of conduct the union alleges KAP engaged in amounted to gross negligence and tort, therefore the Board was without jurisdiction – The Board stated at the outset that it has jurisdiction to make a final and binding determination on whether the grievance is arbitrable, hence the issue was not one of jurisdiction *per se* – The Sheet Metal Workers filed a grievance claiming KAP had violated the collective agreement between EPSCA and SMW when KAP terminated an employee without just cause – The union alleged that KAP had failed to conduct a proper investigation, had caused the employee to be arrested, was grossly negligent and consequently was liable for all damages relating to the arrest and costs of the defence – KAP was the general contractor at a hydro-electric project – The grievor had been KAP's employee at one time but the arrest and termination occurred when he worked for a sub-contractor, Montacier – The grievance did not seek reinstatement or the lifting of the site ban imposed on the employee (he had signed an undertaking to stay away from the workplace as a condition of his release from arrest) – KAP and EPSCA denied responsibility and denied the allegations of negligence and tortious conduct, and asserted the grievor had other remedies in court, therefore the Board was without jurisdiction to arbitrate the matter – SMW argued the Board should hear the grievance, decide whether KAP had just cause to discipline the grievor, and only then consider the remedies – The Board held that even if it accepted the union's assertion about when the alleged incidents occurred, the grievor was not employed by KAP so the collective agreement binding KAP was not applicable to the employee – The union relied on an earlier Ontario Power Generation grievance where the Board found, on those facts, OPG could be liable under a collective agreement although it was not the direct employer of the grievor – The Board found the grievance is not arbitrable – The Board further found that an analysis of *Weber v. Ontario Hydro* would not bring the dispute within the parameters of a grievance arbitration – this was a "workplace problem," not a "problem at the workplace" – Grievance dismissed

KIEWIT – ALARIE PARTNERSHIP; RE: SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL 397; ONTARIO SHEET METAL WORKERS' & CONFERENCE; THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; OLRB File No. 3280-11-G; Panel: Gail Misra (15 pages)

Construction - First Contract Arbitration – The Labourers sought first contract arbitration based on the employer's refusal to bargain and deal with the union – The parties had set ten dates for bargaining since August 2011, and the employer had either cancelled or frustrated bargaining on nine of these dates – The employer argued that these dates had been cancelled because counsel was unavailable – The Labourers had repeatedly requested information from the employer, including a list of current employees, a list of current and future projects, and details of any planned changes to the employer's operations – The employer had not responded to these requests, and argued that this information was overly broad and irrelevant – The employer did not respond to a draft agreement prepared by the Labourers – At a conciliation meeting, counsel for the employer delivered a written statement refusing to bargain because there were no employees in the bargaining unit – The Board held that first contract arbitration was appropriate based on the criteria in s. 43 of the Act – The collective bargaining process had been unsuccessful: there had been no meaningful discussions and minimal communication – The employer refused to recognize the bargaining unit by ignoring the Labourers' requests for information – Significantly, the employer did not advise the Labourers of its plans to use subcontractors and to lay

off seven employees – The employer took an uncompromising position without justification when it refused to negotiate based on an empty bargaining unit – The absence of employees in the bargaining unit does not preclude collective bargaining, especially in the construction industry – The employer failed to make reasonable or expeditious efforts to conclude a collective agreement – Counsel's unavailability was not a sufficient excuse in this case – The Board directed the settlement by arbitration of the first collective agreement between the parties

MAJESTIC MARBLE IMPORT LTD.; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 0133-13-U; 0226-13-FC; 2376-11-U; Dated May 21, 2013; Panel: Matthew Wilson (11 pages)

Bar – Certification – The Board had to determine whether the current application should be barred because OPSEU filed it within one year after it had withdrawn an earlier application following a representation vote – In the earlier application, the parties agreed to count certain ballots, and agreed further that if as result fewer than 50% of the total counted were cast in favour of OPSEU, the union would withdraw the first application – In the meantime CarePartners and the Canadian Red Cross Society combined to form the responding party employer, Red Cross Care Partners – The present application was filed within 6 months of the withdrawal of the first application – At least 70 of the individuals in the bargaining unit proposed in the first application were in the proposed bargaining unit in the second application – The Board stated that the acknowledged purpose of the bar is to provide a period of repose to the workplace parties following an unsuccessful organizing campaign in which the employees' wishes had been tested – Section 7(10) applies to *any trade union*, not just the original applicant – Once an individual in the bargaining unit has been identified as overlapping both proposed units, the Board must focus on the exceptions in 7(10.1) and 10(3.1) – The Board held that the position of the individual is not the same unless it is with the same employer and in a geographic location which was covered by the scope clause of the first application – Although the identity of the employer had changed in the intervening period, the Board held that Red Cross Care Partners was, for all intents and purposes, the same employer as in the first application; accordingly, the Board exercised its discretion to invoke the bar – Application dismissed

RED CROSS CARE PARTNERS; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA; OLRB File No. 2543-12-R; Panel: Mary Anne McKellar; Paul LeMay and David A. Patterson (12 pages)

Certification – Practice and Procedure – Reconsideration – Counsel for the employer sought reconsideration of the Board's refusal to postpone the continuation of this matter until her return from pregnancy and parental leave – The issue was whether counsel's responsibilities and obligations that affected not just her clients, but other parties and the Board, should be held in abeyance during her leave – Counsel pointed out that she was not seeking accommodation for the entire duration of her leave, but just a four-month continuance, counting from the next day available to all parties to the date of her return from leave; counsel indicated also that she had sole carriage of the files and her client would be prejudiced by being required to retain and instruct new counsel – The applicant opposed the request for reconsideration, submitting that: (1), counsel's law firm could and should determine how to allocate the costs of re-assigning the file; (2) delay in dealing with a representation issue is prejudicial to the applicant and the workers; and (3) there is no duty on the Board to accommodate the request for leave – The Board held that in the circumstances of this case, where there have been several days of testimony and employer counsel had no way of knowing when the matter started that she would become pregnant and eligible for leave, the deferral should be granted – Request for reconsideration granted – Additional hearing days set

ROMA BUILDING RESTORATION; RE: UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, THE RESTORATION COUNCIL OF ONTARIO; OLRB File No. 0201-12-R; 0202-12-U; Panel: Harry Freedman (6 pages)

Construction Industry – Intimidation and Coercion – A member of the Labourers joined the Carpenters, and the Labourers convened a Trial Board to expel him and terminate his benefits – This was consistent with the Labourers' policy against dual unionism – The worker filed an internal appeal of his expulsion with the Labourers, and the Carpenters filed a complaint of intimidation under s. 76 before the Board – After the Carpenters filed the complaint, the Labourers amended the charges against the worker to include the relief sought by the Carpenters before the Board – As a result, the Carpenters argued that the worker was being punished for the Carpenters' application – In its first decision on this dispute (Board differently constituted, decision unreported, dated February 2, 2012, reconsideration denied November 20, 2012), the Board dismissed most of the Carpenters' complaint on a *prima facie* basis, finding that unions are entitled to

make and enforce rules regarding membership in other unions – The Board did not dismiss the Carpenters' complaint about amendments to the charges against the worker, however – The Carpenters filed a second application before the Board alleging additional violations of s. 76: the Labourers implemented the Trial Board decision before the worker's appeal had been decided, and the Labourers' newsletter overstated the results of the first Board decision – The Board held that these were not *prima facie* violations of s. 76 – Expelling the worker was not a violation, so any details about how this expulsion was carried out could not convert this into intimidation – The first application did not make out a *prima facie* case to quash the expulsion, and so these new allegations cannot lead to a different result – The Carpenters also asked the Board to rule on whether amending the charges against the worker was a violation of s. 76 – The Board dismissed this complaint because there was no labour relations purpose to pursuing it – It did not make sense to reinstate the worker to the Labourers after several years as a member of the Carpenters – There was insufficient proof that the worker was expelled because of reprisal – The cost of the proceedings would be disproportionate to what was at stake – The dispute related to the Labourers' internal rules; this was not an issue of public importance – As a result, the Board dismissed the Carpenters' second application and the remaining portion of the Carpenters' first application

THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; GLOBAL BENEFIT PLAN CONSULTANTS INC.; OLRB File No. 3035-10-U, 3719-11-U; Dated May 17, 2013; Panel: Bernard Fishbein (15 pages)

Construction – Sector Dispute – The Carpenters filed a grievance claiming that they should have been assigned work on a skateboard park and an outdoor sidewalk/landscaped area for a new university building – The majority of this work had been assigned to the Labourers – The Labourers filed a jurisdictional dispute, arguing that this work fell under the roads sector, while the Carpenters argued that it was institutional, commercial and industrial ("ICI") work – To determine the proper sector, the Board first considered the end-use of each project and supplemented this with the project's work characteristics and the parties' bargaining patterns – The Labourers argued that the end-use of the skate park was to travel and the park required certain materials that were typical of road work, so it was a road; the Carpenters countered that the park was municipally owned, and so the end-use was institutional – The Board held that the park's end-use was institutional, and not a road as it was not made for vehicular travel – The Labourers argued that the end-use of the outdoor sidewalk/landscaped area was foot traffic; the Carpenters asserted that the end-use was institutional because most of the work was inside of a building courtyard – The Board found that this work was closely integrated with the construction of the new university building: this project was clearly institutional – There were no prevailing bargaining patterns to indicate otherwise – The Board found that both the skateboard park and the school fell in the ICI sector of the construction industry

UCC GROUP LTD.; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; LOCAL 785; OLRB File No. 0028-12-M; Dated May 2, 2013; Panel: Diane Gee (15 pages)

COURT PROCEEDINGS

Certification – Judicial Review – The employer ("DCMA") sought review of the Board's decision to certify PSAC as the bargaining agent for DCMA's civilian employees in Ontario – DCMA argued before the Board that it had sovereign immunity from the Board's jurisdiction and that it had been improperly served with the certification application – DCMA was a "Combat Support Agency" that administered contracts for the U.S. Department of Defence and received funding and direction from the U.S. government – PSAC served the certification application on DCMA directly instead of effecting service through the Department of Foreign Affairs and International Trade (DFAIT) – The Commander of DCMA was not familiar with sovereign immunity, and so this defence was not raised until post-vote representations – The Board found that DCMA was an "agency of the state," and therefore was not subject to sovereign immunity and had been properly served – The Board further found that DCMA had waived immunity by responding to the certification application, and that DCMA fell under the "commercial activity" exemption from sovereign immunity – The Court applied a correctness standard because the Board was interpreting the *State Immunity Act* rather than its home statute – The Board erred in finding that DCMA was an independent "agency of the state" – DCMA operates as an integrated part of the U.S. state (its finances, operations and employment relationships are under the control of the U.S. government) and so service should have been effected through DFAIT – The Board erred in finding that DCMA had waived immunity by responding to the

certification application – If service had been properly effected, DCMA would have had the time and awareness to raise the defence of sovereign immunity in its response – The Board erred in finding that the commercial activity exemption applied, as DCMA has a clear sovereign objective to facilitate military preparedness in the U.S. – The Court quashed the Board's certification decision

Board decision reported at [2012] OLRB Rep. July/August 603

DEFENSE CONTRACT MANAGEMENT AGENCY – AMERICAS (CANADA); PUBLIC SERVICE ALLIANCE OF CANADA AND OLRB; OLRB File No. 0955-11-R (Court File No. 513/12); Dated May 3, 2013; Panel: Brown, Swinton and Lederer JJ. (13 pages)

Certification – Construction – Judicial Review – The employer sought review of the Board's decisions to certify a three-person bargaining unit based on two signed union membership cards – The employer challenged one employee's card based on a unique sequence of events: on the date of application, the employee worked half of his shift, was laid off, and then signed a membership card after leaving the worksite – The employer argued that the Board erred by accepting a card signed by someone who was not an employee – The union argued that the employee had been a member of the union and performed bargaining unit work on the date of the application, and that the Act did not require these two conditions to exist at the same time – The Board accepted the card, and held that the date of application cannot be parsed into smaller packets of time – On reconsideration, the Board upheld its decision, and emphasized that union support must be measured on the date of application because of the transitory nature of the construction industry – On judicial review, the employer argued that the Board's decision was unreasonable because it would undermine the union's credibility and permit a former employee to bind future employees to a union – The Court upheld the Board's decisions on a standard of reasonableness: the Board's reasons were transparent and intelligent – The Board explained its traditional refusal to parse the date of application, and the need for quick, reliable findings of membership support in the construction industry – Application for judicial review dismissed

THOMAS FULLER CONSTRUCTION CO. LIMITED; THOMAS FULLER CONSTRUCTION CO. (1958), 494545 ONTARIO INC. FULLERCON LIMITED, THOMAS G. FULLER & SONS LTD.; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND OLRB; OLRB File No. 1056-11-R (Court File No. 12-1832); Dated May 8, 2013; Panel: Whitaker, Matlow and Swinton JJ. (8 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
Robert Pardy	0501-12-ES	Pending
Signature Contractors Windsor Inc.	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	Pending
Weihua Shi Divisional Court No. 158/13	0273-10-ES	Pending
Rail Cantech Divisional Court No. 127/13	1506-12-U	Pending
Defence Contract Management Agency Americas (Canada) (No. 2) Divisional Court No. 86/13	0955-11-R	Pending
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	June 6, 2013
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	Allowed May 3, 2013
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	June 17, 2013
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	Heard, Reserved
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	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Heard, Reserved
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	Dismissed May 8, 2013
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Dismissed on Consent May 23, 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
Dean Warren v. National Hockey League Divisional Court No. 587/10 Seeking Leave to CA	2473–08–U	Dismissed March 5, 2013
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