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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, 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 April of this year. These decisions will appear in the April/May 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.

Duty of Fair Representation – The applicants complained that UFCW should have negotiated an enhanced severance package for them when their worksite closed – The applicants also complained that UFCW should have protected their seniority rights when they transferred to a new facility with a new bargaining unit – The collective agreement at the new facility did not include a "portability provision" to protect the seniority rights of employees who transferred into the unit – UFCW had attempted to negotiate a portability provision at this location, but the bargaining unit members had rejected this proposal to protect their seniority – The Board held that UFCW did not owe a duty of fair representation to the applicants, because a union does not owe this duty to members outside of the bargaining unit, or to those who may someday become members of the bargaining unit – Even if UFCW had a duty to the applicants, UFCW acted reasonably in rejecting a portability provision – UFCW was unable to negotiate an enhanced severance package for the applicants because UFCW had no indication that the applicants' facility was at risk of closing – There was no evidence that UFCW ought to have known about this risk – Application dismissed

AREK POMIETLARZ, ANDRE MENDES AND SIMON HIRST; RE: UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A; NATIONAL GROCERS CO. LTD.; ORLB File No. 2415-12-U; Dated April 10, 2013; Panel: David A. McKee (7 pages)

Collective Agreement – Duty to Bargain in Good Faith – Unfair Labour Practice – LIUNA complained that the employer refused to sign a collective agreement after negotiations had completed and parties had agreed on a final draft – The employer requested more time to review the draft, and refused to sign unless one employee's duties were changed from heavy-duty to light-duty cleaning – The employer had already implemented the collective agreement for all other employees, and had given the cleaner a pay raise in accordance with the collective agreement – The Board declared that a collective agreement existed: negotiations had ended and the parties had decided all matters and reached an agreement – The employer violated its duty to bargain in good faith and interfered in the administration of the union by failing to sign the agreement – The Board directed the employer to sign the collective agreement – Application granted

D.B.S. SERVICES INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 3047-12-U; Dated April 8, 2013; Panel: Tanja Wacyk (8 pages)

Construction Industry – Health and Safety – Jurisdictional Dispute – The Carpenters Local 1946 applied to suspend the operation of an Order under the *Occupational Health and Safety Act* pending an appeal of the Order – The Order stated that only sheet metal workers (and not carpenters) could install metal louvres on a construction project – At the time when the Order was made, Carpenters Local 1946 had

already installed 53 of the 57 louvres – The inspector found that sheet metal workers were qualified to install louvres under the *Trades Qualification and Apprenticeship Act* ("*TQAA*") – The Inspector did not consider the general carpenter trade under the *TQAA* – The Inspector did not consider any health or safety risk created by carpenters performing this work – The Sheet Metal Workers Local 473 had filed a complaint with the Ministry of Labour that led to the Inspector's site visit and Order – Local 473 had not claimed the right to do this work through the normal jurisdictional dispute process before the Board – The fact that the real issue was a jurisdictional dispute, and not a health and safety matter, weighed in favour of suspending the Order – Local 1946 would be prejudiced if the Order were not suspended by losing current and prospective work to Local 473 – Local 1946 had a strong *prima facie* case for the appeal based on the fact that the work-in-question may not be restricted exclusively to the sheet metal trade – Finally, the Board also noted MOL took no position on the suspension request – Order suspended pending the disposition of the appeal

ELLIS-DON CORPORATION; RE: ONTARIO PANELIZATION; A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1946; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL UNION 473; OLRB File No. 3659-12-HS; Dated April 8, 2013; Panel: Patrick Kelly (4 pages)

Certification – Certification Where Act Contravened – Unfair Labour Practice – The union sought remedial certification as it was unable to obtain membership support of at least 40% of the employees in the bargaining unit – First, the Board did not accept the union's evidence that the employer pressured employees to reveal whether they had spoken to or supported the union organizing drive – Second, the Board found there was no evidence of increased monitoring of the sites; the Board accepted the employer's evidence that its conduct in visiting the sites was no different than before – Third, the Board accepted the only evidence tendered that no threats were made at a meeting about loss of work or overtime – Fourth, the Board accepted the uncontradicted evidence of the employer that no promises of raises or extra benefits were made to those who remained non-union – Fifth, the Board reviewed the context of the meeting held at the instance of a senior operator during the organizing campaign, with the permission of the employer, in the shop at the company's yard – The Board found that the employees who instigated the meeting were not acting on behalf of the employer and the fact of permitting the meeting to take place on company grounds was not a contravention of the Act – Following the meeting, prepared notes and a list of attendees were provided (unrequested) to the President of the company – While the Board found it was imprudent for the President to have accepted this list and to have read it, the evidence was clear that the list was not made at the President's suggestion nor was it solicited by him – The Board did not find the mere receipt of these notes to be a contravention of the Act – Finally, the Board reviewed the circumstances surrounding two lay-offs and found that neither was motivated by anti-union animus: the first employee moved on to a higher paid union position elsewhere; the second was replaced by a more senior operator (a long-standing practice of the company) as a result of a downturn in work – Having found no contravention of the Act, the request for remedial certification was dismissed, along with the certification application itself – Application dismissed

GABRIEL EXCAVATING & GRADING LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB File No. 2666-11-R; Dated April 25, 2013; Panel: Edward T. McDermott (25 pages)

Conflict of Interest – Practice and Procedure – Unfair Labour Practice – The BUC filed an unfair labour practice complaint against the Labourers' Local 183 – Local 183 filed a motion to remove BUC's counsel because of a conflict of interest – Counsel for BUC had previously worked as a senior partner at a firm that handled most of Local 183's external legal work – Local 183 argued that this was a breach of confidentiality: counsel for BUC had been privy to information about Local 183's organizing strategies and had a personal relationship with a Local 183 representative who was implicated in the current dispute – The Board found that there was no breach of confidentiality, because counsel for BUC had not received confidential information that was related to the current retainer – The current dispute did not involve Local 183's organizing strategies, and counsel for BUC had no previous dealings with BUC – There was no evidence that counsel's relationship with the Local 183 representative had given him access to information that was relevant to this proceeding – There was no breach of the duty of loyalty: Local 183 was not a current client, and this matter did not relate to the previous retainer – BUC had a right to choose and retain counsel, and this must be balanced against Local 183's objections – Local 183 did not offer any examples of previous files that BUC's counsel worked on that would pose a problem in the current proceeding – Motion dismissed.

THE BUILDING UNION OF CANADA; RE: LABOURERS' INTERNATIONAL UNION OF

NORTH AMERICA, LOCAL 183; PAT SHERIDAN AND EVARISTO PAISANA; ORLB File No. 3224-12-U; Dated April 17, 2013; Panel: Bernard Fishbein (11 pages)

Adjournment – *Charter of Rights and Freedoms* – Collective Agreement – *Education Act* – Mootness – Practice and Procedure – Strike – The School Boards alleged that ETFO encouraged the withdrawal, or cessation, of performing certain activities (the case was argued only on the basis of voluntary activities) which amounted to an unlawful strike – The Board first dealt with the impact of the repeal of the *Putting Students First Act 2012* and rejected ETFO's argument that the collective agreements did not survive the repeal of the *PSFA* – The Board found that the collective agreements were imposed and that shortly after their imposition the statute empowering this was repealed, but pursuant to s. 51(1)(b) of the *Legislation Act*, any "right, privilege, obligation or liability that came into existence" was not affected by the repeal—that is the collective agreements were not affected – Next, the Board addressed the question of whether ETFO was encouraging a "strike" as defined in the *Education Act* – The Board extensively reviewed the statutory history and evolution of the amendments to the *Education Act*, addressed how to interpret the word "strike," whether the conduct at issue came within this definition, and concluded that the conduct did, notwithstanding that the activities were unpaid and voluntary – The Board found that not only does the plain and clear wording of the statute easily include these activities, but from a labour relations purpose and perspective this is a far better interpretation, particularly in the education sector with its long history and expectations about the delivery of these types of activities – Finally, even considering *Charter* values in the interpretation of "strike" within the *Education Act*, the Board was comfortable that strike clearly included a refusal in combination or in concert to perform the duties at issue – The Board did not issue a final order as there exists an outstanding *Charter* challenge – The Board ordered a posting of a Notice and the decision at the applicants' schools and the parties' websites – Matter continues

3042-12-U TRILLIUM LAKELANDS DISTRICT SCHOOL BOARD; RE: ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; MINISTER OF EDUCATION; UPPER CANADA DISTRICT SCHOOL BOARD; OLRB File No. 3042-12-U; Dated April 11, 2013; Panel: Bernard Fishbern (77 pages)

Bargaining unit – Practice and Procedure – Termination – In this termination application under s. 63, the parties' positions on the number of individuals in the bargaining unit differed in a materially significant way – The Board noted that the statute required it to have reference only to the applicant's information in determining the appearance of the number of employees who no longer wished to be represented by the union, however in determining the number of employees in the bargaining unit the Board found the statutory language clear: the Board may do so on all the information available to it – Here the Board preferred the employer's estimate, instead of the applicant's as the employer was in a much better position to know the size of its workforce – As a result the Board was satisfied that less than 40% of the employees in the bargaining unit no longer wished to be represented by the union – Application dismissed

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) LOCAL 9537, RE CONRAD PETRUCCI; SEARS CANADA INC.; OLRB File No. 3838-12-R; Dated April 9, 2013; Panel: Patrick Kelly; R. O'Connor and C. Phillips (3 pages)

COURT PROCEEDINGS

Court Proceedings

Judicial Review – Practice and Procedure – Related Employer – The court first found that the Board's decision to grant a one month adjournment rather than an indefinite one (in the face of a pending civil action) was not a breach of procedural fairness and it was reasonable – The Board did not act arbitrarily and took into consideration relevant factors – Second, the court found the Board's related employer decision both reasonable and correct, in its handling of the alleged incapacity of one of the signatories to the agreement relied upon – Third, the court found that the Board's refusal to exercise its discretion to consider other evidence was reasonable, in light of the applicant's concession that the agreement was sufficient for a related employer declaration and the absence of any reason to allow them to resile from this concession – Application dismissed

TOTAL MECHANICAL SYSTEMS; RE: SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 30; (Court File No. 17/12); Dated April 10, 2013; Panel: Molloy, Herman and Edwards J.J. (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
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	Heard, Reserved
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	Heard, Reserved
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	May 22, 2013
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	May 22, 2013
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	Heard, Reserved
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
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Dismissed April 10, 2013
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	May 13, 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

Pending Court Proceedings

Case name & Court File No.	**Board File No.**	**Status**
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