ISSN 1712–4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

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February 2017

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.

Employment Standards – Reasonable Apprehension of Bias - The Applicant appealed an ESO's decision to deny his claim for overtime and termination pay, and dismiss his complaints regarding breaches of the hours of work and reprisal provisions of the *ESA* – Following a case management hearing, the Applicant sent a letter to the Board alleging the Vice-Chair acted in a biased manner and should recuse himself from the proceeding – The applicant complained that the Vice-Chair greeted counsel by name and agreed to an adjournment of the matter, relying on different facts than those presented by the employer in previous requests for an adjournment -- The Board rejected the motion for recusal, finding there was no basis for a reasonable apprehension of bias — On the merits, the Board held (1) it was unable to order punitive damages; (2) the Applicant resigned from employment and was not constructively dismissed; and (3) the Applicant was exempt from overtime pay because of the exemptions for accounting students found in the *ESA* regulations – Application dismissed

JONAS LANG LASALLE REAL ESTATE SERVICES INC.; RE: JOSE REYES; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0817-16-ES; Dated January 10, 2017; Panel: Maurice A. Green, Vice-Chair (23 pages)

Sale of a Business – ADT, a unionized employer, sought a declaration from the Board that its purchase of non-unionized Protectron was a sale within the meaning of the Act and should result in a representation vote – ADT argued that its acquisition of Protectron triggered the provisions of s. 69 and the intermingled employees of both companies should enjoy the opportunity to express their wishes regarding the union's continued presence in the workplace – The board disagreed, holding that its case law has consistently interpreted s. 69 as a provision for the protection and preservation of an incumbent union's bargaining rights when a unionized business is sold – To direct a representation vote where intermingling occurs following the purchase of a non-union company is contrary to the intent of the section and the Act – Application dismissed

ADT SECURITY SERVICES CANADA, INC.; RE: UNIFOR LOCAL 554; OLRB File No. 0026-16-R; Dated January 26, 2017; Panel: Paula Turtle, Vice-Chair and Lori Bolton, Board Member and Edward Chudak, Board Member (15 pages)

Delay – Duty of Fair Representation – *Prima facie* Review – The OSSTF and the school board both brought a motion to have the DFR dismissed for delay and a lack of a *prima facie* case – The applicant had been accused by a colleague of inappropriate behaviour involving a student – Following an investigation, he was exonerated – The applicant filed a complaint against his accuser; the accuser was found guilty of professional misconduct and her teaching certificate

was revoked (the revocation is currently under judicial review) – The OSSTF filed a grievance on the applicant's behalf, alleging the school board had failed to provide him with a healthy, harassment-free workplace – One year later, the OSSTF withdrew the grievance – The applicant alleged that (1) the OSSTF gave him no reason for the withdrawal of the grievance; (2) the OSSTF violated s. 74 when it provided one individual to represent the applicant and his accuser; (3) the representative subsequently participated in the decision-making to withdraw the grievance; and (4) when the OSSTF found itself in a conflict of interest by acting for both the applicant and the accuser, it wrongly withdrew the grievance – The Board found that the assertions of delay were unfounded: this is a long and continuing process and there was no ambush or prejudice to either the OSSTF or the school board – *Prima facie* motion dismissed – Consultation ordered

ALAN AVERY; RE: ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; OLRB File No. 1027-16-U; Dated January 20, 2017; Panel: Lee Shouldice, Vice-Chair (8 pages)

Certification - Construction Industry - LIUNA and the IUOE applied to displace CLAC – The Application was filed on March 30, 2015, a day on which the Respondents argued there were no employees in the bargaining unit – The Applicants alleged the employer manipulated the expiration date of the collective agreement and their workforce deployment to defeat any potential displacement application, and that the Board should look to a different date to determine the composition of the bargaining unit – The Board found the timing of work was determined by third parties and therefore not an effort by this employer to defeat a displacement application – Furthermore, setting the expiration of a collective agreement so that negotiations would take place during the employer's slow period was not found to be an unfair labour practice – On the question of altering the test for determining the composition of the bargaining unit, the Board's longstanding policy has been to look at the day of the application – While that policy may result in individual cases where there is a perception of unfairness, overall the Board's policy provides for consistency and clarity – Employers, employees and unions need a clear understanding of the rules of engagement, and those rules would be undermined if the Board were to make individual assessments of the process based on the particular circumstances of a given situation – Application dismissed

LOOBY CONSTRUCTION LIMITED; RE : Labourers' Internation Union of North America, Ontario Provincial District Council et al.; OLRB File No. 0011-12-R, 0010-12-R, 0022-12-U, 0027-12-R, 0043-12-U, 0255-12-R, & 0471-12-U; Dated January 13, 2017; Panel: David A. McKee, Vice-Chair (19 pages)

COURT PROCEEDINGS

Judicial Review – Related Employer - The Applicants sought judicial review of the Board's October 2015 decision which found they were related as per sections 1(4) and 69 of the *Labour Relations Act, 1995* – The Divisional Court found the Applicants were attempting to use the Application to re-argue a 2012 certification decision – The Divisional Court further found the Applicants had been provided indulgences throughout the hearing process to allow them to address all issues despite repeated failure on the part of the Applicants to comply with Board Orders and Rules of Procedure – No finding of procedural unfairness was found, and the Divisional Court further endorsed the Board's calculation of damages – Application dismissed

HANNAM V INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES; 2017 ONSC 91 (Court File No. 568/16); Date: January 11, 2017; Panel: Morawetz RSJ, Lederman J. and Stewart J. (9 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
Women's College Hospital 24/17 Divisional Court No. 24/17	0830-15-M	Pending
Innovative Civil Constructors Divisional Court No. 611/16	0142-16-R	Pending
Yuchao Ma Divisional Court No. 543/16	2438-15-U	Pending
Ming Tang Divisional Court No. 452/16	3607-14-U	June 22, 2017
Anishinabek Police Service Divisional Court No. 455/16	0319-13-R & 1629-13-R	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 29, 2017
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	Dismissed December 21, 2016 Seeking leave to C.A.
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	Remitted to Board
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
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621-14-ES	Pending
W.H.D. Acoustics Inc. (Hannam) Divisional Court No. 586/16	3151-14-G 3716-14-R	Dismissed January 11, 2017 Seeking leave to C.A.
IBEW Electrical Power Council of Ontario *(Crossby Dewar Inc.)* Divisional Court No. 501/15	1697-11-G 1698-11-G	Withdrawn
Universal Workers Union, Labourers' International Union of North America, Local 183 *(Maystar)* Divisional Court No. 368-15	1938-12-R	Dismissed September 13, 2016 Seeking leave to CA
Valoggia Linguistique Divisional Court No. 15-2096 (**Ottawa)**	3205-13-ES	Pending