

*H*ighlights Ontario Labour Relations Board

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March 2012

Weekly Applications List

The Ontario Workplace Tribunals Library makes available a weekly electronic list of applications received by the OLRB (published on the Wednesday following a given week). To be placed on the distribution list, please send your email request to: owtl@wst.gov.on.ca.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February 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 at www.canlii.org.

Bargaining unit – Hospital Labour Disputes Arbitration Act – Reference – Ministerial reference to the Board under *HLDA* (the “Act”) seeking advice on whether the relevant bargaining unit employees are covered by the *Act* – The employer is a residential provider and treatment facility for children and youth exhibiting extremely aggressive behaviour in other settings – It operates nine residential facilities providing care and treatment for boys experiencing difficulties such as conduct disorders, psychiatric disorders and attention deficit disorder – It is a privately held, for profit corporation that receives its revenue directly from agencies (primarily Children Aid Societies) who place individuals in their residence – It provides three major types of

services; residential services, clinical services and its school – Residential services employ the largest group represented by the union: Child Care Therapists (“CCTs”) – There are approximately 130 full time and part time CCTs who are responsible for daily care and supervision of the residents – CCTs will often get residents ready for school, transport them to school, accompany them while at school, and transport them back to residence where they will participate in recreational activities and then assist residents with various night time rituals before bed – The Board began its analysis by reiterating the statutory criteria that must be satisfied in order for an entity to be a hospital for the purpose of the *Act*: a) the entity must serve persons who suffer from a physical or mental illness, disease or injury or be convalescent or chronically ill; b) the entity must be operated for the observation, care or treatment of such persons and c) the entity must be a hospital or “other institution” – The Board found the evidence established that the children and youth display serious psychiatric and behavioural problems and therefore it was clear the employer served persons with a mental illness – Next, the Board found the evidence clearly established that the residents were regularly under observation, care and treatment of the staff because staff members provide residents with 24 hour a day, 7 days a week supervision – In regard to whether the employer is an “other institution” the Board stated it was required to carefully balance the norm of free collective bargaining against the need to ensure continued hospital services for persons who have physical or mental disabilities – The Board found that almost all of a resident’s medical or physical care is provided by staff members of the employer or by Consulting Psychiatrists retained by the employer, on employer premises – The CCTs provide considerable care to residents in the form of 24

hours per day, seven day per week care while carrying out the prescribed plans of the Consulting Psychiatrists, Psychologists and other therapists – The Board considered the consequences a work stoppage may have on residents and noted the model upon which the employer is built has at its foundation the relationships that are established, maintained and nurtured amongst its residents and staff members – A work stoppage, which has no time frame, may cause residents to believe they have been abandoned by their caregivers which is a sentiment that would likely continue beyond the conclusion of any work stoppage – The Board concluded by stating that if the purpose of the Act is to ensure that persons who are affected by physical or mental disabilities are not left in a position where their health, safety or well being is undermined in the event of a strike or lockout then this purpose is best satisfied by concluding the employer is a hospital for the purposes of the Act – Accordingly, the Board advised the Minister that the relevant employees are covered by the Act

BAYFIELD HOMES LTD; RE CUPE AND ITS LOCAL 4895; File no: 1667-10-M; Dated February 17, 2012; Panel: Lee Shouldice (43 pages)

Certification – Construction Industry – Council of Trade Unions – Trade Union – The Ontario Council of Construction Unions (OCCU), composed of two entities (Local 1030 of the Carpenters and CCWU, both having been recognized as trade unions and construction trade unions), applied for certification – Locals 183 and 1081 of the Labourers intervened, and with Brookfield, argued that the OCCU could not be certified as a council of trade unions on procedural and substantive grounds – Procedurally, although the Board found that Local 1030 and the CCWU had not taken the necessary steps to adopt the OCCU constitution and vest it with appropriate authority prior to the date of application, it found that subsequent resolutions evinced a clear intent on both Local 1030 and the CCWU to adopt and be bound by the OCCU constitution and to vest the OCCU with the authority to acquire bargaining rights and enter into collective agreements – The Board found the procedural requirements of s. 12 to have been met – Among other substantive matters it was submitted that OCCU was subject to a fundamental constitutional flaw in that it was formed for the illegal object of enabling the Carpenters to represent construction labourers in the ICI sector contrary to s. 162(2) of the Act – The Board found that one of its obligations on a

certification application was to determine an appropriate bargaining unit, and that it would not permit Brookfield and the Labourers to conflate an argument about the appropriateness of an ICI bargaining unit for the OCCU into a finding of overall illegality of the OCCU – The issue of the appropriateness of a bargaining unit will be decided when it has to be – The other substantive objections relating to specific articles of OCCU's constitution were dismissed by the Board – Matter continues

BROOKFIELD HOMES (ONTARIO) LIMITED; RE ONTARIO COUNCIL OF CONSTRUCTION UNIONS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; RE LIUNA, LOCAL 1081; File No. 0263-11-R; Dated February 21, 2012; Panel: Jack J. Slaughter (9 pages)

Crown Employees Collective Bargaining Act – Duty to Bargain in Good Faith – Unfair Labour Practice – AMAPCEO filed an unfair labour practice complaint alleging a breach of s. 17 by the Crown – Prior to AMAPCEO and the Crown entering into collective bargaining, the Crown and OPSEU ratified a renewal of their collective agreement publicly announcing increases of 1.75, 2, 2, and 2% per year – However, not reflected in the memorandum of settlement and not announced publicly was a confidential agreement entered into between the Crown and OPSEU which stated that the bargaining unit members would receive an extra 1% on the final year of the deal effectively making the increase 3% and not 2% – The Crown and AMAPCEO agreed on the renewal of a collective agreement and subsequently AMAPCEO found out about the confidential agreement – AMAPCEO alleged that the Crown's conduct in deliberately keeping this from them constituted bargaining in bad faith – The Crown argued that AMAPCEO failed to establish that it made a misrepresentation to AMAPCEO during collective bargaining – Alternatively, it argued that the Board requires there be more than a mere misrepresentation before it will find a violation of s. 17 of the Act – The Board stated that the duty to bargain in good faith requires parties to engage in full and honest discussion and censures parties for withholding information that the party opposite requires in order to intelligently appraise a proposal – The Board found that the terms agreed to between OPSEU and the Crown (including the confidential additional 1%) were relevant to AMAPCEO in the course of collective bargaining with the Crown – The Board found that the Crown entered into the confidential agreement with OPSEU in order to

create a construct whereby AMAPCEO would believe that the public announcement reflected the actual OPSEU increases – The Board held that this was a deliberate misrepresentation made in bad faith – The intent was to cause AMAPCEO to perceive the OPSEU settlement to be less costly and in turn cause AMAPCEO to lower its own expectations at the bargaining table – The Crown violated s. 17 of the Act and future hearing dates were scheduled to determine the matter of damages

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO; File no: 3711-09-U; Dated January 30, 2012; Panel: Diane L. Gee (22 pages)

Bargaining Unit – Education Act – Collective Agreement – Application for certification by ETFO for a bargaining unit of designated Early Childhood Educators (“DECE’s”) – CUPE intervened claiming ETFO’s application was an abuse of process and untimely because the employees sought were already covered by the CUPE Local 4156 agreement with the School Board – The province recently amended the *Education Act* (the “Act”) to provide for an Early Learning Program which required school boards to provide full day senior and junior kindergarten – The DECE position originated with the development of this program and the Act states that staffing for these classrooms must consist of one teacher covered by the relevant ETFO collective agreement and a DECE as defined in the Act – The CUPE collective agreement covers “all employees” of the School Board “regularly employed as office, clerical, technical and instructional support staff” – There was no dispute that the DECE’s were not office, clerical or technical staff so the Board had to determine whether they were captured as “instructional support staff” – The Board’s analysis focused on determining what instructional support staff under the collective agreement do and comparing that to what the DECE’s do – The Board asked whether the duties, responsibilities and work of the DECE’s was sufficiently similar to bring them within the instructional support group that are already represented by CUPE – The School Board and ETFO argued that DECE’s were qualitatively different than instructional support staff and were a sort of “quasi-teacher” (or educator) thus making them separate and distinct from instructional support staff – CUPE argued

there was no appreciable difference between DECE duties and responsibilities which may be legislatively prescribed and the duties and responsibilities assigned and performed by CUPE instructional support staff – The Board found that although there were some differences between the duties of DECE’s and instructional support staff the distinctions were not very great – The Board concluded that the DECE’s are covered by the CUPE collective agreement – Accordingly, ETFO’s application for certification was untimely – Application dismissed

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS’ FEDERATION OF ONTARIO; CUPE; File No: 1958-10-R; Dated February 15, 2012; Panel: Bernard Fishbein (16 pages)

Abandonment – Bargaining Rights – Collective Agreement – Construction Industry Grievance – Evidence – The main issue was whether Ellis Don was bound to the Provincial Collective Agreement of each of the applicant trade unions based on the Sarnia Working Agreement (SWA) signed in 1958 – First, the Board found the SWA could be admitted into evidence as a business record or simply as an “ancient document” as it met the requirements of proof for such a document – Next, the Board found that although nothing happened for some 30 years, there was no evidence of bargaining from which the Board could infer a conscious decision to abandon bargaining rights or such neglect as to amount to such abandonment – The Board determined that there had been no abandonment of bargaining rights by the unions and that the SWA constituted a series of recognition agreements that bound Ellis Don to the Provincial Collective Agreements – The Board then addressed two arguments by Ellis Don seeking to limit the effect of two settlements (1987 and 1993) of grievances alleging that Ellis Don had subcontracted work contrary to the trade unions’ Provincial Collective Agreements – The Board noted that it was statutory amendments that gave rise to the bargaining rights of the two applicant Unions (not a collective agreement), and that the bargaining rights were extended by statute in 1980 to every affiliated bargaining agent and their respective employee bargaining agency – Additionally, since the union parties to the Minutes were only the Sarnia local unions, any attack on the Minutes of Settlement would not affect the bargaining rights that were held by every affiliated bargaining agent – The Board found that a representation was made by the

Building Trades Council, that it and its affiliates, would not seek to claim bargaining rights from the SWA beyond those set out in the 1987 and 1993 Minutes of Settlement and that Ellis Don was clearly prejudiced in relying upon that representation – A violation of the PCA was found, however the unions were estopped from claiming any damages and the Board declared that the estoppel was to last for two years – Application granted in part

ELLIS-DON LIMITED; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; File Nos. 0784-05-G; 2836-08-G; Dated February 13, 2012; Panel: David A. McKee (35 pages)

Evidence – Practice and Procedure – Witness

– Following the resignation of a Vice-Chair who had heard days of evidence in a case where credibility was a significant issue, the Board was conducting a hearing *de novo* when union counsel put a prior inconsistent statement to the witness which he asserted was made in the previous hearing – The employer brought a motion submitting that the Board lacked the jurisdiction to hear evidence where no independent record of the prior hearing existed for the purposes of assessing credibility of witnesses – The Board noted that prior inconsistent statements may be made orally or in writing, may be sworn or unsworn, may occur in a variety of places and that there was nothing in the SPPA that would carve out a special exception to preclude exploration of an alleged prior inconsistent statement made under oath in a prior aborted proceeding before the same tribunal – The Board found that reasonable cross-examination concerning issues of significance are not the type of evidence which the Board should decline to hear from a witness, and that a refusal to hear such evidence may well constitute a breach of natural justice – The Board concluded that the specific question put by the union to the witness was a proper question which was not precluded by the SPPA – The Board found it was not appropriate to issue a pre-emptive exclusion order, of the reach sought, at the outset of the hearing – Motion dismissed – Matter continues

ISLINGTON NURSERIES LIMITED; RE UNIVESAL WORKERS UNION, LIUNA LOCAL 183; File Nos. 2567-09-U; 2771-09-R; Dated February 29, 2012; Panel: James Hayes (6 pages)

Bargaining Unit – Hospital Labour Disputes Arbitration Act – Reference

– The Minister asked whether the relevant bargaining unit employees working at Syl Apps Youth Centre (SAYC) were covered by *HLDA* – SAYC has two residential programs: Youth Justice (providing placements in Secure Detention and Secure Custody under the *Youth Criminal Justice Act*) and Secure Treatment (which provides services for youth with mental disorders as defined in the *Child and Family Services Act* and the *Criminal Code*) – The Board accepted that many of the SAYC youths had mental health problems and that treatment was provided by SAYC staff and outside professionals – The Board also noted that the Dialectical Behavioural Treatment offered was relevant care that could be included in the definition of “hospital” even though it was not medical in nature – While these factors supported inclusion in the definition of hospital, the Board found that the relationship between the clients and SAYC was formed because the youth need custody and detention and typically not because of the mental health services provided by SAYC – Furthermore the Board found that the labour relations history of these parties (the negotiation of four collective agreements under the *LRA* and a seven and one half month strike with services maintained) was a significant factor – The Board found it could not conclude that the public interest in the continued provision of hospital services, broadly stated, required extension of that interest to the operations of SAYC – Reference answered in the negative

KINARK CHILD AND FAMILY SERVICES – SYL APPS YOUTH CENTRE; RE OPSEU AND ITS LOCAL 213; File No. 2135-10-M; Dated February 13, 2012; Panel: James Hayes (11 pages)

Discharge – Employment Standards – Reprisal

– The employer applied for review of an Employment Standard Officer's finding that it failed to reinstate an employee into the position she held prior to her pregnancy leave and that the employer engaged in a reprisal contrary to s. 74 – The employer argued that the employee's job did not exist upon her return from her leave and that she was placed in a comparable job – Further, it argued that her termination was for legitimate business reasons and had nothing to do with her pregnancy leave – While she was on the leave the employer underwent organizational restructuring which resulted in the elimination of her prior position – She was given a new position upon her return – The Board found that the organizational decision made by the employer

and the elimination of the employee's position were done in good faith – Accordingly, the Board held that the end of her employment in her previous position had nothing to do with her pregnancy leave – Similarly, the Board held that there was nothing unlawful about the employer's decision to offer the employee a new position without any loss of compensation or change in the terms and conditions of her work environment – However, the Board took issue with the timing of her termination – She was terminated before the end of the employer's busy summer season – The employer did not adequately explain the timing of her termination to the Board – The Board was left to conclude that one reason the employee was terminated was because she purported to assert her rights under the Act – The Board stated that inquiries by an employee of his or her rights, even an *attempt* to exercise a statutory right, are protected under s. 74 – Application granted, in part

MARINELAND OF CANADA INC.; RE JACQUELINE EMBLETON AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1295-11-ES; Dated February 2, 2012; Panel: Patrick Kelly (13 pages)

Discharge – Duty to Bargain in Good Faith – Strike – Unfair Labour Practice – The employer discharged nine employees for alleged misconduct during the course of a long strike – The union alleged that the employer's failure to agree to any procedure which may give rise to reinstatement of the nine employees meant the employer did not make every reasonable effort to make a collective agreement and therefore has breached s. 17 of the Act – During the strike which began on July 13, 2009 the employer continued operations hiring replacement workers with some bargaining unit members who crossed the picket line and resumed work – The employer's security staff compiled reports relating to incidents on the picket line and these reports were forwarded to the manager of Human Resources for review – If based on her review the manager of human resources thought discipline was warranted, she would make a recommendation to a committee of senior managers for review and a decision as to discipline – As a result of this process nine striking employees were terminated – Meanwhile, negotiations continued between the parties – In February 2010 the parties resumed collective bargaining with the assistance of a mediator – The employer's position from the beginning was that if someone was fired during the strike they

were not coming back to work – Negotiations were on and off until a final push took place in June 2010 – An agreement was reached on all issues except with respect to the nine discharged employees – The union offered that the issue of the discharged employees be sent to arbitration; the employer refused to move from its position – The sole issue which prevented the parties from concluding a collective agreement was their dispute about whether the discharges of the nine disputed employees should go to arbitration – The Board found that the obligation to make every reasonable effort to make a collective agreement means that a party's position on a fundamentally significant issue must be capable of rational discussion, must be based on an honest assessment of the negotiations and on what would be reasonably required to make a collective agreement having regard to the significance of the issue – The Board concluded that the employer adopted an intransigent position on an issue of fundamental significance to the union – The employer's position was patently unreasonable and in maintaining that position the employer was not making every reasonable effort to make a collective agreement and therefore breached s. 17 of the Act – The matter was directed to arbitration on the just cause standard but no extraordinary orders were made in respect to the conduct of the arbitrations – Application granted

VALE INCO LIMITED; RE UNITED STEELWORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCALS 6500 AND 6200; File No. 3033-09-U; Dated February 24, 2012; Panel: Ian Anderson, P. LeMay, C. Phillips (29 pages)

Court Proceedings

Judicial Review – Duty of Fair Representation – Applicant sought judicial review of a Board decision dismissing an application for failing to make a *prima facie* case – The applicant alleged that the union violated s. 74 by its response to his complaint regarding the School Board's failure to credit him with 'related experience' prior to becoming a teacher – The applicant's reconsideration application was also dismissed – Finding that the Board possessed 'unique expertise', the Court held that both decisions must be given deference – It was apparent to the Board that the union had carried out its duties under s. 74 of the Act, and had done what it considered to be in the best interest of the applicant – Application dismissed

JOHN MCKENNEY; RE UPPER CANADA DISTRICT SCHOOL BOARD; RE ONTARIO SECONDARY SCHOOL TEACHERS FEDERATION; RE ONTARIO SECONDARY SCHOOL TEACHERS FEDERATION DISTRICT 26 AND OLRB; OLRB Board File No. 2867-08-U (Court File No. 10-DV-1652); Dated February 3, 2012; Panel: Matlow, Hambly and Hennessey, JJ. (5 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
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	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894-09-G	Pending
Erie St. Clair Community Care Divisional Court No. 504/11	0144-09-PS	Pending
Swift Railroad Contractors Divisional Court No. 400/11	0039-06-U 0139-06-R	Pending
René Gagné v. Algoma University College Faculty Divisional Court No. 11-1764 Ottawa	0460-10-U	Pending
Greater Essex County District S.B. Divisional Court No. 403/11	1004-08-M	Pending
Sanford Pensler, A Director of Korex Don Valley ULC et al v. CEP L. 132 et al Divisional Court No. 328/11	0598-10-ES	April 17, 2012
John McCredie v. OLRB et al Divisional Court No. 1890/11	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Pending
Ineke Sutherland o/a Designworks Divisional Court No. 238/11	4061-10-ES	Pending
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	March 7, 2012 (motion)
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	June 4, 2012
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	Granted Oct. 7/11 Seeking leave to appeal to C.A.
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	Dismissed Feb. 2, 2012
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10 Court of Appeal No. C53992	3322-03-R 2118-04-R	Reserved
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Divisional Court No. 373/09 Court of Appeal No. C54427	1048-07-HS 0255-08-HS	Pending

Case name & Court File No.	Board File No.	Status
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Dismissed January 12/12; seeking leave to C.A.
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending