Ontario
Labour Relations
Board

Commission
des relations
de travail de l'Ontario

Our File Number / Numéro de dossier 4165-02-U

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March 9, 2004

TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

Ontario Hospital Association, v. The Ontario Public Service Employees Union

Attached is a Decision of the Board dated March 9, 2004 in the above matter which is being sent to you by facsimile, regular mail or purolator.

Sincerely,

Tim R. Parker
Registrar

TRP/ml
Enclosure

APPENDIX "A"

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ONTARIO LABOUR RELATIONS BOARD

4165-02-U Ontario Hospital Association, Applicant v. **Ontario Public Service Employees' Union**, Responding Party.

BEFORE: Kevin Whitaker, Chair.

APPEARANCES: Angela Rae, Shelagh Quigley, Steve Shemluck, Caroline Van Kessel and Sam Mandelbaum for the applicant; James Hayes, Neal McDougall, Moya Beall, Catherine Bowman, Patty Rout and Yves Shank for the responding party.

DECISION OF THE BOARD; March 9, 2004

I

What This Case is About

1. This is an application brought by the Ontario Hospital Association ("the OHA") seeking the Board's consent to prosecute the Ontario Public Service Employees' Union ("OPSEU"), pursuant to section 104(1) of the *Labour Relations Act, 1995,* R.S.O. 1995, c.1, as amended (the "Act"). The OHA alleges that OPSEU has breached an order of the Board dated February 11, 2003 and the provisions of the *Hospital Labour Disputes Arbitration Act* R.S.O. 1990, c.H.14 as amended ("HLDAA") which prohibit strikes. In the alternative, the OHA asks the Board to state a case of contempt against OPSEU, to the courts.

2. OPSEU asks the Board not to exercise its discretion to grant consent to prosecute or state a case of contempt. OPSEU argues that a prosecution is now untimely and that neither a prosecution nor contempt proceedings would serve any labour relations purpose.

3. The Board heard the parties' submissions on December 3, 2003. For reasons which follow, the application is dismissed.

II

The Facts

4. The significant facts are not in dispute.

5. The OHA is a voluntary employer's organization that conducts collective bargaining on behalf of forty participating hospitals in Ontario (the "participating hospitals").

6. OPSEU represents approximately 5500 health professionals at the participating hospitals. These health professionals include medical laboratory technologists, X-Ray and MRI technologists, social workers, laboratory assistants, pharmacists and speech language pathologists.

7. Labour relations between the OHA and OPSEU are governed by HLDAA. Section 11 of HLDAA prohibits hospital employees from striking.

8. Negotiations for a collective agreement between OPSEU and the OHA began in March 2002. The parties could not agree on a collective agreement. An interest arbitration was scheduled for March 2003.

9. In January of 2003, OPSEU issued a press release announcing that February 13, 2003 was to be a "Hospital Emergency Day of Action". It was the union's intention to persuade its members to provide only emergency procedures on that day and to establish picket lines outside hospitals, in support of the Day of Action.

10. On February 6, 2003, the OHA filed an application with the Board, alleging that OPSEU had called for an illegal strike contrary to section 11 of HLDAA.

11. A hearing was held on February 10, 2003 to deal with the application filed by the OHA.

12. On February 11, 2003, the Board issued a decision granting the application by the OHA in part. The Board found the Day of Action to be an illegal strike. The Board ordered and directed OPSEU, and its officers, officials and agents to cease and desist from calling, authorizing, encouraging, supporting or threatening an unlawful strike. The Board also restricted picketing in and around hospitals.

13. On February 12, 2003, OPSEU served the OHA with an application for judicial review of the Board's decision.

14. On February 12, 2003, the President of OPSEU, Ms. Leah Casselman, held a press conference and made a series of statements concerning the planned Day of Action. It is apparent that Ms. Casselman, at the very least, indicated that the Day of Action would proceed as planned.

15. On February 13, 2003, many OPSEU members employed at the participating hospitals did not show up for work. Although the employer response has varied from hospital to hospital, some employees have been subject to discipline. Some hospitals filed policy grievances against OPSEU.

16. This application was filed on March 19, 2003. The OHA requested that the hearing be expedited.

17. On June 27, 2003, counsel for the OHA wrote to the Board asking that the matter be scheduled for hearing.

18. The Board issued reasons for its decision of February 11, 2003 on July 8, 2003.

19. A notice of hearing was sent by the Board to the parties on October 8, 2003.

20. Since the Day of Action, the parties have engaged in bargaining for a collective agreement. There is no allegation that OPSEU has threatened or committed any unlawful action since February 13, 2003. The parties appear to have progressed in collective bargaining on a number of fronts. The interest arbitration process continues, and the parties are also dealing with

issues of hospital restructuring, pension matters and the divestment of Cancer Care Ontario. OPSEU asserts and it does not appear to be contested, that a healthy relationship between the parties has been "restored".

21. OPSEU concedes that there is, on the facts pled by the OHA in this application, a *prima facie* case made out that the union breached the Board's orders and directions of February 11, 2003.

22. The OHA relies on the conduct of OPSEU just before, and during the last Ontario Public Service ("OPS") strike in the late winter and early spring of 2002. At that time in a least two cases, the Board found OPSEU to have engaged in an unlawful strike, the employer being the Crown in Right of Ontario.

III

The Issues

23. The employer argues that there is a *prima facie* case made out in the material filed that OPSEU has breached the Act and that there are good labour relations reasons for the Board to exercise its discretion to grant consent to prosecute.

24. OPSEU seeks to have the application dismissed on the basis that any prosecution brought following the Board's consent is barred by section 76 of the *Provincial Offences Act* (the "POA") which reads as follows:

> 76.(1) **Limitation** – A proceeding shall not be commenced after the expiration of any limitation period prescribed by or under any Act for the offence or, where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed.
>
> (2) **Extension** – A limitation period may be extended by a justice with the consent of the defendant.

This provision precludes the prosecution of an offence more than six months after the date the alleged offence was committed:

25. In the alternative, while OPSEU concedes that a *prima facie* case is made out, it submits that there is no labour relations purpose to be served either between these parties or more generally in the province, by granting consent to prosecute.

26. In response to the POA argument, the employer suggests that the Board should order OPSEU to consent to the initiation of the prosecution, in which case the six month bar may not apply. In the alternative, the OHA argues that OPSEU has waived the right to make such an objection at this point. In the further alternative, the OHA at the hearing requested that the Board state a case of contempt to the Ontario Superior Court, based on OPSEU's conduct on February 13, 2003.

Is the Matter Barred by Section 76 of the POA?

27. There is no dispute that the Board has routinely dismissed applications for consent to prosecute where it appears any prosecution will be barred by section 76 of the POA. The Board has confirmed that there is no purpose to be served by granting consent to prosecute where the prosecution will be barred. See *Federated Contractors Inc.*, [2003] OLRB Rep. Jan./Feb. 61; *Weingarden & Hawrish,* [1975] OLRB Rep. Aug. 608; *Freeman Electric Limited,* [1972] OLRB Rep. Sept. 822; *CCH Canadian Limited,* [1974] OLRB Rep. 375; *James McKeary,* [2001] OLRB Rep. Jan./Feb. 86 and *Plastics CMP Limited,* [1982] OLRB Rep. May 726.

28. The Board has also determined that the scheduling of a matter (even if it were assumed that the Board was responsible for the timing of the hearing being beyond the six months) is not an appropriate basis for granting consent to prosecute. As the Board noted in paragraph 12 of *Federated Contractors Inc., supra,* even if the Board granted consent to prosecute because it - and not the applicant - was responsible for the delay in dealing with the application, the prosecution would still be barred by section 76(1) of the POA. Therefore, even in these circumstances, the granting of consent to prosecute would be without purpose.

29. Failing the consent of OPSEU, the prosecution intended by the OHA will be barred in the present case. The OHA seeks an order directing OPSEU to consent to the prosecution for purposes of section 76(2) of the POA. Even if the Board has the jurisdiction to order such a remedy, there is no basis for granting it here. OPSEU is not in any way responsible for the timing of the application or its scheduling. OPSEU has done nothing to delay the adjudication of this application.

30. The OHA seeks in the further alternative a determination that OPSEU has waived its right to raise the issue of a bar under section 76 of the POA. Similarly, there is no conduct or representation made by OPSEU which could be construed in any way as a waiver of the right to bring the objection. While it is true that OPSEU did not raise the objection concerning the bar until the week prior to the hearing, the OHA has not been prejudiced by the timing of the objection. As is clear from the Board authorities referenced in paragraph 27 above, this particular issue of the application of section 76 of the POA is squarely within the typical range of issues that may be raised in this manner of application.

31. The Board declines to exercise its discretion to grant consent to prosecute here where it is clear that any prosecution will be barred by section 76 of the POA.

Is There a Labour Relations Purpose to be Served in Granting Consent To Prosecute?

32. In the event that I am wrong to decline to grant consent on the basis of section 76 of the POA, I will deal with the issue of whether consent should be granted even if such a prosecution is not barred by the section.

33. The parties agree that the materials filed by the OHA in this application make out a *prima facie* case that OPSEU has violated both sections 104(1) and (2) of the Act by counselling an illegal strike in violation of the Board's orders and decisions of February 11, 2003.

34. OPSEU asserts that since February 13, 2003, many of its members have been disciplined for their conduct on that date, that the parties have progressed in their bargaining of a collective agreement and that there have been no further suggestions or allegations from the OHA

of illegal conduct on OPSEU's part. OPSEU points to other areas where the parties have been able to productively move forward and suggests that the current collective bargaining relationship is vital and positive. These assertions are not seriously challenged by the OHA.

35. The parties agree that the Board has generally granted consent to prosecute where there is some labour relations purpose to be served with respect to the parties and more generally within the province, and where the Board's own range of remedial powers have proven ineffective in precluding illegal conduct (see, for example, *The Toronto Western Hospital,* [1972] OLRB Rep. Dec. 1018; *Fleck Manufacturing Company,* [1978] OLRB Rep. July 615; and *Millcroft Inn Ltd.,* [2000] OLRB Rep. July/August 665; [2000] O.L.R.D. No. 2581. Are these factors present here?

36. The OHA argues that the Board's decision of February 12, 2003 was ineffective and OPSEU's conduct will encourage illegal activity by other unions. It is suggested that the very heart of HLDAA - the prohibition against strike or lockout - is put in jeopardy without proceeding with a prosecution at this point. Finally, the OHA points to OPSEU's conduct during the last OPS strike against the Crown and asks the Board to infer that there is a pattern of unlawful strike activity with this particular union, which must be subject to sanction.

37. It is not argued that there is any labour relations purpose with respect to the current bargaining relationship between the parties which requires a prosecution. Indeed, it would appear that there is no present issue between the parties that requires any of the Board's remedial attention in the absence of a prosecution relating to the events of February 13, 2003.

38. Prior to amendments made to the Act in 1975, the Board had limited remedial powers over and above its ability to consent to prosecute. As a result, the Board was often called upon to exercise this discretion because there were few other remedial options available. Since 1975 however, the Board has been granted a much broader range of remedial authority. Over time, the Board has in exercising this authority, constructed and refined a broad array of remedial devices designed to further the aims and goals of the statute. With these in hand, the Board has repeatedly (as the parties agree), sought to craft its own remedies to support collective bargaining, rather than resort to prosecution in the courts.

39. Since 1975 there have been only a small handful of cases where the Board has granted consent to prosecute (less than half a dozen). Given the vast range of unfair labour practices and otherwise illegal activity that the Board has been called upon to remedy in the last twenty nine years, the small number of cases where the Board has resorted to prosecution underscores the use to which the Board has confined this device - as an instrument of last instance, to be used when all else has failed.

40. It is fair to say that in 2004, the Board will require an applicant to shoulder the very heavy burden of persuading us that nothing else will "work" to "fix" a labour relations "problem", except the prosecution of the respondent - and that this must be done for the purpose of assisting labour relations not only between the parties, but in the province more generally. It must be remembered that the prosecution of a provincial offence – even if maintained privately – is not strictly speaking, a private piece of litigation. Such a prosecution engages the broader public interest.

41. While it may be the case that OPSEU's conduct will embolden other unions in the health care sector to flout the provisions of HLDAA, there is no factual basis now for concluding

that such a result is likely or even probable. It is a proposition that cannot be disproved, but the proposition itself cannot lead to the conclusion that the tool of last resort must be brandished.

42. What of OPSEU's conduct during the OPS strike? The OHA relies on the fact that in two cases -- one just before the commencement and one just before the end of, the strike, the Board found the union to have engaged in an unlawful strike (*Ontario (Management Board of Cabinet)*, [2002] O.L.R.D. No. 921 and *Ontario (Management Board of Cabinet)*, [2002] O.L.R.D. No. 1345). In my view, these two instances coupled with the Day of Action do not amount to a pattern of conduct. The circumstances around the OPS strike were particular to the dynamics of the charged environment surrounding essential services disputes in the public sector. The employer was different and it is not this bargaining relationship.

43. There is nothing before the Board which would permit the conclusion that these parties require the type of intervention sought by the OHA at this point in their bargaining relationship. Similarly, there is nothing before the Board upon which any reasonable person could conclude that labour relations in the province generally would benefit from the prosecution of OPSEU.

44. This is not to say in any way that the Board condones or pardons the apparent conduct of OPSEU and the statements made by its President, Ms. Casselman. It is not difficult to characterize the President's comments following the issuance of the Board's decision of February 12, 2003 as a celebration of unlawful action.

45. Unions engage in this type of behaviour at their own considerable risk. The risk is that such conduct may embolden employers to discount the effectiveness of the Board's remedial authority. If the practical legitimacy of the Board's orders and directions become diminished by the conduct of unions, what message does this send to employers? Unions – and not employers – far more frequently seek relief and protection from the Board in order to assert their rights under the Act. As a result, employers - and not unions - are more typically the parties who are directed to comply with the Board's direction. If OPSEU is prepared to be seen publicly to snub the Board's orders, how or why should it expect an employer to act differently?

46. Fortunately, for these parties and for the public more broadly, OPSEU's conduct and actions have not appeared to erode the rule of law in labour relations in Ontario.

47. The Board concludes that even if the application should not be dismissed on other grounds (the POA section 76 issue), the Board would not in these circumstances exercise its discretion to grant consent to prosecute.

Should the Board State a Case of Contempt Against OPSEU?

48. The last issue is whether the Board should state a case of contempt to the Superior Court.

49. In the Board's view, it is inappropriate to permit such an application to be brought when raised for the first time at the hearing of an entirely different type of application. Further, and for the same reasons described above, there is no labour relations purpose to be served by stating a case of contempt to the courts.

50. The Board's contempt processes should be exercised where there is some real labour relations purpose to be gained in doing so. Whether the purpose is to compel testimony, obtain evidence or information, maintain control over the adjudication process, enforce and order or otherwise supervise the conduct of a party, there should properly be some practical utility other than the prickly defence of the Board's honour (*Re Ajax & Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1981), 132 D.L.R. (3d) 270, leave to appeal to the Supreme Court of Canada refused (Laskin C.J.C., Estey and Chouinard JJ.) March 15, 1982.)

51. It is apparent that the request for a stated case of contempt is a (lawyerly) device to deal with the problem presented by the bar imposed under section 76 of the POA. But for this problem, the applicant would not be pursuing the contempt issue.

52. It may very well be that the applicant is left without a remedy as a result of the bar under the POA. That is however the express purpose of a limitation period -- to remove a remedy unless it is engaged within some fixed time frame. It is not appropriate for the Board to look for, or to devise some method which would have the effect of rendering the limitation period inoperative. How could such a result be consistent with the legislative policy choice reflected in the language of section 76 of the POA?

53. The request to state a case of contempt against OPSEU to the Superior Court is dismissed.

IV

The Result

54. The application is dismissed.

"Kevin Whitaker"
for the Board