LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

SUPPLEMENTARY SUBMISSIONS to the CHANGING WORKPLACE REVIEW

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AMENDMENTS NEEDED TO MODIFY LEGAL TEST FOR SINGLE EMPLOYER UNDER SECTION 1(4) OF THE *LRA*

Since our original submissions we understand that some parties have suggested that the related employer provisions be amended to address the problem of a main employer utilizing labour supply companies to determine the true employer. These submissions address that possibility as an alternative solution.

Recommendation #19: *Section 1(4) of the LRA should be amended to provide that two or more entities shall be deemed to be a single employer under s. 1(4) for the purposes of certification where an entity has exercised control over terms and conditions of employment indirectly or has reserved the authority to do so.*

Or in the alternative, ***Recommendation #19 (a)*** *Section 1(4) of the LRA should be amended to provide that two or more entities shall be deemed to be a single employer under s. 1(4) where two or more entities are engaged in a joint venture for the supply of labour. "joint venture" means any arrangement, commercial or otherwise, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof which in any way involves the supply, sale or use of labour.*

As discussed in our submissions of September 11, 2015, a "deeming" provision of the Act, presumptively making the entity that directly benefits from a worker's labour to be the "true employer" or declaring that parties who engage in a joint venture to supply labour for the purposes of certification shall be deemed to both be the employer, will go a long way to enabling unions to certify precarious workers and legislative fix a gap in the existing labour legislation.

Where corporations sub-contract their work, use staffing agencies, or contract with other third party corporations to do business, the nature of the contractual relationship between the contractor/sub-contractor, this by necessary implication creates significant impediments to the bargaining of terms and conditions of employment for employees unless both parties are at the bargaining table and financially liable.

In these circumstances, Unions ought to have the option to avoid the requirement to prove that one or the other entity is artificially the true employer and be able to seek a finding that the entities are a single employer. Section 1(4) of the Act, does permit the Board to find that two entities are a single employer for the purposes of the Act. This provision should be expanded to afford greater protections.

The Related Employer provision as it is commonly known is, of course, most often resorted to in circumstances where there is an allegation that an entity is attempting to avoid its collective agreement or bargaining rights. However, there is precedent for the Board relying on this

provision to find a client and labour supply company to be a single employer under 1(4) in "recognition of the reality of the workplace" where certifying one or the other employer would "substantially diminish" bargaining rights for employees.[1]

In *United Food and Commercial Workers International Union (UFCW Canada) v. PPG Canada Inc.*, 2009 CanLII 15058 (ON LRB), ("*PPG*"), UFCW applied for certification of a bargaining unit of employees at a facility operated by PPG Canada Inc, a producer of automobile glass. The Union identified both PPG and Liberty Staffing, a company PPG engaged to supply 100% of its labour needs. After reviewing the factors from *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645 (see discussion in our September 11, 2015 submissions) to try to determine "who is the employer," the Board concluded that it was "not at all clear whether PPG or Liberty is the 'true' employer of the employees. The various employer indicia are shared."[2] The Board went on to conclude that the two entities were, in fact, a single employer under s. 1(4).

Of note in terms of the importance of making the single employer declaration, the Board wrote:

> 115. In addition, there seems to be good reason to make a single employer declaration in recognition of the reality of the workplace. One of these realities is that it is difficult for anyone – employee, union or the Board, to determine who the "true" employer is.
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> 116. Another reality is that if the union is certified for just PPG or just Liberty its bargaining rights are substantially diminished. Bargaining with either one of them alone would be enormously difficult. Power over the employee is shared between PPG and Liberty. Neither has the unfettered right to raise wages. It only makes sense that they be treated as a single employer rather than splitting them in a way which undermines the bargaining rights at the time the union is certified.

The Board really highlighted in *PPG* how out of step the current legislative scheme is with the practical commercial realities which exist in the market place. For a greater review of the *PPG* case see the paper attached as Appendix "A".

Unions have tried to approach the unionization of works by claiming the contracting owner to be the true employer or in other instances claiming the labour supply company to be the real employer. The lack of a cohesive organizing strategy by trade unions is indicative of the frustration experienced by unions trying to prevent anti-union practices by employers who seek to interfere and prevent the employees from exercising their democratic and statutory rights.

The perversions that can arise from unions having bargaining relationships with an employer that does not solely control terms and conditions of employment can be seen in many in cases where a company/entity that sub-contracts work to an employer retains the ability to exclude certain employees from its premises. In such cases, the owner may decide, without any due diligence, that it no longer will allow a particular employee on its property. If there is no other

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[1] PPG at para. 114-115.

[2] PPG at para. 96.

bargaining unit work to be done off property, then that excluded employee can essentially be terminated without just cause. See, for example: *Waste Management of Canada Corp. and TC, Local 419 (Beaul),* Re, [2013] O.L.A.A. No. 335.

In *Teamsters Local Union No. 419 v. Metro Waste Paper Recovery Inc.*, 2009 CanLII 60617 (OLRB) the Board made a similar finding to that in *PPG*. After reviewing the various factors to try to determine "who is the employer," the Board concluded it could not make this determination, but that the test for s. 1(4) had been made out.

The starting point in a s. 1(4) analysis is a consideration of three conditions: 1) whether there are two or more entities, 2) under common control or direction and 3) in associated or related activities or businesses.

In *Metro Waste,* the Board looked at "numerous examples" of joint decision-making between the staffing agency and Metro including that there had been:

- Joint decisions on wages;
- Joint interview of people in the harassment issue;
- Joint discipline of an employee for running the line empty;
- Discussions about discipline issues;
- Discussions about hiring specialized employees;

The Board concluded that though the parties were legally distinct corporations, that there was common direction or control. The Board found that the two entities were "functionally and economically integrated" and were under common control and direction, despite the contractual agreement between the companies that stated otherwise.

In defending its decision against claims by the staffing agency that the Board's decision in *PPG* was overly broad and would collapse all subcontracting relationships, the Board wrote that the Board's decision would collapse only sub-contracting relationships that "lack legitimacy." Factors that the Board stated could impact on whether a sub-contracting relationship is "legitimate" included i) the extent to which the contracting business is genuinely arms-length vis-à-vis the contractor, ii) the extent to which the contractor devolves control over the subcontracted (the more the contractor retains control, the less "legitimate"), iii) whether the subcontracted work represents a core business of the contractor and iv) the extent to which the labour subcontracting is a permanent or temporary contract (para 112, *Metro Waste*).

Local 183 is of the view that the ability of Unions to circumvent the requirement to determine "who is the true employer" and obtain a finding that employers are related for certification purposes can be a powerful alternative where circumstances warrant. However, we have serious reservations about the Board's analysis of the "common control or direction" component of the test under s. 1(4). As noted, in *Metro Waste,* the Board examined detailed evidence about Metro and KAS, in fact, working jointly to make decisions regarding employees.

Local 183 believes the question ought not to be limited to whether there is joint control in practice, but rather should be whether the contractor reserves the right to exercise control

and/or exercises this control indirectly or where two entities engage in a joint venture.

We believe that guidance can be taken from a recent decision of the US National Labour Relations Board ("NLRB") in *Browning-Ferris*.[3] In that case, the Union asked the NLRB to find Browning-Ferris and Leadpoint Business Services (a staffing firm) to be joint employers of a group of subcontracted workers hired through the staffing agency. The union said it couldn't adequately bargain for the workers unless Browning was at the table.

The Board re-interpreted its approach to determining "joint employer" status to include in its consideration of whether the entities "share or codetermine matters" governing terms and conditions of employees, a consideration of whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so. In the past, the Board had required evidence of shared decision-making, much like the case law suggests in s. 1(4) cases before the Board.

Significantly, the Board found:

> "These additional requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found—leave the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes."

That is, it should be sufficient that control be exercised indirectly, or that the contractor/parent retains the right to exercise control to justify a single employer declaration under s. 1(4) or where a joint venture exists. Once that is shown there should be no Board discretion to determine whether the declaration should be made and the entities in question should be deemed to be one employer, much like the deeming provision as found in the sale of a business provision in section 69 of the Act.

AMEND THE EMPLOYMENT STANDARDS ACT TO PROVIDE CONSTRUCTION EMPLOYEES WITH A RIGHT TO SEVERANCE AND TERMINATION PAY

We also understand that parties have made submissions respecting the scope of exemptions under the ESA. We wish to add our comments respecting the exclusion of construction employees from the termination and severance provisions of the ESA.

Recommendation #20: *Regulation O Reg 288/01 should be amended to remove the exemption of construction workers from the termination and severance entitlements under the ESA.*

[3] Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner. Case 32–RC–109684 August 27,2015.

Under the *Termination and Severance of Employment, O Reg 288/01* under the *ESA,* s. 2(1) par. 9, "a construction employee" ...is not entitled to "notice of termination or termination pay." Nor are construction employees entitled to severance pay (per s. 9(1) par. 7).

While there is little doubt that the original justification for this exemption was the fact that employment in the construction industry is generally short-term, project specific, and may involve work for a number of different employers over the span of short periods, these assumptions about the nature of construction work do not characterize the entire construction industry.

The historical justification to the extent it was ever appropriate has over time been rendered less relevant.

Many workers in the construction industry, in fact, are long-term employees – working for the same employers for many years. History has shown that construction employers want to retain good workers who they know and who also know how the employer operates in the field. This includes workers who work for the same employer year after year, though in some cases laid off on a seasonal basis from January to early March. The best examples of this are in the electrical power systems sector and residential high rise construction in Toronto. However, this trend can be found throughout Ontario in different sectors and companies. One of the results of the "level playing field" approach to construction where many employers compete on the basis of the same collective agreement, is that the manpower of an employer can make all the efficiency differences that separate good profits from modest gains. These concerns are reflected in changes to hiring hall provisions which allow more name hires and recalls. It also underlies the intention of section 163.5 of the *LRA,* which were amendments that an ICI sector employer to hire up to 40 per cent of the workers on a project from outside of the jurisdiction in which the work is performed, and up to 75% of the remaining workers from the local union to be name hired.

While these workers are long-term employees and are retained in employment to provide an employer with a stable and known quantity of labour, they have no right to severance or notice of termination/termination pay under the *ESA,* which means that to receive termination pay, they must bring a lawsuit and sue in common law in the courts, which can be expensive and complex. These exclusions enhance the precarity of construction workers. Ironically, the "long-term" nature of certain construction workers' employment may exacerbate their precarity when laid off. That is, employees who may have worked for an employer for decades and are then laid off may be less likely to find replacement employment where they do not know many employers and so are not as likely to be "name hired," and may be older, which could also impact on an employer's willingness to hire them.

The notice provisions of the *ESA* do not require notice to be given unless an employee has worked for the employer for 3 months. Further, severance is not required unless an employee

was employed by the employer for five years or more. Given these limitations already built into the *ESA,* there can be no justification for the wholesale exclusion of construction workers from these entitlements.

We note as well that while temporary/seasonal layoff is a feature of many types of construction work, under s. 56(2)(a), termination for the purpose of notice is not triggered unless the layoff is longer than a period of 13 weeks in any period of 20 consecutive weeks, which should be sufficient to protect the continuity of employment for construction employees.

Appendix "A"

The *Labour Relations Act* was crafted to deal with the traditional bipartite relationships between employers and their employees. However, companies are increasingly using labour supply companies to staff their workplaces and projects, with the resultant relationships being tripartite in nature – labour supply agency, client, and worker. The legislation does not provide clear guidance on how to determine the parties who owe obligations for labour relations purposes in these types of situations. The complexity and lack of certainty in the law leads to many wasted days of litigation, significant expense, delay and effectively denying the rights of employees to unionize and collectively improve their terms and conditions of employment.

In reality, agency workers have little connection to the labour supply company. The workers briefly attend at the agency to be assigned work with a client, and it is the client who determines their day-to-day employment experience. The labour supply company then sells the labour at a significantly marked up value to the owner all of which is designed to frustrate any attempt at unionization. This imposition of an intermediary supply agency creates a third party impediment when applying the current labour legislation which is predicated on a bilateral model.

Attempts to organize these types of workers results in prolonged and expensive fights at the labour board which in turn eats up significant hearing time and the Board's limited resources. The lack of an easy to apply legal test compounds the complexity surrounding these types of cases.

The Board itself in *United Food and Commercial Workers International Union, Local 1000A v Nike Canada Ltd*, 2006 CanLII 24724 (OLRB) (McLean) identified and discussed the challenges created by agency employees, as follows [emphasis added]:

> 58. Agency employees present a difficult challenge to the application of labour and employment laws in Ontario. These challenges were, in part, identified by the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour)* Court [1977] 1 S.C.R. 1015] where Lamer C.J., speaking for a majority of the Court made statements about the Quebec Labour Code which are equally applicable to the Act:
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> > 63. Unfortunately, tribunals and courts must often make decisions by interpreting statues in which there are gaps. The case at bar shows that situations involving tripartite relationships can cause problems when it comes to identifying the real employer if the Labour legislation is incomplete in this regard. The tripartite relationship does not fit very easily into the classic pattern of bilateral relationships. The Labour Code was essentially designed for bipartite relationships involving an employee and an employer. It is not very helpful when a tripartite relationship like the one at issue here must be analysed. <u>The traditional characteristics of an employer are shared by two separate entities – the personnel agency and its client – that both have a certain relationship with the temporary employee. When faced with such **legislative gaps**, tribunals have used their expertise to interpret the often terse provisions of the statute. In the final analysis, however, it is up to the legislature to remedy those gaps. The Court cannot encroach upon an area where it does not belong.</u>

59. In many respects, agency employees are employees of both the client and the agency. It was for this reason that I invited the parties to make submissions on whether the concept of "co-employment" exists in Ontario and whether it has application in Ontario labour relations. That is, whether it is possible for a temporary agency employee to be an employee of both an agency and the client at the same time. While the parties took up my invitation, I judge their enthusiasm for the concept to be lukewarm at best. They both seemed content with the current practice which is to identify one "true" employer unless there is an application under s. 1(4) of the Act. I note, in any event, that the issue before the Board in this case is whether the employees in question are employees of Nike which does not necessarily mean that they cannot also be employees of Manpower.

60. That leaves the Board in the usual position of grappling to identify the "real employer". However, in my view it is worth **identifying the problems which the current practice creates both under the Act and under other important employment laws**.

61. The application of health and safety laws is of particular concern. The problem is exemplified at Nike. The Nike D.C. has a JHSC as it must under the Occupational Health and Safety Act, ("OHSA"). Despite the fact that Associates make up a significant part of the D.C.'s workforce (at times there are as many as three times more Associates than Nike employees), the representation of the Associates on the committee is problematic. While it is true that the Manpower Rep. attends at least some JHSC meetings, there is no suggestion that Associates selected her in accordance with the OHSA. Nor is there any suggestion that they participated in the selection of any other worker representatives on the JHSC. In fact it appears that the Manpower Rep. is not on the JHSC all, but is just a special guest of sorts. The end result is that two thirds of the Nike D.C. workforce, and arguably the most vulnerable workers at that, have no effective health and safety representation.

62. Concerns also arise with respect to the Employment Standards Act (the "ESA") because for ESA purposes Nike takes the position it is not the employer of the Associates. For example, the ESA provides for expanded rights on termination in the case of a "mass termination". Those provisions are designed to assist employees who lose their employment in great numbers all at the same time. I have great doubts whether the Associates or Nike employees get the full benefit of these provisions.

63. There are similar problems under the Labour Relations Act. The presence of Associates in this workplace leads to all sorts of challenges to unions, issues which are highlighted by this case. The union is between the proverbial rocks and the shoals. If the Associates are employees of Nike then the Union must organize a larger workforce, the vast majority of which is not at Nike for very long and which changes frequently. While the effects of this may be eliminated by a determination of the bargaining unit to exclude agency employees, that solution leads to an outcome of significantly reduced bargaining power for the union in any collective agreement negotiations as it will not represent the majority of the workers doing essentially the same work as its members. The union faces the same problem, if as it argues, the Associates are determined to be Manpower's employees. If Manpower is the true employer then the Union, if certified, faces the task of negotiating a collective agreement with diminished bargaining power because the employer has a ready supply of non-bargaining unit workers who are easily able to do the work if employees go on strike.

The practical result for these employers under the current legislation is that they are insulated from their proper obligations and liabilities they owe to their employees under the Act by injecting an intermediary into the equation. The companies for which the labour is supplied are no longer "employers" of those that provide their labour, and these workers no longer have access to the protections of the Act as against that party. By adding the artificial interface of the labour supply company, these employers are subverting the application of the labour legislation to the detriment of the vulnerable workers. This is the main reason the Legislature should adapt and change the legislation to address the "true employee" issue. There is a significant level of abuse on the employer's side due to the form in which they engage their labour. The substance of the relationships have not changed, the client company is still, in most cases, the fundamental employer to the supplied employees. The form of being hired through a labour supply company should not be relied on to get around the responsibilities required by the legislation.

The legislative gap mentioned in *Pointe-Claire* was pointed out by the Supreme Court of Canada almost twenty years ago and has yet to be remedied by the Legislature. The current practice, as mentioned above in *Nike Canada*, is to identify one true employer unless there is an application under subsection 1(4) of the Act. The true employer law has evolved over the years, with the current test adopted by the Ontario Labour Relations Board in *Ontario Pipe Trades Council (UA) v BM Metals Services Inc,* 2012 CanLII 63784 (OLRB)(McKee). The Board undergoes a contextual assessment of the relationships between the parties to determine which entity, the labour supply agency or the client company, exercises the most control over all aspects of work of the employees in question. No single factor is determinative and there is no exhaustive list of relevant factors. What facts the Board will ultimately rely on and what weight each item will receive depends on each specific case. This leads to uncertainty in this area of law.

The single employer declaration pursuant to subsection 1(4) can only be used to remedy this situation when related activities are being conducted under common control and direction. The client companies specifically engage independent labour supply companies to insulate against being subject to this declaration. The instances where the Board will make a declaration under subsection 1(4) to remedy this type of issue are going to be limited.

The Board's decision of *United Food and Commercial Workers International Union (UFCW Canada) v PPG Canada Inc and/or Liberty Staffing Services Inc and The Staffing Edge* ("TSE"), 2009 CanLII 15058 (OLRB)(McLean) is a good example of the Board applying the current approach. The Union in the PPG case filed a certification application seeking to represent the employees of PPG working at its Cambridge plant. PPG is a producer of automotive glass. At its Cambridge plant, PPG engages the services of Liberty Staffing Services to staff 100% of its labour needs. Liberty and PPG have a written agreement for the supply of labour. To complicate the matters further, TSE, a human resources company, provides significant services to Liberty which it uses in relation to the workers engaged at PPG. Under the agreement between TSE and Liberty a clause states that all staff assigned to Liberty's customers will be the employees of TSE.

This case exhibits the classic tripartite relationship with an added layer of a fourth party, all of which are significantly involved in the labour activities occurring at PPG's Cambridge plant. The

Union's main arguments were the traditional arguments that the client should be the true employer or that all entities should be declared to be a single entity for labour relations purposed due to their interconnectedness at the Cambridge plant.

In PPG the Board first assessed the true employer issue. The Board's assessment of the factors determined that the parties equally shared the qualities of an employer. The Board reserved making a determination in this case on the true employer issue as it held that subsection 1(4) of the Act was a tool "which appears to eliminate the necessity of disentangling the identity of the "true" employer especially on an application for certification. S. 1(4) makes it clear that in certain circumstances there may be two or more entities which employ an employee."[1] In this case the entities were independently operating in the same plant. All entities, although independent, were found to nonetheless be under "common control and direction" as they all work towards the same objective in the same physical space. Liberty provided 100% of the labour at PPG's plant. Liberty and PPG are therefore co-existing and conducting the same work in the PPG plant. The Board held that this was enough to find them operating under "common control and direction" and to make a subsection 1(4) declaration. The subsection 1(4) declaration is not going to be useful in most cases that are brought before the Board. This case can be easily distinguished on its facts, making this remedy ineffective to address the tripartite relationship issue in most cases.

Since the shortcomings were identified in *Pointe-Claire*, the Board still uses inconsistent methods to artificially adapt a tripartite relationship into a bipartite relationship by either determining one of the two employer entities as the "true employer" or linking both employers together as related entities treated them as a single entity for labour relations purposes pursuant to subsection 1(4) of the Act.

The above noted cases illustrate the need for legislative intervention to ensure that vulnerable employees, like employees employed by temporary agencies, can have the real ability to exercise their statutory rights and to prevent such fundamental rights from being illusory for these workers.

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[1] PPG at para 97