Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1889-17-PS**

Canadian National Federation of Independent Unions (LIUNA Local 3000), Applicant v **Providence St. Joseph's and St. Michael's Healthcare**, Responding Party v Service Employees International Union, Local 2, Service Employees International Union, Local 1, Ontario Public Service Employees Union, Canadian Union of Public Employees, Local 1144, Canadian Union of Public Employees, Local 1590, and Ontario Nurses' Association, Intervenors

OLRB Case No: **1107-18-U**

Canadian Union of Public Employees, Applicant v **Providence St. Joseph's and St. Michael's Healthcare**, and Service Employees International Union Local 1 Canada, Responding Parties

OLRB Case No: **1352-18-PS**

Service Employees International Union, Local 1 Canada, Applicant v Canadian Union of Public Employees, and **Providence St. Joseph's and St. Michael's Healthcare**, Responding Parties v Ontario Public Service Employees Union, Intervenor

OLRB Case No: **1353-18-U**

Service Employees International Union, Local 1 Canada, Applicant v Canadian Union of Public Employees, and **Providence St. Joseph's and St. Michael's Healthcare**, Responding Parties v Ontario Public Service Employees Union, Intervenor

BEFORE: Paula Turtle, Vice-Chair

APPEARANCES: Mark Wright, Tracey Pinder, Deb Oldfield and Sharon Richer appearing on behalf of Canadian Union of Public Employees; Meg Atkinson, James Meades and Richard Saladziak appearing on behalf of Service Employees International Union, Local 1 Canada; Gerald Griffiths, Jeffrey A. Stewart, Mona Bratenescu and Arthur Bosua appearing on behalf of Providence St. Joseph's and St. Michael's Healthcare; Richard Blair appearing on behalf of Ontario Public Service Employees Union

DECISION OF THE BOARD: November 27, 2018

1. These applications are made under the *Public Sector Labour Relations Transition Act, 1997*, S.O. 1997, c.21, Schedule B ("the PSLRTA") and/or the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the LRA").

2. The correct name of the Responding Party is Providence St. Joseph's and St. Michael's Healthcare. That entity was formerly comprised of three separate hospitals. Some events in this application occurred before any declaration or agreement of the name of the successor employer such as, for example, the ratification by Providence Healthcare and St. Joseph's Hospital of the Central Issues Memorandum of Settlement ("the MOS"). For purposes of this application, the amalgamated entity will be referred to as "the Employer". Only where an action was specifically taken by one of the predecessor entities will that be noted by the Board.

3. Very generally, Board file 1107-18-U is an application under section 96 of the LRA by the Canadian Union of Public Employees ("CUPE"). CUPE alleges that the Employer has violated the Act by failing to implement the terms of the MOS and that Service Employees International Union Local 1 Canada ("SEIU") is supporting and encouraging those actions.

4. Also very generally, Board files 1352-18-PS and 1353-18-U are, respectively, applications filed under the PSLRTA and the LRA by SEIU. Those applications name the Employer and CUPE as responding parties.

5. All of the parties appeared before me on November 19, 2018 to argue a narrow issue that does not engage or involve SEIU's

allegations of misconduct. OPSEU appeared at the hearing represented by counsel and none of the parties objected to OPSEU's very limited participation in the arguments that day.

6. This matter came before me on the basis of the parties' agreement, after Arbitrator Michael Mitchell, on terms set out in his decision dated October 16, 2018 urged the parties to refer to the Board determination the issue of whether the provisions of the PSLRTA preclude or prohibit the implementation of the MOS by the Employer.

Background and agreed facts

7. Attached to this decision is an agreed statement of facts. The parties are not disputing those facts for the purposes of this determination. CUPE put before me several documents which, like the facts, were not disputed for the purpose of this hearing.

8. The parties' submissions were based on the language and purpose of the PSLRTA. Accordingly, while the facts were helpful to establish the context for the parties' submissions, they were not determinative of the issues before me. Based on the facts and the documents, the context can generally be summarized as follows:

a) Providence, St. Joseph's and St. Michael's Hospitals operated as separate hospitals in Toronto. On April 2017 they proposed an integration of services under the *Local Health System Integration Act, 2006*, S.O. 2006, c.4. The integration was subsequently approved by the Toronto Central LHIN and the Ministry of Health and Long-term Care and it took effect August 1, 2017;

b) Effective August 1, 2017 the separate hospitals became predecessor hospitals and Providence St. Joseph's and St. Michael's Healthcare ("the Employer") became the successor employer for the purposes of the PSLRTA;

c) SEIU did not agree that the PSLRTA applied to the amalgamation until May 7, 2018 and the Board by decision dated July 17, 2018 found that an integration had occurred on August 1, 2017. Pursuant to the PSLRTA, August 1, 2017 is the changeover date;

d) Central bargaining between CUPE-OCHU and the OHA began in June of 2017 and continued in the summer of 2017. On November 10, 2017 CUPE-OCHU and the OHA requested a "no board" report;

e) An application under the PSLRTA was filed by a union representing other employees of the Employer on October 27, 2017;

f) On April 22, 2018 CUPE-OCHU and the OHA agreed to and signed the Central Issues Memorandum of Settlement ("the MOS"). The MOS included retroactive wage increases for CUPE members;

g) The CUPE locals that represent bargaining units of the Employer ratified the MOS on May 23 and May 24, 2018, respectively;

h) The OHA communicated ratification of the MOS by participating Employers (including Providence and St. Joseph's) on May 31, 2018;

i) On June 9, 2018 Providence and St. Joseph's informed representatives of the two CUPE locals that they would not implement the terms of the MOS because the parties were "in the process of PSLRTA".

As noted above, the parties have asked me to determine whether the provisions of the PLSRTA preclude or prohibit the Employer's implementation of the MOS. The outstanding unfair labour practice applications are not relevant to this narrow issue and will be determined, if necessary, after this issue is decided.

9. The agreed statement of facts and the summary above refer to "central bargaining". Arbitrator Mitchell commented as follows about central bargaining in his October 16 decision:

> 41. … central bargaining in the hospital sector in Ontario is one of the most sophisticated and important central bargaining mechanisms in the province. There are central negotiations and local negotiations, central issues and local issues. Central bargaining has been in place in the hospital sector and between hospitals and CUPE for many years. Importantly it has been constructed over the years on a

> platform of voluntarism, unlike, for example, central bargaining in the education sector. I make this observation because of my sense that the parties in this proceeding were not seeking to undermine the integrity and efficacy of central bargaining.

For employers, central bargaining is conducted on behalf of multiple employers through the OHA.

10. Because of the way the PSLRTA operates, it is possible (as was the case here) that significant labour relations events will take place after the changeover date, but before it is agreed to or takes effect. In this case, central bargaining began in June of 2017, the PSLRTA application was filed in October of 2017, central bargaining continued after the filing of the PSLRTA application up to and including the settlement of the MOS on April 22, 2018 and the ratification process that was concluded in late May 2018. Two weeks after that, the employer advised that it would not implement the MOS. Now, the employer relies on the consequences arising from the changeover date of August 1, 2017 under the PSLRTA to assert that it cannot implement the MOS.

The statutory provisions

11. The parties focused their submissions on sections 15, 18 and 19.4 to 19.6 of the PSLRTA which are set out in full, below:

> **Collective agreements**
>
> 15 (1) The collective agreement, if any, that applies with respect to employees of a predecessor employer immediately before the changeover date continues to apply with respect to those employees who are employed by the successor employer on or after the changeover date and with respect to employees hired by the successor employer to replace such employees.
>
> **Expired agreements**
>
> (2) If no collective agreement is in operation immediately before the changeover date, the most recent collective agreement, if any, shall be deemed to be in effect from the changeover date for the purposes of this Act and subsection (1) applies with necessary modifications.

Status of successor employer

(3) The successor employer is bound by the collective agreement as if he, she or it had been a party to it. The successor employer shall be deemed to be the employer under the collective agreement.

New bargaining agents

(4) If a bargaining agent has bargaining rights under section 14 but there has never been a collective agreement between the bargaining agent and the predecessor employer that applied to employees in the like bargaining unit of the predecessor employer or after the changeover date a bargaining agent is certified or voluntarily recognized as the bargaining agent for a bargaining unit of the successor employer but there has never been a collective agreement between the bargaining agent and the successor employer, the following rules apply:

1. Before a collective agreement applying to the employees in the bargaining unit of the successor employer comes into effect, the employer shall not, without the consent of the bargaining agent, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the bargaining agent or the employees in the bargaining unit unless and until the right of the bargaining agent to represent the employees is terminated.

2. Before a collective agreement applying to the employees in the bargaining unit of the successor employer comes into effect, the bargaining agent shall not, without the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the bargaining agent or the employees in the bargaining unit.

(5) Repealed: 2006, c. 35, Sched. D, s. 10 (1).

Employees not in bargaining unit

(6) The terms and conditions of employment of an employee of the successor employer who is not in a bargaining unit are the terms and conditions of his or her

contract of employment, as it may be amended from time to time.

Termination of certain proceedings

18 (1) On the changeover date, the appointment of a conciliation officer under section 49 of the Fire Protection and Prevention Act, 1997, section 18 of the Labour Relations Act, 1995 or section 121 of the Police Services Act for the purpose of endeavouring to effect a collective agreement between a predecessor employer and a bargaining agent with respect to employees described in subsection 14 (1) is terminated.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 18 (1) of the Act is amended by striking out "section 121 of the Police Services Act" and substituting "section 172 of the Police Services Act, 2018".

No appointments

(2) No conciliation officer shall be appointed in respect of a dispute concerning a collective agreement for a bargaining unit on or after the changeover date unless the description of the bargaining unit is agreed upon by the employer and the bargaining agent under section 20 or the description of the bargaining unit is determined in an order under section 22.

Duty to bargain terminated

(3) No bargaining agent is under an obligation to bargain as a result of a notice to bargain given by a predecessor employer and no successor employer is under an obligation to bargain as a result of a notice to bargain given to a predecessor employer.

No notice to bargain to be given

(4) No bargaining agent or employer shall give notice to bargain for a collective agreement for a bargaining unit under section 47 of the Fire Protection and Prevention Act, 1997 or section 16 or 59 of the Labour Relations Act, 1995 on or after the changeover date unless the description of the bargaining unit is agreed upon by the employer and the

bargaining agent under section 20 or the description of the bargaining unit is determined in an order under section 22.

Same, interest arbitrations

(5) On the changeover date, interest arbitrations in which a final decision has not been issued are terminated in relation to a predecessor or successor employer.

Conciliation officer

19.4 (1) Subsections 18 (1) and (2) apply to a partial integration in accordance with this section.

Existing appointment

(2) Where a conciliation officer has been appointed under section 49 of the Fire Protection and Prevention Act, 1997, section 18 of the Labour Relations Act, 1995 or section 121 of the Police Services Act for the purpose of endeavouring to effect a collective agreement between a predecessor employer and a bargaining agent that has bargaining rights in respect of a predecessor bargaining unit or a non-affected bargaining unit, the appointment continues to be valid on the changeover date with respect to those parties.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 19.4 (2) of the Act is amended by striking out "section 121 of the Police Services Act" and substituting "section 172 of the Police Services Act, 2018".

Same – successor employer

(3) A conciliation officer described in subsection (2) has no status with respect to a successor employer and a bargaining agent that has bargaining rights in respect of a successor bargaining unit and his or her appointment shall not be interpreted as giving him or her the authority to endeavour to effect a collective agreement between those parties.

No appointment

(4) Subsection 18 (2) applies, with necessary modifications, with respect to a successor bargaining unit

and no conciliation officer shall be appointed in respect of a dispute concerning a collective agreement for a successor bargaining unit on or after the changeover date unless the conditions described in subsection 18 (2) are satisfied.

Duty to bargain

19.5 (1) Subsections 18 (3) and (4) apply to a partial integration in accordance with this section.

Existing notice to bargain

(2) If, before the changeover date, a notice to bargain had been given by either of a predecessor employer or a bargaining agent that had bargaining rights in respect of a predecessor bargaining unit or a non-affected bargaining unit to the other, the notice continues to be valid between those parties on the changeover date.

Same – successor employer

(3) A notice to bargain described in subsection (2) does not apply with respect to a successor employer and the bargaining agent that has bargaining rights in respect of a successor bargaining unit and neither of those parties is under an obligation to bargain as a result of the notice.

New notice to bargain – predecessor employer

(4) Subsection 18 (4) does not apply with respect to a predecessor employer and a bargaining agent that has bargaining rights in respect of a predecessor bargaining unit or non-affected bargaining unit and either of those parties may give notice to bargain for a collective agreement on or after the changeover date if entitled to do so under section 47 of the Fire Protection and Prevention Act, 1997 or under section 16 or 59 of the Labour Relations Act, 1995.

Same – successor employer

(5) Subsection 18 (4) applies, with necessary modifications, with respect to a successor employer and a bargaining agent that has bargaining rights in respect of a successor bargaining unit and neither of those parties shall give notice to bargain for a collective agreement unless the conditions described in subsection 18 (4) are satisfied.

Interest arbitrations

19.6 (1) Subsection 18 (5) applies to a partial integration in accordance with this section.

Existing arbitrations

(2) Subsection 18 (5) does not apply with respect to a predecessor employer and a bargaining agent that has bargaining rights in respect of a predecessor bargaining unit or non-affected bargaining unit and interest arbitrations in relation to those parties in which a final decision was not issued before the changeover date continue on and after the changeover date unless the arbitrations are otherwise lawfully terminated.

Same – further submissions

(3) With respect to interest arbitrations described in subsection (2) in which the parties are a predecessor employer and a bargaining agent that has bargaining rights in respect of a predecessor bargaining unit, the arbitrator or arbitration board shall not issue a final decision without giving those parties full opportunity to make further submissions that address the partial integration, regardless of whether the time in which parties were permitted to present evidence and make submissions in the arbitrations has passed.

Procedure

(4) An arbitrator or arbitration board shall determine its own procedure for the purposes of subsection (3).

Arbitrations – successor employer

(5) Interest arbitrations in relation to a predecessor employer and a bargaining agent that has bargaining rights in respect of a predecessor bargaining unit in which a final decision was not issued before the changeover date do not apply in relation to a successor employer and a bargaining agent that has bargaining rights in respect of a successor bargaining unit and the previous appointment of an arbitrator or arbitration board shall not be interpreted as giving it the authority to make a decision respecting the successor employer and bargaining unit.

Also set out below are the notice to bargain provisions of the Labour Relations Act:

> …
>
> **Early termination of collective agreements**
>
> (3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.
>
> …
>
> **Notice of desire to bargain for new collective agreement**
>
> 59 (1) Either party to a collective agreement may, within the period of 90 days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

The parties' positions

CUPE

12. CUPE acknowledged that section 18 of the PSLRTA affects the normal course of bargaining after the changeover date, as follows:

a) Section 18(1) terminates the appointment of a conciliation officer already appointed;

b) Section 18(2) provides that no conciliation officer will be appointed;

c) Section 18(3) provides that successor employers are not "under an obligation" to bargain as a result of a notice to bargain issued to their predecessors;

d) Section 18(4) prohibits the issuance of notice to bargain to successor employers; and

e) Section 18(5) terminates interest arbitrations in which a final decision has not been issued.

13. CUPE argued that, unlike section 18(3), the other four subsections of section 18 prohibit certain things, either by terminating a pre-existing process (as in subsection (1) for a conciliation officer already appointed or in subsection (5) for an interest arbitration commenced but not concluded) or by prohibiting new procedures (as in subsections (2) and (4) for appointment of a conciliation officer or issuance of notice to bargain).

14. Subsection (3), which addresses notice to bargain that has already issued to a predecessor employer, does not expressly terminate the bargaining process. It provides that "no successor employer is under an obligation to bargain". This has the effect of nullifying the notice to bargain, which means an employer is not required to bargain in good faith and make every reasonable effort to make a collective agreement. However, it does not prevent an employer from agreeing to bargain. CUPE argues that section 18(3) is a permissive provision that entitles successor employers to bargain where notice has been given to their predecessor, but it does not compel them to do so.

15. CUPE argues that if the legislature intended to prohibit bargaining between a predecessor union and successor employer, it would have used more direct language to achieve that result.

16. CUPE argues that, having chosen to engage in collective bargaining as it is permitted to do by section 18(3), and by negotiating and ratifying a collective agreement, the Employer may not refuse to implement it.

17. CUPE disputes the Employer's position that sections 15(1) and (2) prohibit the implementation of new terms of employment. Its arguments are set out below.

The Employer

18. The Employer argues that sections 15(1) and (2) of the PSLRTA prohibit it from implementing the MOS, and that section 18 suspends notice to bargain, if it has been given. The Employer relies heavily on what it says is the intent and the language of section 15.

19. The Employer argues that sections 15(1) and (2) must be interpreted consistently with the purpose of the PSLRTA, which applies in the midst of significant organizational and related changes. In the context of that restructuring, the affected employees must often choose between two or more bargaining agents which one will represent them in the restructured workplace. One of the purposes of the PSLRTA (sometimes referred to as "the third purpose") is to facilitate collective bargaining between employers and unions that are the freely-designated bargaining agents of the affected employees.

20. The Employer notes that in most cases employees will determine their bargaining agent through a representation vote. To ensure the decision is made freely, there must be a level playing field between competing unions, and it would be contrary to the third purpose for one union to have an unfair advantage over another.

21. The Employer argues that by concluding the MOS but not implementing it (and by not conducting local negotiations with CUPE or with SEIU) it is levelling the playing field and facilitating the free designation of bargaining agents.

22. The Employer argues that its position is supported by the language of sections 15(1) and (2), which provide that the current or expired collective agreement "continues to apply" after the changeover date. It says this language means that the collective agreements in place on the changeover date continue to operate with "no room to amend them". The Employer points out that the language of section 15 is more restrictive than the language of the statutory freeze in section 86 of the LRA, which permits the parties to agree to change terms of employment. Under the employer's interpretation of sections 15(1) and (2), the parties are not permitted to change terms of employment, even if they agree to do so.

23. The Employer relies on the language of subsections 15(4) and (6) to argue that where the legislature intended to permit changes to terms of employment - for bargaining agents who have not yet negotiated a collective agreement and for employees not in a bargaining unit, under subsections (4) and (6) respectively - it expressly authorizes those changes.

24. The Employer referred to Board decisions which order sharing of employee contact information equally to unions in a representation vote. The Board has explained such orders by holding that if employees' contact information were not shared equally among

employees, the larger bargaining agent would have an inherent advantage in a vote.

25. For the same reasons the Board has held that all affected unions should have access to the same employee contact information in a representation vote conducted under the PSLRTA, the Employer says the freeze imposed by section 15 ensures the employer is not able to signal its preference for one union over the other.

26. The Employer argued that by providing in section 18(3) that successors are not under an obligation to bargain, and in 18(4) that no bargaining agent can give notice to bargain, any unfair advantage is eliminated and that labour relations stability is maintained during the transition.

27. It compared section 18 with sections 19.4 to 19.6 which apply to employees who are unaffected by a partial integration and do not have to vote on which union they want to represent them. Those sections provide with respect to employees unaffected by the health services integration that the appointment of a conciliation officer continues to be valid; notice to bargain continues to be valid; notice to bargain may be given and interest arbitrations continue.

28. The Employer argued that the fact that the PLSRTA expressly permits bargaining to continue in these situations, and not for units affected by the PSLRTA application, prevents changes to conditions of employment pending the final determination of what are the bargaining units and who is the bargaining agent. The Employer relies on the language difference to argue that if the law wanted bargaining to continue, it would say so.

CUPE's section 15 arguments

29. CUPE argued that section 15 does not require that the terms that existed before the changeover must be maintained (or, in this case, that the terms of MOS cannot be implemented):

> a) Section 15 provides that the collective agreement that applied to the predecessor's employees continues to apply to the successor's employees, which ensures continuity of conditions of employment for the affected employees and some certainty for the parties. If the law intended to

freeze terms of employment, it would use different language, i.e. that the *terms and conditions of employment* in place on the changeover date cannot be changed, as the LRA provides in section 86. Instead, section 15 says the *collective agreement* applies, and it does not limit the parties' rights to do things in the normal course that may change employees' entitlements under the agreement, such as arbitrating disputes about the language, or amending or renewing the language. A collective agreement is not a static document, says CUPE;

b) If section 15 imposes a freeze, this is inconsistent with the language of section 18(3) which permits bargaining to continue;

c) The imposition of a freeze is also inconsistent with the purpose of section 15(1), which is to preserve the pre-existing bargaining structures and thereby ensure a level of stability and protection for employees in an environment that is in a state of flux. CUPE argues that by continuing the structures of preexisting bargaining units and allowing employees to benefit from ongoing collective bargaining, the objectives of the PSLRTA are advanced. The consequences associated with the changeover date are dramatic and unfair if the changeover date imposes an absolute freeze. For example, a collective agreement ratified one day before the changeover date is effective and implemented, but if ratified one day after the changeover date the changes are not given effect. The PSLRTA must be interpreted to avoid this unfairness, which CUPE describes as an absurdity;

d) In this case, the Employer's refusal to implement the MOS deprives many employees of the benefit of central bargaining, which the parties voluntarily participated in. In these circumstances, reading section 15 to prohibit implementation of a deal undermines the voluntary bargaining permitted under section 18(3). If the Act intended bargaining to continue under section 18(3) but for the

> Employer to announce after ratification that it would not implement the terms agreed to, it must be expressed more clearly;
>
> e) The Employer's interpretation promotes labour relations mischief by allowing parties to ratify a deal and then permitting an employer to refuse to implement it.

Analysis

30. The parties urged me to rely on different principles of statutory interpretation. I have considered them all, but ultimately, I am guided in my interpretation of the statute by the following principles set out at paragraph 21 of *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, 1998 CanLII 837 (SCC):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

31. Although the parties agreed that the integration and therefore the changeover date occurred before many of the important background events, none of the parties argued about the implications of these factors. Furthermore no one argued before me that the fact that the MOS was negotiated at central bargaining and only related to central issues, had any bearing on my determination. Accordingly, I have not considered either of those issues in coming to my decision.

32. I find that, subject to section 18, the PSLRTA does not prohibit the continuation of bargaining after the changeover date, and it would frustrate the purpose of section 18 if an employer could refuse to implement the negotiated amendments. Where the PSLRTA intends to change the normal course of labour relations in the interest of stability, the language is clear.

33. I also find that the purpose of section 15 is to ensure the continuation of the collective agreement that applied to the predecessor's employees, pending final determination of the bargaining agent(s) and the collective agreement(s), and as CUPE observed, collective agreements are not static documents and they

may be changed in accordance with the LRA. It cannot be the case that in the face of a labour relations regime that permits the parties to negotiate that section 15 is intended to undermine their agreement by permitting an Employer to bargain but not implement terms it has agreed to.

34. For the reasons given below, I find that the PLSRTA does not preclude or prohibit the implementation of the MOS.

Section 18 does not prohibit bargaining in some cases

35. I do not disagree with the Employer that the PSLRTA process is designed to provide labour relations stability to the parties and to ensure as much as possible a level playing field, but these objectives do not justify interpreting the PSLRTA to interfere with the normal course of labour relations and prevent bargaining or changes to the collective agreements that are in place at the changeover date.

36. A PSLRTA application can occur at any time in the cycle of collective bargaining. It may take time (as this case demonstrates) for the parties and/or the Board to determine the issues necessary to a final resolution, including who will be the bargaining agent and what the terms of employment will be for employees in the new bargaining unit. Because there may be many collective agreements affected by a single application at different stages in the collective bargaining cycle, the PSLRTA affixes consequences triggered by the changeover date to events associated with collective agreements and bargaining.

37. Section 18 achieves a balance by permitting the parties to voluntarily continue collective bargaining, while prohibiting either party from triggering changes that would be too disruptive. For example, the first step that may lead to interest arbitration under the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c.H.14 ("HLDAA") is terminated (the appointment of a conciliation officer under section 18(1)) so that interest arbitration cannot occur or continue after the changeover date.

38. Especially under the PSLRTA where there may be several collective agreements covered by an application, it could be just as disruptive (if not more disruptive) to the parties affected by the application to be constrained by an inflexible freeze, as the Employer

argues here. Accordingly, I find that section 18 does not preclude collective bargaining activity in some circumstances.

39. A careful reading of section 18 shows that the legislature has prohibited some but not all collective bargaining activity after the changeover date.

40. The issuance of notice to bargain requires the parties to bargain in good faith and make every reasonable effort to make a collective agreement. But nothing prohibits an employer and a union from negotiating or amending a collective agreement at any time. The parties can amend a collective agreement at any time under section 58(5) of the LRA, for example and they can amend a collective agreement when notice to bargain has been given, and a statute (such as section 18(3)), nullifies its effect.

41. The effect of both subsections (3) and (4) is that, regardless of whether notice to bargain was given before or after the changeover date, the successor employer cannot be compelled to bargain but it may voluntarily do so. This interpretation puts all of the bargaining agents affected by an integration on equal footing by eliminating an artificial distinction between unions that gave notice to bargain before the changeover date, and unions that did not do so. As noted above, the changeover date is often not determined or agreed to until long after it has occurred.

42. Sections 18(3) and (4) do not prohibit the continuation of or the commencement of collective bargaining, subject to the important limitation that employers cannot be compelled to bargain.

43. Sections 19.4 and 19.5 provide that the conciliation process and the validity of notice to bargain continue for employees who are unaffected by a restructuring. This, the Employer says, supports its position that the legislation intended that bargaining in the normal course continues for employees unaffected by an integration, but not where a competition for bargaining rights is at issue. These provisions are not relevant to the interpretation of section 18(3). Rather, they reflect that differently situated employees are treated differently under the PSLRTA.

44. When bargaining is voluntary, an employer has considerable power and flexibility about whether, and how, bargaining will occur after the changeover date. This is understandable, given the disruption

typically associated with an amalgamation. It means that the employer can choose not to bargain where, in its view, the disruption or cost of bargaining outweighs the benefits. The employer may choose not to bargain where there is uncertainty about the future configuration of bargaining units, or it may bargain on condition that implementation of an agreement would be deferred.

45. Where central collective bargaining has occurred, as in this case, the employer may choose to continue to bargain because the cost of disrupting the central bargaining system outweighs the harm to continuing it. However, the PSLRTA does not entitle it to make that choice and then refuse to implement the agreement.

46. In response to a question from the Board the Employer agreed that there may be circumstances where bargaining can continue under section 18(3), provided one party is not put into a position where they have "superior rights". The Employer then questioned why an employer would bargain where there is going to be a new bargaining structure and a new bargaining agent. But these factors are relevant to the employer's decision about whether to bargain or how to bargain, and not to whether bargaining (or the implementation of terms) is prohibited by the PSLRTA.

47. Section 18(3) did not prohibit bargaining from continuing in this case beyond the changeover date. Having voluntarily negotiated a collective agreement with CUPE without qualification, it would be inconsistent with that right for the Employer to rely on the PSLRTA to refuse to implement the agreement.

Section 15 does not preclude implementation of the MOS

48. The Employer argued that the Board must interpret section 15 to achieve a "level playing field" in PSLRTA applications, and that prohibiting negotiated changes is consistent with this objective. In my view the Board must be cautious about allowing this objective to inform its interpretation of substantive provisions of the Act (as opposed to ensuring that competing unions have the same access to employees in votes, for example) because the "level playing field" goal is somewhat illusory. Many issues affecting the choices employees must make pursuant to a PSLRTA application, like the relative bargaining power of competing unions, for example, are reflected in the often-historic terms of collective agreements and are out of the parties' (and the Board's) hands. Furthermore, if as the Employer argues here, parties are prohibited from implementing agreed to

changes, this may lead to an unfair result depending on where in the bargaining cycle of affected unions a changeover date occurs: if the changeover date freezes everything, a union that has just concluded bargaining and had the new terms implemented will likely be in a better position to make a case for its bargaining skill than a union whose collective agreement is near the end of its term and has not yet begun bargaining. I raise these points to illustrate that for the Board to place too high a value on achieving a level playing field, given these kinds of variables, is potentially complex. At the very least, it should cause the Board to be cautious about interpreting the PSLRTA to achieve a "level playing field" by preventing the parties from engaging in the normal course of labour relations.

49. To be clear, I agree with the Employer that an employer bargaining in the shadow of a PSLRTA application who seeks to manipulate or influence the free choice of employees by demonstrating a preference for one union over another will be violating the LRA and/or the PSLRTA. But the obligation to not prefer one union over the other can be enforced under sections 70, 72 and/or 76 of the LRA and not by freezing terms of employment that have been properly negotiated. The fact that there exist other mechanisms for ensuring a level playing field in this context further reinforces my view that it should not inform my interpretation of section 15.

50. In any event, the language of section 15 does not support the Employer's argument that its purpose is to achieve a level playing field. Sections 15(4) and (6) expressly permit changes to terms of employment, while sections 15(1) and (2) do not. If sections 15(1) and (2) mean that the agreements covered by those sections cannot be changed, while at the same time sections 15(4) and (6) expressly permit changes to terms of employment, the basis for the policy argument that the Employer urges on me does not exist. If sections 15(1) and (2) prevent negotiated changes from being implemented, the effect of the Employer's interpretation is that parties covered by sections 15(4) and (6) – including a newly certified bargaining agent - could agree to significant wage increases in the lead up to a vote under the PSLRTA and thereby undermine the level playing field the Employer says should inform my interpretation of this section of the PSLRTA.

51. I reject the Employer's argument that the absence of language in subsections 15(1) and (2) permitting changes to terms of employment (compared to subsections 15(4) and (6) which expressly

permit changes) means that changes cannot occur in the circumstances covered by sections 15(1) and (2). It means that it is implicit in the language of (1) and (2) and the "continuation" of collective agreements that changes can occur, so it would have been superfluous to have said so.

52. The Board held in *Children's Hospital of Eastern Ontario v. Ontario Nurses' Assn.,* 2004 CanLII 25190 (ON LRB) the purpose of section 15 is not to create a level playing field, but to resolve a conflict that arises on the changeover date when the successor employer may in cases like this one find itself bound by two collective agreements, i.e. the predecessor's collective agreement and an overlapping collective agreement to which it is party with a different union. Until the Board or the parties have settled which bargaining agent and which collective agreement apply, section 15(1) and (2) require the successor employer to apply the predecessor's collective agreement to the employees who are now the successor's employees by virtue of the integration.

53. The Employer argues that the plain language of section 15 prevents any changes to the terms of employment that exist as of the changeover date and the "terms and conditions that applied immediately before the changeover date remain in place". For that reason there is no room, says the Employer, to amend the collective agreement after the changeover date, including implementing the MOS. This analysis of section 15 is at the core of the Employer's argument.

54. If the legislature intended to freeze the terms of employment in place on the changeover date, it would have used clear language to achieve this result. In accordance with the LRA, the collective agreement that continues to apply under section 15 may be interpreted at arbitration and it can be amended by the parties. The continuation of the agreement, by the very words of the PSLRTA and scheme of the LRA, implies that the language and/or the meaning of the language may change by negotiation or interpretation. If section 15 were intended to restrict those important rights it would say so.

55. The Employer's interpretation of section 15 in my view could lead to adverse consequences. If labour relations were essentially stalled after the changeover date, especially where (as here), the Employer argues that section 15 imposes an absolute freeze on conditions of employment which is not capable of amendment by

agreement of the parties (as it is under section 86 of the LRA), this may well be more disruptive than permitting labour relations to continue in accordance with the LRA, including the Employer's obligation not to prefer one bargaining agent over another.

56. Here the Employer seeks to be selective about what will continue (for example negotiations and ratification) and what will not (implementation of the agreement). I agree with CUPE that it would cause labour relations mischief to permit the Employer to negotiate, conclude an agreement and ratify it in accordance with the well-established structure of central bargaining – and in the absence of any qualification about the Employer's continued participation in in central bargaining – if the Employer were entitled to undo the deal after both parties have ratified it.

Disposition

57. I find and declare that the PSLRTA does not preclude or prohibit the implementation of the MOS.

"Paula Turtle"
for the Board