2018 CarswellOnt 13157
Ontario Arbitration

Hilltop Manor Cambridge and SEIU, Local 1 (Rai Coordinator), Re

2018 CarswellOnt 13157, 137 C.L.A.S. 21, 295 L.A.C. (4th) 17

IN THE MATTER OF AN ARBITRATION Under the Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

HILLTOP MANOR CAMBRIDGE (the "Employer") and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA (the "Union" or "SEIU") and ONTARIO NURSES' ASSOCIATION (the "Intervenor" or "ONA")

Gordon F. Luborsky Member

Heard: July 5, 2017; June 5, July 3, 2018
Judgment: August 1, 2018
Docket: None given.

Counsel: Aleisha Stevens, for Union
Michael C. Allen, for Employer
Alison Dover, for Intervenor

Subject: Public; Labour

Headnote

Labour and employment law --- Labour law — Labour arbitrations — Limits to arbitrability — Mootness

MOTION by employer to dismiss union's two policy grievances on grounds of mootness.

***Gordon F. Luborsky Member*:**

Introduction

1 This is the second award of a preliminary nature between the parties concerning two policy grievances filed by the SEIU alleging that the Employer violated the collective agreement when it failed to assign duties related to the coordination of a "Resident Assessment Instrument", referred to as "RAI", to members of the SEIU for purposes of documenting residents' ongoing care at the Employer's facility that is required for planning and funding purposes.

2 The Employer initially assigned these tasks to excluded members of management under the title, "Health Informatics and Education Manager". However after the Union's grievances were filed in 2009 and 2016, the Employer reassigned this work (or substantial portions thereof) effective July 1, 2017 to two registered nurses who are members of the Ontario Nurses' Association ("ONA"). As a result of this reassignment, the Employer claims that the Union's grievances before me are now "moot".

3 This interim award is therefore limited to the consideration of the Employer's motion to dismiss the Union's two grievances on the grounds of mootness.

Decision

4 For the reasons that follow I conclude that in spite of a change in circumstances the essential matter in dispute is not moot but rather is a live controversy between the parties and therefore I must deny the Employer's motion to summarily dismiss the grievances on that basis.

Background Circumstances

5 In my first preliminary award dated June 4, 2018 arising out of written pre-hearing representations of the Employer, SEIU and ONA (reported as *Hilltop Manor Cambridge and SEIU, Local 1 (Rai Coordinator), Re*, 2018 CarswellOnt 8971 (Ont. Arb.) (Luborsky), I determined that the participation of ONA as an interested party in these proceedings was conditional on its agreement to be bound by the decision on the merits of the grievances and its undertaking to pay its proportionate share of the costs of the arbitration.

6 At the first day of oral hearings in this case held on June 5, 2018, ONA unequivocally agreed to be bound by the arbitration award and to pay its proportionate share of the costs of these proceedings, as later assessed. With the agreement of the parties the style of cause of these proceedings was accordingly amended to include the Ontario Nurses' Association as Intervenor with full party status.

7 I also heard testimony at that time from Ms. Andrea Brissette, who is the Vice President of Operations for the company managing the Employer's facility (identified as "peopleCare Inc."). Ms. Brissette was presented by the Employer (and subjected to cross-examination by ONA and SEIU) for the purpose of supporting the Employer's motion to dismiss the SEIU's grievances on the grounds of mootness. That evidence along with agreed facts and documents relevant to the Employer's motion may be summarized as follows.

8 The Employer operates a Long Term Care ("LTC") home located in Cambridge, Ontario. Like many homes of this nature, it is unionized with a bargaining unit of registered nurses ("RNs") organized by ONA, and a support bargaining unit represented by the SEIU, consisting of registered practical nurses ("RPNs"), personal support workers, activation, physiotherapy, dietary and laundry aids, among other classifications that assist elderly and infirmed residents with activities of daily living.

9 In or about 2005, the Ontario government directed all LTC facilities to implement a then new computerized software tool called, Resident Assessment Instrument - Minimum Data Set ("RAI-MDS"), to collect information considered necessary to guide care-planning for residents. In utilizing this software at the home, all registered staff and other members of an interdisciplinary team including dieticians, pharmacists, physiotherapists and physicians, make entries via the RAI tool on a regular basis that records their observations and treatments rendered to each resident, which is collated and remitted every three months to a data collection agency called the Canadian Institute of Health Information ("CIHI") for eventual transmission to the Ontario Ministry of Health and Long Term Care ("MOHLTC"). The MOHLTC requires each home to appoint at least one person to coordinate this labour intensive activity so that the required information is received in a timely manner. Such individuals are generically known as "RAI Coordinators".

10 At some homes this work has been assigned to RPNs within the support bargaining units (often SEIU), while at others it is a duty of RNs within the ONA bargaining unit; and elsewhere, employers have designated excluded members of management to perform this function. The SEIU has taken the position that this work belongs to its members in workplaces where the SEIU has bargaining rights, and thus it has been challenging the assignment of RAI Coordinator work to any unionized or non-unionized employees outside of its bargaining unit at LTC facilities throughout the province of Ontario.

11 In or about the late spring of 2009, the Employer in the present case created a new position that it referred to as "Health Informatics and Education Manager". The June 2009 job posting for this position lists among its requirements that the applicant possess a "current registration with respective licensed College in Ontario" and have "demonstrated leadership ability to manage, organize and direct work in all disciplines using RAI". At the time of the job posting, Ms. Vicki Cook was an RPN who held the second highest seniority in the SEIU bargaining unit with a seniority date of September 20, 2002. She had been effectively performing the functions of an RAI Coordinator as well as other RPN duties and was the successful applicant for the new, purportedly non-unionized position.

12 The Union submitted a timely policy grievance on the matter, claiming that work exclusively for the SEIU bargaining unit. Although the parties did not file a copy of the Union's 2009 grievance, I understood it was substantially identical to its subsequent policy grievance dated June 9, 2016 which states: "The Union grieves Management has violated Article 2.01 and 11.01 by not posting and including the RAI position in the bargaining unit." The remedy requested is: "The position to be posed in the bargaining unit, dues deducted and that the Employer should negotiate the rate of pay with the Union".

13 Article 11.05 of the SEIU collective agreement (reproduced below) provides a "trial period" of 337 $^{1}/_{2}$ hours for employees changing positions (inside or outside of the SEIU bargaining unit) that may be extended up to an additional 112 $^{1}/_{2}$ hours, within which an employee may be returned to his or her former position without loss of seniority. The Union put the Employer on notice by e-mail dated July 7, 2010 it was taking the position that, "Vicki Cook is extending the trial period under art. 11.05 until such grievance is resolved [and that] all seniority and service she has accrued and will accrue in this [new] position goes with her into the SEIU bargaining unit should she return." This e-mail also stated that in the event the Union lost the grievance, that Ms. Cook asserted the right to either continue in the new position or return to her previous position as an RPN in the SEIU bargaining unit, "with all seniority and service accrued."

14 The parties agreed to hold the 2009 policy grievance in abeyance pending a decision on the question of the SEIU's claim for RAI Coordinator work at another LTC home that was being heard by Arbitrator Russell Goodfellow at a Leisureworld facility which the SEIU saw as a "test case". The SEIU was ultimately successful on the matter in the February 1, 2013 decision of *Leisureworld Caregiving Centres and SEIU, Local 1 (Exclusion of RAI Coordinators), Re*, 2013 CarswellOnt 981 (Ont. Arb.), CanLII 3822 (Goodfellow). Nevertheless the parties were unable to resolve their 2009 policy grievance on the basis of the decision in the *Leisureworld* award, which consequently resulted in the Union's second policy grievance dated June 9, 2016 and my later appointment as arbitrator to determine both grievances.

15 During that interval and afterwards, Ms. Cook continued performing the RAI Coordinator duties and was joined in or about 2015 by Ms. Angel Roth who was replaced by Mr. Jeffery Wilson, both being RPNs. By that time the size of the Employer's LTC facility had grown from 88 to 185 beds, and consequently the Employer decided it needed a second RAI Coordinator. Mr. Wilson was hired as a "Director of Resident Quality Outcomes", which was renamed from the former, "Health Informatics and Education Manger" but still performing RAI Coordinator functions (and was the title of Ms. Cook's position as of that change as well). The job description for this position summarizes the main duties and responsibilities as follows:

> As a member of the peopleCare Management Team, this position is directly responsible for the management and leadership of all RAI-MDS Assessment and outcome data, and the multidisciplinary documentation practices in the home. This person must be a currently certified RN or RPN with 3 years of related experience. You are a self-motivated individual who possesses effective communication, analytical, and assessment and leadership skills and independent decision-making abilities. High level computer competency is a requirement. The successful candidate possesses a valid Certificate of Registration from the College of Nurses of Ontario. Experience in a long term care residence is preferred.

16 The job description also notes that the Director of Resident Quality Outcomes reports to the "Director of Resident Care" which in turn reports to the Executive Director of the home. In or about May of 2017, Ms. Cook began filling a temporary vacancy for one of two Director of Resident Care ("DORC") positions. On June 2, 2017 Ms. Cook was offered and accepted that role on a permanent basis, which was to take effect on July 1, 2017. The second DORC position was also vacant at that time, which Mr. Wilson was offered and accepted to begin at or about July 1, 2017 as well. (Mr. Wilson later moved to a different LTC home performing in a similar role that is not immediately relevant).

17 The Employer consequently knew by the first week of June 2017 that it needed to fill two positions for RAI Coordinators to replace Ms. Cook and Mr. Wilson who were considered members of management at the time. Instead of

posting for the position the Employer decided to restructure its operations by reassigning the RAI Coordinator tasks to two registered nurses who had been working as charge nurses (i.e. overseeing different areas of the home in the absence of senior management typically between 6 p.m. and 6 a.m.), and as such were members of the ONA bargaining unit.

18 Thus, as of July 1, 2017, these two RNs who were identified as Ms. Amy Johnston and Ms. Sharon Turner have taken over the RAI Coordinator functions, along with continuing certain responsibilities as RNs while relinquishing their roles as charge nurses for different areas of the home. No employees in the SEIU bargaining unit as of July 1, 2017 were laid off or had their hours reduced as a result of the assignment of the RAI Coordinator work to these two RNs. Rather, as part of the workforce reorganization, the Employer has hired two new RPNs who are members of the SEIU bargaining unit to replace the functions that Ms. Johnston and Ms. Turner performed in their charge nurse capacities. Consequently, the size of the SEIU bargaining unit has increased by at least two individuals as a result of the reorganization.

19 Meanwhile, the arbitration to hear the SEIU's 2009 and 2016 policy grievances that was scheduled to begin on July 6, 2017, was adjourned to receive the parties' submissions on the terms of ONA's participation in the instant arbitration proceedings, which was decided by my preliminary award dated June 4, 2018.

20 It is in the foregoing context that the Employer now brings its motion to dismiss the policy grievances because they are claimed to be moot in the face of the most recent reassignment of the RAI Coordinator duties to the RN members of the ONA bargaining unit. At the outset of the hearing held on June 5, 2018, Employer counsel stated that if the Employer violated the collective agreement by originally allocating the RAI Coordinator functions to managerial positions outside of the SEIU bargaining unit, which was not admitted, then given the change in circumstances since the filing of those grievance, the extent of the Employer's liability would be limited to unpaid Union dues for the period that Ms. Cook, Ms. Roth and Mr. Wilson were performing as either Health Informatics and Education Managers or as Directors of Resident Quality Outcomes from on or about August 1, 2009 until July 1, 2017.

21 Thus on that hypothetical premise, the Employer offered to pay the full dues contribution that the SEIU would otherwise have received from the Employer had those individuals been recognized as members of the SEIU bargaining unit throughout that almost eight-year period on a "without prejudice" basis. Since Ms. Cook is now employed in a senior management role and Mr. Wilson left the home to accept a management position in another LTC facility, the Employer claimed there was no further remedy available to the Union aside from a declaration that the Employer violated the collective agreement (which the Employer did not concede) that would have no practical effect even if the Employer had been incorrect in its assignment of the RAI Coordinator functions to employees outside of the SEIU bargaining unit. As such, the Employer submitted the two SEIU policy grievances before me should be dismissed because the controversy between the parties had, by the intervention of events after the filing of those grievances, been rendered moot.

Relevant Contractual Provisions

22 The parties filed the collective agreements between SEIU and the Employer in effect at the time of the 2009 and 2016 grievances to the present date, which appear to have identical contractual provisions related to the matters in dispute. Those provisions (taken from the SEIU collective agreement in effect from September 22, 2016 to September 21, 2019) are reproduced in relevant part below:

> **ARTICLE 2 - SCOPE AND RECOGNITION**
>
> 2.01 The Employer recognizes the Union as the sole collective bargaining agent for all its employees in its nursing home at Hilltop Manor in Cambridge, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.
>
> . . .

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 The Union agrees that all rights, prerogatives and authority the Employer had prior to signing the first Agreement are retained by the Employer except those specifically abridged, delegated, granted or notified by this or any supplementary Agreements that may be made in the future, and without limiting the generality of the foregoing, it is the exclusive function of the Employer to:

. . .

(c) select, hire, transfer, assign to shifts, promote, demote, classify, lay off, recall or retire employees and select employees for positions excluded from the bargaining unit;

. . .

. . .

3.02 The Employer agrees that it will not exercise its functions in Article 3 Management Rights, in a manner inconsistent with the express provisions of this Agreement.

ARTICLE 11 - JOB POSTING

11.01 In the event new jobs are created or vacancies occur in existing job classifications including new positions created for a specific term or task (unless the Employer notifies the Union in writing that it intends to postpone or not fill a vacancy), the Employer will post such new jobs or vacancies for a period of seven (7) calendar days, and shall stipulate the qualifications, classification, rate of pay, department, appropriate start date (if known) and initial assignment (shift and floor) before new employees are hired, in order to allow employees with seniority to apply.

. . .

11.05 The successful applicant shall be placed on trial in the new position for a period of three hundred and thirty-seven and one-half (337 $^{1}/_{2}$) working hours. The trial period may be extended by mutual agreement, but in any case, not longer than an additional one hundred and twelve and one-half (112 $^{1}/_{2}$) working hours. Such trial promotion or transfer shall become permanent after the trial period unless:

It is understood and agreed that once the trial period has expired, the employer no longer has the right to return an employee to her former positon and the employee no longer has the right to return to her former position.

In the event of either (i) or (ii) above, the employee will return to her former position and salary without loss of seniority, any other employee promoted or transferred as a result of the rearrangement of positions shall also be retuned to her former position and salary without loss of seniority.

The above provisions shall also apply in the event of a transfer to a position outside the bargaining unit. It is understood however, that no employee shall be transferred to a position outside the bargaining unit without her consent.

. . .

ARTICLE 13 - WORK OF THE BARGAINING UNIT

13.01 Persons excluded from the bargaining unit shall not perform duties normally performed by employees in the bargaining unit which shall directly cause or result in the lay-off or reduction in hours of work of an employee in the bargaining unit.

. . .

ARTICLE 25 - COMPENSATION

. . .

25.04 New Classification

When a new classification (which is covered by the terms of this agreement) is established by the Home, the Home shall determine the rate of pay for such new classification and notify the Local Union of the same within seven (7) days. If the Local Union challenges the rate, it shall have the right to request a meeting with the Home to endeavor to negotiate a mutually satisfactory rate. Such request will be made within ten (10) days after the receipt of notice from the Home of such new occupational classification and rate.

Any change mutually agreed to resolution from such meeting shall be retroactive to the date that notice of the new rate was given by the Home. If the parties are unable to agree, the dispute concerning the new rate may be submitted to arbitration within fifteen (15) days of such meeting. The decision of the Board of Arbitration (or arbitrator as the case may be) shall be based on the relationship established by comparison with the rates for other classifications in the bargaining unit having regard to the requirements of such classification.

. . .

The parties further agree that any change mutually agreed to or awarded as a result of arbitration shall be retroactive only to the date that the Union raised the issue with the Home.

The Parties' Submissions

23 All parties referred to the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), in considering the Employer's request to dismiss the grievance on the grounds of mootness. *Borowski* was a challenge to the constitutional validity of portions of section 251 of the *Criminal Code*, R.S.C. 1970, c. C-34 relating to abortions that were claimed to contravene purported *Charter* rights of the foetus. The question of whether that application was moot arose after section 251 was struck down by the Supreme Court of Canada in the intervening decision of *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.). Concluding that the *Borowski* challenge was consequently moot because it failed to meet the "live controversy test", Sopinka J. explained the proper "two-step analysis" in determining whether a matter is moot as follows at p. 353:

15. The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

16. The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to case that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I

consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

24 Thus as indicated above, even where the outcome of the first step in the analysis applied in *Borowski* is a finding of no tangible dispute or present live controversy between the parties rendering a matter technically moot, there may be circumstances justifying the exercise of the decision-maker's discretion to hear it anyway, to be assessed at the second step in the analysis. In formulating guidelines for the exercise of that discretion, Sopinka J. looked to the rationale underlying the concept of mootness that included: (1) the need for a prevailing adversarial context; (2) a desire to promote efficiency of scarce judicial resources; and (3) sensitivity to the court's adjudicative role that in the absence of a tangible dispute affecting the rights of parties might be a perceived intrusion into the political law-making function.

25 Considering those factors he concluded that, "despite the cessation of a live controversy, the necessary adversarial relationship will nevertheless prevail [where] there may be collateral consequences of the outcome that will provide the necessary adversarial context" (at p. 359). For example, the continuing interest of an intervenor in a dispute that has become moot is cited as justification for hearing such a case (see p. 360). Notwithstanding judicial economy concerns it may be appropriate to hear a matter that is moot "if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" (at p. 360). Such expenditure is said to be warranted "in cases which although moot are of a recurring nature but brief duration" as in determining the validity of an interlocutory injunction prohibiting certain strike action long after the strike has ended (see p. 360 - 361). And while the division between adjudicative and law-making functions is important, the Supreme Court stated there is "need to maintain some flexibility in this regard" in proper circumstances (see pp. 362 - 362).

26 Applying the principles from *Borowski*, *supra*, Mr. Allen on behalf of the Employer submitted that the matter addressed by the two policy grievances before me was now moot in the face of more recent events and that any declaration substantiating the Union's position with respect to the 2009 and 2016 grievances, "would be of no practical effect" at the current workplace.

27 In explaining, the Employer noted that article 13.01 of the SEIU collective agreement states that, "Persons excluded from the bargaining unit shall not perform duties normally performed by employees in the bargaining unit *which shall directly cause or result in the lay-off or reduction in hours of work of an employee in the bargaining unit*" (emphasis added). Even if the Employer violated the collective agreement when it assigned the RAI Coordinator tasks to RPNs arguably included within the SEIU bargaining unit, the Employer submitted those assignments were immaterial as of July 1, 2017 when the RAI Coordinator functions were reassigned to the RNs in the ONA bargaining unit (who retained other RN duties), which the Employer asserted had fundamentally changed the underlying facts or substratum of the grievances. Inasmuch as the Employer had the contractual right to make an assignment of SEIU work to non-SEIU bargaining unit members under article 13.01 where the assignment did not "directly cause or result in the lay-off or reduction in hours of an employee in the [SEIU] bargaining unit", the Employer claimed it had the right to assign the RAI Coordinator functions to members of ONA in the exercise of its managerial authority to "classify...employees for positions excluded from the bargaining unit" under article 3.01(c), reproduced above. Since the evidence, in the Employer's assessment, was conclusive that no members of the SEIU bargaining unit were laid off or had their hours reduced as a direct result of the reassignment of RAI Coordinator functions to the two RNs effective July 1, 2017, but rather the number of RPNs actually increased by at least two employees because of the workforce reorganization at that time, there was simply no remedy available to the SEIU as of that date.

28 Therefore, if the Employer had improperly assigned the RAI Coordinator work to an excluded management position when Ms. Cook, Ms. Roth and Mr. Wilson did that work between August 1, 2009 and July 1, 2017, the workforce reorganization subsequent to the 2009 and 2016 SEIU policy grievances had rendered those grievances of mere academic interest, having no practical effect, which satisfied the first step in the *Borowski* two-step analysis by removing any live controversy between the parties and rendering the matter moot, according to the Employer. At most the SEIU lost union dues otherwise payable by the Employer on behalf of Ms. Cook, Ms. Roth and Mr. Wilson when they performed the RAI Coordinator work, which the Employer offered to pay to the Union as an expedient way of dispatching the issue

without conceding any violation of the collective agreement and any concomitant right of the SEIU to claim such work as properly included within its bargaining unit in the future. In order to test that purported right, the Union would have to wait for another occasion where the Employer assigned RAI Coordinator functions to RPNs outside of the SEIU's bargaining unit, which would then be decided on the specific factual circumstances existing at that time. As for the 2009 and 2016 grievances before me, however, the Employer argued that several days of potential litigation on a matter of historical interest only, undermined any labour relations sense to proceeding with a case that would have no practical impact in the current work environment other than a declaration substantiating the Union's right to the position *in the past* that the Employer disclaimed as having "no value" to the parties at the present time or in the future.

29 In such circumstances the Employer submitted that the 2009 and 2016 grievances should be dismissed as being moot and that there were insufficient grounds justifying the exercise of arbitral discretion to hear the grievances, referring to the following arbitration awards in support: *Windsor Western Hospital Centre Inc. and ONA, Re*, 1993 CarswellOnt 6687, [1993] O.L.A.A. No. 1227, 32 C.L.A.S. 592 (Ont. Arb.) (Devlin), *Cochrane Temiskaming Resource Centre and OPSEU, Local 664 (Agostino), Re* [2013 CarswellOnt 12964 (Ont. Arb.)], 2013 CanLII62279 (Marcotte), *Renfrew County District School Board and ETFO, Re*, [2008] O.L.A.A. No. 225 (Ont. Arb.) (Beck), *University of Western Ontario and UWOSA (X-091-12), Re*, [2013] O.L.A.A. No. 447 (Ont. Arb.) (Howe), *Welland (County) Roman Catholic Separate School Board v. O.E.C.T.A.*, [1992] O.L.A.A. No. 15 (Ont. Arb.) (Brunner), *Windsor Roman Catholic Separate School Board v. S.E.I.U., Local 210*, [1994] O.L.A.A. No. 135, 45 L.A.C. (4th) 149 (Ont. Arb.) (Jolliffe) and *Niagara South Board of Education v. O.S.S.T.F., District 7*, [1980] O.L.A.A. No. 63 (Ont. Arb.) (Kennedy).

30 Ms. Dover, counsel for ONA, supported and substantially adopted the Employer's submissions that the two grievances should be dismissed on the grounds of mootness. Noting that its natural interest in protecting its bargaining unit rights had compelled ONA to seek intervenor status in these arbitration proceedings, ONA contended that even if the SEIU succeeded in obtaining a declaration that the Employer violated the collective agreement when it assigned RAI Coordinator functions to managerial positions, with the July 1, 2017 reorganization of the work that included significant elements of RN functions, any arbitration decision on the 2009 and 2016 SEIU policy grievances could have no impact on ONA's continuing right to the RAI Coordinator work as currently intermingled with RN duties, which undermined any sense of there being a "live controversy" on the matter. In the absence of the showing of a live controversy with respect to the current assignment of the work to the RNs, which ONA contended had not been demonstrated, it submitted there was no labour relations justification in proceeding with a case that had no effect except to require all parties to expend much money and time on what would be an unnecessary litigation.

31 On behalf of the SEIU, Ms. Stevens presented a very different take on the matter. The SEIU argued it made no difference on the face of the 2009 and 2016 policy grievances whether the RAI Coordinator work was assigned to a purported managerial or RN position. In either case the Union submitted that its policy grievances challenged the ability of the Employer to assign RAI Coordinator outside of the SEIU bargaining unit. Consequently, the fact that circumstances had changed from the initial assignment of the work to employees who were originally RPNs between August 1, 2009 and July 1, 2017 to the more recent assignment of that work to RNs, made no difference to the essential dispute between the parties on the wording of the grievances before me, according to the SEIU. This, in the SEIU's submission, supported a conclusion that the assignment of that work to anyone outside of the SEIU's bargaining unit remained in dispute between the parties, whenever that assignment occurred.

32 Moreover, to the extent the Employer and ONA sought to rely upon article 13.01 of the SEIU collective agreement to justify the assignment of the RAI Coordinator work to RNs, the SEIU submitted it was premature to rule on the Employer's and ONA's position without hearing the evidence and arguments of the parties going to the merits of the dispute, with all appropriate support that must await another day. As a preliminary matter the SEIU disagreed that article 13.01 gave the Employer the unfettered ability to assign SEIU bargaining unit work to RNs in the factual circumstances of the present case, rendering any purported reliance on that provision an improper or bad faith application of the Employer's managerial authority, which arguably violated the collective agreement.

33 In such circumstances the SEIU submitted it had the right to pursue a claim for the continuing RAI Coordinator work performed by RNs on behalf of the SEIU bargaining unit employees along with the remedies proposed in its 2009 and 2016 policy grievances that in addition to compensation for lost union dues included the positive obligation of the Employer to negotiate rates of pay for a new position of RAI Coordinator in the SEIU bargaining unit. In the alternative, the SEIU submitted that if I determined the specific grievances before me were moot on technical grounds, given the Union's demonstrated claim for RAI Coordinator work at this workplace and throughout the province, and reasonable desire for certainty on the matter for the benefit of the parties' present and future labour relations, this was an appropriate case to exercise arbitral discretion to hear the dispute on the principles established by the case law. In support of its submissions the Union also relied upon: *Sherbrooke Community Society v. S.U.N., Local 22*, 1981 CarswellSask 590, [1981] S.L.A.A. No. 2, 2 L.A.C. (3d) 97 (Sask. Arb.) (Norman) and *Domtar Inc. and IWA-Canada, Local 2693 (Boyuk), Re*, 2005 CarswellOnt 11056, 80 C.L.A.S. 223 (Ont. Arb.) (Barrett).

34 And at my request the parties also commented upon relevant portions of *NSUPE, Local 13 and Halifax (Regional Municipality), Re*, 2017 CarswellNS 860, 133 C.L.A.S. 269, 287 L.A.C. (4th) 317 (N.S. Arb.) (K. Raymond) and *Fleet Industries Ltd. v. I.A.M. & A.W., Lodge 171* (2002), 112 L.A.C. (4th) 120 (Ont. Arb.) (Luborsky).

Reasons for Decision on Mootness Question

(a) Overview of the Jurisprudence

35 A review of the arbitration awards indicates, not surprisingly, a fact specific approach by labour arbitrators in applying the "two-step analysis" derived from *Borowski*, *supra*, with the caveat that as adopted in labour relations disputes under a collective agreement, the interests of the parties are often seen as more than simply those of the employee against the employer in the case of an individual grievance, but rather as layers of interests to a consideration of the broader concerns of the bargaining unit as a whole in the course of an ongoing employment relationship (particularly for grievances of a "policy" nature), both at the time of the grievance and into the future, in determining the first analytical question of whether in the face of some intervening event after the filing of a grievance there continues to exist "a tangible and concrete dispute" (per *Borowski*, at para. 16) between the parties.

36 This nuanced appreciation of the concept of "mootness" as applied in labour relations was recognized before the *Borowski* decision in the 1981 arbitration award of *Sherbrooke Community Society v. S.U.N., Local 22*, *supra*, where Arbitrator Norman gave voice to an essential difference between judicial and arbitral approaches to dispute resolution presaging a broader outlook in considering disputes under collective agreements to the underlying premise or basis of a grievance, as follows at para. 20:

> ...The parties before an arbitrator, by definition, must continue to live together in a work relationship, under a collective agreement. The parties before a Court are seldom so intertwined. Appellate Courts find questions of law to be moot when there is no real issue left between the parties. ***In a continuing relationship once a systemic issue is raised by a particular grievor, it simply does not disappear due to a change in that particular person's circumstances.***
>
> [Emphasis added]

37 This idea that a dispute involving one individual might survive as a live controversy between the union and employer parties to the collective agreement having implications at a broader bargaining unit level notwithstanding a change in circumstances of the individual grievor undercutting any practical effect for that individual, both at the time of the grievance and into the future, was noted by Arbitrator Kennedy in the 1980 decision of *Niagara South Board of Education v. O.S.S.T.F., District 7*, *supra*, who in reviewing the arbitral jurisprudence to that date on the issue of mootness, noted at para. 9 that, "some arbitrators will permit the grievance to be arbitrated even where specific relief is no longer sought", going on to observe:

> ...***However, an analysis of those cases would indicate that the fact situation being considered could readily arise again and that it would be useful for the guidance of the parties that the matter be resolved, and the issue of whether or not there had existed a violation of the collective agreement be settled.*** It is our view that that can be a legitimate function of declaratory relief in an arbitration where specific relief is no longer sought, but before proceeding on that basis, the board should be very sure that there exists some positive benefit to the parties in proceeding to hear the evidence and determine the issue. ***Put another way, it is appropriate to proceed where the issue has become academic to the individual grievor, only where the issue has a real potentiality of arising again, and the award can therefore be of assistance to the parties in avoiding future conflict under the collective agreement****....*
>
> [Emphasis added]

38 Arbitrator Barrett later applied the foregoing guidelines in *Domtar Inc.*, *supra*, which was decided after the *Borowski* decision, in dismissing the grievance of a mechanic who in the aftermath of the elimination of the garage where he worked, filed a grievance when he was refused the opportunity to exercise his seniority to bump into a job as a "delimber operator" that the employer did not consider him qualified to perform, instead transferring the grievor to another mechanic position receiving a higher rate of pay. After three days of hearings on the grievance which requested as remedy that the grievor be granted the delimber operator job, but before the proceedings concluded, the grievor took an early retirement package, leading the employer to bring a motion to dismiss the grievance as being moot. Following a review of the case law, the arbitrator concluded it was appropriate to exercise her discretion to dismiss the grievance as moot, where she found (at para. 12) that: "the fact situation being considered could not readily arise again and where it would not be useful for the guidance of the parties that the matter be resolved in the form of a declaration as to the proper interpretation of a clause in the collective agreement". The arbitrator went on to suggest that "in order to continue a hearing into a grievance where no individual remedy is possible, the grievance must have some hallmarks of a policy grievance of general application to the bargaining unit", which did not exist in that case.

39 This appreciation of a grievance having various levels of significance or effect from the specific individuals involved to the larger collective as a whole, for present and future purposes, and the particular observation of the benefits of a declaration to settle issues of general application to the bargaining unit even where there is no remedy available for the immediate grievor, is evident in *Cochrane Temiskaming Resource Centre*, *supra*. In that case the union filed a grievance dated April 2, 2013 on behalf of an employee working as a "Psychometrist" (which is responsible for administering and scoring various tests and instruments that assess a subject's neuropsychological functioning), who objected to the assignment of "behavior therapist" duties outside of his written job description that the grievance claimed was beyond the employer's authority under the collective agreement to operate and manage its Resource Centre in all respects. But when the grievor retired on May 13, 2013 before his grievance was heard, Arbitrator Marcotte held that this subsequent event did not render the grievance moot. Rather, the arbitrator noted in applying the first step of the *Borowski* analysis that he was required to examine the grievance statement "in order to ascertain the issue it raises", which he found (at p. 17) included the right of the employer to determine which employees will do the work it requires to be performed under the collective agreement and the right of the union to challenge such assignments. Having found that the grievance framed the dispute "as whether or not the duties [that the grievor] was assigned are properly within his job description as a Psychometrist", and noting there were five other Psychometrists in the bargaining unit (outside of the specific grievor in that case), the arbitrator concluded that "a decision on the merits of the grievance has the potential to resolve controversy as to the propriety of their assignments", and the underlying issue raised by the grievance had broader implications to the appropriateness of work assignments in relation to job descriptions as a whole. Although acknowledging that any specific remedy for the individual grievor was no longer available due to his retirement, it was noted at p. 18 that, "where an issue is not moot, the matter of lack of remedy, in and of itself, does not render the issue moot", but if successful the union would be entitled to declaratory relief which was in itself a tangible benefit having implications throughout the bargaining unit.

40 I came to a similar appreciation in *Fleet Industries Ltd. v. I.A.M. & A.W., Lodge 171*, *supra*, and in the subsequent decision of *Waterloo (Regional Municipality) v. C.U.P.E., Local 1883* (2008), 171 L.A.C. (4th) 107 (Ont.

Arb.) (Luborsky), when in assessing the merits of an individual grievance in both cases where circumstances had changed removing any possibility of a remedy other than a declaration concerning past events, I concluded that while a matter in issue may be technically moot at the level of the individual grievance, it might nevertheless represent an ongoing tangible dispute between the union and employer at the level of the bargaining unit considered as a whole, thereby retaining the character of being a live controversy.

41 Thus in *Fleet Industries Ltd. v. I.A.M. & A.W., Lodge 171*, *supra*, where two individual grievors challenged the employer's refusal to provide a training opportunity for another job in the context of an impending layoff, and there were 10 other individual grievances on the issue being heard by another arbitrator, I held that the matter was not moot where the collective agreement had expired before the hearing date, notwithstanding the possibility that the applicable contract language might be amended as a result. In denying the employer's request to dismiss the grievance and that any future grievance had to await the conclusion of the new collective agreement, I concluded the speculation of a change in contact language that might undermine any right of the individual grievors to the relief claimed was insufficient to render the matter moot under the language existing at the time of the grievances. And I found (at para. 19) that the fact the parties were also at arbitration with 10 other cases at the same time raising the same interpretative issues under the expired collective agreement underscored "the obvious concrete and tangible nature of the real dispute between them" that the union was entitled to pursue in the interest of supporting rights enjoyed by bargaining unit members as a whole.

42 In *Waterloo (Regional Municipality) v. C.U.P.E., Local 1883*, *supra*, the union alleged the employer failed to reasonably accommodate an employee suffering from post-traumatic stress disorder ("PTSD") after the employee hit a deer on her drive into work, by claiming it had no obligation to adjust the employee's schedule to reasonably accommodate an employee with a disability so that she would not need to commute outside of daylight hours during the winter months when symptoms of her PTSD in the form of "panic attacks" typically arose. While the PTSD had resolved itself by the time the grievance was heard at arbitration, leading to my determination that the grievance was moot at the level of the individual employee who no longer needed an adjustment in her working hours (and did not suffer financial loss as a result of the employer's position in the matter), I nevertheless held that unlike the situation in *Borowski* where the intervening event effectively undermined "the entire substratum" of that case, the same could not be said in *Waterloo (Regional Municipality) v. C.U.P.E., Local 1883*, *supra*, where I found at para. 37 that, "the underlying policy and interpretive aspects of the grievance remained unresolved and were live issues constituting a continuing difference between these parties" for which the union was entitled to pursue a claim for declaratory relief, and thus concluded that:

> In order to satisfy the "live controversy test", set out in *Borowski*, it is not necessary for all aspects of the grievance to remain in issue; ***rather it is sufficient if only one portion or part of the grievance remains outstanding,*** which I find is the situation before me now.
>
> [Emphasis added]

43 Finally, *NSUPE, Local 13 and Halifax (Regional Municipality), Re*, *supra*, considered the grievance of a municipal records clerk who was denied a one-year unpaid leave of absence in order to take a 12-month nonpayment position with the Royal Canadian Mounted Police ("RCMP") that the employer declined because it was against its policy to provide job security to an employee who was pursuing work with another employer, notwithstanding the language of the collective agreement which provided the employer had discretion to grant such leaves of absence that would not be unreasonably denied. Consequently, the grievor quit her job as a records clerk under protest in order to take temporary employment with the RCMP, while submitting her grievance that she should be permitted to return to the status of an employee for the municipality and placed on immediate leave of absence without pay. After the arbitration hearing to consider the grievance had begun but before its completion, the grievor accepted a permanent position with the RCMP, causing the employer to bring a motion to dismiss the grievance on the ground that this intervening event had rendered the grievance moot. In denying the employer's motion, Arbitrator Kathryn Raymond accepted at para. 61 that the starting point of the analysis in cases of this nature, "is to delineate the scope of the grievance, considering its breadth or narrowness, to identify the specific issues in dispute". And following the earlier decision in *Halton District School Board and OSSTF (Nero), Re* (2016), 267 L.A.C. (4th) 329 (Ont. Arb.) (Stephen Raymond) at para. 20 that the determination

of whether subsequent events have rendered a grievance moot, "turns entirely on the subject matter of the grievance", the arbitrator stated:

> If an issue is found to remain, arbitrators have been careful to ensure that the issue actually concerns the interpretation, application, or administration of the Collective Agreement, as opposed to a peripheral issue. The case law demonstrates that the usual arbitral approach is to also consider whether the outcome that has occurred while the matter was pending ***addressed all aspects of the remedy being requested***.
>
> [Emphasis added]

44 Thus applying the foregoing principles to the question of whether the grievance was moot, the arbitrator found that the grievance incorporated a number of different remedial aspects that were not resolved by the grievor's acceptance of the RCMP position, which were noted at para. 72 as including, "the issues surrounding the [employer's] policy and the manner in which the collective agreement was interpreted and applied by the employer [which remained] live issues, in terms of the merits of this grievance and in relation to the remedy requested by the union on behalf of all of its members." But even if the grievance was moot, in determining it was appropriate to exercise arbitral discretion to hear the grievance anyway, the arbitrator relied upon Mr. Justice Sopinka's observation at p. 359 in *Borowski*, *supra*, that "despite the cessation of a live controversy, the necessary adversarial relationship will nevertheless prevail [where] there may be collateral consequences of the outcome that will provide the necessary adversarial context", in concluding at para. 96 that:

> ...***there are other collateral consequences if this grievance is not heard.*** For this issue to be dealt with, in the future, another employee will be faced with a decision to resign under protest to preserve a job opportunity or will need to decline the other job opportunity and file a grievance in order to test the existence, application and relevance of the Employer's alleged policy. There is potential prejudice to any employee who applies for and is awarded a temporary position with another employer without having this issue resolved. The loss of an external position, that is directly placed in issue in such a grievance, cannot be directly remedied by an arbitrator. I do not consider it conducive to labour relations for an employee to have to resign from a position under protest to ensure that his or her ability to accept a temporary position is not prejudiced or to have to choose to forego an opportunity for beneficial employment that could be upheld at arbitration. ***In my view, it is more consistent with fostering good labour relations between the parties for the parties to have prospective guidance in relation to whether working for another employer is a relevant consideration.***
>
> [Emphasis added]

45 Therefore distilling the foregoing review of the jurisprudence in determining whether a live controversy has been extinguished as a result of intervening circumstances rendering a grievance moot, or if arbitral discretion should be exercised to hear the grievance even if moot, the following key principles may be identified:

> (i) The starting point in assessing whether a grievance is moot at the first step in the two-step analysis described in *Borowski*, *supra*, is to delineate the scope of the grievance, considering its breadth or narrowness, to identify the specific issues in dispute from the wording of the grievance itself, and in that context the determination of whether subsequent events have rendered a grievance moot turns entirely on the subject matter of the grievance;
>
> (ii) Viewed from the perspective of a continuing union-management relationship, once a systemic issue is raised by a particular grievor it doesn't disappear due to a change in that particular person's circumstances;
>
> (iii) In order to satisfy the "live controversy test" it is not necessary for all aspects of the grievance to remain in issue after the intervening event; rather it is sufficient if only one portion or part of the grievance remains outstanding;

(iv) Thus, if the intervening or subsequent events do not address all of the aspects of the remedy being requested, the grievance will not be considered moot;

(v) And where an issue underlying a grievance is not moot, the matter of lack of remedy, in and of itself, does not render the issue moot, but the successful party would be entitled to declaratory relief which is in itself a tangible benefit;

(vi) However, even where the specific relief requested in a grievance is no longer sought or available because of intervening events and is in that sense moot, it may nevertheless be appropriate under step two of the *Borowski* analysis to exercise arbitral discretion to continue hearing the dispute where there may be "collateral consequences of the outcome" that will provide the necessary adversarial context, touching on a number of circumstances consistent with fostering good labour relations between parties for their prospective guidance.

(b) Application of Law to the Instant Factual Circumstances

46 Thus applying the foregoing principles to the factual circumstances of the instant case, I find that notwithstanding the reassignment of work to RNs effective July 1, 2017, there continues to exist a live controversy between the parties on the question of whether RAI Coordinator work properly falls within the SEIU's bargaining unit, and thus under the first step of the two-step analysis in *Borowski*, *supra*, the 2009 and 2016 grievances are not moot. Given that determination it is not necessary to consider whether I should exercise arbitral discretion to hear the matter in any event. My reasons are as follows:

(i) The starting point...

47 The starting point of my analysis is the specific wording of the policy grievances themselves in order to define the breadth or narrowness of the controversy and identify the issues in dispute. The 2009 and 2016 grievances allege: "Management has violated Article 2.01 and 11.01 by not posting and including the RAI position in the bargaining unit", and request as relief that: "The position to be posted in the bargaining unit, dues deducted and that the Employer should negotiate the rate of pay with the Union".

48 This wording does not, in my opinion, limit the scope of the grievances to the assignment of RAI Coordinator work only to purported managerial positions under the title Health Informatics and Education Manager or Director of Resident Quality Outcomes to the three RPNs performing those functions between August 1, 2009 and July 1, 2017. Rather, the wording of the grievances is sufficiently broad to include the assignment of RAI Coordinator work to anyone outside of the SEIU bargaining unit, including RNs represented by ONA, which clearly arises as the overarching issue in dispute on the face of the grievances themselves. The relief sought by the grievances does not change as a result of the reorganization of the workplace resulting in the reassignment of RAI Coordinator functions from RPNs to RNs, which continues to be a demand that it be recognized as SEIU bargaining unit work. Whether that demand is valid under the collective agreement is to be determined on the evidence; it is not a matter to be decided on a preliminary claim of mootness.

(ii) The systemic nature of the dispute undermines a claim of mootness...

49 Moreover, having been framed as policy grievances between the SEIU and Employer, without temporal limitations, it is clear that the entire substratum of the grievances having general application to the bargaining unit as a whole was not undermined or removed by the reassignment of RAI Coordinator functions to the RNs effective July 1, 2017, but rather continues to have the character of a live controversy between the parties in the nature of a tangible, concrete policy dispute ongoing to the present date. The essential issue raised by the grievances is that under the scope and recognition clause of article 2.01 of the collective agreement, the RAI Coordinator function is the exclusive work of employees in the SEIU bargaining unit, which is systemic in the sense that the claim continues whether the assignment of RAI Coordinator work is to RPNs or RNs, and thus the underlying issue is not resolved by the change in the assignment from one to the

other. Indeed the Employer's reliance upon article 13.01 of the SEIU collective agreement, which permits the Employer to assign duties, "normally performed by employees in the bargaining unit" in limited circumstances that the Employer claims applied in the instant case, presupposes that the work itself fundamentally falls within the jurisdiction of the SEIU bargaining unit, which in the absence of the Employer's concession on that point, remains a present live controversy between the parties.

(iii) Not necessary for all aspects of the grievance to remain in issue...

50 In that context, I agree with the SEIU's submission that whether the Employer has a valid justification for the assignment of the RAI Coordinator duties to members of the ONA bargaining unit under article 13.01 of the collective agreement, which arguably permits the Employer to assign SEIU bargaining unit work to the RNs provided it shall not "directly cause or result in the lay-off or reduction in hours of work of an employee in the bargaining unit", is not an assessment that can be done in a preliminary motion of the current nature, but rather requires evidence going to the merits of the issue in dispute. The Employer's assertion that the Union's policy grievances are moot because it has the right to reassign the RAI Coordinator work to the RNs cannot be accepted without a showing that: (a) the work to begin with is SEIU bargaining unit work; which (b) was subject to a legitimate transfer to the RNs. These remain open questions that are encompassed within the policy grievances presently before me.

51 As indicated by the job description for the RAI Coordinator function, reviewed above, both RPNs and RNs having valid registrations with the Ontario College of Nurses are eligible for the RAI Coordinator role, and thus the fact that an RN is performing RAI Coordinator duties does not, in itself, insulate the RN from a claim that she or he is performing bargaining unit work of the SEIU. While article 3.01(c) of the collective agreement permits the Employer to "select, hire, transfer...classify, and select employees for positions excluded from the bargaining unit", that right is not unfettered where article 3.2 of the collective agreement expressly prohibits the Employer from exercising its management rights, "in a manner inconsistent with the express provisions of this Agreement." The percentage of the time that the RNs currently performing RAI Coordinator functions are in fact assigned to RN duties may in fact raise the question of whether these RNs retain their essential character as being members of the ONA bargaining unit, or are in reality doing substantially the same work performed by the RPNs prior to July 1, 2017 with little distinguishing their actual work from the group of employees doing the work at the time of the 2009 and 2016 policy grievances, and what impact the answer to that question might have on the question of whether article 13.01 of the collective agreement can provide the Employer with any protection from the assignment of SEIU bargaining unit work to the RN classifications. These are obviously complex questions going to the merits of the policy grievances before me that requires evidence, which cannot be determine in a preliminary motion, and to that extent constitute live areas of dispute between the parties.

(iv) The subsequent events must address all aspects of the remedy being sought...

52 Nevertheless, even if the evidence supports the Employer's contention that a valid assignment of RAI Coordinator work was made to the RNs, the Employer's offer to pay all union dues that would otherwise have been owed to the SEIU from the past employment of Ms. Cook, Ms. Roth and Mr. Wilson in the RAI Coordinator role between August 1, 2009 to July 1, 2017 if their assignments violated the collective agreement, is not in my opinion sufficient to unequivocally concede that the work is properly within the SEIU's bargaining unit that has past, present and future implications affecting this workplace. Without that unequivocal concession by the Employer, I conclude there continues to be "a present live controversy" on the matter between the parties, potentially impacting the current assignment of RAI Coordinator work to members of ONA or the future reassignment of that work back to RPNs.

53 Moreover, the Employer's offer to pay the union dues does not address all remedial aspects of the Union's claim that there was an improper assignment of RAI Coordinator work to Ms. Cook, Ms. Roth and Mr. Wilson as purported members of management. For example, the Employer's offer of union dues alone to SEIU in order to resolve any potential liability for the period August 1, 2009 to July 1, 2017 before the RAI Coordinator work was reassigned to the RNs, disregards the SEIU's right under article 25.04 of the SEIU collective agreement to require that the Employer agree on an appropriate wage rate for the new RAI Coordinator position that if not resolved may be submitted to binding

arbitration, notwithstanding that the actual number of incumbents in the position may have been reduced to zero on July 1, 2017. The ability to negotiate a wage rate for the RAI Coordinator as a position recognized within the SEIU bargaining unit is a tangible right that is triggered by an acknowledgement that the RAI Coordinator function is SEIU bargaining unit work. Without knowing what the wage rate for the RAI Coordinator role that the parties might have agreed upon (or would have been assessed through arbitration), one cannot say that Ms. Cook, Ms. Roth and Mr. Wilson received proper compensation for their time working as RAI Coordinators. To that extent the payment of union dues alone to SEIU in order to remedy any breach of the collective agreement by not originally recognizing the Union's legitimate claim to that work does not address all of the aspects of the remedy being requested in the policy grievances, leaving a live issue between the parties on that point, at least.

(v) Declaratory relief is a tangible benefit where an issue is not moot...

54 But even if the Employer's offer of union dues and the transfer of the work to the RNs had addressed all potential remedial issues encompassed by the 2009 and 2016 policy grievances (which I have disagreed with above), that would not in my view satisfactorily resolve the underlying question raised by the SEIU's grievances of whether the RAI Coordinator work is properly within the SEIU's bargaining unit, consistent with the findings at arbitration in similar workplaces elsewhere in the province.

55 It is entirely possible that at some point in the future the Employer may consider transferring the RAI Coordinator work back to RPNs recognized as members of the SEIU bargaining unit. In that event, it is my opinion that the fact situation addressed by the assignments of RAI Coordinator functions to Ms. Cook, Ms. Roth and Mr. Wilson between August 1, 2009 and July 1, 2017 could readily arise again and, to quote from Arbitrator Kennedy's assessment of the case law on the issue of mootness in *Niagara South Board of Education v. O.S.S.T.F., District 7*, *supra*, at para. 9, "that it would be useful for the guidance of the parties that the matter be resolved, and the issue of whether or not there had existed a violation of the collective agreement be settled".

56 This supports a conclusion that the present question of the SEIU's representation ought to be determined even if the result is limited to a declaration concerning the rights of the parties to the collective agreement, which as Arbitrator Marcotte observed in *Cochrane Temiskaming Resource Centre and OPSEU, Local 664 (Agostino), Re*, *supra*, is itself a tangible benefit having implications for the relationship of the parties when similar issues arise in the future. In that regard I see no factual circumstances, nor were any specifically put to me, where the Employer's potential use of RPNs to perform RAI Coordinator functions would be substantially different (if different to any degree) than the past assignment of such work to Ms. Cook, Ms. Roth and Mr. Wilson that prompted the 2009 and 2016 policy grievances, and thus must respectfully disagree with the Employer's assertion that one must wait until an actual assignment of the work to employees outside of the ONA bargaining unit occurs again in order to determine the parties' rights in the unique factual circumstances existing at that time. This would have the effect of delaying the determination of what is a clear disagreement over the interpretation and administration of the collective agreement between them now, which has implications to their present and future labour relations.

Disposition

57 I therefore conclude for the foregoing reasons that the essential matter in dispute between the parties remains a present live controversy concerning the rights of the SEIU to its recognition as bargaining agent for employees performing the RAI Coordinator function, with all attendant obligations to negotiate an appropriate wage rate and that require vacancies to be filled under the posting and seniority provisions of its collective agreement, which was not affected by the change in circumstances on July 1, 2017 with the assignment of those duties to members of the ONA bargaining unit.

58 Consequently the Employer's motion to dismiss the two policy grievances before me on the grounds of being moot is denied. The hearing into the merits of the dispute will accordingly continue on a date to be scheduled in the usual course.

Motion dismissed.

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