

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

October 2018

UPDATES FROM THE BOARD

PLEASE TAKE NOTICE THAT e-filing, including electronic payment, is now available for forms related to construction industry grievances under s. 133 of the Labour Relations Act, 1995. All other filing methods previously permitted by the Board's Rules of Procedure remain available.

The updated forms for a Referral of Grievance (A-86), Request for Hearing/Notice of Intent to Defend (A-87) and Response/Intervention (A-88) may now be e-filed along with attachments. If a filing fee is required, the filing party will be directed to the online payment page to pay by VISA or Mastercard. The filing party will receive confirmation by email that the form has been submitted and payment, if required, has been made.

Rules 31.3, 34.2 and 34.3 of the Board's Rules of Procedure and Information Bulletin No. 20 have been amended to facilitate the launching of the new A-86 and A-87 forms and the Board's online payment system.

PLEASE TAKE NOTICE THAT all Board forms were revised and updated during the development of e-filing. Please note that effective May 1, 2019, the Board will no longer accept previous versions of its forms. (Updated forms are PDFs which have the Ontario Coat of Arms at the top left.) Parties are encouraged to access Board forms on its website rather than storing forms on desktops as they may be updated electronically from time to time.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September of this year. These decisions will appear in the September/October issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Employment Standards – Pursuant to section 116 of the *Employment Standards Act*, the Applicant Employer sought to review and rescind an Order to Pay, Notices of Contravention and a Compliance Order made against it – Applicant also raised a preliminary issue of it being recently found to be bound to a collective agreement with a Union – The Respondent is the beneficiary of the Order to Pay and appeared to be a bargaining unit member – Applicant argued section 99(2) of the *ESA* prohibits the filing of the beneficiary's claim and any subsequent investigation – The Director of Employment Standards submitted the preliminary issue be dealt with without a hearing and the Order to Pay Notices of Contravention and a Compliance Order be rescinded – There is some suggestion in earlier jurisprudence that section 116(6) requires a *viva voce* hearing in all cases except those that can be characterized as jurisdictional – Board concluded that pursuant to its authority to determine its own practice and procedure for review in 116(9) of the *ESA*, no *viva voce* or oral hearing is necessary to deal with the Applicant's preliminary issue – Where an applicable collective agreement exists, employee rights under the *ESA* are to be exercised by the bargaining agent and the

grievance and arbitration procedure, except pursuant to section 99(6) of the *ESA* which allows for the Director of Employment Standards to permit an employee to file a complaint – Order to Pay, Notices of Contravention and a Compliance Order are rescinded

1198070 ONTARIO INC. OPERATING AS CHAMPLAIN MANOR RETIREMENT RESIDENCE; RE: LINDA KNAPP; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1518-18-ES; Dated September 24, 2018; Panel: Bernard Fishbein (9 pages)

Employment Standards – Practice and Procedure – Employee anonymously filed an application for review pursuant to section 116 of the *Employment Standards Act* – Issue is whether the employee can pursue the application anonymously – Employment Standards Officer refused to investigate a complaint about the payment of personal emergency leave days because the employee insisted on remaining anonymous – It is at discretion of the Director of Employment Standards to consider if a targeted inspection or another strategic initiative is needed for an investigation – It is not necessary to identify a complainant to conduct an investigation, make inquiries, or demand documents within the scope of the DES's statutory authority – However, given the nature of the anonymous employee's claim, an examination of the employee's individual complaint is required – Employer's procedural fairness rights would be violated if it was issued an Order to Pay without the identity of the employee – Provisions of the *ESA* providing for an application for review are not available to the anonymous employee – Application dismissed

ANONYMOUS; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1705-18-ES; Dated October 1, 2018; Panel: Matthew R. Wilson (5 pages)

Jurisdictional Dispute – Practice and Procedure – Work assignment dispute pursuant to section 99 of the *Labour Relations Act* – Applicant's consultation brief contravened Rule 28.7 of the Board's rules of Procedure for being too long in length – Rule 28.7 came into effect on May 7, 2018 – Respondent asked Board not to accept the Applicant's brief – Applicant argued Rule 28.7 has no application to the proceeding because it was enacted after the filing of the application, after the Pre-Consultation Conference was conducted, and after the commencement of the timelines was

established for the exchange of briefs – Applicant argued in the alternative that Rule 28.7 only relates to the "argument portion" of the brief – As a further alternative, Applicant filed an alternate brief with an argument portion that complied with Rule 28.7 – Board determined Rule 28.7 applies to all briefs filed with the Board in jurisdictional disputes after the effective date of May 7, 2018 – Rule 28.7 therefore applies to the Applicant's brief – Introductory information in a brief is not included in the page limit established by Rule 28.7 – Quotes and charts are included in the Rule 28.7 page limit – Board found the Applicant's longer brief was not prejudicial to the Respondent as it provided them with more information and was not excessively long or granular – The amended brief filed by the Applicant, compliant with Rule 28.7, was accepted by the Board

BONDFIELD CONSTRUCTION COMPANY LIMITED; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93; RE: SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 47; RE: INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 7; OLRB File No. 3121-17-JD; Dated September 6, 2018; Panel: Lee Shouldice (4 pages)

Employee List – Order for Productions – Application filed under section 6.1 of the *Labour Relations Act* for an order directing the Respondent to provide the Applicant a list of employees in a bargaining unit that the Union claims to be appropriate for collective bargaining – The first application filed by the Union was dismissed for failure to file membership evidence to establish that 20 percent or more of the Union's proposed bargaining unit were members of the Union – The second application filed by the Union demonstrated the required support and the Employer was directed to provide a list of employees in the proposed bargaining unit – Many names on the list provided by the Employer did not have contact information or specific dates of hire – Respondent stated it provided the information it had because the employees in question were from temporary work agencies – Respondent was subsequently able to obtain the hire dates of the employees – Respondent stated it had now fully complied with the Board order to the extent it was required to do so by the *Act* – Applicant asserted the Respondent frustrated the Board order by not providing contact information or attempting to obtain the information – Board finds for the Respondent – The *Act* does not provide the Board authority to compel an

employer to provide contact information it does not have or information that has not been provided to it by the employees

CAN ART ALUMINUM EXTRUSION L.P.;
RE: UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL & SERVICE WORKERS
INTERNATIONAL UNION (UNITED
STEELWORKERS); OLRB File No. 0776-18-R;
Dated September 12, 2018; Panel: Bernard
Fishbein (9 pages)

Duty of Fair Representation – Applicant alleged Union Respondent breached section 74 of the *Labour Relations Act*, the Employer did not file an intervention – Board must determine whether to accept the Respondent’s late response (three months late), and subsequently, whether the application ought to be dismissed for delay – The Respondent argued the allegations were significantly out of time, there had been different representatives servicing the bargaining unit, and the Applicant did not raise his issues with these representatives. There was also an error in handling the facsimile that was sent to the Respondent’s central office – Board found the reasons for the late filing to be “not very good” but allowed for the late filed response as there was no legal prejudice to the applicant and the remedial relief sought was significant and serious – The Board expects workplace parties to bring forward complaints in a timely manner *per* Rule 5 of the Boards Rules of Procedure – Board measured the delay from the Applicant’s last communication with the union regarding his dissatisfaction, totalling eight months – Respondent submitted it is prejudiced by the delay and the Applicant submitted the delay was due to his lack of knowledge about his rights and the Board’s procedures – The Board reiterated that an applicant’s ignorance of legal rights to pursue an application against a union or the pursuit of a remedy in a different forum does not justify a delay – Applicant’s explanation does not explain why he waited so long to pursue a complaint against the Union and there is prejudice to the union – Application dismissed

DMYTRO MARTYNYUK; RE: SERVICE
EMPLOYEES INTERNATIONAL UNION
LOCAL 1 CANADA; RE: IVAN FRANKO
HOME FOR THE AGED; OLRB File No. 2602-
17-U; Dated September 27, 2018; Panel: Matthew
R. Wilson (6 pages)

Certification – Construction – Reconsideration

– Applicant elected to have construction certification dealt with under section 128.1 of the *Labour Relations Act* – Applicant filed a Request for Reconsideration concerning a previous decision regarding status disputes of six individuals (the “group”) and the finding that the Respondent was the true employer of the group – Board found the group to no longer be considered an entrepreneurial activity – Applicant submitted the Board made errors in fact and law and submitted it had new evidence that could not have been previously discovered with due diligence and would otherwise be dispositive of the matter – Applicant argued Board made an accounting error which underestimated the level of profit the group brought to the Employer – Applicant argued the Board made an error in tax law in failing to consider if business expenses claimed by the group was legitimate – Applicant asserted the errors impacted the Board’s finding that the group was no longer an entrepreneurial enterprise, which was foundational to the Board’s true employer analysis – Applicant also argued the Board disregarded expert evidence from the Union and failed to explain why it was rejecting the Union’s expert evidence and accepted the Employer’s evidence – Respondent argued the Applicant is trying to re-argue its case and any mathematical errors did not impact the Board’s acceptance of the Applicant’s position that the group had underreported its income – Board was of the view that in the unique circumstances of this case, profit was only one of a number of factors the Board should consider in determining which entity was the true employer – Board properly considered the necessary context and factors in reaching its decision – Applicant asserted a “new” relevant document existed which only came to light under “extremely fortuitous circumstances” but did not explain the circumstances nor provide reasons why the document could not have been obtained previously through due diligence. Board was not convinced the new documents would materially affect the decision – More detail and explanation was required by the Applicant before the Board would consider this to be a valid basis for reconsideration – Application for reconsideration dismissed

MANALCO CONTRACTING LTD.; RE:
CARPENTERS AND ALLIED WORKERS
LOCAL 27, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA;
OLRB File No. 0295-14-R; Dated September 21,
2018; Panel: John D. Lewis (25 pages)

Bargaining Unit – Certification – Joint application for review of the structure of bargaining units filed by the Union and Employer – Parties wish to consolidate a new bargaining unit into an existing bargaining unit pursuant to subsection 15.1(8)(a) of the *Labour Relations Act* – Nothing in the materials filed with the Board would give the Board pause to not consent to the remedial relief sought by the parties – The Board will not automatically or always consent merely because the parties have agreed – The Board’s consent will turn on the facts of each case – The Board consents to the consolidation of the bargaining units

NIAGARA SUPPORT SERVICES; RE: SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA; OLRB File No. 1679-18-R; Dated September 25, 2018; Panel: Matthew R. Wilson (3 pages)

adjourned *in lieu* of an application filed pursuant to section 99 of the *Act*

POMERLEAU INC.; RE: THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 765; OLRB File No. 2154-17-G; Dated September 12, 2018; Panel: Lee Shouldice (13 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Adjournment – Construction – Grievance – Respondent is bound to collective agreements from two separate unions in the ICI sector – Applicant filed a grievance under section 133 of the *Labour Relations Act* – Respondent subcontracted out work to a non-union employer and the Applicant claimed this was a breach of the terms of the Collective Agreement – A separate grievance was filed by the other union against the Respondent, subsequently withdrawn to avoid a jurisdictional dispute – Respondent requested the proceeding be adjourned to file a work assignment application with the Board under section 99 of the *Act* – Respondent argued it would be impossible to comply with both collective agreements at the same time – Respondent argued in the alternative that an adjournment is needed to permit it to file a jurisdictional dispute application – Applicant argued the Respondent is requesting an adjournment to avoid damages as a work assignment dispute did not exist and an agreement was entered into by the two unions to avoid completing claims for the work – Respondent’s request for adjournment is dismissed – Both unions only claim a specific portion of the work in dispute, and each expressly stated it is not entitled to the portion of the work claimed by the other trade union – There is no chance the Respondent will be required to pay damages to one of the unions for work properly performed by the union – Both unions agreed that the apportionment of the work in dispute between them has no precedential value in any future proceeding – Respondent can defend itself and assert all of its rights in both grievance proceedings – Respondent has identified no legitimate reason why the proceeding ought to be

Pending Court Proceedings

| Case name & Court File No. | Board File No. | Status |
|---|---|------------------|
| Tomasz Turkiewicz Divisional Court No. 601/18 | 2375-17-G | Pending |
| Amec Foster Wheeler Americas Limited Divisional Court No. 537/18 | 2743-16-R 3025-16-R | Pending |
| The Daniels Group Inc. Divisional Court No. 535/18 | 0279-16-R | Pending |
| D. Andrew Thomson Divisional Court No. 238/18 (Sudbury) | 1070-16-ES | Pending |
| Tomasz Turkiewicz Divisional Court No. 262/18 | 2374-17-R | Pending |
| Deloitte Restructuring Inc. Divisional Court No. 238/18 | 2986-16-R | Pending |
| Alicia R. Allen Divisional Court No. 199/18 | 0255-17-UR | Pending |
| Provincial Employers' Bargaining Agency - Labourers Divisional Court No. 141/18 | 2221-15-U | Pending |
| Trisect Construction Corporation Divisional Court No. 087/18 | 2553-15-R | Pending |
| Matrix North American Construction Canada Divisional Court No. 051/18 | 0056-16-JD | Pending |
| Brookfield Multiplex Ltd. Divisional Court No. 025/18 | 1368-15-R | October 1, 2018 |
| Canada Bread Company, Limited Divisional Court No. 11/18 | 3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R | Pending |
| Bricklayers (Prescott) Divisional Court No. 18/18 | 3440-14-U | Pending |
| Robert Daniel Laporte Divisional Court No. 037/18 | 2567-15-U | Pending |
| Highcastle Homes Inc. Divisional Court No. 7/18 | 3196-15-R 3282-15-U | March 11, 2019 |
| China Visit Tour Inc. Divisional Court No. 716/17 | 1128-16-ES 1376-16-ES | Pending |
| Rouge River Farm Inc. Divisional Court No. 637/17 | 0213-16-ES | January 24, 2019 |

(October 2018)

| | | |
|--|--|--------------------|
| Sheet Metal Workers' International Association Divisional Court No. 613/17 | 1536-16-R | September 12, 2018 |
| Dennis McCool Divisional Court No. 566/17 | 0402-16-U | Pending |
| S. & T. Electrical Contractors Limited Court of Appeal No. ____ | 1598-14-U 1806-14-MR | Pending |
| Ramkey Construction Inc. Court of Appeal No. ____ | 1269-15-R | Pending |
| Front Construction Industries Divisional Court No. 528/17 | 1745-16-G | Pending |
| Enercare Home Divisional Court No. 521/17 | 3150-11-R 3643-11-R 4053-11-R | Pending |
| Ganeh Energy Services Divisional Court No. 515/17 | 3150-11-R 3643-11-R 4053-11-R | Pending |
| LIUNA (Pomerleau Inc.) Divisional Court No. 257/17 | 3601-12-JD | Pending |
| Myriam Michail Divisional Court No. 624/17 (London) | 3434-15-U | Pending |
| Peter David Sinisa Sesek Divisional Court No. 93/16 (Brampton) | 0297-15-ES | Pending |
| Yuchao Ma Divisional Court No. 543/16 | 2438-15-U | October 4, 2018 |
| Byeongheon Lee Court of Appeal No. M48402 | 0095-15-UR | Pending |
| Byeongheon Lee Court of Appeal No. M48403 | 0015-15-U | Pending |
| R. J. Potomski Divisional Court No. 12/16 (London) | 1615-15-UR 2437-15-UR 2466-15-UR | Pending |
| Qingrong Qiu Court of Appeal No. M48451 | 2714-13-ES | Pending |
| Kognitive Marketing Inc. Divisional Court No. 51/15 (London) | 0621-14-ES | Pending |
| Valoggia Linguistique Divisional Court No. 15-2096 (Ottawa) | 3205-13-ES | Pending |