

*H*IGHLIGHTS

Ontario Labour Relations Board

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February of this year. These decisions will appear in the January/February 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.

Certification – Construction Industry – Applicant filed an application for certification under s.128.1 asserting only two employees were working on the date of application – The City contended it was not the employer of the two individuals and, even if the two individuals were employees, they were performing general clean-up and maintenance work, not construction work – Intervenor claimed bargaining rights over the individuals if they were found to be construction labourers – The City enlisted help of a general contractor to assist in the maintenance and repair of properties – Some work is subcontracted out by the general contractor – Applicant relied on the City's day to day supervision of the two employees on the date of the application to show it was the employer of the two individuals – A party will not be classified as the employer on the sole basis of providing day-to-day direction to workers, rather the Board will consider the context of the entire situation and the statutory and labour relations framework within which it operates – The subcontractor was found to be the employer because it paid the workers, remitted their union dues, albeit under the mistaken assumption it was

obliged to under a collective agreement, and requested the labourers from a hiring hall to work at the site – Certification dismissed

CITY OF TORONTO; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB Board No. 3558-13-R; Dated February 20, 2018; Panel: Harry Freedman (21 pages)

Certification – Employee List – The union applied under section 6.1 for an order directing the employer to provide a list of all employees in the bargaining unit that the applicant claimed to be appropriate – The employer submitted that if granted, the proposed bargaining unit would cause "undue fragmentation; that the Board prefers comprehensive bargaining units; that it is reluctant to certify departmental bargaining units; that the community of interest among its employees and the effects of a labour dispute would all give rise to labour relations harm." – The employer's considerations are not relevant to the Board's determination under section 6.1, and they do not persuade the Board that the unit described in the application is one that the Board would never find appropriate – If an application for certification is ever filed, the responding party will then have an opportunity to be heard on the bargaining unit description – For a responding party to persuade the Board to dismiss a list application, the unit applied for would have to be one that could never be granted by the Board, and not one that may be doubtful although still arguably possible – The union's evidence of membership was well in excess

of 20 per cent or more of the employees in the proposed bargaining unit – The Board directs the employer to provide a list of employees in the proposed bargaining unit to the union

GROCERY GATEWAY; RE:
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS;
OLRB File No. 2943-17-R; Dated February 14,
2018; Panel: Paula Turtle (7 pages)

Certification – Construction Industry – Membership Evidence – Applicant filed an application for certification, unfair labour practice alleging the responding party forced members into giving statements against the applicant, and a s.1(4) application – The ULP and s.1(4) application were held in abeyance pending the decision in the certification application – Responding party argued the membership evidence of two employees should not be considered because it alleged the evidence was elicited by a misrepresentation made by a union organizer – Responding party asked the Board to order an oral hearing in order to receive the employees' *viva voce* evidence – The two individuals were asked by a union organizer to provide their information in order to be notified of future contracts or work opportunities but were not explicitly informed by the union organizer they were signing a union membership card – Applicant relied on *Silver Concrete Pumping Limited* for the proposition that a 'change of heart' should not be given any weight by the Board because employees are "reasonable and responsible adults who read what they sign and do not behave in a frivolous or uncaring manner about events and documents that may have a significant effect on their life" – The Board agreed with the applicant that employees are assumed to be reasonable and rational but found there was no fundamental misrepresentation on the basis that the union organizer had identified himself as being from the union, asked the individuals to join the union, told them they will be updated on future work opportunities if they provided their information, and the membership card clearly indicated its purpose – The Board was also dissuaded from placing weight on the limited English argument for one of the individuals because the claim was only presented by the responding party and not asserted by the individual – Certificate issued

LANCASTER HOMES INC.; RE:
LABOURERS' INTERNATIONAL UNION OF
NORTH AMERICA, ONTARIO PROVINCIAL
DISTRICT COUNCIL; RE: LH (NIAGARA)
LTD.; RE: LINDENBROOK PROPERTIES INC.;

RE: 2380409 ONTARIO LTD.; RE: 1392927
ONTARIO LTD.; RE: 1437791 ONTARIO LTD.;
OLRB Board No. 2411-17-R, 2505-17-U & 2610-
17-R; Dated February 21, 2018, Panel: John D.
Lewis (17 pages)

Certification – Membership Evidence – Practice and Procedure – The Board addressed the employer's request that the union be directed to provide it with a blank membership card used to solicit its members in this application – The Board first noted that it was the Board's exclusive responsibility to determine the form of the membership evidence and to examine and verify the membership evidence filed by the union; that there was no provision in the *Act* for the employer to have access to blank cards and the employer has no role in their examination; and that this makes good labour relations sense given that certification applications are intended to proceed expeditiously – Next the Board reviewed its jurisprudence where it has ordered production of a blank membership card or included one in a decision and concluded that there may be occasions when the Board will consent to the disclosure of blank membership cards where there are reasonable and properly particularized concerns raised by the employer, an affected individual or otherwise by the Board – In this case however the employer had not made any allegations of impropriety or inappropriate use of a membership card and accordingly had not pled any basis for seeking a copy of the blank card – Request denied – Matter continues

PRIMARY RESPONSE INC.; RE: UNITED
FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 333; OLRB
File No. 2832-17-R & 2927-17-R; Dated February
26, 2018; Panel: Matthew R. Wilson (5 pages)

Certification Where Act Contravened – Construction Industry – Interference with Trade Unions – Applicant sought remedial certification pursuant to s.11 alleging the employer had committed an unfair labour practice when it terminated two employees who had shown support for the union and retracted an employment offer to another individual because of his perceived support for the union – Employer claimed to have no knowledge of an organizing campaign and argued the loss of a project led to work shortages – Applicant relied on the employer's distribution of anti-union material to employees and the close proximity between the employer's decision to terminate the two employees and revoke the employment offer of the other individual and their

signing of union membership cards – Referring to *DES Building Contractors Inc.* the Board explained in a small company it is not a neutral or ordinary event for an employee to express interest in a union – Anti-union motive does not have to be the sole reason or predominant reason for the conduct complained of to find the *Act* was violated – The Board found the employer’s decisions and conduct were motivated, in part, by the individuals’ perceived support for the union and violated s.70, 72, and 76 of the *Act* for several reasons including, the decision to terminate employees was inconsistent with a claim of shortage of work, no evidence corroborating the loss of a project led to work shortages, and distribution of anti-union literature to employees – The employer’s conduct also directly affected the applicant’s ability to gain the necessary membership support – When affected employees are aware of the termination of an inside organizer, s.11 relief will almost automatically follow – Certificate issued

ROB COLLINS ELECTRICAL INC.; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 120; RE: IBEW CONSTRUCTION COUNCIL OF ONTARIO; OLRB Board No. 3170-16-U & 0067-17-R; Dated February 14, 2018; Panel: Jack J. Slaughter (32 pages)

COURT PROCEEDINGS

Evidence – Judicial Review – Applicant sought a stay pending judicial review of the Board’s decision certifying all construction labourers employed by Multiplex in the ICI sector of the construction industry in Board Area 8 – Multiplex opposed the application for certification on the basis that the two individuals were employed by CLM General Enterprise Ltd. – The Board found that Multiplex’s claim “that it was not the true employer [of the two foremen] is merely a fiction that does not accord with the reality of the workplaces.” – The application for judicial review alleged the Board breached the rules of natural justice and procedural fairness by excluding relevant evidence about the roles of the two foremen after the date of application – The applicants argued that the test on a stay application of a Board’s decision is that there is a serious issue to be tried, not a strong *prima facie* case, or alternatively that the refusal to allow evidence is a denial of natural justice – The Board’s decision should not be stayed unless Multiplex can establish a strong *prima facie* case on the merits of the application for judicial review – Courts in Ontario have generally applied the strong *prima facie* test –

The Board’s decisions are afforded significant deference from the reviewing court – Reasonableness standard generally applies to the Board’s decisions as it is recognized that the Board has “established and recognized expertise in the ‘complex and sensitive field’ of labour law” – Under section 111 of the *Labour Relations Act*, the Board has the discretion to refuse post-application evidence – Multiplex did not meet the strong *prima facie* test – Application dismissed

BROOKFIELD MULTIPLEX CONSTRUCTION CANADA LIMITED; RE: BROOKFIELD MULTIPLEX HSP HOLDINGS LIMITED; RE: BROOKFIELD MULTIPLEX CANADA HOLDINGS LIMITED; RE: LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: THE ONTARIO LABOUR RELATIONS BOARD; 2018 ONSC 548 (Court File No. 025/18); Dated February 1, 2018; Panel: C. Horkins J. (7 pages)

Judicial Review – Occupational Health and Safety – Timeliness – The applicant sought an order by way of judicial review of the Board’s decision declining to adjudicate an appeal by the Amalgamated Transit Union, Local 113 – The Board adjourned the appeal pending the outcome of a grievance arbitration between the same parties arising out of the same concerns – The applicant argued that the Board is not entitled to decline to exercise its exclusive appellate jurisdiction under the *OHS Act* or to subordinate its own decision making authority to an arbitrator – The application for judicial review was premature – The Board has not made any final findings or determination – It has exercised its “undoubted jurisdiction” to adjourn a hearing on the basis that it is more practical and appropriate for the related arbitration to proceed first – The doctrine of prematurity precludes judicial review of interim decisions made by administrative tribunals in all but exceptional cases – Application dismissed

TORONTO TRANSIT COMMISSION; RE: AMALGAMATED TRANSIT UNION, LOCAL 113; RE: A DIRECTOR APPOINTED UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; RE: THE ONTARIO LABOUR RELATIONS BOARD; 2018 ONSC 641 (Court File No. 262/17); Dated January 25, 2018; Panel: Myers, C. Horkins, Varpio JJ (3 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.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
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	Pending
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	Pending
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	Pending
Sheet Metal Workers' International Association Divisional Court No. 613/17	1536-16-R	Pending
Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 20, 2018
S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1806-14-MR	May 15, 2018
Reuben Gooden Divisional Court No. 556/17	1113-16-U 1114-16-U 1213-17-U	March 14, 2018
Ramkey Construction Inc. Divisional Court No. 539/17	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

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Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Pending
Kevin Mackay Divisional Court No. 466/17	2972-16-U	Pending
Across Canada Divisional Court No. 244/17	3673-14-R	April 12, 2018
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	Pending
Byeongheon Lee Court of Appeal No. M48402	0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403	0015-15-U	Pending
Carpenters (Riverside) Court of Appeal No. M48481	0630-16-R	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