

*H*IGHLIGHTS

Ontario Labour Relations Board

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SOLICITORS' OFFICE

The Board welcomes **Andrea Bowker** to the Solicitors' Office. Andrea joins the Board with 22 years' experience as a labour lawyer, both in private practice and as in-house counsel. Her practice has included regular appearances before the Board, private arbitrations and other tribunals. She has spoken regularly on a wide range of labour law topics. She is a graduate of University of Toronto and McMaster University.

SCOPE NOTES

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

Bankruptcy – Collective Agreement – First Contract Mediation-Arbitration – Jurisdiction – Stay of Proceedings – Union filed an application pursuant to section 43.1 of the *Act* seeking a direction from the Board that the first collective agreement between the union and the employer be settled by way of mediation-arbitration – Employer did not file a response, instead court appointed manager (the “Manager”) took the position that the proceeding was stayed by Order of the Court – The Manager argued that the union had attorned to the jurisdiction of the court by attending at earlier court proceedings – Board found that the Union had not

attorned to the jurisdiction of the court – Board found that it had jurisdiction to interpret the stay order issued by the Court – Board found that there was nothing in the court's order that could reasonably be interpreted to stay the proceeding – The Board noted that there was no allegation that the union violated section 17 of the *Act* or that bargaining was unsuccessful because of the uncompromising nature of any bargaining position adopted by the union – The parties met for bargaining at least three times and engaged in the conciliation process and were unable to reach a collective agreement – Therefore, the Board concluded that further mediation would not assist the parties in reaching a collective agreement – The Board directed that the first collective agreement be settled by mediation-arbitration – Application allowed

ACROSS CANADA CONSTRUCTION LTD.;
RE: LABOURERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 183; OLRB File
No. 0253-18-FA; Dated May 24, 2018; Panel:
Matthew R. Wilson (10 pages)

Application for Certification – Collective Agreement – Construction Industry – Status – This application for certification filed by the Iron Workers turns on the status of two individuals: Mr. M and Mr. W – The employer is bound to a collective agreement with the Carpenters – Iron Workers argued that the work performed by the individuals falls within the craft certification of work performed by Iron Workers in the ICI sector of the construction industry, that whether a person is included in a bargaining unit should be

determined by applying a contextual analysis and that the gratuitous application of a collective agreement does not create bargaining rights – Employer argued that the individuals should be excluded because the work performed by the individuals was covered by the Carpenters' collective agreement – Mr. M was hired by the employer directly and was not referred to the employer from the Carpenter's hiring hall in accordance with their collective agreement – On the date of application, Mr. M welded on a handrail and performed other welding related work for the majority of the day – Board found that Mr. M was not covered by the Carpenters' collective agreement as he was not hired through the hiring hall – Accordingly, Mr. M was included on the list of employees – Mr. W was dispatched to the employer as a carpenter through the Carpenter's collective agreement – Mr. W performed welding work on the date of application – Board found that the work performed was covered both by the Iron Workers' ICI collective Agreement and the Carpenters' collective agreement – Board found that Mr. W. cannot be included on the list of employees as he was covered by the Carpenters' collective agreement on the date of application – Application dismissed

BONDFIELD CONSTRUCTION COMPANY LIMITED; RE: IRON WORKERS DISTRICT COUNCIL OF ONTARIO; OLRB File No. 2552-16-R; Dated May 31, 2018; Panel: Jack J. Slaughter (20 pages)

Interim Order – Unfair Labour Practice – Union filed an application under section 98 of the *Act* seeking an interim order requiring the employer to give employees a pay raise of 4.85% each year until the conclusion of the outstanding unfair labour practice application – The Union alleged that following a representation vote in an application for certification, the employer gave employees raises which were lower than those set out in its administrative policy – In so doing, the Union alleged that the employer violated sections 70, 72 and 86(2) of the *Act* – Employer argued that the wage increases established in the administrative policy were not guaranteed and were always subject to the approval of its Board of Governors on an annual basis – Employer further argued that given its financial position, management decided not to give the full increase set out in the administrative policy – Given that this is one of the first section 98 applications since section 98 was amended by Bill 148, the parties made submissions on the appropriate test to be used – The union argued that the Board should adopt the test

established in *Loeb Highland* following the Bill 40 amendment to the *Act* – The employer argued that the Board should apply the three part test for interlocutory relief established in the Supreme Court of Canada decision *RJR-Macdonald Inc.* – The Board held that given the broad authority conferred upon it under the amended section 98 of the *Act*, it should adopt a test that could be applied in the wide variety of labour relations circumstances which the Board may face – The Board held that the fundamental question is: “does the making of an interim order, of whatever kind, make labour relations sense in all of the circumstances” – In making this determination the Board held that it would consider a number of factors including: the purpose of the *Act*, the nature of the interim order sought; the urgency of the matter, the apparent strength of the applicant's case, the balance of convenience/inconvenience, the balance of labour relations and other harm, whether the damage is irreparable, delay and any other labour relations consideration – The Board found that the union had stated a prima facie case – Board found the remedy requiring an employer to pay employees on an interim basis is an extraordinary remedy – Board held that the employer has a reasonable defence on the merits and therefore, these facts do not justify an extraordinary remedy – Board directed the employer to post a notice to employees in the workplace – Application allowed

NATIONAL JUDICIAL INSTITUTE; RE: THE SOCIETY OF ENERGY PROFESSIONALS, IFPTE LOCAL 160; OLRB File No. 0442-18-IO; Dated May 31, 2018, Panel: Brian McLean (22 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – Unfair Labour Practice – Applicant seeks judicial review of the Board's decision and reconsideration decision dismissing his unfair labour practice and duty of fair representation complaint filed under the *Colleges Collective Bargaining Act* – The applicant is a college professor at Mohawk College and holds three elected positions within the union – In his applications, the applicant alleged that the Union breached its duty of fair representation and engaged in intimidating and coercive conduct when its president asked the president of Mohawk College to fire the applicant – The Board dismissed the duty of fair representation complaint on the basis that there was no labour relations purpose in proceeding with the application – Board dismissed the unfair labour practice complaint on the basis

that the comment to the College President was not meant to have the applicant refrain from exercising a right under the act – Divisional Court found that the Board did not violate principles of natural justice or procedural fairness – Court held that there is no requirement that reasons address every submission a party makes – Court found Board’s decision to be reasonable – The Court noted the Board’s discretionary power to dismiss a complaint without a hearing – Application dismissed

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.

KEVIN MACKAY; RE: WARREN “SMOKEY” THOMAS; RE: THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION (OPSEU); Divisional Court File No. 466/17; Dated May 9, 2018, Panel: C. Horkins, Conway and C. MacLeod JJ. (7 pages)

Related Employer – Sale of Business – Stay Motion – Applicant brought a motion to stay a decision of the Board declaring that the applicant was a single employer with a predecessor company that was bound to a collective agreement with the union pending the hearing of his judicial review application – Applicable test of a stay motion is whether the moving party has established: 1. A strong prima facie case that the decision was unreasonable; 2. That irreparable harm will result if the stay is not granted 3. The balance of convenience towards the moving party – Court found that there was no strong prima facie case that the decision was unreasonable – court noted that the decision determined the essential threshold of the issue and applied the agreed facts to that threshold – Court found that costs of having to engage in additional legal proceedings does not rise to level of irreparable harm – Court found that the unions would be more inconvenienced than the applicant if the status quo is not maintained – Motion dismissed

TOMASZ TURKIEWICZ, a sole proprietor c.o.b. as TOMASZ TURKIEWICZ CUSTOM MASONRY HOMES; RE: ONTARIO RELATIONS LABOUR BOARD; RE: BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY; Divisional Court File No. 262/18; Dated May 22, 2018, Panel: Conway J. (2 pages)

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
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	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

(June 2018)

Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	June 7, 2018
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
Kevin Mackay Divisional Court No. 466/17	2972-16-U	Dismissed
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