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Ontario Labour Relations Board

HIGHLIGHTS

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SCOPE NOTES

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

Related Employer – Sale of a Business – Union sought declarations and associated relief under sections 1(4) and 69 of the *Labour Relations Act* based on relationship and transactions between responding parties F, FERL and R – Union was certified to represent F's construction labourers – F was a construction contractor specializing in building envelope work, including roofing – FERL was a holding company whose shareholders were the same as F's – R was a contractor specializing in rooftop solar systems, founded in 2006 – In 2010, FERL became 50% shareholder of R – No one affiliated with F or FERL was a director or officer of R – Following share purchase, R and F also entered into a shared services agreement ("SSA"), with F and R both renting office space from FERL and F providing many business support services, such as financial, bonding, accounting and IT support, to R through SSA – In and after 2010, R's business expanded through the Feed In Tariff ("FIT") program to the point that R ceased to subcontract much of the construction of rooftop solar systems, instead self-performing the construction – R ultimately became a licensed electrical contractor performing ICI construction work – R and F performed work on some of the same roof projects through separate bids, although some bids were co-ordinated – On one project, F secured both the roof and rooftop solar work prior to the share purchase and, after the share purchase, effectively transferred the solar work to R – Other than this project, all of R's work obtained by R's efforts, not by F's efforts – R and F did not perform work on projects at the same time or using any common employees, and did not do the same type of work on projects (with R doing roofing and F doing solar work) – R also continued to develop other lines of work, such as energy efficient lighting retrofits, in which F had no involvement – Union argued that the requirements of s. 1(4) were met and that R's growth into the rooftop solar business was growth that would have naturally accrued to F but for the relationship between the companies – Union also argued that the requirements of s. 69 were also met, in that the services provided by F to R through the SSA constituted the transfer of all or part of a business – Responding parties argued, among other things, that R was not controlled by either F nor FERL within the meaning of s. 1(4), that the SSA did not constitute a sale of a part of F's construction business to R, and that R's work did not constitute the natural growth of F's work – Board found that F and FERL exercised no control or direction over R's employment or labour relations arrangements, its assignment or performance of work such that they were not under common control or direction within the meaning of s. 1(4) – R existed independently as a real and successful business, different from F's, prior to the share purchase, and was not simply F's "alter ego" – Board found no evidence that rooftop solar work was work that would have naturally accrued to F but for the agreements with R, as nothing in F's business suggested that F would naturally become an ICI

electrical contractor, which is what R did in order for its rooftop solar business to grow – Board also found no sale of all or part of a business as no tangible assets transferred and the services provided by F under the SSA were simply generic services and not specific parts of Flynn's construction business – Application dismissed

FLYNN CANADA LTD.; RE: LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: RESCO ENERGY INC.; RE: FLYNN EQUIPMENT RENTALS LTD.; OLRB File No. 3520-13-R; Dated November 13, 2018; Panel: Michael McFadden (33 pages)

Certification – Construction Industry – Membership Evidence – Council of trade unions applied for certification – Membership evidence did not indicate membership in a constituent local of the council but in the council itself – Employer argued there was no valid membership evidence and application should be dismissed – Council argued that its by-laws made it clear that the council had the power to accept individuals as members – Board concluded that membership evidence should be accepted – Board also considered Employer's late response to application – Employer took position that it did not employ anyone in the bargaining unit on the application filing date, and that the individuals in dispute were independent contractors – At case management hearing, Employer also took the alternative position that the individuals in dispute did not perform bargaining unit work for the majority of the day on the application filing date – Board determined that the Employer could advance the position that it was not the employer of the individuals in dispute, but it was too late for the Employer to challenge the individuals on the basis of the work performed on the application filing date – Matter continues

FOXWOOD BUILDING CORPORATION; RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: FOXWOOD DEVELOPMENTS (LONDON) INC.; OLRB File No. 2065-18-R, 2066-18-R & 2282-18-R; Dated November 27, 2018; Panel: Caroline Rowan (10 pages)

Certification – Construction Industry – In application for certification, Union challenged an individual, DC, whose name appeared on Employer's Schedule "A" as excluded pursuant to section 1(3)(b) of the *Act* – Employer and Union produced documents to each other in advance of hearing – After the evidence of the Employer's first witness (who was not DC), Board asked parties to address question of whether further evidence was necessary in respect of DC's status – Documents produced by Employer indicated that DC was hired and employed as full-time, salaried Site Supervisor (and was sometimes referred to in those documents as a Project Supervisor or Healthcare Construction Superintendent) – Employment contract subjected DC to non-competition and non-solicitation obligations, and indicated that he would have access to the Employer's confidential information, including information about other employees – DC participated in Employer's benefits and bonus plans – DC identified as supervisor on Notices of Project required by *Occupational Health and Safety Act* – Emails indicated DC met with subcontractors to organize and make recommendations in respect of work – Employer argued that DC was a "working foreman" and therefore included in the bargaining unit, that his status was not clear from the documents and the pleadings and that evidence was required – Union argued that the documents produced and the first witness's evidence made it clear that the Employer was a general contractor, that DC was required to and did liaise with subcontractors on the Employer's sites, that DC was in charge of those sites and that he was identified as such by the Employer – Board applied Rule 41.3, which allows for the Board to decide a case on the basis of the material before it, and to limit evidence – Board has obligation to decide construction industry certification applications as efficiently and effectively as possible – Rule 41.3 underlines that parties are not entitled to an oral hearing in every circumstance – Board will be cautious in deciding disputed issues without oral evidence but also draw on its labour relations expertise – Board found that the documentary materials produced by the Employer indicated that DC was not simply a working foreman who sometimes directed other tradespersons – Documentary materials indicated that he was a site superintendent, the "eyes and ears" of the Employer on its construction site, and that he co-ordinated the work of subcontractors on the sites – Formalities of his employment contract also indicated that he was not a working foreman – DC's supervisor rarely attended at construction sites – Finally, the Employer's identification of DC as the supervisor for *Occupational Health and Safety Act* purposes is a material consideration – Board concluded that DC clearly the management representative of the Employer at the relevant construction sites, and struck his name from the Schedule "A" list – Matter continues

GEN-EER CONSTRUCTION LIMITED; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 0177-18-R; Dated November 9, 2018; Panel: Lee Shouldice (11 pages)

***Public Sector Labour Relations Transition Act* – Unfair Labour Practice –** Responding Party employer (the "Employer") was the successor to three predecessor health care facilities following a voluntary integration – Before and after the voluntary integration, CUPE and Ontario Hospital Association (which also represented the Employer and its predecessors) engaged in central bargaining – Central Issues Memorandum of Settlement ("MOS") executed by CUPE and OHA in April, 2018 and ratified by both sides in May, 2018 – In June, 2018, the Employer notified CUPE that it would not implement the MOS because of the ongoing *PSLRTA* application before the Board – Board issued decision dated July 17, 2018 determining that an integration had occurred on August 1, 2017 (the "changeover date") and determining the bargaining unit structure for the Employer – Unfair labour practice application filed by CUPE in respect of Employer's refusal to implement the MOS – Employer argued that section 15 of *PSLRTA*, which governs the effectiveness and deemed application of collective agreements binding on the parties prior to a changeover date, prohibited the implementation of the MOS – Employer argued that s. 15 was intended to level the playing field for the various bargaining agents affected by an integration and that it did not authorize changes to the collective agreements that predated the changeover date – CUPE argued that having chosen to engage in collective bargaining prior to the conclusion of the *PSLRTA* process, and having negotiated and ratified a collective agreement, the Employer could not refuse to implement it, and nothing in s. 15 prevented its implementation – CUPE argued that s. 15 did not require the terms and conditions in effect prior to the changeover date to be frozen, and that such a reading of s. 15 undermined the voluntary bargaining permitted by s. 18(3) – Board concluded that the purpose of s. 15 was to ensure the continuation of collective agreements, but not to freeze them in place where the parties choose to bargain as permitted by *PSLRTA*, which prohibits some, but not all, collective bargaining after the changeover date – S. 18 did not permit a successor employer to be compelled to bargain, but it did not prevent it from voluntarily bargaining – S. 15 as a whole could not be interpreted as requiring terms and conditions of employment to be frozen in place – Board concluded that s. 15 was not designed to create a "level playing field" but to resolve conflicts among collective agreements that might exist on a changeover date – Board noted the labour relations mischief that would flow if an employer could negotiate and ratify a collective agreement in these circumstances but then refuse to implement it, and that nothing in *PSLRTA* compelled such a result - Board found that *PSLRTA* did not prohibit the implementation of the MOS

PROVIDENCE ST. JOSEPH'S AND ST. MICHAEL'S HEALTHCARE; RE: CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS (LIUNA LOCAL 3000); RE: CANADIAN UNION OF PUBLIC EMPLOYEES; RE: SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA; OLRB File No. 1889-17-PS, 1107-18-U, 1352-18-PS & 1353-18-U; Dated November 27, 2018; Panel: Paula Turtle (22 pages)

Certification – Construction Industry – Dispute over identity of "true employer" – Union filed application for certification in respect of D, a construction manager with contract with builder – Although D was to recommend subcontractors in respect of various trades on the site, D played no role in selecting subcontractors to perform site cleanup on site – Builder entered into contracts directly with other subcontractors, including F and R, to supply construction labourers to the site – D supplied site superintendent, EP, and was paid a flat fee for its services – Builder's contract with F included provision of a backhoe operator, PM, as needed for "housekeeping" – Builder had pre-existing relationship with R and R was contacted directly by EP at builder's suggestion to provide additional site labour, which was provided at an hourly rate – D had no role in contractual or rate arrangements with F and R, who were paid directly by builder – Daily work assignments were determined by EP who communicated them sometimes to PM, who relayed them to construction labourers supplied by R, and sometimes communicated them directly to all workers – Hours of work for all individuals approved by EP and then paid for by builder – F and R had little to no supervisory presence on site – Board considered analysis set out in *ABB Inc.*, which also relied on considerations set out in *Pointe-Claire* and *Rochon* – In this case, the Board considered the most relevant question to be whether D controlled the main or most fundamental terms of employment – D did not select subcontractors or

pay them, did not bear the burden of remunerating the workers, supplied none of the tools or equipment they used, did not train them and there was no record of any discipline or evidence of which entity had the power to do so – Only term of employment controlled by D on-site supervision, which was tempered as very little supervision was required – Entity with no role at all in determining who will work on site because it does not select the contractors, and that bears no burden of remuneration, is not the appropriate collective bargaining partner – Board determined that D was not the employer of the individuals in dispute – Matter continues

ROYAL VINTAGE HOMES INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: 2149629 ONTARIO INC.; RE: DANMAR DEVELOPMENT CORP.; OLRB File No. 1927-16-R; Dated November 30, 2018; Panel: Mary Anne McKellar (19 pages)

Certification – Construction Industry – Dispute over identity of "true employer" – Union filed application for certification in respect of Y, a homebuilder – Y had entered into a subcontract for the provision of site labour with A – Y paid A flat rate per block of homes – A selected employees, provided tools and equipment and was required to ensure a foreman was present on site – Work assigned by Y's representatives to A's owner or project manager, who then determined how many, and which, of A's workers would be sent to Y's site based on the project schedules – A periodically also obtained additional workers from a third party labour supplier without advising Y – Y periodically requested that A send more workers to site, which requests were sometimes accommodated and sometimes not – Y complained to A about quality of work and on one occasion asked that a particular worker, DF, not return to the site – A sometimes accommodated Y's requests but continued sending DF to the site – Y received stop work order from Ministry of Labour due to poor housekeeping on site and hired other workers directly in order to complete enough work to lift the stop work order, which workers were supervised by Y, not A, but two of these workers were added to A's payroll – Level of supervision supplied by A varied with the volume of work and different individuals paid by A were designated as the site foreman depending on who was on site – Board reviewed *Pointe-Claire* and *York Condominium* and had regard to the factors set out in *York Condominium* – Y's direct hiring of employees, some of whom were put on A's payroll, to perform work necessary to lift stop work order indicated that the "hiring" criterion was mixed, but mostly pointed to A as the employer – Other than this one mixed criterion, all of the factors indicated that A was the employer, and not Y – Application dismissed

YOUR HOME DEVELOPMENTS (KINGSTON) INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 1551-13-R; Dated November 9, 2018; Panel: Caroline Rowan (17 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
Audio Visual Services (Canada) Corporation Divisional Court No. 732/18	2694-16-R	Pending
Kelly White Divisional Court No. 671/18	2032-17-ES	Pending
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	March 19, 2019
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	May 22, 2019
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	April 3, 2019
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	June 18, 2019
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

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Rouge River Farm Inc. Divisional Court No. 637/17	0213-16-ES	January 24, 2019
Dennis McCool Divisional Court No. 566/17	0402-16-U	March 7, 2019
S. & T. Electrical Contractors Limited Court of Appeal No. M49460	1598-14-U 1806-14-MR	Motion for Leave to Appeal Dismissed
Ramkey Construction Inc. Court of Appeal No. M49563	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
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