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Ontario Labour Relations Board HIGHLIGHTS

Editors: Aaron Hart, Solicitor

November 2019

NOTICES TO THE COMMUNITY

Holiday Season Board Schedule

The Board's holiday operations schedule is attached and can be found on the Board's website.

Form A-4 and A74: Declarations Verifying Membership Evidence

The Board is re-examining its practice of providing the A-4 to the Responding Parties and Intervenors in s. 8 applications for certification and not providing the A-74 in s. 128.1 applications for certification (Construction Industry). Submissions about whether to alter or continue those practices are requested by January 21, 2020 and are to be directed to the Board's Solicitors' Office.

New full-time Vice-Chair

The Board welcomes **Michael McCrory.** Prior to his appointment at the Board Michael was the Director for Labor Relations at Air Canada, former Head of Flight Crew for Employee Relations at Cathay Pacific Airways Ltd, and former Counsel for Labor and Employment Law at Air Canada.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in October 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.

Displacement Application for Certification — Construction Industry — Reconsideration — Request for reconsideration of a displacement application for certification pursuant to s. 128.1 of the *Labour Relations Act, 1995* (the "*LRA*") — Two prior decisions of the Board, among other things, dismissed the application for certification because the Board determined another union had not abandoned its bargaining rights for the hoist operators — Labourers ("Local 183") applied for judicial review which was ultimately dismissed on the basis it was premature as the Labourers did not request reconsideration — In the subsequent request for reconsideration, Local 183 argued the Board incorrectly decided two issues: 1. Not exercising discretion under s. 128.1(13)(b) of the *LRA* to direct a representation vote; and 2. Determining the application ought to be dismissed because it was untimely — Board outlined broader factual context of the reconsideration — After outlining the test for reconsideration, Board found reconsideration was appropriate, as important policy issues had not been adequately addressed or correctly decided in the Board's initial decision — On reconsideration, Board held Local 183: 1. Could file a displacement application under s. 128.1 by requesting a representation vote under s. 128.1(13)(b); and 2. Board was not required to have directed such a vote in the circumstances — Despite acknowledging s. 128.1 may be used for the purpose of displacing an incumbent union, Board reasoned that doing so "in the normal course would make little sense", as the process would take longer under s. 128 than under s. 8 and the true wishes of the bargaining unit employees may no longer be reflected — Board reasoned it was not required to have directed a representation vote as, at the time of the request, there was no determination the unit of employees was appropriate for bargaining, as required by s.

128.1(13)(b) — Board determined the appropriate bargaining unit of employees for the purpose of the application — Board declined to exercise discretion under s. 128.1(13) to direct a vote because there was no evidence that Local 183 had sufficient support amongst the bargaining unit employees — Board acknowledged application was in fact not untimely — In conclusion, Board revoked a portion of a decision that stated the application was untimely; Local 183 was entitled to file this displacement application under s. 128.1; it was not appropriate to direct a representation vote because the unit of employees for which Local 183 initially sought bargaining rights was not appropriate for collective bargaining — Application dismissed

THE DANIELS GROUP INC; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 0279-16-R; Dated October 15, 2019; Panel: Lee Shouldice (38 pages)

Employment Standards — Reconsideration — Director of Employment Standards brought an application for reconsideration of a Board decision — Board determined there were proper grounds for reconsideration — Director argued Board cannot permit an employee to choose whether he/she wishes to be reinstated or not, and to vary the compensation award depending on the employee's election — Director made four arguments in support of this position: 1. Board only has the powers of an Employment Standards Officer ("ESO") under s. 119 of the *Employment Standards Act, 2000* (the "*ESA*"); 2. ESO only has power under s. 103(1), if it finds the employer owes wages, to order a specific "amount of wages"; 3. Board had no authority to provide the employee an option for reinstatement as it is required to determine the final quantum of the loss before issuing the order for compensation pursuant to s. 104(1); and 4. Board's order resulted in an indeterminate compensation order which cannot be enforced without the Director making further findings — Regarding jurisdiction, the Board held s. 104 permitted the Board's order since s. 104 does not limit the powers of the Board to order reinstatement or compensation or both — Board found it erred in directing that the employee advise only the Employer if he chose reinstatement; Board ought to have directed the employee to advise the Board, Director, and Employer in writing of his decision within two weeks of that decision, as this would dispense with the Director's concerns regarding the finality of the Board's order — Board rejected the Director's argument that it is limited to the powers of an ESO and is required to impose minimum administrative costs — Board clarified that its order is the new comprehensive order and original orders of the ESO are rescinded — Board ordered the parties to make submissions regarding the final amount owing respecting statutory deduction — Board concluded interest was not available in the circumstances — Board revoked the order of its earlier decision and substituted its order in light of the employee advising he did not wish to be reinstated

L&L McCAW HOLDINGS LTD. OPERATING AS CANADIAN TIRE; RE: CHUN BAO YIN; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1961-18-ES; Dated October 10, 2019; Panel: C. Michael Mitchell (15 pages)

Reprisal Application Under Section 50 of *OHSA* — Interim Decision — Reprisal application brought by the Applicant pursuant to s. 50 of *OHSA* alleging her employment was terminated for requesting the Employer provide her a safe workplace and investigate her allegations of harassment — Applicant requested "potential reinstatement, damages and any penalties that this Board finds just and appropriate" — Following her application to the Board, the Applicant filed a complaint with the Human Rights Tribunal of Ontario (the "HRTO") — In this decision, Board considered two issues: 1. Whether it would be appropriate to defer the matter pending the outcome of the HRTO proceeding; and 2. The Applicant's production — Board outlined the following factors to be considered when a deferral request has been brought in the context of a reprisal application: 1. Are there parallel proceedings? 2. Will the other proceeding resolve all (or the substantial portion of) the factual and/or legal issues the Board would decide? 3. Will the other proceeding provide a more "complete" disposition of the central dispute? And 4. Are there logistical matters that weigh on the deferral? — Board found: 1. There were parallel proceedings; 2. HRTO proceeding would not resolve all factual and/or legal issues; 3. HRTO complaint offered a more complete disposition of the central dispute; and 4. Logistical reasons go against deferring the matter, as the Board can hear the issue more expeditiously – Board emphasized the importance of avoiding delay, which the Board considered "the overriding consideration in the circumstances of this case" — Board declined to defer the hearing — Board reminded the Applicant she is required to produce any document that is arguably relevant to the proceeding

SCORE PROMOTIONAL MARKETING INC.; RE: MELISSA ART; OLRB File No. 0259-19-UR; Dated October 15, 2019; Panel: Patrick Kelly (7 pages)

Standing — Appeal of Inspector's Order — Interim Decision — Application under section 61 of the *Occupational Health and Safety Act* ("*OHSA*") seeking an appeal of an inspector's decision that there was no basis for a work refusal initiated by teachers in response to a violent incident from an "exceptional student" — Inspector's Field Safety Report indicated a revised safety plan would be prepared before John's return to school — Teachers initiated a work refusal on the Student's return — Inspector advised they did not have grounds for the work refusal – Ontario English Catholic Teachers' Association ("OECTA") appealed that decision — This interim decision addressed the right of the Student's parents to intervene and participate in the hearing on its merits — OECTA opposed their participation, the School Board supported their participation, and the Director took no position — OECTA argued that the Student's parents should not be granted standing as they have no direct legal interest in the proceeding and would not assistant the Board in the matter — School Board and parents argued: 1. Parents are uniquely situated to assist the Board; 2. The Student has a direct legal interest in the proceeding; 3. Their participation would not delay, inconvenience or prejudice the parties; and 4. It would be unfair to litigate about the Student and his behaviour and prevent him from participating — Board canvassed the case law and legislation and outlined the following non-exhaustive factors to be considered when determining whether a person should be permitted to participate in such an appeal: 1. Legal rights of person under *OHSA* or another statute are potentially affected such that the person should be permitted to participate; 2. Safety of the person is actually or potentially affected; 3. Party has unique or helpful contribution to make to the proceeding; and 4. Proposed participation potentially impedes the litigation by making it too complex and lengthy — Board found: 1. The Student's legal rights under *OHSA* were not affected; 2. His safety could "theoretically" be affected, but the potential impact of the remedy requested by OECTA was "indirect and speculative" and did not itself justify participation; 3. Parents would not be particularly useful in the proceeding; and 4. Participation would not result in the proceeding becoming too complex or unwieldly — Board reasoned fairness considerations could not sustain a right to participate in the proceeding — Request to intervene as party denied, but permitted to make submissions on admissibility of the Student's records

DUFFERIN-PEEL CATHOLIC DISTRICT SCHOOL BOARD.; RE: ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB File No. 0299-18-HS; Dated October 8, 2019; Panel: C. Michael Mitchell (14 pages)

Statutory Interpretation — *Public Sector Labour Relations Transition Act* ("*PSLRTA*") — Four applications filed by Ontario Nurses' Association ("ONA") pursuant to s. 9 of *PSLRTA* – – Applications were joined for the purposes of the decision — Issue was whether the *PSLRTA Regulation* was in effect: if in effect, the applications must be terminated — ONA filed four applications pursuant to s. 9 of *PSLRTA* between April 11, 2019 and May 29, 2019 — *Protecting What Matters Most Act ("Budget Measures Act")* received royal assent on May 29, 2019 and repealed s. 9 — *PSLRTA Regulation* was enacted on August 7, 2019 and deemed any current application under s. 9 to be terminated, effectively giving the repeal of s. 9 retroactive effect — Applicants argued *PSLRTA Regulation* is of no force or effect since: 1. It conflicts with the *Legislation Act*; 2. Rights under each application vested prior to the *Budget Measures Act* coming into force; and 3. *PSLRTA Regulation* was *ultra vires* — Responding parties made arguments relating to statutory interpretation and why *PSLRTA Regulation* was a lawful exercise of authority — Board held: 1. *PSLRTA Regulation* does not conflict with the *Legislation Act* as *PSLRTA* conferred authority on the Lieutenant Governor in Council to enact regulation retroactively; 2. ONA did not have any vested rights with respect to these applications as ONA's legal situation was "not tangible or concrete", but at best "a mere hope or expectation"; and 3. *PSLRTA Regulation* was not *ultra vires* as the elimination of s. 9 of *PSLRTA* was: consistent with a purpose of *PSLRTA*; *PSLRTA* confers broad and express regulation making power; and even if a conflict between *PSLRTA* and *PSLRTA Regulation* was found, the latter would prevail – Board found the *PSLRTA Regulation* applied to the four applications and therefore terminated the applications pursuant to s. 1(1) of the *PSLRTA Regulation*

NORTH SIMCOE MUSKOKA LOCAL HEALTH INTEGRATION NETWORK; RE: THE ONTARIO NURSES' ASSOCIATION; RE: TORONTO CENTRAL LOCAL HEALTH INTEGRATION NETWORK; RE: CENTRAL LOCAL HEALTH INTEGRATION NETWORK; RE: CHILDREN'S TREATMENT NETWORK; OLRB File Nos. 0645-19-PS, 0676-19-PS, 0684-19-PS, & 0695-19-PS; Dated October 31, 2019; Panel: Matthew R. Wilson (19 pages)

COURT PROCEEDINGS

Application for Certification — Judicial Review — Employer sought judicial review of Board decisions and certificate issued to the Union — Union applied to certify the Employer and dispute arose about the appropriate bargaining unit — Board issued 15 decisions dealing with the application and appropriate bargaining unit, and ultimately certified the Union — Parties agreed the standard of review was reasonableness — Employer argued the Board's decisions were unreasonable and resulted in a denial of natural justice — Among other things, Employer argued the Board ordered an essentially different bargaining unit than the one the Union applied for and it was denied procedural fairness based on the Board's refusal to hear oral evidence regarding the status of employees — Union argued the Board is entitled to a high degree of deference because the issue before the Board fell within its core expertise and there was no denial of procedural fairness, so the application should be dismissed — Court held the decisions of the Board were reasonable, as the Board's findings regarding the proposed bargaining unit were "perfectly rational" — Court held there was no violation of the principles of procedural fairness — Court reasoned the parties were given "ample opportunity" to provide submissions and held oral hearings where necessary — Application Dismissed

AUDIO VISUAL SERVICES (CANADA) CORPORATION.; RE: ONTARIO LABOUR RELATIONS BOARD; RE: INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES, AND CANADA, LOCAL 58; Divisional Court File No. 752/18; Dated October 9, 2019; Panel: D. L. Corbett, Gray and Sossin JJ. (17 pages)

Application for Certification — Judicial Review — Employer sought judicial review of a Board decision and the issuing of certificates on the basis the Board had no jurisdiction to grant the applications because the affected employees were subject to federal labour relations jurisdiction — Employer held a contract for part of a federal government project for the long-term management of low-level radioactive waste and was involved in the construction of a new waste management facility, excavation and transportation of low-level radiation waste and soil, and transition to long-term monitoring and maintenance of the new facility — Board concluded the labour relations of the Employer was within provincial jurisdiction – Parties agreed standard of review was correctness, as the Board applied constitutional principles; findings of fact made by the Board were entitled to deference and a reasonableness standard of review — On judicial review, Employer argued the Board erred in finding provincial law applied as: 1. It was a federal undertaking; or 2. It performed essential and vital work for a federal undertaking, resulting in derivative jurisdiction — Majority of the court disagreed with Employer's first argument and reasoned the Employer was a large construction and consulting business using ordinary construction and demolition techniques for a one-time contract; its essential operation was not for the purpose of possessing nuclear substances — Accordingly, majority of the court held Employer was not subject to direct federal jurisdiction as a federal work or undertaking — Majority of the court disagreed with Employer's second argument since, among other reasons, the Employer was not functionally integrated with the licensee for the project but was simply in a contractual relationship and its involvement ended when it completed its part of the contract, playing no ongoing role in the operation of the nuclear waste management facility — Accordingly, majority held the doctrine of derivative jurisdiction did not apply — Majority dismissed the application for judicial review — Dissent agreed with majority regarding factual background, standard of review, and that Employer was not itself a federal work or undertaking — However, dissent held Employer was subject to federal jurisdiction by way of derivative jurisdiction — Dissent concluded Employer was "integral to federal competence" over the project by specifically engaging the distinctly federal interest of the health and safety of affected employees, the public, and environment in the handling of nuclear substances — Application Dismissed

AMEC FOSTER WHEELER AMERICAS LIMITED; RE: LABOURERS' INTERNATIONAL UNION OF NORTH

AMERICA; RE: ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 537/18; Dated October 1, 2019; Panel: Swinton, Backhouse and Wilton-Siegel JJ. (25 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
Audrey Thomas Divisional Court No. 436/19	2508-18-U	Pending
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
Kuehne + Nagel Ltd. Divisional Court No. 393/19	0433-18-R	Pending
Kuehne + Nagel Ltd. Divisional Court No. 392/19	1172-18-R	November 22, 2019
Todd Elliott Speck Divisional Court No. 371/19	1476-18-U	April 29, 2020
ASL Agrodrain Limited Divisional Court No. 19-DC-2492 **(Ottawa)**	1840-18-R	November 21, 2019
New Horizon Divisional Court No. 264/19	0193-18-U	April 7, 2020
Doug Hawkes Divisional Court No. 249/19	3058-16-ES	Pending
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
Hector Yao Divisional Court No. 063/19	1841-18-ES	February 20, 2020
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
Kelly White Divisional Court No. 671/18	2032-17-ES	Dismissed
Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	July 25, 2019
D. Andrew Thomson Divisional Court No. 238/18 **(Sudbury)**	1070-16-ES	Dismissed
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019

(November 2019)

Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	November 14, 2019
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	Dismissed
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	December 18, 2019
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	September 12, 2019
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	October 21, 2019
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Abandoned
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