

H *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 December 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.

Construction Industry – Practice and Procedure – Termination – The Board found the package containing the termination application was delivered (within the time prescribed by the Rules) to a large, communal super mail box slot, however the key to this slot was not delivered, through some error of Priority Courier, to the union until days after the material was placed in the oversize box – Given the application was not delivered according to the Board’s Rules and given the length of time which passed before the union was able to review the application, the application was dismissed

697723 ONTARIO INC. o/a FENCE DEPOT; RE: Robert Winters; RE: Labourers’ International Union of North America, Local 527; OLRB File No. 0373-13-R; Dated December 4, 2013; Panel: Brian McLean; A. Haward and Roy O’ Rourke (8 pages)

Duty of Fair Representation – Judicial Review

– K alleged that the Union breached s. 74 by refusing to bring an application for judicial review of an arbitration award – The Board noted previous decisions expressing doubt in whether the union’s duty extends that far, however it stated that the union’s duty arises out of the union’s exclusive authority to act on behalf of an individual employee in litigating rights under a collective agreement – Given that an individual cannot litigate his or her own rights under a collective agreement, nor apply for judicial review (see *Weber*) the Board found the union was under an obligation to make a decision about whether to bring an arbitration award to judicial review in a “manner that is free from factors of arbitrariness, discrimination and bad faith” – The Board clarified that the standard that would have to be met before it could make a finding of a breach of s. 74 for not bringing a judicial review application of an arbitration award, would be to see a decision that was clearly beyond the realm of what was reasonable, or “the defects in the arbitration award must be so patent and pervasive that the Board can readily conclude that the union would be acting arbitrarily not to do so” – The Board assessed the award and found no breach by the union of its duty – Application dismissed

BOGDAN KOSCIK; RE: Ontario Public Service Employees Union; RE: Lakeridge Health; OLRB File No. 0956-13-U; Dated December 19, 2013; Panel: David A. McKee (9 pages)

Certification – Construction Industry – Membership Evidence – Practice and Procedure – The Board had to determine whether to accept M’s attempt to revoke his membership

application – The agreed facts for the purposes of this issue were that M left a voice message with the union’s organizer advising he wished to revoke his membership and later that same day drafted a letter of revocation that he mailed the next day (which was the day the certification application was filed) Additionally in the early evening of the day the certification was filed M spoke to the organizer by phone and during that conversation the organizer agreed to send his card back – The Board was first informed by employer’s counsel of the revocation six days after the certification was filed – The Board noted that for a desire to revoke a membership to be valid it “must be timely, in writing and signed by the employee concerned to have any effect on an application for certification” – This standard was not met as of the day of application – The Board further noted that there was no evidence the union accepted the revocation prior to the date of application and that at best the union orally accepted the revocation on the evening of the application, which was of no consequence as the Board does not parse events occurring during the course of a day – Matter proceeds

NORTH STAR HOMES INC.; RE: Lilyview Estates Inc.; RE: Labourers’ International Union of North America Local 183; RE: Elkford Investments Inc.; RE: Cottonlane Estates Inc.; RE: Jaycrest Developments Inc.; OLRB File Nos. 1719-13-R; 1995-13-U; Dated December 12, 2013; Panel: Jack J. Slaughtier (3 pages)

Collective Agreement – Termination – Timeliness – The union alleged the termination application was not timely given the rollover clause in the parties’ collective agreement and the fact that neither party had furnished notice of termination, or proposed revision, of the agreement – On the basis of the evidence of the union’s business agent, who was at the hearing under a summons, the Board found that a meeting took place during the relevant period (satisfying the condition of notice) and that the content of the meeting(s) was to address proposed revisions to

the collective agreement – The Board noted the article required only notice of a proposed revision or revisions and that it did not require that the parties be “negotiating a new agreement” or be engaged in “meaningful sincere bargaining” – The motion to dismiss the application was denied – The conditions of the article had been met – A declaration that the union no longer represented the employees was issued – Application granted

TOPPER LINEN SUPPLY LIMITED; RE: Danijel Dejanovic; RE: Teamsters Local Union 847 Laundry and Linen Drivers and Industrial Workers, Film and Television Production the Province of Ontario, Canada Topper Linen Supply Limited; OLRB File No. 1081-13-R; Dated December 11, 2013; Panel: Derek L. Rogers; J.A. Rundle and Shannon McManus (9 pages)

COURT PROCEEDINGS

Employment Standards – Judicial Review – Prior to the date scheduled for a hearing before the Board, the applicant contacted all the responding parties and received consents to his adjournment request from the Director of Employment Standards and from two of the other responding parties – A paralegal appeared apparently renewing the request for an adjournment, making it clear that counsel was in Divisional Court and the applicant director was out of the province – At the conclusion of the hearing the Board affirmed an order to pay against the applicant finding that he had not rebutted the presumption that he was a director – The uncontradicted evidence before the court was that the paralegal acting on behalf of the director was assured an adjournment was not required and the hearing was then held — The Board’s reasons did not make reference to, or deal with, an adjournment request – The court found the Board breached its duty of procedural fairness to the applicant when it proceeded with the hearing without dealing with his unopposed request for a short adjournment so that he could be present at the hearing, and then ruled against the applicant because there was no evidence from him

on the central issue in dispute – Application allowed and remitted for a new hearing

ROBERT R. PARDY; RE: Her Majesty the Queen in Right of the Province of Ontario (Represented by the Minister of Labour for the Province of Ontario); RE: Ashleigh Knoll; RE: Faren Bauslaugh; RE: Kurt Class; RE: Taryn Moase; RE: Christie Massi; RE: Stacey Traynor; RE: Dianne Lacoste; RE: Dianna Haskett; RE: Stacy Young; RE: Tara Sirey; RE: Linda Legacy; OLRB File No. 0501-12-ES; (Court File No. 2004/13); Dated November 26, 2013; Panel: Sachs, Polowin and Henderson JJ. (5 pages)

Certification – Constitutional Law – Judicial Review – Cantech sought judicial review of the Board's determination that its labour relations fell under provincial jurisdiction and that LIUNA's application to certify Cantech's employees could, as a result, proceed before the Board – LIUNA submitted that this judicial review violated the principle of judicial economy and was premature because the Board had not yet made a final decision on the underlying certification application – LIUNA relied upon the Divisional Court's ruling in *Ontario College of Art* and the Ontario Court of Appeal's decision in *Volochay*, which held that only in "exceptional circumstances" will judicial review be justified *before* an administrative process is exhausted – The Court held that Cantech had not raised an "exceptional circumstance" that would warrant the review of the Board's decision on the constitutional issue before the Board had finally decided the certification application – Application quashed as premature

RAIL CANTECH INC.; RE: Labourers' International Union of North America; OLRB File No. 1506-12-U; (Court File No. 127/13); Dated December 5, 2013; Panel: Then, Baltman, and McEwan JJ. (4 pages)

Employment Standards – Judicial Review – Ms. Shi sought judicial review of two Board decisions awarding her damages in the amount of approximately \$68,000 for unpaid overtime, nine months of lost wages and vacation pay, and emotional pain and suffering – Ms. Shi argued the Board unreasonably denied her a number of other heads of damages including: lost bonus pay, which was discretionary, compensation for loss of reasonable expectation of continued employment, job search and out-of-pocket expenses, legal costs, compensation for lost value of her pension plan, and payments for professional membership fees – The Director submitted that the Board's decisions were reasonable, except for the failure to award damages for loss of pension contributions for the nine-month period of lost wages she was awarded – Holcim submitted that the decisions of the Vice-Chair were reasonable when taken as a whole, and that remedies under the *Employment Standards Act, 2000* are discretionary and owed deference – The Court agreed that the decisions of the Board involved the exercise of discretion and held that they were reasonable – The Court noted that the conclusions reached by the Board were "clear, rational and logical and demonstrated an appreciation and careful analysis of the statutory provisions, relevant jurisprudence and application of the law to the factual findings" – Application dismissed

WEIHUA (MARIE) SHI; RE: Ontario Labour Relations Board; RE: Holcim (Canada) Inc; RE: Director of Employment Standards; OLRB File No. 0273-10-ES; (Court File No. 158/13); Dated December 2, 2013; Panel: Then, Himel and MacKinnon JJ. (10 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
2218783 Ontario Inc. Divisional Court No. 13-DV-0133	2872-12-ES	Pending
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	Pending
DH General Contracting Inc. Divisional Court No. 13-DV-1966 (Ottawa)	1820-12-R 3025-12-G	Pending
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Nadalín Electric Company (Ontario) Inc. Divisional Court No. 498/13	0615-13-R	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Pending
Charles W. Colhoun Divisional Court No. 293/13	0260-12-U	January 8, 2014
Robert Pardy Divisional Court No. 2004/13 (London)	0501-12-ES	Allowed
Signature Contractors Windsor Inc. Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	January 30, 2014
Weihua Shi Divisional Court No. 158/13	0273-10-ES	Dismissed; Leave to Appeal
Rail Cantech Inc. Divisional Court No. 127/13	1506-12-U	Quashed for Prematurity
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Allowed Leave to CA Granted
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	March 11, 2014

Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	February 19, 2014
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	March 26, 2014
EllisDon Corporation Divisional Court No. 310/12 M42989	0784-05-G	Allowed; Seeking Leave to CA
SMW v. EllisDon Divisional Court No. 363/12 M42989		Dismissed; Seeking Leave to CA
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 M43026	2692-06-ES	Dismissed; Seeking Leave to CA
Landmart Building Corp. Divisional Court No. DC 12-346JR (Hamilton)	2519-11-R	Week of February 24, 2014
John McCredie v. OLRB et al Divisional Court No. 1890/11 (London)	1155-10-U	Pending
Dr. Peter A. Khaïter v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaïter v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	See above
Dr. Peter A. Khaïter v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	See above