

*H*Ontario Labour Relations Board **HIGHLIGHTS**

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October 2014

NOTICES TO THE COMMUNITY

Peter Gallus Retirement

Please see the attached note from the Chair, and the invitation to the party.

Weekly Application Listing

To subscribe to a weekly listing of applications to the Board, please contact the Ontario Workplace Tribunals Library at: owtl@wst.gov.on.ca. The Library publishes the previous week's applications every Wednesday.

SCOPE NOTES

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

Construction Industry – Discharge for Union Activity – Employee – Employer – Interim Relief – Unfair Labour Practice – Bronte requested the Board's leave to lay off three individuals (F, B, and C) after they had been reinstated on an interim basis pursuant to s. 98 of the Act – The Board directed that Bronte was prohibited from disciplining, terminating, or otherwise changing the working conditions of F, B, and C, as well as three other workers, pending

the determination of the ULP, without the consent of the OPDC or leave of the Board – The Board held that it should vary its order and permit one or more of the reinstated individuals to be laid off only if Bronte established a coherent and consistent basis for such a layoff -- The Board found that the basis offered by Bronte for the decision to choose F, B, and C for layoff was not coherent and contained inconsistencies – The Board concluded that the variance sought by Bronte ought not to be made – The OPDC requested that the Board vary the order that was made on July 31, 2014 to clearly require Bronte to assign work to the reinstated workers on the same basis that each was assigned work prior to their termination – The Board declined the OPDC's request – The Board recommended that the parties should work collaboratively to resolve OPDC's concerns about how the order is being applied

2220742 ONTARIO LTD. OPERATING AS BRONTE LANDSCAPE AND CONSTRUCTION; RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB Case No: 1167-14-M; Dated: September 30, 2014; Panel: Lee Shouldice (8 pages)

Abandonment – Construction Industry – Delay – Related Employer – Sale of a Business – Timeliness -- Local 607 sought a declaration that there was a sale of business between the responding parties or, in the alternative, that the responding parties be treated as one employer -- Metro Ontario raised several preliminary objections: (1) having regard to the termination of

two previous successor employer applications, the Board ought to dismiss this application; and (2) on the basis of laches, issue estoppel, and abandonment, the Board ought to dismiss the current application -- With respect to the first objection: Metro submitted that a party will not be permitted to revive a lapsed application in the absence of either a cogent explanation for the failure to seek a timely relisting of the matter for hearing, or special circumstances -- The Board found that that principle did not apply: Local 607 was not asking that the Board relist the previously terminated successor employer application brought by the OPDC -- In addition, the previous proceeding did not seek relief from the Board pursuant to subsection 1(4), whereas the instant proceeding sought relief pursuant to both section 69 and subsection 1(4) -- The Board was satisfied that the previously dismissed application was not in and of itself sufficient basis to dismiss this proceeding -- With respect to laches: The Board found that Metro established (a) that Local 607 was for many years aware of facts that provided it with a successor employer claim under what is now section 69 of the Act and/or a related employer claim under subsection 1(4), and effectively acquiesced to the position taken by Metro and A&P that no such claim existed; and (b) that Metro relied upon that acquiescence and so did not act to maintain the documents necessary to establish that Locals 607 and 1036 had abandoned their bargaining rights -- The evidentiary record is now so incomplete and inadequate that it would be unfair for Metro to be expected to establish its position that the bargaining rights were abandoned -- In the circumstances, it was not possible for the Board to conduct a fair hearing into the question of whether Local 607 and 1036 had abandoned their bargaining rights, because Metro cannot access the information it needs to establish that position -- Application dismissed

A & P CANADA INC.; RE: Construction and Allied Workers, Local Union 607; RE: Labourers' International Union of North America; RE: Metro Ontario Inc.; OLRB Case No: 1648-09-R; Dated: September 8, 2014; Panel: Lee Shouldice (29 pages)

Bar -- Bargaining Rights -- Construction Industry -- Termination -- Voluntary Recognition - The Carpenters applied for a bargaining unit of carpenters and carpenters' apprentices employed by Ball Construction Ltd. ("Ball") in all sectors of the construction industry, except the industrial, commercial, and institutional

sector, in Board Area No. 3 -- Ball and the intervenor LIUNA Local 1059 asserted that this certification application was untimely because they were parties to a pre-existing collective agreement that included carpenters -- The Carpenters also applied to terminate the bargaining rights held by Local 1059, pursuant to section 66 of the Act -- The central issue was whether Local 1059 was entitled to represent six members of Locals 183 or 1081 who were employed by Ball at the time that Local 1059 entered into the collective agreement with Ball -- The Board made it clear that a certification application and a section 66 application have the same underlying objective: the demonstration that the trade union is/was authorized by the majority of the employees to represent that bargaining unit -- The onus was on Local 1059 and Ball to demonstrate that Local 1059 was entitled to represent the employees in the bargaining unit at the time the Collective Agreement was entered into -- There was no evidence to support that the six members of Locals 1081 and 183 had chosen 1059 to represent them -- The LIUNA Constitution may have granted Local 1059 the right to represent LIUNA members who wished to be represented in Board Area 3, but it did not impact employee choice and it did not in any way obligate members to authorize Local 1059 to represent them -- The Board ought not to make assumptions about employee wishes -- The fact that no individual employee complained to the Board about Local 1059 entering into the Collective Agreement was not evidence that the employees authorized Local 1059 to represent them -- The Board declared that Local 1059 was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit and accordingly the collective agreement is not a bar to a certification application filed by the District Council -- Termination application allowed; certification application continues

BALL CONSTRUCTION LTD.; RE: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; OLRB Case No: 3110-13-R; Dated: September 11, 2014; Panel: Jesse M. Nyman (27 pages)

Discharge for Union Activity -- Employee -- Employer -- Interim Relief -- Unfair Labour Practice -- Cotton requested the Board's consent to terminate its employee, S, on the basis of alleged culpable conduct after he had been reinstated on an interim basis pursuant to s. 98 of

the Act. The Board directed that Cotton was prohibited from terminating or altering S's terms and conditions of employment pending the determination of the ULP, unless the Union agreed or the Board consented – Cotton referred to six incidents of misconduct by S; Cotton had disciplined him for three of these incidents and characterized the final event as a culminating incident – Cotton submitted that reinstatement would be dangerous to both S and the public, would damage Cotton's reputation, and was impractical as S did not appreciate the gravity of his misconduct – The Board noted that the language of s. 98(2) of the Act indicates a statutory presumption that an interim order for reinstatement will subsist pending a decision on the merits in the ULP; that the balance of harm can only weigh in favour of an employer resisting the reinstatement order when it would suffer irreparable harm of a greater magnitude than the union; and hence that there is an implicit statutory recognition that an interim order for reinstatement can be issued even where it will result in some harm to the employer – The Board found that Cotton's request to vacate the reinstatement order would deal with issues that would be more appropriately dealt with in the ULP hearing and it would not be desirable to deal with them in a parallel proceeding where the outcomes could be different – The Board also recognized that a request to vacate or set aside an interim reinstatement order while the underlying application remains pending is an extraordinary request and only exceptional circumstances warrant granting such a request – The Board rejected Cotton's submission that harm to LIUNA could be minimized by posting an explanation in the workplace – Cotton was unable to demonstrate that the balance of harm favoured vacating the order – Consent to terminate refused

COTTON INC.; RE: Labourers' International Union of North America, Local 837; RE: Labourers' International Union of North America; OLRB Case No: 3253-13-M; Dated: September 29, 2014; Panel: Mary Anne McKellar (19 pages)

the normal course – The Board also held that an application under s. 43 of the Act applied to the current parties to the application – Any collective bargaining history between other parties could not be relevant to first contract arbitration when a new bargaining agent enters the scene – Preliminary motions dismissed – Matter continues

McMaster University; RE: The Building Union of Canada; OLRB Case No. 1237-14-FA; Dated: September 11, 2014; Panel: Lyle Kanee (4 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.

First Contract Arbitration – Practice and Procedure – Stay – McMaster University asked the Board to stay its first contract proceedings until the Minister had unsealed the ballot box and determined the results of a recent last-offer vote – The University acknowledged the Board had no jurisdiction to order that the ballot box be opened, or to direct the Minister to unseal it – The Board held that it would not interfere with the Minister's own processes, and would not stay the request for first contract direction; both applications, made to two different decision makers, should proceed in

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
College Employer Counsel Divisional Court No.397/14	1143-14-CV	Pending
Dean Warren Divisional Court No.345/14	2336-13-U	Pending
LIUNA- Trisan Divisional Court No.342/14	2620-13-G 2001-13-G et al	Pending
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Kosciak Divisional Court No. DC-14-000636-00JR (Newmarket)	0956-13-U	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	Pending
Mary McCabe Divisional Court File No.14-2012 (Ottawa)	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Jan 19/15
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 (Brampton)	2872-12-ES	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
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	October 28, 2014
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	September 11, 2014 Heard; Reserved

EllisDon Corporation Court of Appeal No. C58371	0784-05-G	October 8, 2014 Court of Appeal
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 (London)	1155-10-U	Pending
Dr. Peter A. Khaite v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaite v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	See above
Dr. Peter A. Khaite v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	See above

PETER GALLUS RETIREMENT

After a long and distinguished career in the Ontario Public Service, primarily although not exclusively at the Ontario Labour Relations Board, Peter Gallus, Director/Registrar of the Ontario Labour Relations Board and the Pay Equity Hearings Tribunal has decided it is time to retire October 31st, 2014. We are certain that many of you--maybe not as much as I-- will miss Peter but we are still very glad for him and his family.

Peter has represented the best of the Ontario Public Service and the Board—a quiet, unassuming, unfailingly courteous person who was incredibly good at his job. So our advice to all of you is to savour your opportunities to deal with Peter while you can—the end of October will be upon us faster than we can imagine. Although certainly somewhat of a bittersweet occasion for us, we felt the departure of this remarkable civil servant ought not go unnoticed. Accordingly we have organized a reception marking Peter's departure on October 29th, 2014 from 4 pm to 7 pm. We have attached an invitation to the reception to this email and hope to see many of you there to join us in expressing our gratitude to Peter and wishing him well.

We are also very pleased to announce (and this is not bittersweet at all) that Catherine Gilbert has been appointed as Director/Registrar effective November 1, 2014. She is currently the Board's Deputy Director/ Registrar. Catherine has worked closely with Peter over the last three years and is clearly the right person for the job. She joined the Board as a Senior Mediator in 2004 and became Deputy Director/Registrar in 2011. She was a labour lawyer for UNIFOR (then CAW-Canada) for 10 years prior to joining the Board. We are sure you will join us in congratulating Catherine and wishing her well in her new position.

Yours Truly,
Bernard Fishbein – Chair, Ontario Labour Relations Board