

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

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NEW BOARD MEMBERS

The Board is pleased to announce the appointment of five new part-time Members (management-side):

David St. Louis is currently the Executive Director of the Terrazzo Tile and Marble Guild of Ontario. He has been a Senior Mediator with Dispute Resolution Services, Ministry of Labour, and has held directorships with other industrial unions.

John (Jack) Sullens is Chief Legal and Human Resources Officer of the Windsor-Essex Children's Aid Society. He has extensive experience in senior human resources positions in the school board context.

Lori Bolton is Director of Human Resources for the City of Orillia with wide-ranging experience in collective bargaining and human resource policies.

William S. Cook is a former partner with Mathews, Dinsdale & Clark LLP. He is an Honorary Member of the Law Society of Upper Canada.

Ron Martin is currently the Executive Director of the Construction Employers Coordinating Council of Ontario and an executive member of the Ontario Construction Secretariat.

SCOPE NOTES

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

Bar – Construction – Timeliness – Pickard asked the Board to dismiss three applications for certification, either pursuant to s. 128.1(21) or to s. 111(3)(c) – Two of the three applications were filed before the February 2015 withdrawal of an earlier application (filed in January of 2011 and litigated over that four-year period until its ultimate withdrawal) – The Board agreed with Pickard that there is no material difference in the Board's approach to the manner in which it exercises its discretion under these two sections – Pickard argued that the recent applications were "opportunistic" and deprived both the employer and the employees of a period of repose from certification-related litigation – The Board considered the context and circumstances of the earlier application, the dispute that was the subject of litigation over that very lengthy period (the status of an employee association), and held that neither the sector issue nor the wishes of the employees had ever been canvassed during that time – In the interim, LIUNA solicited membership from current employees in the bargaining unit and chose to file a fresh application, rather than continue with the protracted litigation which would then be turning to the status of employees in an employment relationship as it existed four years earlier – Motion dismissed; one application to proceed; one postponed pursuant to s. 111(3)(b); third application granted and certificate issued

955140 ONTARIO INC. O/A PICKARD CONSTRUCTION; RE: Labourers' International Union of North America, Ontario Provincial District

Council; RE: Northern Employees Association; OLRB File No. 2943-14-R, 3295-14-R & 3403-14-R; Dated March 13, 2015; Panel: Harry Freedman (18 pages)

Bargaining Unit – Certification – Construction Industry – Practice and Procedure – The applicant sought to certify employees working in non-ICI sectors in a number of townships in the “white area” – The Board held that an applicant seeking non-ICI certification in the white area must include all employees of the employer working in the geographic area in which a project is located, as well as in any of the adjacent geographic townships (the same way an applicant for non-ICI employees in a Board Area must include employees working at all locations in that Board Area) – There is no obligation on the union to attempt to organize employees in non-contiguous townships – Certificate granted

955140 ONTARIO INC. O/A PICKARD CONSTRUCTION; RE: Labourers’ International Union of North America, Ontario Provincial District Council; OLRB File No. 3404-14-R; Dated March 2, 2015; Panel: Harry Freedman (18 pages)

Certification – Sector Determination – The Board was asked to determine, for the first time, whether work at certain solar farms was work in the ICI sector or in one of the other non-ICI sectors, specifically the electrical power systems sector (as LIUNA had sought in its application for certification) – Can-Am was contracted for site preparation and restoration, and for the assembly, mounting and erection of solar or photovoltaic panels – Ultimately, the power generated from the panels is fed to the power grid by way of Hydro One distribution lines – The Board had to examine work characteristics, bargaining patterns and end-use, as well as take into account its jurisprudence involving modern construction of other electrical power generation facilities, notably wind farms – End-use clearly pointed to the electrical power sector; work characteristics (the construction of structures upon which electrical equipment is mounted, outdoor work, mostly using hand tools, away from actual buildings) was unique to solar farms, but ultimately neutral; bargaining patterns across several trades and numerous large contractors overwhelmingly favour the conclusion that the work falls into the electrical power sector – Certificate issued

2346811 ONTARIO INC. O/A CAN-AM CONTRACTING; RE: Labourers’ International Union of North America, Ontario Provincial District

Council; OLRB File No. 0142-14-R; Dated March 9, 2015; Panel: Lee Shouldice (21 pages)

Certification – Membership Evidence – Trade Union – Membership cards filed by the Canada Council of Teamsters did not identify a Teamsters Local on the form – CCT was not a “certified council of trade unions” and the Board had not previously found it to be a trade union within the meaning of the *Labour Relations Act* – The CCT Constitution provides that members of affiliated Teamsters Locals are deemed to be members of the CCT, yet not all Teamsters Locals in Ontario are affiliated with the CCT – The responding parties and intervenor argued the Board could not conclude that individuals on whose behalf membership evidence was submitted are members of the CCT – CCT argued the Board could draw this conclusion but must hear evidence about its practice of admitting individuals directly to its membership, notwithstanding the terms of its Constitution – CCT Constitution does not provide a means by which individuals can apply for or become members other than through membership in an affiliated Teamsters Local – The Board noted it will routinely decline to certify an applicant if any of the individuals it seeks to represent are not eligible to become its members, unless it can be shown there is an established practice of admitting persons to membership without regard to eligibility requirements in its Constitution or by-laws – No material facts or particulars provided that established individuals in application are eligible to become CCT members – The Evidence that a union holds bargaining rights for individuals is not evidence those individuals are eligible to become its members – The Board found the form of membership evidence filed by the CCT and the manner of the cards’ completion was fatal to the application for certification – The Board was unable to conclude that membership evidence filed satisfied the requisite appearance of membership in CCT – Application dismissed

ARCADERS PRODUCTIONS LTD.; RE: Canada Council of Teamsters; RE: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 793; OLRB File No. 1610-14-R; Dated March 6, 2015; Panel: Mary Anne McKellar (14 pages)

Certification – Construction Industry – Reconsideration – Related Employer – Timeliness – Devron sought reconsideration of a default certificate and related employer declaration, as well as leave to file a late response with a “nil” list of

employees – Devron argued it is a company involved in marketing and sales, with no construction employees and specifically no employees at the only project listed in the certification application – Devron argued further that if the applicant had filed a related employer application, its (Devron's) response would have been timely – The Board held that the instant circumstances (a certificate and a declaration issued on a default basis) were unique and distinguishable from earlier jurisprudence – Reconsideration granted – Devron removed from the certificate – Applicant invited to file a related employer application

AVONGATE DEVELOPMENT HOLDING INC. AND DEVRON DEVELOPMENTS INC.; RE: Labourers' International Union of North America, Local 183; OLRB File No: 2641-14-R; Dated: March 6, 2015; Panel: John D. Lewis (12 pages)

Employment Standards – The employee sought review of an Employment Standards Officer's refusal to award him vacation and statutory holiday pay – The Officer had found the employee was exempt from those provisions of the ESA because he was a person employed on a farm whose employment was directly related to the primary production of vegetables – The applicant testified, unopposed, that his work involved the application of fertilizer, pest management, irrigation, and ventilation, light and temperature control, but he had no hands-on contact with the agricultural product – The Board held that without hands-on contact, the exemption did not apply – Application allowed

J.C. FRESH FARMS LTD.; RE: Juraj Harmaniak; RE: Director of Employment Standards; OLRB File No. 0446-14-ES; Dated March 5, 2015; Panel: Christine Schmidt (4 pages)

Duty to Bargain in Good Faith – Unfair Labour Practice – As Navistar wound down its Chatham truck manufacturing facility, laying off all production and office employees, negotiations for a renewal collective agreement were transformed into negotiations for a closure agreement – Many items were resolved, including arbitration provisions for interpretation issues or non-compliance, but two issues remained outstanding: pensions and severance pay – Several avenues of litigation were commenced by the Union, at the Financial Services Commission and Tribunal (judicial review pending) and a class action (dismissed) – The parties could not agree on (or a process to determine) severance pay entitlements – The union asserted that Navistar had violated s. 17 of the Act by failing to “make every

reasonable effort to make a collective agreement” arguing that the refusal to agree to a process of arbitration was “objectively unreasonable” – Six years had passed since the employees were laid off and their statutory severance entitlements had not been determined – Navistar's intransigence or insistence on a resolution of pension issues before agreeing to consider severance pay entitlements was unreasonable – Navistar argued the contrary, that it was the Union which was not bargaining in good faith by launching various tactical actions and proceedings instead of continuing to negotiate – It cannot be improper for Navistar to say it will not agree to arbitration of severance entitlement when person benefit issues were still being litigated, issues which even the union concedes, could have an impact on the severance payments – The Board noted that it was not its role to assess the wisdom or merits of a particular bargaining position or proposal, but to ensure that the process of collective bargaining is undertaken properly; nor is it the Board's role to redress any economic imbalance between the parties – The Board found that it was never Navistar's position that it would not pay severance entitlements, nor that any disputes about such entitlements would not be decided by arbitration – The union failed to persuade the Board that Navistar's position was objectively unreasonable – Application dismissed

NAVISTAR CANADA INC.; RE: Unifor and its Locals 127 and 35; OLRB File No. 0520-14-U; Dated March 18, 2015; Panel: Bernard Fishbein (31 pages)

Health and Safety – Human Rights Code – When the applicant filed a reprisal complaint some six weeks after launching a proceeding before the Human Rights Tribunal of Ontario, the Board considered whether (1) these are parallel proceedings; (2) the other (non-Board) proceeding will resolve all or a substantial portion of the factual and legal issues in dispute; (3) there is a risk of inconsistent determinations; (4) the other proceeding will provide a more “complete” disposition of the central dispute; and (5) any logistical matters come into play – Parallel proceedings need not be identical – The Board ruled that, since the applicant believes the proximate cause for his discharge was his employer's failure to acknowledge his health needs attributable to a pre-existing medical condition, the HRTO is the better forum for resolving the dispute – Application adjourned *sine die*

PARK UNIVERSITY ENTERPRISES, INC. COB AS FRED PRYOR SEMINARS / CAREERS TRACK SEMINARS; RE: Andrew

Lawson; OLRB File No. 0730-14-OH; Dated March 4, 2015; Panel: Michael McFadden (6 pages)

Bar – Bargaining Unit – Certification – Practice and Procedure – The IBEW applied to represent a bargaining unit of electricians – The employer and CLAC moved for a dismissal of the application, relying on the bar described in s. 7(10) of the Act, or the exercise of the Board’s discretion pursuant to s. 111(3) when two applications are being considered together – LIUNA had earlier applied for a non-ICI all-employee unit of Strabag’s employees; following the vote in that application, LIUNA amended its bargaining unit to consist of construction *labourers* only and not electricians or other trades; LIUNA was certified – Strabag and CLAC argued that LIUNA had withdrawn its original application as it related to electricians, and therefore the s. 7(10) bar applied; secondly, when two applications are being considered contemporaneously, if the first application is withdrawn pursuant to s. 7(10), the bar applies and the second application cannot be entertained – The applicant argued the contrary: that s. 111(3) supersedes the operation of 7(10); while some of Strabag’s electricians participated in the LIUNA application, their statutory right to choose a bargaining agent had not been exercised – The Board held that descriptions of bargaining units are often fluid during the early course of applications for certification; a change to the bargaining unit description to exclude a particular trade is not a withdrawal of that application, especially when the balance of the application was successful and a certificate was issued – Motion dismissed – Matter continues

STRABAG INC.; RE: International Brotherhood of Electrical workers, Local Union 353; RE: Construction Workers, Local 52, affiliated with the Christian labour Association of Canada; OLRB File No. 0379-14-R; Dated March 4, 2015; Panel: Eli A. Gedalof (16 pages)

Bargaining Rights - Construction Industry – Related Employer – Sale of Business – LIUNA sought a declaration that the City of Sault Ste. Marie, the Public Utilities Commission and a group of companies known as the PUC Corporations were one employer for the purposes of the Act – LIUNA argued that the establishment of the Corporations constituted a sale of business and justified the application of subsection 1(4) of the *Act* – Employees of the PUC Corporations are represented by the Power Workers’ Union, CUPE, Local 1000 – When one of the PUC Corporations asked for tenders on the construction of a building (work in

the ICI sector), LIUNA grieved the award of the contract to a company with which it had no contractual relations – The Board noted the PUC Corporations are separate operations that are not integrated with the City in any meaningful manner – The PUC Corporations do not need approval or consent from the City to finalize their collective agreement – The City does not oversee the human resources or labour relations functions of the PUC Corporations and the City has no institutional control or authority over the organization of the PUC Corporations’ workforce – LIUNA argued the City had control over the PUC Corporations as it was sole shareholder – The Board examined the Shareholders’ Agreement between the City and the PUC Corporations and found that aside from “very high level governance issues,” the directors of the PUC Corporations were unrestricted in their discretion to manage their operations – The Board held the involvement of the City in the operations of the PUC Corporations was virtually non-existent and any control exercised by the City was akin to the way a shareholder exercises control over an asset – The Board noted it has never found that the relationship of a parent and subsidiary or owner of shares of a closely held corporation to the corporation was, by itself, a basis for a related employer declaration – Granting the relief sought by the union would constitute an expansion of bargaining rights – Application dismissed

THE CORPORATION OF THE CITY OF SAULT STE. MARIE ET AL; RE: Labourers’ International Union of North America, Local 1036; RE Power Workers’ Union C.U.P.E. Local 1000; OLRB File No. 2531-11-R; Dated March 13, 2015; Panel: David A. McKee (15 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, 7 th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Valoggia Linguistique Divisional Court No.15-2096	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No.49/15	0229-13-R	Pending
Sentry Electrical (Canada) ULC Divisional Court No. 041/15	0505-14-R	Pending
Charles Zubovits Divisional Court No. 3/15	1368-04-U	Pending
Royal Ottawa Hospital Divisional Court No.14-62782 (Ottawa)	2461-14-IO	Pending
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	Pending
College Employer Council Divisional Court No.397/14	1143-14-CV	May 22, 2015
Dean Warren Divisional Court No.345/14	2336-13-U	September 22, 2015
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	March 4, 2015 Reserved
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015 Reserved
Mary McCabe Divisional Court File No.14-2012 (Ottawa)	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	April 27, 2015
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	May 11, 2015
EllisDon Corporation Court of Appeal No. 36256 (EllisDon seeking leave to SCC)	0784-05-G	Allowed Board Decision restored