

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

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December 2016

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## **NOTICES TO THE COMMUNITY**

### **White Areas**

The Board is considering eliminating the “White Areas” in the province (for construction industry matters). Please see the attached request for submissions.

### **Holiday Schedule**

The Board’s holiday operations schedule is attached.

### **New Part-time Vice-Chair**

The Board welcomes **Graham J. Clarke**, a bilingual labour arbitrator/mediator, as a new part-time Vice-Chair. A member of the Bars of Ontario and Québec since 1987, he spent two decades practising labour and employment law. From 2007-2016, he decided cases in his role as a Vice-Chair at the Canada Industrial Relations Board. Since 1990, he has written and continuously updated *Clarke’s Canada Industrial Relations Board*.

## **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](http://www.canlii.org).

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**Bargaining Unit – Certification – Fraud – Membership Evidence** – In this card-based

application for certification, the employer alleged that LIUNA engaged in “fraud or misrepresentation” prohibited by s. 128.1(5) of the Act when it interfered with the composition of employees in the bargaining unit on the date of the application by “knowingly and falsely” informing a site superintendent that a particular employee was not available and subsequently hiring a different employee to report to work – LIUNA brought a *prima facie* motion, arguing that the sub-section does not grant the Board jurisdiction to police misrepresentation or fraud *generally* – Rather, a finding under section 128.1(5) must relate *specifically* to the matters prescribed in section 128.1(4): (a) the bargaining unit; and (b) membership evidence – Further, unions owe no statutory duty to be honest with an employer regarding a certification application, in contrast to their express obligations to be truthful to the Board and to employees – The employer countered that section 128.1(5) applies to “the number of employees in the bargaining unit” – Accordingly, the Board ought not weigh the wishes of employees who are “not supposed to be there” but are hired in order to manipulate the bargaining unit, as per the approach to termination applications (see *April Waterproofing*) – Equally, lying and dishonesty must factor into the analysis given the remedial purpose of the Act “to facilitate collective bargaining between employers and *trade unions that are the freely designated representatives of the employees*” – Indeed, the Board has imported the equitable doctrine of “fraudulent concealment” as a broad remedy for unconscionable conduct that bars the exercise of a right (see *Golfwright Sports and Halloran*) – The Board accepted the union’s position

that an allegation of misrepresentation or fraud under section 128.1(5) must refer to an issue contemplated by section 128.1(4) – In this respect, the membership evidence must reflect the true wishes of the employees to be represented by the union – Here, no statutory duty required the union or employee to disclose their ultimate purpose, in contrast to the legal obligations binding employers in the context of termination applications – Correspondingly, no statutory right held by the employer was frustrated by the conduct of the union, as distinguished from the decisions referencing fraudulent concealment – Employer’s allegation dismissed without further hearing – Matter continues

**GOVAN BROWN & ASSOCIATES LIMITED AND/OR GOVAN BROWN CONSTRUCTORS INC. AND/OR GOVAN BROWN ENTERPRISES LIMITED AND/OR GOVAN BROWN HOLDINGS LIMITED AND/OR GOVAN BROWN INC. AND/OR GOVAN BROWN MANAGEMENT INC.;** RE; **LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL;** OLRB File No. 0838-16-R; Dated November 25, 2016; Panel: Bernard Fishbein, Chair (24 pages)

**Bargaining Unit – Certification – Representation Vote** – In this application for certification brought by IUOE to represent a bargaining unit of licenced seamen employed by Hornblower, at issue was whether the Board ought to exercise its discretion, following a representation vote, to allow the parties to alter their positions with respect to the inclusion of one or both of two Port Captains in the bargaining unit – Prior to the vote, the employer sought to include, while the union sought to exclude, both Port Captains in the bargaining unit – At the representation vote, the union challenged the voting eligibility of both Port Captains and their two ballots were sealed and segregated – Upon counting all other eligible ballots the vote was tied 6:6 – As a result, the employer sought to withdraw its motion to include both Port Captains such that the union would fail to obtain requisite support of over 50 per cent – Conversely, the union sought to include *one of two* Port Captains so as to trigger a second representation vote, pursuant to Board policy to hold a new vote rather than to count a single ballot that would reveal the preferences of an identifiable employee – Post-vote changes in position fall into two categories: first, appropriate alterations where parties swap, or “flip flop,” their existing positions; and second, inappropriate alterations where a party attempts to raise a new issue not previously addressed and thereby undermines the Board’s process to date (see *Martha’s Garden*) – The Board found that the union fell into the second category as the selective

inclusion of *one of two* Port Captains in the bargaining unit constituted a novel position which, if successful, would necessarily invalidate the first representation vote – In the case at bar, accommodating the strategic interests of a party who did not achieve its desired result is insufficient to justify a departure from Board procedure in favour of “quick votes” under the current certification scheme – Given that the employer was now equally prepared to uphold or abandon its initial position, it was open to the union to elect which position to take and advise the Board accordingly within five days of the decision date – Matter continues

**HORNBLOWER CANADA CO.;** RE: **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793;** OLRB File No. 1182-16-R; Dated November 10, 2016; Panel: Eli A. Gedalof (11 pages)

**Bargaining Rights – Related Employer – Sale of a Business** – Applications were brought by the Labourers and Carpenters against Orlando and Canadian Motorsport Ventures Ltd. under sections 69 and 1(4) of the *Labour Relations Act, 1995* – Orlando, a property developer, is bound to construction collective agreements with the Labourers and the Carpenters – In 2011, the sole owner and director of Orlando incorporated CMVL and purchased Mosport, a motorsport racing facility – The evidence revealed that following the sale to CMVL, Mosport continued to use the same subcontractors and contractors for “day to day work,” while relying on Orlando for more extensive projects requiring design, planning and construction expertise – No “continuum of business” had taken place as the essential elements that made up the business of Orlando had not been transferred to CMVL – Despite common ownership and direction, there was no material change in the pre-existing operation of Orlando, which remained a property developer in the business of construction, or in Mosport, which remained a racing facility that retained various contractors and subcontractors to perform maintenance and upgrades – Although CMVL’s decision to carry out certain construction work through Orlando instead of some other contractor is non-arms-length, this did not diminish Orlando’s business or the Applicants’ bargaining rights with Orlando – Similarly, even if the Applicants could establish the statutory precondition that the Respondents carry on related or associated businesses, the Board would not exercise its discretion to issue a declaration – The purpose of a declaration is to preserve, rather than expand, bargaining rights where the employer of a unionized workplace uses a non-unionized entity as a vehicle to operate the same business free of collective bargaining obligations – In this case, the operation of CMVL had not resulted in any erosion of the Applicant’s bargaining rights with Orlando, and there was no meaningful potential for such erosion given that the

companies operated distinct businesses – Both applications dismissed

**ORLANDO CONSTRUCTION INC., ORLANDO CORPORATION, CANADIAN MOTORSPORT VENTURES LTD.;** RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA LOCAL 397; OLRB File No. 3155-13-R & 1611-14-R; Dated November 15, 2016; Panel: Eli A. Gedalof (20 pages)

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**First Contract Arbitration** – UFCW complained that Denninger violated all three criteria enumerated in s. 43(2) of the Act (refusing to recognize the bargaining authority of the union; taking uncompromising bargaining positions; and failing to make reasonable or expeditious efforts to conclude a collective agreement) – The Board held that although it was evident the parties had not achieved a CA, they had engaged in a meaningful and fruitful process of bargaining – The Board was not persuaded that Denninger had done anything of significance to undermine the union's authority – Denninger's new and unprecedented communications with employees (one-on-one or small group meetings) ostensibly to clarify the employer's position and give details of its final offer were found to be too brief to accomplish the desired effect; moreover, there was no evidence of any steps the union took to counteract the employer's tactics – The union took no position to guide employees to accept or reject the proposed agreement – None of the criteria in s. 43(2) were met – Application dismissed

**R. DENNINGER LTD.;** RE: UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, LOCAL 175; OLRB File No. 2021-16-FA; Dated November 29, 2016; Panel: Derek L. Rogers, Vice-Chair (25 pages)

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**Construction Industry Grievance – Human Rights Code** – The IBEW alleged that RBI discriminated against the grievor when it refused to accommodate her travel restrictions following a workplace injury – RBI countered arguing that its obligation to accommodate was defined by the available medical evidence – The Board found that the medical evidence tendered (as Functional Abilities Forms) was equivocal and ambiguous during the better part of the accommodation period – When the grievor's injury intensified, the

evidence became clear and RBI responded appropriately – Grievance dismissed

**ROBERTSON BRIGHT INC.;** RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353; OLRB File No. 1554-14-G; Dated November 28, 2016; Panel: Yvon Seveny, Vice-Chair (18 pages)

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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<sup>th</sup> Floor, 505 University Avenue, Toronto.

### Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
<b>Yuchao Ma</b> Divisional Court No. 543/16	2438-15-U	Pending
<b>Ming Tang</b> Divisional Court No. 452/16	3607-14-U	Pending
<b>Anishinabek Police Service</b> Divisional Court No. 455/16	0319-13-R & 1629-13-R	Pending
<b>Cecil Cooray</b> Divisional Court No. 324/16	1594-15-U	Pending
<b>946900 Ontario Limited</b> Divisional Court No. 239/16	3321-14-ES	Pending
<b>S &amp; T Electrical Contractors</b> Divisional Court No. 406/16	1598-14-U	Pending
<b>Carpenters (Riverside)</b> Divisional Court No. 363/16	0630-16-R	Pending
<b>Lee Byeongheon #2</b> Divisional Court No. 16-2219 (Ottawa)	0095-15-UR	Pending
<b>Lee Byeongheon #1</b> Divisional Court No. 16-2220 (Ottawa)	0015-15-U	Pending
<b>College Employer Council</b> Divisional Court No. 308/16	0625-16-R	December 9, 2016
<b>Labourers' International Union of North America, Local 183 (Alliance Site Construction Ltd.)</b> Divisional Court No. 133/16	3192-14-JD	Pending
<b>Public Service Alliance of Canada</b> Divisional Court No. 115/16	0119-13-R	December 19 & 20, 2016
<b>R. J. Potomski</b> Divisional Court No. 12/16 (London)	1615-15-UR 2437-15-UR 2466-15-UR	Pending
<b>Serpa Automobile (2012) Corporation (o/a Serpa BMW)</b> Divisional Court No. 095-16	0668-15-ES	Pending
<b>David Houle</b> Divisional Court No. 1021-16 (Sudbury)	0292-15-U	Pending
<b>Qingrong Qiu</b> Divisional Court No. 669/15	2714-13-ES	Pending

<b>Airside Security Access Inc.</b> Divisional Court No. 670/15	1496-15-ES	Pending
<b>Kognitive Marketing Inc.</b> Divisional Court No. 51/15 (London)	0621-14-ES	Pending
<b>W.H.D. Acoustics Inc.</b> Divisional Court No. 52/15	3151-14-G 3716-14-R	January 4, 2017
<b>IBEW Electrical Power Council of Ontario (Crossby Dewar Inc.)</b> Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
<b>Labourers' International Union of North America, Local 1059 (McKay-Cocker)</b> Divisional Court No. 384/15	0883-14-R	June 17, 2016 Reserved
<b>Universal Workers Union, Labourers' International Union of North America, Local 183 (Maystar)</b> Divisional Court No. 368-15	1938-12-R	Dismissed September 13, 2016 Seeking leave to CA
<b>Carlene Bailey</b> Divisional Court No. 173/15	0480-13-U	December 21, 2016
<b>Valoggia Linguistique</b> Divisional Court No. 15-2096 (Ottawa)	3205-13-ES	Pending

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## NOTICE

### REQUEST FOR SUBMISSIONS ON “WHITE AREAS”

This is to advise all interested parties that the Board is considering eliminating the “White Areas” (see: *Bur Oak Resources Inc.* 2016 CanLII 75563 at paras. 8-37) which can be located on the Board’s Geographic Area Map on the Board’s homepage. This may affect not only the white areas but the descriptions of existing Board areas adjacent to or encompassed by the white areas. In addition to any submissions a party believes will be relevant to the Board’s consideration, the Board would appreciate submissions on the following questions:

1. Should the Board create new Board areas? [For example, does it make sense to create a new Board Area south of Area 25 and north of Area 21 to include Hearst, Kapuskasing and Island Falls? Does it make sense to create a new Board Area south of Areas 16 and 17 and North of Areas 11 and 18?] In any event, should the descriptions of Board areas 16, 17 and 19 (within a radius of certain buildings) be changed, and if so, how?
2. Should the Board enlarge current Board areas to include adjacent white areas? [For example, should Areas 19, 20 and/or 21 be expanded to include the white areas adjacent to them? Should Areas 16 and/or 17 be expanded south, or Areas 18 and/or 11 expanded north to include the white areas near them?]
3. In making its decision, in addition to local bargaining patterns and municipal structuring are there other factors the Board should consider in its deliberations?

Please send an email [subject: White Area Submissions], attaching submissions in a Word or PDF document, on or before **January 27, 2017**, to [webolrb@ontario.ca](mailto:webolrb@ontario.ca). You should receive a reply confirming receipt within one business day. **Please note** that all submissions will be placed on the Board’s website (under the “construction industry” links) for public review. Hard copies of submissions may also be sent to the Director/Registrar, Attention: White Area Submissions, 505 University Avenue, 2<sup>nd</sup> Floor, Toronto, ON M5G 2P1.

Please forward this notice to any party you think may be interested.

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## NOTICE TO THE COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between December 22, 2016 and January 3, 2017 inclusive. Matters of an urgent nature, however, may be scheduled on an expedited basis, as determined by the Board, during this period. Applications will be processed in the usual manner on the dates that the Board is open for business including: December 22, 23, 28, 29, and 30, 2016 and January 3, 2017.

Please note the following hearing schedule for s. 133 grievance referrals over the holiday season.

Thank you for your attention to the above. Please have a safe and very happy holiday season.

DATE REFERRAL FILED	HEARING DATE
December 8, 2016	January 4, 2017
December 9	January 4
December 12	January 5
December 13	January 5
December 14	January 6
December 15	January 6
December 16	January 9
December 19	January 9
December 20	January 10
December 21	January 10
December 22	January 11
December 23	January 11
December 28	January 12
December 29	January 13
December 30	January 16
January 3, 2017	January 17