

H Ontario Labour Relations Board **HIGHLIGHTS**

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November 2016

NOTICES TO THE COMMUNITY

Holiday Season Board Schedule

The Board's holiday operations schedule is attached.

New OIC APPOINTMENTS

Part-time Vice Chair

HARVEY BERESFORD was a Founding Member and Partner with Hicks Morley, specialising in labour relations, employment and human rights law. He was a former Negotiator, Mediator and Advisor with the Ministry of Health and Long-Term Care and Ministry of Education and a Special Advisor to the CEO with the Ontario Lottery and Gaming Corporation.

Board Member (Union Representative)

JAWARA GAIREY is Regional Representative/ Negotiator with Public Service Alliance of Canada.

REQUEST TO PROVIDE THE BOARD WITH CURRENT CONSTRUCTION INDUSTRY COLLECTIVE AGREEMENTS

To avoid the necessary filing of collective agreements with every individual application (see Rule 34.1(b)), parties have previously filed provincial collective agreements, and others, with the Board and then referred to this filing by identification code in their subsequent

applications. The Board notes that all previously filed provincial collective agreements statutorily expired on April 30, 2016. Accordingly the Board wishes to remind the community, in the absence of current applicable collective agreements attached to each application or filed with the Board, the processing of applications by the Board may be hampered.

The effective terms of the collective agreements the Board has on file may be viewed on the Board's website under "Construction Industry" and "Collective Agreement Codes." If you (or your client) have a copy that is more current than the listed one, please forward a digital copy via email to france.poirier@ontario.ca and twenty hard copies to her attention at the Board's offices. Thank you.

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.

Certification – Remedies – Termination – Unfair Labour Practices – The Carpenters sought remedial certification for unfair labour practices by Net Drywall during an organizing campaign – The union alleged that the employer required employees to sign an anti-union pledge, questioned employees about their support for the

union, and terminated the employment of two employees who admitted to having signed cards for the union – The pledge was a card every new employee was expected to sign acknowledging that he or she was not a member of a trade union and had no intention of becoming a member – While there was evidence that prospective employees would be hired irrespective of signing a card, the Board found the document sent a clear message that employees were expected to agree not to exercise their statutory right to seek union representation in order to work for the company – The Board found one of the alleged terminated employees to have been discharged as a result of his expressed support for the union – The other employee was found to have been questioned on whether he signed a union card; however, he had already decided to resign his employment – The Board found that the combination of the pledge cards and the employee's termination had a causal link with the union's inability to obtain further membership – While the union only received limited support during the campaign, this was found to be due to the early stages at which the unfair labour practices were committed – The Board found that the actions of the employer were sufficiently divisive that no ancillary relief could remedy the damage done and that remedial certification was appropriate in these circumstances – Certificates issued

NET DRYWALL & ACOUSTICS LTD; RE: CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0514-15-U & 0515-15-R; Dated October 4, 2015; Panel: Eli A. Gedalof (27 pages)

Grievance – Settlement – The Teamsters sought an order of the Board to require the responding party, ML Ready Mix Concrete, to comply with Minutes of Settlement pursuant to 96(7) – The Minutes of Settlement were entered into by the parties in settlement of a grievance scheduled for arbitration – The union alleged that the employer failed to assign work in accordance with the Minutes of Settlement – Even assuming the settlement of a grievance under s. 133 is a proceeding under the Act pursuant to s. 96(7), the Board concluded that it would not be appropriate to use the Board's process under section 96(7) to resolve this matter – It is the Board's policy to defer any dispute arising under a collective agreement to arbitration, unless there are greater labour relations issues that arise out of the dispute – This matter requires interpretation of a collective agreement and minutes of settlement, which does not engage the Board's particular expertise or its

general jurisdiction over labour relations matters – The Board retains jurisdiction to adjudicate any matter that cannot be handled by grievances filed with respect to this dispute – Matter adjourned and deferred to grievance and arbitration provisions under the collective agreement

ML READY MIX CONCRETE INC.; RE: TEAMSTERS LOCAL UNION NO. 230, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; OLRB File No. 0974-16-U; Dated October 18, 2016; Panel: David A. McKee (9 pages)

Construction Industry Grievance – Interim Relief – The Bricklayers and Stonemasons Local 2 (Ontario) Employee Benefit Trust & Pension Benefit requested interim relief in an ongoing construction industry grievance referred to the Board for arbitration – The Trust sought security for the costs of the grievance proceeding – The test for interim relief is threefold: whether the Board has jurisdiction, whether a prima facie case is established, and whether the balance of harm favours granting the interim relief – The Board's authority to grant interim relief in arbitrations is limited to procedural matters – The Board was satisfied jurisdiction was met, because an order for security of costs is a procedural matter – An order for security of costs does not affect substantive rights – The Board was not satisfied a prima facie case for entitlement of legal costs was established by the Trust pursuant to the collective agreement – The Trust anchored its entitlement to costs in two articles of the collective agreement – The first article provided that if the employer was delinquent for remittances, it was required to pay all costs of collection of such liquidated damages – The Board identified two issues with the Trust relying on this article – First, the Trust is not a party to the collective agreement – Second, the wording implies costs only for collection of liquidated damages, not full costs – The second article relied upon by the Trust provided that if the employer is found to have breached the collective agreement by failing to make the appropriate payments to the trust fund, the employer will be required to pay all reasonable costs incurred by the Union in prosecuting the grievance – The union is empowered by the article to enforce it on behalf of the Trust with its consent – The Board had two issues with the Trust relying on this article – First, the Trust did not file a declaration with its request for interim relief – Accordingly, there were no facts to establish that the union had brought the grievance on consent and on behalf of the Trust – Second, the article expressly states that the Board will require the employer to pay all reasonable costs incurred by the union – The Trust has no

express entitlement under the article – For these reasons, the Board found that the Trust failed to establish a prima facie case – The Board did not find it necessary to consider the balance of harm factor – Request denied

LIMEN MASONRY LIMITED; RE: LIMEN GROUP LTD.; RE: LIMEN MASONRY (2003) INC. ; RE: LIMEN ENTERPRISES (2003) INC.; RE: THE BRICK AND ALLIED CRAFT UNION OF CANADA LOCAL 2; RE: MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO; RE: BRICKLAYERS AND STONEMASONS UNION LOCAL 2 (ONTARIO) EMPLOYEE BENEFIT TRUST & PENSION BENEFIT TRUST; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; RE: MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY; OLRB File No. 0878-09-G; Dated October 26, 2016; Panel: Lee Shouldice (13 pages)

Health and Safety – Reprisal – Work Refusal –

The applicant alleged reprisal as a result of engaging in a work refusal – Fifty fellow correctional officers had called in sick on the same day as part of ongoing labour relations matters – The applicant and five other officers attended work in the normal course – Upon learning of the mass absence, the applicant and fellow workers advised management that they were engaging in a work refusal because there was insufficient staff to operate the institution – W, acting for management, advised that he was prepared to immediately begin the stage 1 work refusal investigation – The applicant informed W that her preferred representative for the investigation was not on site, would not be able to attend the site for another two hours, and that she did not wish to proceed in her representative's absence – W's response is the reprisal at issue – The applicant testified that W threatened her and the others with discipline for insubordination – W testified that he explained that not participating in the investigation would be deemed to abandon the work refusal – If they were not engaging in a work refusal and the workers continued to refuse to work, then they could be found insubordinate and disciplined – The Board did not find this threat of a penalty to be a reprisal – The Board found it to be advice that it was not acceptable to wait two hours to conduct the investigation – Under the Act, there is no right to insist on preferred representatives – The employer was entitled to inform the applicant that a refusal to participate in the work refusal process in a timely manner could be taken as an

abandonment of the work refusal, which could lead to disciplinary consequences if the applicant continued to refuse to work – Application dismissed

ELGIN-MIDDLESEX DETENTION CENTRE; RE: LYNDA KATHLEEN GOUGH; OLRB File No. 2932-15-UR; Dated October 21, 2016; Panel: Brian McLean (6 pages)

Bargaining unit – Certification – Construction Industry – Practice and Procedure –

The proper geographic scope of the bargaining unit was at issue in this application – The work was performed in an area west of North Bay in a township which had been subsumed in a larger municipality – The Board could not apply its normal practice in the "White Area" for defining the geographic scope of the bargaining unit (namely, the geographic township where the work was being performed plus each contiguous geographic township) – After reviewing the origin of Board Areas from 1973 and its subsequent practice in respect of certificates issued to unions seeking representation in the non-ICI sectors in the "White Area," the Board decided it was appropriate to determine an area that does not conflict with existing Board Area boundaries, and does not leave the parties bargaining for a hodge-podge of portions of municipalities – In these particular circumstances however it was not possible to accommodate both of these principles and the Board decided to exercise its discretion to ensure that a certificate did not undermine the pattern of Board Areas that had been functioning well since 1980 – Accordingly, the Board ruled that combining four portions of municipalities into a single geographic bargaining unit created a sufficiently large area to be meaningful and identifiable – Finally, the Board made it clear its determination with respect to the White Area was made only on the basis of the specific information before it and that the Board and interested parties may wish to address this issue in a systemic way – Certification granted

BUR OAK RESOURCES INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493; OLRB File No. 1755-16-R; Dated October 28, 2016; Panel: David McKee (19 pages)

COURT PROCEEDINGS

Duty of Fair Representation - Judicial Review –
The applicant was involved in a grievance with the

City of Toronto arising from his dismissal – The applicant was reinstated without compensation – The arbitrator took two years to release a bottom line decision, so the applicant was granted reinstatement without two years of wages – The applicant believed the union should have judicially reviewed the arbitrator's decision – The union sought legal advice and concluded that there was no reasonable likelihood of success at a judicial review and seeking judicial review would risk the order of reinstatement – The applicant alleged this decision not to go forward with the judicial review was a failure by the union in its duty of fair representation – At the Board, the application was dismissed – The Board found that the union acted reasonably and that there were no errors so obvious in the arbitrator's decision that one could conclude the chance of success at judicial review was very strong – The Divisional Court found the Board's decision to be reasonable – Application dismissed

MISRA V CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79; 2016 ONSC 6745 (Court File No. 176/16); Date: October 27, 2016; Panel: Marrocco A.C.J.S.C., Nordheimer J., Thorburn J. (3 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
Ming Tang Divisional Court No. 452/16	3607-14-U	Pending
Anishinabek Police Service Divisional Court No. 455/16	0319-13-R & 1629-13-R	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	Pending
946900 Ontario Limited Divisional Court No. 239/16	3321-14-ES	Pending
S & T Electrical Contractors Divisional Court No. 406/16	1598-14-U	Pending
Carpenters (Riverside) Divisional Court No. 363/16	0630-16-R	Pending
Lee Byeongheon #2 Divisional Court No. 16-2219 (Ottawa)	0095-15-UR	Pending
Lee Byeongheon #1 Divisional Court No. 16-2220 (Ottawa)	0015-15-U	Pending
College Employer Council Divisional Court No. 308/16	0625-16-R	December 9, 2016
Ajay Misra Divisional Court No. 176/16	1849-15-U	Dismissed October 27, 2016
Labourers' International Union of North America, Local 183 (Alliance Site Construction Ltd.) Divisional Court No. 133/16	3192-14-JD	Pending
Public Service Alliance of Canada Divisional Court No. 115/16	0119-13-R	December 19 & 20, 2016
R. J. Potomski Divisional Court No. 12/16 (London)	1615-15-UR 2437-15-UR 2466-15-UR	Pending
Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 095-16	0668-15-ES	Pending
David Houle Divisional Court No. 1021-16 (Sudbury)	0292-15-U	Pending
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending

Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	Pending
Cotton Inc. Divisional Court No. 554/15	3254-13-U 3255-13-R	Dismissed May 30, 2016 Leave to CA dismissed October 11, 2016
Kognitive Marketing Inc. Divisional Court No. 51/15 (London)	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15 (London)	3151-14-G 3716-14-R	Pending
IBEW Electrical Power Council of Ontario (Crossby Dewar Inc.) Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
Labourers' International Union of North America, Local 1059 (McKay-Cocker) Divisional Court No. 384/15	0883-14-R	June 17, 2016 Reserved
Universal Workers Union, Labourers' International Union of North America, Local 183 (Maystar) Divisional Court No. 368-15	1938-12-R	Dismissed September 13, 2016 Seeking leave to CA
Carlene Bailey Divisional Court No. 173/15	0480-13-U	December 21, 2016
Valoggia Linguistique Divisional Court No. 15-2096 (Ottawa)	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No. 49/15; Court of Appeal No. M46308	0229-13-R	Dismissed March 8, 2016, LIUNA leave to CA dismissed October 17, 2016

Ontario Labour Relations Board

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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. 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, 2nd 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