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*Ontario Labour Relations Board*

# *HIGHLIGHTS*

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## CHANGES IN THE LIBRARY

**Kevin Jenkins**, the Board's stalwart, erudite librarian (since 1998 co-located in the Ontario Workplace Tribunals Library), will be retiring at the end of April, after almost 26 years of answering questions and finding obscure cases for us and the labour community at large. We thank Kevin for his years of service, dedication and cool resolve. Taking over from Kevin will be **Emily Sinclair**, incorporating the unique combination of both lawyer and librarian. Emily has been on OWTL staff for the past couple of years; she is no stranger to our queries. Adieu and best wishes, Kevin!

## 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.

**Certification – Trade Union – Membership Evidence -** The Paramedic Network applied to carve out paramedic employees from a city-wide bargaining unit of outside workers represented by CUPE Local 416 – The issue before the Board was whether the documents filed by the Paramedic Network constituted membership evidence within the meaning of the Act – The membership evidence consisted of "Member Pledge Forms", which indicated an individual pledges to support the Paramedics, and "Application for Membership" forms, which indicated an individual requests and accepts membership with the Paramedic Network – The bulk of the membership evidence consisted of the former rather than the latter – The Applicant submitted the language in the Member Pledge Form was sufficient to demonstrate the individual was a member of the Paramedic Network, arguing the word "appear" in section 8(2) of the Act meant that 40% of individuals in a bargaining unit must only "appear" to be members of the union and that this was accomplished by pledging to support the union – The Board held the word "appear" in section 8 of the Act relates not to the *quality* of the membership evidence (whether the individuals are members in the union) but to the *quantity* of membership evidence (whether 40% of the individuals are members in the union) – The Board applied the principles as elaborated in *Famous Players* and found that pledging to support the Paramedic Network did not equate to agreeing to become a member of the organization – Consequently, the Board held there was insufficient membership evidence to support the application – Application dismissed

**CITY OF TORONTO;** RE: THE PARAMEDIC NETWORK; OLRB File No. 2603-15-R; Dated March 7, 2016; Panel: Bernard Fishbein (32 pages)

***Hospital Labour Disputes Arbitration Act* – Reference –** The Minister asked whether the employees of Compass Group working in a cafeteria and a Tim Horton's at the hospital are "hospital employees" covered by HLDAA – The Board acknowledged the broad wording of the

definition (" a person employed in the operation of a hospital") but found that the employees at issue worked in the retail arm of food services (for staff, visitors and patients) but they did not provide meal services to patients – CUPE had not challenged the contracting-out provision of the collective agreement that permitted the hospital to award the work to Compass, a third party – The occasional institutional use of the cafeteria or Tim Horton's for hospital functions was considered a business transaction and not integral to the hospital's operation – The Board advised the Minster that the employees at issue were not "hospital employees" within the meaning of HLDAA

**COMPASS GROUP CANADA AT PETERBOROUGH REGIONAL HEALTH CENTRE;** RE: CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 1943.1; OLRB Board No. 0710-15-MR; Dated March 30, 2016, Panel: Roslyn McGilvery (9 pages)

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**Certification – Construction Industry – Employee – Status –** The employee in dispute presented a completely different account of his activities on the date of application, contrary to what the employer had pleaded in its response – The applicant argued that the Board should disregard the testimony, not because the employee's testimony was not credible, but because it was completely at odds with the responding party's pleaded case – The Board found that Fairlawn failed to investigate what the employee claimed he was actually doing on the application date – The effect of that meant the union was foreclosed from engaging in a timely investigation into the state of affairs as they existed on the application filing date – Moreover, Fairlawn did not have a compelling reason for failing to have uncovered the employee's version of events – In representation applications in the construction industry, where the issue often is concerned with what a worker was doing on a particular day that is like most other days on a construction job site, it is critical that the parties take care to plead their positions with a measure of precision – The union accepted the description and location of the employee's work as set out in Fairlawn's pleading, but maintained that his work was not electrical work within the construction industry – The employee's evidence, however, went to an entirely different issue: whether he was an on-site employee; that is not the issue in dispute – Fairlawn cannot now grasp on to that issue simply because the Board heard evidence about it or because the employee's testimony may well have otherwise been persuasive – The pleadings determine the issues in dispute – The employee's testimony describing his work on the date of application was simply not relevant to the issue in dispute as framed by the parties, and to give it any consideration would be akin to allowing Fairlawn to resile from the parties' agreement on the facts – Matter continues

**ED SAFFREY O/A FAIRLAWN ELECTRICAL SERVICES;** RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 105; OLRB file No. 1107-15-R & 1129-15-U; Dated March 15, 2016; Panel: Patrick Kelly (15 pages)

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**Employment Standards – Reprisal – Timeliness –** The Applicant sought review of an ESO's decision to dismiss his reprisal complaint because it was filed outside the two-year limitation period provided by section 96(3) of the ESA – The complaint was filed on January 18, 2015 and the event giving rise to the complaint allegedly occurred in June 2012– The Applicant urged the Board to apply the *Limitations Act* to allow for the operation of the "discoverability" principle, as the Applicant argued he only became aware of the impugned events in December of 2014 – The Applicant also argued that his complaint was not subject to a limitation period since he is only asking for a declaration that the Employer breached the ESA and the *Limitations Act* effectively by-passes the time limits in the ESA – Finally, the Applicant argued even if the Board finds the *Limitations Act* does not apply to the ESA, the Board should "read in" or "imply" the terms of the *Limitation Act* when interpreting the employment statute – The DES argued that the *Limitations* Act is not applicable to the Applicant's claim, that neither the ESO nor the Board have the authority to grant relief against the impact of section 96(3), and that the Board does not have the power to remit the issue to the ESO – The Board held it is abundantly clear from the wording of section 2 of the *Limitations Act* and the jurisprudence that that Act is not applicable to the ESA, as the proceedings before the Board cannot be characterized as "court proceedings" – The Board also held it cannot read in the principles which the Applicant wishes to extract from the *Limitations Act* and apply them to the ESA – As the alleged events giving rise to the complaint occurred more than two years prior to the filing of the complaint, the complaint fell outside the limitation period provided by the ESA – Application dismissed

**KASHRUTH COUNCIL OF CANADA / LE CONSEIL CACHEROUT DU CANADA;** RE: MR. MORLEY RAND; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 1332-15-ES; Dated March 29, 2016; Panel: Maurice A. Green (6 pages)

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**Employment Standards –** The employer sought review of an Employment Standards Officer's order to return $1,152.05 which it had improperly deducted from CB's final wages – Upon hire, the employer required its employees to sign an agreement which provided that the employer could deduct $1,500 against the employee's earnings if the employee left his or her employment before six months of service – CB resigned his employment before the expiry of six months and the employer provided him with a final paycheque of zero dollars, instead of the $1,152.05 he earned for that pay period – The principal issue between the parties was whether retaining $1,152.05 from the employee's final pay constituted a lawful deduction in accordance with section 13 of the ESA – The employer argued this deduction was justified to avoid having uncommitted employees and to recoup the costs associated with employee training – The Board held the $1,152.05 retained by the employer was not a deduction but rather a disincentive or penalty against the employee for leaving his employment within the stipulated time frame – In making this decision, the Board found: (1) the amount deducted did not relate to an actual expense the employer incurred; (2) the employee did not personally benefit from the training he received; and (3) when he entered the agreement, CB had no way to gauge what he was getting in exchange for the $1,500 deduction – There are public policy reasons for limiting an employer's ability to take the extreme action of retaining an employee's entire paycheque – The Board will not give effect to an arrangement where an employee must either remain employed for a set amount of time or face economic repercussions – This was an inappropriate restraint on an employee's right to leave his or her employment and does not gain legitimacy because the employer attempted to characterize it as a section 13 deduction – Application dismissed

**RAINBOW CONCRETE INDUSTRIES LIMITED;** RE: KAVAN CHEFF-BURNS; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 2280-14-ES; Dated March 14, 2016; Panel: Roslyn McGilvery (11 pages)

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**Employment Standards –** Tempest sought review of an order for compensation, citing issue estoppel, *res judicata* and abuse of process – M's original claim with the Ministry was denied because the ESO found Tempest to be a federal jurisdiction employer – M then filed her claim under the *Canada Labour Code*; the federal authorities declined jurisdiction – When M subsequently sought review of the original ESO's refusal to issue an order, that application was dismissed for delay – At the Ministry's urging, M filed a fresh claim under the ESA and a different ESO issued the compensation order – Tempest argued that the Ministry acted improperly in encouraging M to file a fresh claim – The Board ruled that it would not address the Ministry's conduct, but would take the effect of that conduct into account as it applied the equitable doctrines in determining whether to allow the review to proceed – The Board held that issue estoppel cannot be successfully invoked because the original ESO's ruling on jurisdiction was not a final decision; equally, the Board's decision to dismiss M's first application for review for delay did not constitute a decision on the jurisdiction of the claim – The fact that the DES did not actively participate in the first proceeding means the DES is not bound by issue estoppel or *res judicata* arising from that decision (which was not a final decision in any event) – Because the issue of jurisdiction remains outstanding at the Board, there has been no abuse of process – Matter continues

**TEMPEST GLOBAL TELECOM INC.;** RE: KELLY MADDISON; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 3688-14-ES; Dated March 30, 2016; Panel: Paula Turtle (18 pages)

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**Certification – Construction Industry – Delay –** The successful Union requested that the Board exercise its discretion to adjourn this matter and delay the issuance of a certificate until after the statutory open period had expired in order to avoid the possibility of the employer initiating a termination application during that period – The Union argued the Board has the discretion to adjourn this matter through an exercise of its right to "determine its own practice and procedure" pursuant to s. 110(16) of the Act – The Employer argued it would not be appropriate for the Board to pre-determine a potential future proceeding on the basis of the proceeding now before it and that, under these circumstances, the Board should not delay the issuance of the certificate – The Board held that however well founded the applicant's

concern may be that a termination application will be initiated by the Employer, this event has not yet taken place and it would be improper for the Board to base its exercise of discretion to adjourn this matter on a presumption of guilt against the Employer – The Board also held there is nothing which remains in dispute in this application that would prevent the Board from bringing this application to its conclusion – As the Board was satisfied that more than 55% of the employees in the bargaining unit were members of the Union on the application filing date, the Board held it should certify the union - Certificate issued

**THE ELECTRIC COMPANY LTD.;** RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353; OLRB file No. 1724-15-R; Dated March 31, 2016; Panel: Eli A. Gedalof (6 pages)

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## COURT PROCEEDINGS

**Certification – Construction Industry – Judicial Review –** LBM brought an application for judicial review of a decision of the Board certifying the Carpenters – While there was no question the employer did not receive the application for certification before it was considered by the Board, the Board found the certification materials were delivered, within the meaning of the Board's rules, to a previous business address that had not been changed by the employer on the Ontario government records – Additionally, the previous address was listed on one of the employer's previous business cards, which the union also relied upon as an indicator of the employer's business address – LBM argued it was unreasonable for the Board to find that the certification materials were delivered in accordance with its rules and that it was equally unreasonable for the Board to refuse to exercise its discretion to receive the employer's late-filed response – The employer also argued it was denied procedural fairness because the Board failed to contact the employer by telephone to inform it that an application for certification had been made – The Court held that the Board's decision fell within a range of reasonable outcomes which the Board was entitled to reach – The Court also held the Board's refusal to set aside the certification decision was reasonable given the Board's finding of irreparable prejudice to the union if the certification decision was set aside – Finally, the Court held that since the issue of procedural fairness was not raised before the Board in the reconsideration hearing, or in any of the materials before the Board, the employer could not raise this issue for the first time on judicial review – Application dismissed

**LBM CONSTRUCTION SPECIALTIES INC.;** RE: ONTARIO LABOUR RELATIONS BOARD; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0121-14-R; (Court File No. 353/15); Dated: March 17, 2016; Panel: Aston, Swinton and Pattillo, JJ. (3 pages)

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**Certification – Construction Industry – Judicial Review – Natural Justice – Practice and Procedure –** LIUNA sought judicial review of a Board decision certifying the Carpenters in a displacement application – LIUNA argued it had been denied natural justice when the Board refused to order production of alleged legal fee arrangements among Toran, the Group of Employees and the Carpenters from an earlier termination application (alleging on-going employer support in the displacement) – The Court held that what LIUNA had characterized as an issue of procedural fairness and natural justice was in fact an exercise of the Board's discretion on the production issue, and that discretion was exercised reasonably by the Board – Application dismissed

**TORAN CARPENTRY INC.;** RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: GROUP OF EMPLOYEES; RE: ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 0229-13-R; (Court File No. 49/15); Dated: March 8, 2016; Panel: Molloy, H. Sachs and Pattillo, JJ. (4 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, 7th Floor, 505 University Avenue, Toronto.

# Pending Court Proceedings

| Case name & Court File No. | Board File No. | Status |
|---|---|---|
| **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 | Pending |
| **R. J. Potomski** Divisional Court No. 12/16 **(London)** | 1615-15-UR<br>2437-15-UR<br>2466-15-UR | Pending |
| **Serpa Automobile (2012) Corporation (o/a Serpa BMW)** Divisional Court No. 095-16 | 0668-15-ES | Pending |
| **Byeongheon Lee** Divisional Court No. Unknown **(Ottawa)** | 0015-15-U | Abandoned<br>March 18, 2016 |
| **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<br>3255-13-R | April 21, 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<br>3716-14-R | Pending |
| **IBEW Electrical Power Council of Ontario** ***(Crossby Dewar Inc.)*** Divisional Court No. 501/15 | 1697-11-G<br>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 |
| **Universal Workers Union, Labourers' International Union of North America, Local 183** ***(Maystar)*** Divisional Court No. 368-15 | 1938-12-R | September 12, 2016 |
| **LBM Construction Specialties Inc.** Divisional Court No. 353/15 | 0121-14-R | Dismissed<br>March 20, 2016 |
| **EMT Contractor Division Inc** Divisional Court No. 32-15 (**London)** | 3514-13-R | April 20, 2016 |
| **Carlene Bailey** Divisional Court No. 173/15 | 0480-13-U | Pending |

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| **Valoggia Linguistique**<br>Divisional Court No. 15-2096 (**Ottawa)** | 3205-13-ES | Pending |
| **Toran Carpentry Inc.**<br>Divisional Court No. 49/15 | 0229-13-R | Dismissed March 8, 2016, LIUNA seeking leave to CA |
| **Royal Ottawa Hospital**<br>Divisional Court No. 14-62782 **(Ottawa)** | 2461-14-IO | Pending |
| **Dean Warren**<br>Divisional Court No. M-45870 | 2336-13-U | Allowed<br>Leave to CA dismissed March 30, 2016 |
| **Godfred Kwaku Hiamey**<br>Divisional Court No. 345/13; 346/13 | 2906-10-U<br>3568-10-U | Dismissed<br>Seeking leave to CA |