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*Ontario Labour Relations Board*

# *HIGHLIGHTS*

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November 2017

## NOTICES TO THE COMMUNITY

### Holiday Season Board Schedule

The Board's holiday operations schedule is attached.

## 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.

**Health and Safety – Practice and Procedure** – The applicant delivered his appeal to the responding parties (MOL and the employer) and the intervening union within 30 days of the Inspector's decision not to issue an order – He did not provide his appeal to the Board until after the 30 day limit in the statute, a mistake he discovered after he called the MOL and the Board inquiring about the status of his appeal – The Board considered it advisable to relieve against the strict application of the meaning of "file" in the exceptional circumstances of the case, and found the delivery of the correct form to all the parties, having occurred within the 30 day time period, to constitute filing for the purpose of starting the appeal – Appeal processed

**CITY OF MISSISSAUGA;** RE: **MISSISSAUGA TRANSIT;** RE: JUDE FERNANDEZ; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB File No. 1211-17-HS; Dated October 17, 2017; Panel: Kelly Waddingham (4 pages)

**Reprisal– Termination –** The applicant alleged that her employment was terminated by Eamon Park Housing Co-Operative Inc. ("Eamon Park"), contrary to section 50 of the *Occupational Health and Safety Act* ("Act"), as a reprisal for exercising a right under the Act – Two preliminary issues – Applicant argued it was improper to accept the late filed response and that the hearing should be limited to remedial issues – The Board accepted the late filed response after balancing the harm of the late filing with procedural fairness afforded to the parties – Applicant also objected to the respondent's supplemental document brief which contained two documents: a court decision which found the Applicant to be a vexatious litigant and a complaint filed by a member of Eamon Park against the Applicant – The Board allowed the objection to the admissibility of the complaint from a member of Eamon Park because the details of the complaint were not pled by Eamon Park and the complaint itself had not been disclosed in accordance with the Board's Rules of Procedure – Onus on the employer to establish it did not contravene the Act – Eamon Park argued dismissal due to Applicant's poor work performance, insubordination, and inability to work with other members of Eamon Park – Applicant had filed a complaint regarding harassment and employer's failure to comply with the Act – At the time the Applicant filed her complaint with the

Ministry, there had already been a decision to examine the Applicant's performance more carefully – The decision to terminate the Applicant's employment was made after she was unwilling to undergo a performance review – The Board notes an employee does not insulate herself from the usual performance evaluations and decisions of the employer when she attempts to enforce her rights under the Act – The Board accepted the employer's evidence that the Applicant was not performing at the expected level, the employer had extended the Applicant's probationary period, and the Applicant had refused to answer the employer's questionnaire during her performance evaluation – The Board found no evidence that the employer was motivated, in whole or in part, by the Applicant's attempts to enforce her rights under the Act in the decision to terminate – Application dismissed

**EAMON PARK HOUSING CO-OPERATIVE INC.;** RE: ALICIA R. ALLEN; OLRB File No. 0255-17-UR; Dated October 10, 2017; Panel: Matthew R. Wilson (14 pages)

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**Employment Standards** – Two directors claimed they resigned as directors of the corporation they sold in 1996 and were therefore not liable for directors' Orders issued in 2015, notwithstanding that their names remained on the corporate filings – They submitted that they had instructed counsel to remove their names as directors when they sold Greenpoint; however, they were unable to obtain the relevant documents from counsel due to the passage of time – Neither the employee claimant nor the Director took issue with the facts submitted by the two directors including that neither director has had any involvement with the Greenpoint since they sold the business – The Board considered its case law addressing the rebuttable presumption in section 262(3) of the OBCA (that a person named as a director in corporate filings is presumed to be a director) and was satisfied, on these facts (particularly the length period of time with no involvement), that the directors had resigned and were not Greenpoint's directors in 2013 when the wages were payable – Orders rescinded

GEORGE RICHARD COOK; RE; PETER KAVANAGH, DIRECTORS OF GREENPOINT LASER PRODUCTS INC.; RE: PAUL D. MOREAU; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0656-17-ES; Dated October 6, 2017: Panel: Paula Turtle (6 pages)

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**Ratification and Strike Vote – Unfair Labour Practice –** PSAC Local 610 Executive Committee ("the Applicant") alleged PSAC violated s.79.1 of the Act in conducting a ratification vote of a collective agreement with the other Responding Party, the University of Western Ontario – PSAC had been certified for post-doctoral associates ("PDAs") in the employ of the University – Collective agreement between PSAC and the University covering PDAs expired in September 2016 – PSAC became certified for post-doctoral fellows ("PDFs") in the employ of the University in August 2016 – Parties agreed that PDAs and PDFs should be covered by the same collective agreement – Collective agreement covering PDAs amended to also include PDFs – First Memorandum of Agreement ("MOA") was not ratified – In the ratification vote of the second MOA, PDAs received a single ballot which asked them whether they ratified the MOA or, if they did not, whether they authorized a strike – PDFs were given two ballots, one asked them whether they ratified the MOA, the second asked them whether they would authorize a strike – s.79.1 provides that a question on a ballot used in a vote to ratify a first collective agreement shall not make direct or indirect reference to the calling of a strike – Applicant contended second MOA was a first collective agreement and s.79.1 applied since PDFs were not covered by previous collective agreement – PSAC and University contended the collective agreement was previously in operation and expanded to include PDFs, therefore s.79.1 had no applicability – The Board found s.79.1 only applied where no collective agreement has previously been in operation – Although the previous collective agreement did not cover PDFs, it formed the basis of a renewal collective agreement which parties expanded to include PDFs – The mere fact that a prior collective agreement now covered employees not previously covered by the collective agreement is not sufficient to transform the prior collective agreement into a first collective agreement or to create a situation where "no collective agreement has previously been in operation" within the meaning of s.79.1 of the Act – Board found s.79.1 was not applicable and had not been violated – Application dismissed

**PSAC LOCAL 610 EXECUTIVE COMMITTEE;** RE: PSAC ONTARIO, PUBLIC SERVICE ALLIANCE OF CANADA (PSAC); RE: THE UNIVERSITY OF WESTERN ONTARIO; OLRB File No. 1180-17-U; Dated October 30, 2017; Panel: Bernard Fishbein (12 pages)

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**Health and Safety – Practice and Procedure –** The Applicant company opposed the MOL's request that the Board adjourn an application pending the completion of its investigation and potential prosecution that might arise from it – The Board

noted that the cases relied upon by the Ministry where the Board granted adjournments dealt with adjournment requests after charges had been laid – Concerning the areas of prejudice pled by the Ministry, the Board found that the argument that the company and/or witnesses may be prejudiced is not a prejudice against the Ministry – Also any risk related to improper disclosure or about the subjects that witnesses may be asked to testify about, can be dealt with by the panel hearing the case – Finally, the Board notes that the appeal process is a creature of statute that the Board has always strived to hear these appeals in a reasonable timeframe, and that it is the company that is seeking to exercise its rights to appeal – Request for adjournment denied – Matter continues

**TIM ALLEN'S AERIAL SERVICES;** RE: BRENDAN HART; RE: MATT DEJONG; RE: TYRONE TYO; RE: GUERMO REYES; RE: SHAWN MAJOR; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB File No. 0636-17-HS: Dated October 23, 2017; Panel: Matthew R. Wilson (5 pages)

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## COURT PROCEEDINGS

**Duty of Fair Representation – Judicial Review –** The Board dismissed the Applicant's complaint that the union had breached its duty of fair representation – The Applicant had been terminated from his 14 year employment with the company for a serious safety violation – The union grieved the termination, and subsequently the applicant, who was within weeks of his 65th birthday, retired and began drawing his pension without consulting with the union as to the implications on the outstanding grievance – When the union informed the Applicant of the employer's settlement offer and he informed the union he had taken retirement and was receiving his pension, the union withdrew the grievance, since he was no longer seeking reinstatement and there was no purpose in pursuing the grievance – The Court found the standard of review was reasonableness and that the Board's decision met that standard – Application for Judicial Review dismissed

DAVID HOULE; RE: SUDBURY MINE, MILL & SMELTER WORKER'S UNION, LOCAL 598/UNIFOR; RE: ONTARIO LABOUR RELATIONS BOARD**;** 2017 ONSC 6054 (Court File No. 1021/16); Dated October 10, 2017; Panel: Kiteley, Conway, Mulligan JJ. (5 pages)

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**Certification – Construction Industry – Judicial Review – Practice and Procedure –** The union sought judicial review of a reconsideration decision in which the Board held the application filing date of the union's application for certification was March 29, 2016, and was therefore filed out of time – The application was received by the Board on May 29, 2016, but identified March 29, 2016 as the application filing date in two places on the application form – On judicial review the Court noted all parties agreed the standard of review was reasonableness – The Court noted that the Board was exercising its discretion whether to relieve from compliance with its rules and in doing so was drawing on its expertise in construction industry labour relations – The Board considered factors set out in its jurisprudence when deciding whether to exercise its discretion and reasonably found that an amendment of the filing date would cause material prejudice to the Employer – The Court found that the Board's decision was justified and intelligible and that it fell within a range of reasonable outcomes – Application for judicial review dismissed

CARPENTERS AND ALLIED WORKERS, LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: RIVERSIDE DOOR & TRIM INC.; RE: ONTARIO LABOUR RELATIONS BOARD; 2017 ONSC 6057 (Court File No. 363/16); Dated October 10, 2017; Panel: Lederman, Swinton, Rady JJ. (2 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 |
|---|---|---|
| **Rouge River Farm Inc.**<br>637/17 | 0213-16-ES | Pending |
| **Sheet Metal Workers' International Association**<br>613/17 | 1536-16-R | Pending |
| **Dennis McCool**<br>Divisional Court No. 566/17 | 0402-16-U | Pending |
| **S. & T. Electrical Contractors Limited**<br>Divisional Court No. 562/17 | 1598-14-U<br>1666-14-G<br>1806-14-MR | Pending |
| **Reuben Gooden**<br>Divisional Court No. 556/17 | 1113-16-U<br>1114-16-U<br>1213-17-U | Pending |
| **Ramkey Construction Inc.**<br>Divisional Court No. 539/17 | 1269-15-R | Pending |
| **Front Construction Industries**<br>Divisional Court No. 528/17 | 1745-16-G | Pending |
| **Enercare Home**<br>Divisional Court No. 521/17 | 3150-11-R<br>3643-11-R<br>4053-11-R | Pending |
| **Ganeh Energy Services**<br>Divisional Court No. 515/17 | 3150-11-R<br>3643-11-R<br>4053-11-R | Pending |
| **Kevin Mackay**<br>Divisional Court No. 466/17 | 2972-16-U | Pending |
| **Across Canada**<br>Divisional Court No. 244/17 | 3673–14–R | Pending |
| **LIUNA *(Pomerleau Inc.)***<br>Divisional Court No. 257/17 | 3601–12–JD | Pending |
| **TTC**<br>Divisional Court No. 262/17 | 1995–16–HS | January 25, 2018 |
| **Myriam Michail**<br>Divisional Court No. 624/17 **(London)** | 3434–15–U | Pending |

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|---|---|---|
| **Peter David Sinisa Sesek**<br>Divisional Court No. 93/16 **(Brampton)** | 0297–15–ES | Pending |
| **Women's College Hospital**<br>Divisional Court No. 24/17 | 0830–15–M | Pending |
| **Innovative Civil Constructors**<br>Divisional Court No. 611/16 | 0142–16–R | Pending |
| **Yuchao Ma**<br>Divisional Court No. 543/16 | 2438–15–U | Pending |
| **946900 Ontario Limited**<br>Divisional Court No. 239/16 | 3321–14–ES | Pending |
| **Carpenters (*Riverside*)**<br>Divisional Court No. 363/16 | 0630–16–R | Dismissed |
| **R. J. Potomski**<br>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)**<br>Divisional Court No. 095–16 | 0668–15–ES | Pending |
| **David Houle**<br>Divisional Court No. 1021–16 | 0292–15–U | Dismissed |
| **Qingrong Qiu**<br>Divisional Court No. 669/15 | 2714–13–ES | Pending |
| **Kognitive Marketing Inc.**<br>Divisional Court No. 51/15 **(London)** | 0621–14–ES | November 28, 2017 |
| **Valoggia Linguistique**<br>Divisional Court No. 15–2096 (**Ottawa)** | 3205–13–ES | Pending |

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Ontario

November 3, 2017

# NOTICE TO THE COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between December 21, 2017 and January 2, 2018 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 21, 22, 27, 28, and 29, 2017 and January 2, 2018.

Please note the 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 7, 2017 | January 3, 2018 |
| December 8 | January 3 |
| December 11 | January 4 |
| December 12 | January 4 |
| December 13 | January 5 |
| December 14 | January 5 |
| December 15 | January 8 |
| December 18 | January 8 |
| December 19 | January 9 |
| December 20 | January 9 |
| December 21 | January 10 |
| December 22 | January 10 |
| December 27 | January 11 |
| December 28 | January 12 |
| December 29 | January 15 |
| January 2, 2018 | January 16 |
| | |

Catherine Gilbert
Director/Registrar