ISSN 1712–4506 (Online)

Ontario Labour Relations Board

HIGHLIGHTS

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December 2017

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.

NOTICE TO COMMUNITY

PLEASE TAKE NOTICE that the Board has implemented phase 1 of its e-filing project. The A-33 & A-34 Application/Response/Intervention under Section 96 of the Act (Unfair Labour Practice), the A-103 Application for Review (Employment Standards Act, 2000) and the new A-108 Electronic Submissions Form are now able to be electronically filed with the Board. The Electronic Submissions Form may be used to e- file correspondence and submissions but not Board forms, membership evidence or books of authorities/documents. The Board will be hosting a drop-in e-filing training session including for counsel and/or their assistants on December 20, 2017 from 12:30-3:30. Please consult the Board's website for further information about e-filing.

PLEASE TAKE NOTICE that revised Rules of Procedure (in light of amendments to the *Labour Relations Act, 1995* arising from Bill 148) effective January 1, 2018 will be available on the Board's homepage on, or before, December 22nd. The revised rules include the following new rules and revisions: new Rule 9A [List of Employees]; new Rule 9B [Certification—Specified Industry]; revisions to Rules 6.4, 6.9(a), 6.11 & 7.3(c) which incorporate Rules 9A and 9B; revisions to Rule 12 to reflect the amendments to s. 43 and 43.1 [first collective agreement by mediation-arbitration]; revisions to Rule 19 to reflect changes to s. 98 [Board's interim order powers]. Finally, new forms will follow for applications under s. 6.1 [List of Employees], s. 15.1 [Review of Structure of Bargaining Units] and 15.2 [Specified Industry].

***Prima Facie* Motion - Related Employer – Sale of Business –** The Carpenters filed a sale of business and related employer application arising out of the performance of work on the Kitchener-Waterloo Light Rapid Transit system – The project was allegedly designed and executed as a joint venture or partnership between Aecon Construction and Peter Kiewit, embodied by a partnership known as Grandlinq – Two motions were brought by each of the responding parties and the Carpenters – Responding parties moved that the Board dismiss the application for failing to plead facts that form the basis of findings for the relief sought by the Carpenters (the "no *prima facie* case" motion) – Carpenters sought to add new parties and add new particulars to its pleadings (the "Amendment Motion") – The Board acknowledged the Union's *prima facie* burden was not significant given the type of application and the Union's lack of knowledge about the internal operations of businesses – The Board noted that the low standard may lead to pleadings that are reckless and untrue, simply to make out a *prima facie* case – The Board found some of the pleadings in this case were an example of that problem – In previous jurisprudence, the Board has granted a "no *prima facie* case" motion in a related employer application where the issue was whether the Board would exercise its discretion – In this case, the

Board could not determine whether it will exercise its discretion to grant the relief sought in the absence of all of the relevant facts – There were no facts pled of any sort to support a sale of business, and therefore the application under section 69 was dismissed – Pleadings in the Amendment Motion were obviously untrue on their face and pled with the expectation that the Board would be bound to accept them as true and provable, and for the sole purpose of defeating a "no *prima facie* case motion" – The Amendment Motion was denied – There was nothing pled that could possibly form the basis for a finding of related employer between Peter Keiwit and Aecon, therefore the application was dismissed as against Peter Keiwit – In pleadings about Aecon Buildings and Aecon Construction, the applicant only provided a partial description of the central interaction giving rise to the application – When a party pleads facts related to only part of the whole picture, such pleadings can lead to hearings that are inefficient or unfair to responding parties – The Board found these pleadings were not so defective that they undermined the Board's ability to manage the litigation process – Therefore, the "no *prima facie* case" motion was denied in respect of allegations against Aecon Buildings and Aecon Construction – The Board directed both parties to set out production requests – Matter continues

AECON CONSTRUCTION GROUP INC. (O/A AECON BUILDINGS); RE: AECON CONSTRUCTION AND MATERIALS LIMITED; RE: PETER KIEWIT INFRASTRUCTURE CO.; RE: GRANDLINQ CONSTRUCTORS; RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 1002-16-R; Dated November 15, 2017; Panel: David A. McKee (16 pages)

Electronic Vote – Final Offer Vote – Strike – The College Employer Council brought an Application pursuant to section 17(2) of the *Colleges Collective Bargaining Act, 2008* for a vote of the employees on its last offer – The Board ordered that the final offer vote was to be conducted by electronic vote – The Board ordered the Union and the Council to post the Notice of Vote their websites -

COLLEGE EMPLOYER COUNCIL; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No. 1956-17-VO; Dated November 7, 2017; Panel: Matthew R. Wilson (3 pages)

Bargaining Unit – Certification – Construction Industry – Employee– *Prima Facie* Motion – Status – The union sought to add the names of three individuals (Blair, Francis, and Lewis) to the list of employees – Two of the individuals (Blair and Francis) were supplied by a temporary labour provider, Labour Ready – The responding party asserted that Blair and Francis were employed by Labour Ready - Local 183 brought a motion to determine the responding party was the true employer of Blair and Francis on a *prima facie* basis – The responding party states that the Board should refer the matter to hearing unless it is satisfied that there is no serious issue to be tried – The Board held that while it takes a contextual approach to determinations about true employer cases, that does not mean that it does so in a vacuum and without regard to the significant body of caselaw involving temporary labour providers such as and including Labour Ready – If the facts pled in support of a claim that the temporary labour provider is the true employer are not distinguishable from the established caselaw, the issue can be decided on a consideration of facts pled at a Case Management Hearing – The Board found there were no facts pled by the responding party that distinguished this case from the existing caselaw – Any factual differences must be significant and material to the factors that the Board considers in its determination of true employer cases – The Board found that the Responding Party did not plead any significant facts that differentiated the case of Blair and Francis from the existing jurisprudence involving Labour Ready – Therefore, the Board found the responding party was the true employer of Blair and Francis – As a result of the inclusion of Blair and Francis, the Board is satisfied more than 55% of the employees in the bargaining unit were members of the applicant on filing date – Certificate issued

GAY COMPANY LIMITED, RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 1495-17-R; Dated November 10, 2017; Panel: Yvon Seveny (24 pages)

Certification – Charter of Rights and Freedoms – Constitutional Law – Union challenged constitutionality of section 3(c) of the Act on the basis of violating section 2(d) guarantee of "freedom of association" in the *Canadian Charter of Rights and Freedoms* – In a previous decision, the Board determined that all employees encompassed in both certification applications were employed in horticulture by an employer whose primary business is horticulture – The Board reviewed jurisprudence surrounding the guarantee of freedom of association in the context of labour relations and collective bargaining – The Supreme Court of Canada has confirmed that guarantee of freedom of association "protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their

collective interests" – The Board adopted the analytical framework set out in *Dunmore*, informed by the subsequent decisions of the Supreme Court of Canada to determine the constitutional challenge – Very little factual dispute between the union and the Attorney General of Ontario (AG) about the practice and operations of horticultural businesses in Ontario – The Board found there has been substantial interference with the horticultural employees' guarantee of freedom of association – The exclusion of horticultural workers is analogous to the exclusion of agricultural workers from the Act, which was found to be unconstitutional in *Dunmore* – While the *Charter* does not guarantee employees their collective bargaining regime of choice, the Supreme Court of Canada has prescribed minimum requirements for freedom of association – The exclusion of horticultural workers from the Act and any other statute means they have no protection of their minimum requirements for freedom of association – The horticultural exclusion in section 3(c) of the Act is an anomalous one, and only applies to persons who perform horticultural work for an employer whose primary business is agriculture or horticulture – Persons who perform horticultural work employed by the municipality or a non-horticultural employer enjoy the protections of the Act – The Board found the exclusion of an entire category of workers under section 3(c) of the Act violated the guarantee of freedom of association set out in section 2(d) of the *Charter* – The Board will treat section 3(c) of the Act as inoperative for purpose of proceedings and will not issue a formal declaration of invalidity – Matter continues

HERMANNS CONTRACTING LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB File No. 1626-12-R, 1660-12-R & 1955-12-U; Dated November 29, 2017; Panel: Jack J. Slaughter (42 pages)

Bargaining Unit – Certification – Construction Industry – Employee – Status – The Board directed the employer to file "will say" statements of what the employees in dispute would testify they were doing on date of application and union could renew its *prima facie* motion that the employees should be excluded on the basis of the "will say" statements – The employer withdrew the status dispute of one individual, but maintained that one employee ("Lombardi") should be included in the bargaining unit – The union disagreed and renewed its motion to determine status on a *prima facie* basis without any *viva voce* evidence – The employer argued Lombardi ought to be included in the bargaining unit pursuant to the "off-site employee" exception under section 126(1) of the Act – On the date of application, Lombardi worked a total of 9 ½ hours at the shop, spending 4 hours "preparing plumbing trim work and finishes" and 5 ½ hours performing "shop work" – The union noted the Board's well-established jurisprudence that an employee must spend a majority of his time on the date of application performing bargaining unit work in order to fall within that bargaining unit – The employer argued that if any work performed on the date by the disputed employee fell within the construction industry in the applicable trade, that individual ought to be included on the List of Employees – There was no logic or policy based foundation for treating Lombardi differently when he was in the shop all day and not on the site at all, than if he was actually on the construction site for that day – The Board distinguished this case from circumstances where an employee is moving from location to location doing work for two different bargaining units – Relying upon earlier Board caselaw (*O'Brien Fabrications*) the Board rejected the argument that it is enough to do "some" bargaining unit work when an employee was working in the shop all day on the date of application – Consequently, the Board found that Lombardi did not fall within the bargaining unit – Matter continues

SKYLINE MECHANICAL LTD.; RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; OLRB File No. 0906-17-R; Dated November 20, 2017; Panel: Bernard Fishbein (9 pages)

COURT PROCEEDINGS

Employment Standards – Judicial Review – Practice and Procedure – Timeliness – The applicant applied to judicially review a Board decision directing the applicant to pay Ms. Teneva unpaid wages, overtime pay, and damages for pain and suffering pursuant to the *Employment Standards Act* – A Notice Dismissing the Application was sent to the Director of the applicant, Ms. Thakrar, clearly stating the Application would be dismissed for delay unless the applicant perfected the Application within 10 days after the service of Notice – Ms. Thakrar confirmed the Notice was sent to the proper address for service – The Application was dismissed pursuant to Rule 68.06 (3) of the Rules of Civil Procedure – The applicant moved for an order setting aside the Dismissal order and allowing it a further 30 days to perfect its Application on the basis she did not receive the Notice – To set aside the Dismissal order, the applicant must demonstrate three factors (i) bona fide intention to seek judicial review within the prescribed time limit; (ii) a reasonable explanation for the delay; and (iii) that the justice of the case requires that the requested extension be granted – The applicant brought its Application in time, within two weeks of

the Affirming decision which satisfied the first branch of the test – The applicant did not provide sufficient evidence to establish on a balance of probability that it did not receive the Notice nor did it provide an explanation of why the Application was not perfected, causing a delay – The Court found that not all of the issues the applicant wished to raise in the application were raised before the Board in the Request for Reconsideration and there was no merit to the Application – There wass also presumed prejudice to Ms. Teneva, who had not received the benefit of the award due to the delay in the hearing the Application – Motion dismissed

946900 ONTARIO LIMITED O/A IDLEWOOD INN/CLOVERLEAF MOTEL; RE: ELITSA V. TENEVA; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: ONTARIO LABOUR RELATIONS BOARD; 2017 ONSC 6724 (Court File No. 239/16); Dated November 10, 2017; Panel: Spies K (8 pages)

Employment Standards – Evidence – Judicial Review – Practice and Procedure – Preliminary issue – Admissibility of two affidavits filed on behalf of applicants – The applicant submitted that the affidavits do not constitute fresh evidence – Both respondents objected to admissibility of the affidavits – The applicant did not seek leave to introduce evidence and respondents did not move to strike the evidence – The Court confirmed that the general rule on application for judicial review is that affidavits containing material not before the decision maker at first instance is not allowed – That Court held that the onus is on applicant to bring a motion for leave in advance of the application to file affidavit evidence – Matter is adjourned to permit applicant to bring motion for leave to introduce the two affidavits as evidence – No costs to any party

KOGNITIVE MARKETING INC.; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: ONTARIO LABOUR RELATIONS BOARD; 2017 ONSC 7219 (Court File No. 51/15); Dated November 28, 2017; Panel: J. Henderson, H. Pierce, J. Fregeau JJ. (2 pages)

Construction Industry – Judicial Review – Jurisdictional Dispute – The Board dealt with the dispute relating to the assignment of exterior concrete formwork in the construction of the Bridgepoint Hospital – The contractor, Alliance Site Construction ("Alliance"), assigned the work in dispute to members of the Carpenters rather than the Labourers, albeit through a composite assignment that included workers of both unions assigned to get the total job done – The Labourers asserted Alliance should have assigned all of the work in dispute to its members exclusively – The Board's Decision upheld the assignment and dismissed the Labourer's claim, concluding that the factors that favoured the Labourers were outweighed by the absence of a more important collective agreement based claim to all of the work in dispute – The Carpenters argued the Application was moot as the Labourers' collective agreement was amended to expressly include the work in dispute, and Labourers cannot satisfy its onus to demonstrate why the Court should depart from usual practice of refusing to hear moot applications – The Court was not satisfied that the issues were entirely moot to dispose of application without considering its substantive merits – The Court affirmed the applicable standard of review is 'reasonableness' – The Court found the Board's decision properly referred to various factors considered and applied in a jurisdictional dispute, and found two factors of great significance: the collective agreement and area practice factors – The Board's interpretation of the LIUNA's collective agreement was transparent, correctly reasoned, and reasonable – There is no legislative or judicial mandate that there may never be any deviance in Board decisions from decisions it has previously rendered – The Board's Decision was reasonable and well within the Board's purview and discretion to reach – Application dismissed

LABOURERS INTERATIONAL UNION OF NORTH AMERICAL, LOCAL 183; RE: THE CARPENTER'S DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ALLIANCE SITE CONSTRUCTION LTD (Court File No. DC 133-16); Dated November 22, 2017; Panel: Fragomeni, Quigly, and Matheson J.J. (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, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Rouge River Farm Inc. Divisional Court No. 637/17	0213-16-ES	Pending
Sheet Metal Workers' International Association Divisional Court No. 613/17	1536-16-R	Pending
Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1666-14-G 1806-14-MR	Pending
Reuben Gooden Divisional Court No. 556/17	1113-16-U 1114-16-U 1213-17-U	Pending
Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Pending
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Pending
Kevin Mackay Divisional Court No. 466/17	2972-16-U	Pending
Across Canada Divisional Court No. 244/17	3673–14–R	Pending
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Pending
TTC Divisional Court No. 262/17	1995–16–HS	January 25, 2018

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Myriam Michail Divisional Court No. 624/17 **(London)**	3434–15–U	Pending
Peter David Sinisa Sesek Divisional Court No. 93/16 **(Brampton)**	0297–15–ES	Pending
Women's College Hospital Divisional Court No. 24/17	0830–15–M	Pending
Innovative Civil Constructors Divisional Court No. 611/16	0142–16–R	Pending
Yuchao Ma Divisional Court No. 543/16	2438–15–U	Pending
946900 Ontario Limited Divisional Court No. 239/16	3321–14–ES	Pending
Byeongheon Lee Court of Appeal No. M48402	0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403	0015-15-U	Pending
Carpenters (*Riverside*) Court of Appeal No. M48481	0630–16–R	Pending
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. 110/16	0668–15–ES	Pending
David Houle Court of Appeal No. M48449	0292–15–U	Pending
Qingrong Qiu Court of Appeal No. M48451	2714–13–ES	Pending
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621–14–ES	Pending
Valoggia Linguistique Divisional Court No. 15–2096 (**Ottawa)**	3205–13–ES	Pending