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Ontario Labour Relations Board HIGHLIGHTS

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JOB POSTINGS

The Board has posted ads on the OPS Careers website at: www.gojobs.gov.on.ca

Board Solicitor (1) (Job ID 106580)
Competition closes May 24, 2017

Labour Relations Specialist (3) (Job ID 106295)
Competition closes May 19, 2017

NOTICES

PLEASE TAKE NOTICE that on Tuesday, July 4, 2017 the Board will revise the Geographic Areas used in construction industry cases. This revision eliminates the "white areas". It creates one new Board Area (33: The District of Parry Sound) and reconfigures seven areas (12, 16, 17, 19, 20, 21 & 32). Attached is a Construction Industry Area list [effective July 4, 2017]. Links to two maps (Board Areas [2017] – South and Board Areas [2017] – North) which reflect these changes may be found with the Notice on the Board's homepage. The Board's goal is to have created and installed on our website by July 4, 2017 a one–page map similar to the current one which shows the entire province. The current Geographic Area Map and the lists for Construction Industry Areas [January 1982] and [June 2016] will remain on the website.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April 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.

Construction Industry – Employer Support – Evidence – Sector Determination – Termination – In this application to terminate bargaining rights, the Board had to determine whether the work performed on the application date was in the ICI sector or a non–ICI sector, such as the roads sector – The work in dispute was the pouring of a municipal sidewalk following the renovation of a school – There was also a dispute regarding whether a sidewalk/slab abutting the school itself was poured – The work order only referred to the municipal sidewalk and the work itself was performed two to three weeks after the general contractor finished the ICI work – The Board found the employees only poured the municipal sidewalk as the other sidewalk/slab was not on the work order, there was not enough concrete on site to pour both sidewalks, and the work was not mentioned in the applicant's or intervenor's pleadings or status submissions as it arose, for the first time, in the employer's evidence – The Board found the municipal sidewalk work fell within the roads sector noting the work was distinct from the main project, was not a part of the general contractor's original contract with the school, and it was not physically connected to the school – The Board found the work was severable from the ICI work as the general contractor completed that project two to three weeks before the sidewalk was poured, and standalone repair work to a municipal sidewalk, as opposed to exterior sidewalks closely integrated with a project, typically falls within the roads

sector – The union also alleged the termination application had employer support and should be dismissed – The union alleged the employer met with employees to discuss applying for decertification, told employees their hours were reduced because of the union, that the employer and applicant's friendship influenced the applicant, and the employer coached the applicant to withdraw a previous application to remedy a defect – The Board dismissed the union's section 63(16) allegations – The Board found the fact the applicant and employer were Facebook friends did not create an inference they discussed the application nor was there evidence to support an inference the employer told the applicant the union led to the slowdown in work – The fact the employer knew the applicant withdrew his initial application and intended to file another was insufficient to infer the employer assisted the applicant with his application – The Board ordered the ballots be counted – Matter continues

2385575 ONTARIO INC. O/A EXTREME CONCRETE; RE: JASON KONARSKI; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA PROVINCIAL DISTRICT COUNCIL; OLRB FILE NO. 3323–15–R; Dated April 19, 2017; Panel: John D. Lewis, Vice–Chair (31 Pages)

Dependent Contractor – Employer – LIUNA, Local 837 filed an application for certification to represent the employees of the respondent, Moffatt Excavating and Utilities Ltd. ("Moffatt") – Moffatt argued Badger Daylighting LP ("Badger") was the true employer of the affected individuals and that it was a dependent contractor of Badger – The IUOE, Local 793 intervened, arguing Badger was the true employer of the individuals and its collective agreement set out the nature of the employment relationship among the individuals, Badger and Moffatt – The IUOE did not hold bargaining rights with Moffatt – Badger owned a hydrovac–truck which Moffatt operated as an Independent Operator ("IO") – The IUOE collective agreement established pay rates for those working as an IO and required Badger to make remittances – Badger obtained the hydrovac work and then assigned it – Moffatt could only use the truck for Badger's clients and Badger had final approval on who could operate the truck, but it never refused an individual Moffatt hired – On–site clients called Badger if a problem arose – Badger had removed a person from one of its sites and Moffatt, who was unable to find the person other work, was forced to lay him off – The majority of Moffatt's business came from Badger, however, Moffatt also performed non–hydrovac work for other clients using its own equipment – Outside of emergencies, Mr. Moffatt himself had not operated the hydrovac–truck for at least four years – Despite the collective agreement pay rates, Moffatt chose to pay individuals at a higher rate and paid a greater percentage for vacation and holiday pay – The Board concluded Moffatt was the employer – Relying on the *York Condominium* factors the Board found Badger never refused to approve anyone Moffatt hired to work on the hydrovac–truck – Moffatt chose to pay, and did not require Badger's approval to pay individuals more than the IUOE's collective agreement rates – The money Moffatt received from Badger was unconnected to the wages Moffatt paid its employees – It is not uncommon for the main contractor to be responsible for union remittances in the construction industry – The fact Badger refused a certain Moffatt employee to enter its worksite did not make it the employer – The Board found the existence of a collective agreement between the IUOE and Badger did not make Badger the employer – The collective agreement was an attempt to bring an administrative structure and to level the playing field for the IOs whether they were dependent contractors or employer subcontractors – Moffatt was found to be an employer in its own right and not a dependent contractor as it earned profit off of the labourers operating the Hydrovac – The Board certified the applicant

MOFFATT EXCAVATING AND UTILITIES LTD; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE: BADGER DAYLIGHTING LP; OLRB FILE NO. 2581–14–R; Dated April 13, 2017; Panel: Jesse M. Nyman (33 pages)

Lock–out – Settlement – Unfair Labour Practice – The union and employer entered into Minutes of Settlement that included a return to work protocol, referred outstanding wage issues to arbitration (final offer selection) under s. 40(1) and addressed entitlement to vacation credits – The Settlement stated that any disputes regarding the implementation of the settlement may be remedied by application to the Board pursuant to s. 96(7) and the union brought an application alleging that the employer violated the settlement by not adjusting vacation credits for full time employees – The Board requested the parties'

submissions on whether it had the jurisdiction to hear the dispute and if so, whether it should exercise its discretion to do so – Although the Board was not persuaded that the settlement resolved a proceeding under the Act, it assumed without deciding that it had the jurisdiction to proceed – First, the Board decided that this case did not engage the type of return to work issues typically dealt with by the Board, rather it dealt with entitlement to vacation credits, not employee rights to return to work – Second, the Board noted that parties typically incorporated protocols into their collective agreement for the purposes of enforcement – Third, the case does not raise an issue of urgency or public policy, but rather an interpretation of the unique language of a private agreement – Finally, the Board stated that such a request is unprecedented – After noting that there may be other ways for the parties to resolve this issue, but even if there are not, the Board was not persuaded it should exercise its discretion to hear the matter – The Board found it was not appropriate for parties to use s. 96(7) to settle a dispute before the Board that normally would be resolved at private arbitration at the parties' expense and that the potential effect on the Board's resources, absent a compelling public policy justification, did not justify hearing the matter – Application dismissed

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS OLG SLOTS AT RIDEAU CARLETON RACEWAY; RE: Public Service Alliance of Canada; OLRB FILE NO. 1669–16–U; Dated: April 5, 2017; Panel: Paula Turtle (10 Pages)

Employment Standards – F, working as a manager with broad authority to manage the business, was responsible for ensuring that employees' wages were paid – He also made payments through his credit card into the employer's account to cover shortfalls (referred to as "loans") – He made payments to himself throughout his employment saying some payments were for wages and some were repayment of the loans – Relying upon s. 14(1) of the ESA, the employer argued that all payments were wages – The Board rejected the employer's argument that s. 14(1) deems the amount F said were repayments of loans to be wages – The Board noted that s. 14(1) is not a deeming provision but rather requires employers to pay employees before they pay unsecured creditors – The remedy in this case is not to deem loan payments to be wages, but to find that the employer violated the Act and direct appropriate remedies – On the evidence the Board found certain wages still owing to F – Application partially granted

TIRE TO GO INC.; RE: IRAJ FATEHBASHARZAD; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB FILE NO. 2737–15–ES; Dated April 24, 2017; Panel: Paula Turtle (13 Pages)

COURT PROCEEDINGS

Employment Standards – Judicial Review – Practice and Procedure – Timeliness – Four individuals filed complaints against Airside for unpaid wages – The Employment Standards Officer issued four Orders to Pay Wages – These orders were served on June 30, 2014, and received by Airside on July 9, 2014 – Airside applied to the Divisional Court for judicial review of the orders – On May 27, 2015 the Court quashed the application for being premature – On September 3, 2015, Airside applied to the Board for a review of the orders and requested an extension to the timeline to make the application – The Board dismissed this request and a subsequent reconsideration request – Airside applied for judicial review – On a reasonableness standard, the Court noted that Airside must not only establish that there is another reasonable decision that might have been made, but also that the decision reached by the Board is unreasonable – The Court found the Board's conclusion that an extension will only be granted in extreme circumstances when the delay is a matter of months to be reasonable – The court found there is a level of urgency inherent in matters of unpaid wages as a delay in payment will prejudice the employee – Application dismissed

AIRSIDE SECURITY ACCESS INC. V. ONTARIO LABOUR RELATIONS BOARD; 2017 ONSC 2347 (Court File No. 670/15); Dated: April 13, 2017; Panel: Nordheimer J., Corbett J., DiTomaso 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, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Myriam Michail Divisional Court No. 624/17 **(London)**	3434–15–U	Pending
Peter David Sinisa Sesek Divisional Court No. 93/16	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
Ming Tang Divisional Court No. 452/16	3607–14–U	June 22, 2017
Anishinabek Police Service Divisional Court No. 455/16	0319–13–R & 1629–13–R	September 11, 2017
Cecil Cooray Divisional Court No. 324/16	1594–15–U	June 29, 2017
946900 Ontario Limited Divisional Court No. 239/16	3321–14–ES	Pending
S & T Electrical Contractors Divisional Court No. 406/16	1598–14–U	May 11, 2017
Carpenters (*Riverside*) Divisional Court No. 363/16	0630–16–R	Pending
Lee Byeongheon #2 Divisional Court No. 16–2219 **(Ottawa)**	0095–15–UR	June 15, 2017
Lee Byeongheon #1 Divisional **Court** No. 16–2220 **(Ottawa)**	0015–15–U	June 15, 2017
Labourers' International Union of North America, Local 183 *(Alliance Site Construction Ltd.)* Divisional Court No. 133/16	3192–14–JD	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. 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	Dismissed April 13, 2017
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621–14–ES	Week of November 27, 2017
W.H.D. Acoustics Inc. (Hannam) Court of Appeal No. M47477	3151–14–G 3716–14–R	Seeking leave to C.A.
Valoggia Linguistique Divisional Court No. 15–2096 (**Ottawa)**	3205–13–ES	Pending

Construction Industry Areas

AREA	DESCRIPTION
1.	The County of Essex and the Municipality of Chatham-Kent.
2.	The County of Lambton.
3.	The Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin.
4.	The County of Brant and Norfolk County.
5.	The Regional Municipality of Niagara and Haldimand County.
6.	The Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township).
7.	The County of Wellington.
8.	The City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Town of Ajax and the City of Pickering in the Regional Municipality of Durham.
9.	The Regional Municipality of Durham (except for the Town of Ajax and the City of Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the City of Kawartha Lakes.
10.	The Town of Cobourg, the Municipality of Port Hope, and the geographic Townships of Hope, Hamilton, Haldimand and Alnwick in the County of Northumberland.
11.	The County of Peterborough (except for the geographic Township of Cavan), the City of Kawartha Lakes (except for the geographic Township of Manvers) and the County of Haliburton.
12.	The County of Prince Edward, the County of Hastings and the Municipality of Trent Mills (formerly the Townships of Seymour, Campbellford, Hastings and Percy) and the Municipality of Cramahe and all lands east thereof in the County of Northumberland.

13. The County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville.

14. The County of Renfrew.

15. The City of Ottawa and the United Counties of Prescott and Russell.

16. The District of Nipissing.

17. The District of Sudbury.

18. The County of Simcoe and the District Municipality of Muskoka.

19. The District of Cochrane south of the 50th parallel of latitude.

20. The District of Temiskaming.

21. The District of Algoma.

22. The District of Thunder Bay.

23. The District of Rainy River.

24. The District of Kenora including the Patricia portion.

25. The District of Cochrane north of the 50th parallel of latitude.

26. The City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic townships of Nassagaweya and Nelson.

27. The County of Dufferin.

28. The County of Grey.

29. The County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville.

30. The geographic Townships of Elizabethtown, Augusta and Edwardsburgh and all lands south thereof in the United Counties of Leeds and Grenville.

31. The United Counties of Stormont, Dundas and Glengarry.

32. The District of Manitoulin.

33. The District of Parry Sound.

N.B.1. See also: “Boundary Description of Board Area 8" under “Notices” on the OLRB website: http://www.olrb.gov.on.ca/english/scheda.htm

N.B.2. All townships referred to in the above descriptions except for North Dumfries Township, are geographic townships, and therefore include any incorporated municipality, town, or village located within the geographic township.

July 4, 2017