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Ontario Labour Relations Board

HIGHLIGHTS

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NOTICES TO THE COMMUNITY

New part-time Vice-Chair

The Board welcomes **Michael Hancock** as a part-time Vice-Chair. Michael graduated from the University of Ottawa in 1997 and from Osgoode Hall in 2000. Upon being called to the bar in 2002, and until his appointment to the Board, Michael worked on behalf of trade unions acting in both an in-house capacity and at Koskie Minsky LLP. Michael has extensive experience in various sectors including healthcare, retail, manufacturing and construction. Michael is a member of the Ontario Labour Management Arbitrators Association.

TARA

The *Tribunal Adjudicative Records Act, 2019* ("TARA") came into force June 30, 2019. TARA applies to all proceedings commenced at the Board on or after that date.

TARA provides that adjudicative records (as defined in the statute) are presumptively available to the public. Certain records are also expressly excluded by the statute [s. 1(3]). It also provides that parties and affected persons may apply for, and the Board itself may make, confidentiality orders in certain circumstances.

Statutory provisions governing the secrecy or confidentiality of certain records will prevail over TARA. Such records will include membership evidence or evidence of employee wishes.

Part VIII of the Board's Rules addresses requests for adjudicative records and requests for confidentiality orders.

The text of the Tribunal Adjudicative Records Act, 2019 is available here: https://www.ontario.ca/laws/statute/19t07. The text of the Regulation providing that certain statutes prevail over TARA is available here: https://www.ontario.ca/laws/regulation/r19211.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July of this year. These decisions will appear in the July/August 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 – Reconsideration – Application by employer to reconsider certificates granted in two Board decisions to two unions more than 20 years earlier in order to combine them into a single bargaining unit – Employer operates, among other things, a chilled water plant, a steam plant formerly operated by a hospital and a steam plant formerly operated by local hydro utility – Employees at the former hospital plant and the chilled water plant represented by Unifor – Employees at the former local hydro utility plant represented by CUPE – Both bargaining units subject to *Hospital Labour Disputes Arbitration Act* – Parties had never co-ordinated bargaining – Employer argued that bargaining unit structure was nonsensical as the Employer could not effectively bargain different terms in the two collective agreements as a result of

HLDAA and the "me too" clauses requiring the Employer to maintain parity in the terms of the two collective agreements – Current structure effectively requires the Employer to bargain twice to obtain the same result – Board reiterated its previous jurisprudence that although the Board has typically described a certificate as "spent" once the first collective agreement is achieved, it does retain jurisdiction to reconsider its decisions, including certification decisions – Board determined that however irrational the current bargaining situation may be, it was not demonstrated to be unworkable and it did not warrant the Board exercising its discretion to reconsider the certificates – Application dismissed

ENWAVE ENERGY CORPORATION; RE: TORONTO CIVIC EMPLOYEES UNION, CUPE LOCAL 416; RE: UNIFOR AND ITS LOCAL 2003E; OLRB File No. 0318-19-R; Dated July 29, 2019; Panel: Bernard Fishbein (19 pages)

Trade union – Status – In an application filed under sections 69 and 1(4) by USW, PSWU asserted intervenor status on the basis that it had executed a voluntary recognition agreement with the Employer – USW opposed such status being granted on the basis that PSWU was not a trade union – PSWU had previously applied for certification at a different location, which application was dismissed on the basis that PSWU was not a trade union – PSWU and Employer argued that approach to trade union status should be broad and flexible, and that the facts established that the employees wished to "band together" to collectively bargain – Employer also argued that "*Charter* values" should compel a different approach to the definition of "trade union" - Board found that although a meeting of employees had been convened, a voluntary recognition agreement signed thereafter, nothing had occurred to create an "organization" as required by the definition of "trade union" in the *Labour Relations Act* – Board rejected "*Charter* values" argument, finding that such values did not override the clear terms of the *Labour Relations Act* and that the Board's interpretation of the term "organization" did not substantially interfere with *Charter* values - Board agreed that the steps laid out in the Board's jurisprudence concerning the formation of a trade union were not to be rigidly applied and that substantial compliance could be sufficient – However, in the absence of a foundational document such as a constitution, the Board could not be satisfied that an "organization" existed or that individuals were authorized to act on its behalf – Policy reasons also require that the Board be able to determine when the organization came into existence – Subsequent ratification of organizational documents could not retroactively constitute the organization as a trade union - Request for intervenor status dismissed

INTELLIGARDE INTERNATIONAL INC.; RE: UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 5296; OLRB File No. 2563-18-R; Dated July 24, 2019; Panel: Paula Turtle (16 pages)

Construction Industry - Termination of bargaining rights – Application seeking to terminate Union's bargaining rights identified job site in Toronto as location where employees were working on application date – In post-vote status submissions, Union submitted that it had investigated the location and that no work was performed on application date or for some time previously – Applicants' post-vote status submissions then indicated employees were scheduled to work at Toronto site on application date but due to weather, actually worked at two Brampton locations instead – Union submitted that after receiving these submissions, it attended at the Brampton locations and could not determine whether work had been performed on the application date, and that sign-in sheets for that date were no longer available – Union argued irreparable prejudice resulting from learning of actual claimed work sites three weeks after application date – Applicants argued that error was in good faith and did not cause any actual prejudice, and was a technical rather than substantive error – Board reviewed its case law concerning new or amended information in status submissions – Inadvertence or good faith on the part of the Applicants could not relieve against the significant prejudice to the Union – Correct and timely identification of job sites goes to the heart of a union's ability to respond to a termination application - Request to amend application denied and application dismissed

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE: NUNO QUINTELA AND FRANCISCO MEDEIROS; OLRB File No. 0426-19-R; Dated July 24, 2019; Panel: Michael McFadden (7 pages)

Employment standards – Reprisal – Damages – Employee claimed that he was terminated after exercising his statutory right to take a family caregiver leave under s. 49.3 of the ESA, contrary to s. 74 of the ESA – Employee testified that he had advised Employer of his intention to take such leave to visit sick parent overseas, and that his supervisor had acknowledged the leave, and upon his return he was advised that he had quit – Employer asserted that he had requested vacation and had been denied and had never sought family caregiver leave, but did not provide evidence in support of this claim – Board found that employee was terminated contrary to ESA – Board discussed general approach to remedies for reprisals under the ESA – Board affirmed that reinstatement is the presumptive primary remedy – Wage loss to be calculated from the date of termination to the date of reinstatement – If employee decides not to accept reinstatement following an order of such, he is further entitled to compensation for the loss of his job which, for a short-term employee (in this case approximately 1 1/3 years), is preferably calculated as a fixed amount rather than based on service – Board also ordered damages for mental distress caused by Employer's conduct – Application granted

L & L MCCAW HOLDINGS LTD. OPERATING AS CANADIAN TIRE; RE: CHUN BAO YIN; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1961-18-ES; Dated July 10, 2019; Panel: C. Michael Mitchell (51 pages)

Construction Industry - Application for certification – Displacement – Incumbent union in application for certification requested that application be dismissed on the basis of Tile Accord to which incumbent and applicant were both parties – Accord never ratified but a council of trade unions ("TTCU") established pursuant to Tile Accord – No subsequent steps taken to establish the TTCU such as electing an executive or signing up members – Incumbent took steps to arrange for an arbitration pursuant to the Tile Accord and submitted that Board should defer consideration of application pending the arbitration – Board rejected this argument – Board reiterated longstanding jurisprudence that Board has no discretion to refuse to consider a timely application for certification that is not otherwise barred by the *Labour Relations Act* – Employees' statutory rights to be represented by trade union of their choice could not be defeated by a private arrangement – Board also determined that in the absence of any steps being taken to breathe life into the TTCU, the Accord had been left dormant – Assuming Accord was ever binding on applicant trade union, it no longer was – Application to proceed with counting of votes

METRIC TILE AND MARBLE INC.; RE: METRIC TILE LTD.; RE: METRIC FLOORING GROUP INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No. 3612-18-R; Dated July 2, 2019; Panel: Maurice A. Green (12 pages)

Certification – Conduct of vote – Practice and procedure – After application for certification was filed, parties disputed status of a single voter and ballot was segregated – Union initially sought to include the voter and Employer initially sought to exclude voter – Voter's employment status changed over the course of the proceeding – Voter's status was initially disputed by parties on the basis of whether or not he occupied a position that was agreed to be in the bargaining unit – After the vote, voter was to assume another position, which the Employer had initially proposed should be excluded from the bargaining unit as managerial – Board determined that voter was included in the bargaining unit – Parties then disputed how to deal with the single segregated ballot – Union took the position that his ballot could not be counted, based on the Board's approach to the critical importance of maintaining secrecy of voters' wishes, and that a new vote should be conducted – Union also took the position that since at the time of the new vote, he would be in a managerial position, that it would challenge his ballot – Employer took the position that secrecy of votes could not always be maintained and in some cases was fictitious; that it was important to expedite applications for certification and the possibility of a future dispute over voter's right to vote would present a further delay; and that a second vote would be less accurate in capturing the employees' wishes – Board determined, after receiving further submissions, that best option was to order a second vote but to include voter's segregated ballot from the first vote and count all ballots together – Board concluded that a single ballot should only be counted where necessary, and that it would not be necessary if Board proceeded in this fashion – Transferring ballot from the first vote to the second avoids inevitable delay in determining a potential status dispute at the time of the second ballot, as well as a situation where Board would be determining a status dispute based almost exclusively on post-

application date evidence – Second vote ordered – Application continues

RAIL-TERM INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File Nos. 1374-18-R & 1333-18-R; Dated July 19, 2019; Panel: M. David Ross (15 pages)

Construction industry – Unfair Labour Practice – Intimidation and Coercion – Application by residential builder asserting that responding party unions and masonry subcontractors committed unfair labour practices contrary to *Labour Relations Act* by refusing to allow non-union tarping company to install tarping – Prior Board decision concluded that tarping was not covered by the accredited collective agreement binding on the builder – Builder alleged that responding parties' conduct constituted intimidation and/or coercion contrary to s. 76 of the *Act* – Responding parties brought no *prima facie* case motion under Rule 39.1 – Board noted that s. 76 requires that alleged intimidation or coercion be aimed at compelling "any person .. refrain from exercising any other rights under this Act or from performing any obligations under this Act" – Regardless of merits of builder's position that the relevant collective agreement permitted it to use non-union tarping companies, a right provided for under a collective agreement is not the same as a right or obligation "under this Act" – None of the builder's rights under the *Act* (in this case, s. 48(1), s. 56 and s. 140(1) of the *Act* were relied on) were arguably engaged as there was no claim that the responding parties had sought to prevent the builder from exercising its rights under those sections, all of which related to the application and enforcement of collective agreements – Application dismissed

SUNDIAL HOMES LIMITED; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: THE BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; RE: THE MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY; RE: RIVER VALLEY MASONRY GROUP LTD.; RE: MORE MASONRY; RE: MEGATON CONSTRUCTION LTD.; RE: 2020268 ONTARIO LIMITED O/A PRESCOTT MASONRY; RE: PERPETUO MASONRY LTD. OLRB File No. 3344-18-U; Dated July 22, 2019; Panel: Lee Shouldice (11 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
Kuehne + Nagel Ltd. Divisional Court No. 393/19	0433-18-R	Pending
Kuehne + Nagel Ltd. Divisional Court No. 392/19	1172-18-R	Pending
Todd Elliott Speck Divisional Court No. 371/19	1476-18-U	Pending
ASL Agrodrain Limited Divisional Court No. 19-DC-2492 **(Ottawa)**	1840-18-R	Pending
New Horizon Divisional Court No. 264/19	0193-18-U	Pending
Doug Hawkes Divisional Court No. 249/19	3058-16-ES	Pending
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
Hector Yao Divisional Court No. 063/19	1841-18-ES	September 30, 2019
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 789/18	2375-17-G	Pending
Kelly White Divisional Court No. 671/18	2032-17-ES	Pending
Tomasz Turkiewicz Divisional Court No. 601/18	2375-17-G	Pending
Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	July 25, 2019
D. Andrew Thomson Divisional Court No. 238/18 **(Sudbury)**	1070-16-ES	Pending
Tomasz Turkiewicz Divisional Court No. 262/18	2374-17-R	Pending
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019

(August 2019)

Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	November 14, 2019
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	May 22, 2019
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	October 24, 2019
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	September 12, 2019
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	October 21, 2019
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Abandoned
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
Byeongheon Lee Court of Appeal No. M48402	0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403	0015-15-U	Pending
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615–15–UR 2437–15–UR 2466–15–UR	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