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Ontario Labour Relations Board

HIGHLIGHTS

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/June 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.

Bargaining Unit Description – Certification – Construction Industry – Applicant initially sought to displace intervenor with respect to bargaining unit of employees of the responding party working in Board Areas 8, 9, 10, 11, 18 and a portion of Board Area 12 – Intervenor asserted that the geographic scope should be limited to Board Area 8 – On the application date, the two bargaining unit employees were working pursuant to the MCAT agreement in Board Area 8 – Responding Party was bound to the MCAT agreement with the Intervenor – The Intervenor's bargaining rights cover the province of Ontario – Subsequent to the application, Applicant asserted that the appropriate geographic scope is the province of Ontario – Applicant asserted that the Board has consistently found that in a displacement application, the appropriate bargaining unit is the unit held by the incumbent union – Intervenor asserted that the geographic scope should be limited to Board Area 8 since that is the Board Area where the employees were working on the application date – Board found that the appropriate geographic scope is the Province of Ontario – Application granted

DUARTE BRICKLAYERS LTD.; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0435-19-R; Dated June 28, 2019; Panel: Geneviève Debané (5 pages)

Application for Certification – Employees – Practice and Procedure – Review decision following a displacement application filed by the Applicant – Intervenor sought the dismissal of the application on the basis of the principles set out in *April Waterproofing Limited* – The Responding Party filed its response beyond the two days prescribed for filing a response – Intervenor asserts that the Response should be dismissed and not accepted – Board noted that there is no dispute about the work the individuals performed or where they performed it - Board held that it is difficult to discern what prejudice was suffered by the Intervenor as a result of the late filing of the response – Board dismissed Intervenor's request that the Response not be accepted – Board held with respect to the *April Waterproofing* challenge that it seeks to strike a balance between inadvertent and innocent breaches of the hiring or retention provisions of a collective agreement and an innocent employee's ability to participate in a displacement application – Board held that the assessment of whether the breach was inadvertent and innocent and the knowledge of the intervenor is a fact driven assessment – Purpose of a review decision is to see whether there is enough that is worthy of a hearing and to remove mere "boiler plate" pleadings – Board held that *April Waterproofing* issue should proceed to a full hearing – Matter continues

JACQUES CARRIER & SONS CONSTRUCTION LTD.; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0339-19-R; Dated June 7, 2019; Panel: Bernard Fishbein (7 pages)

Employee – Managerial – Reference – Application filed by union pursuant to section 114(2) of the act for a declaration that an individual, Mr. P was employed as "Warehouse Manager" is an employee of the purposes of the *Act* – The Board adopted the approach set out in the *Toronto Military Family Resource Centre* and *The Corporation of the City of Thunder Bay* Decisions in determining the application – Onus rests with the party who seeks to establish that individuals exercise managerial functions and are thereby excluded from collective bargaining – The purpose of the managerial exclusion is to preclude the possibility of a conflict of interest situation arising among employees in the bargaining unit – Board noted that Mr. P performed a number of non-supervisory functions for the employer – Board noted that although Mr. P participated in some interviews, he asked the questions provided to him by the executive director - Board noted that Mr. P performed some training and performance reviews – Board found that Mr. P did not discipline employees – Board found that the performance evaluations had no impact on the employees' performance, assignment of work or economic livelihood – Board found that Mr. P had no impact on the employees' earnings – Board noted that Mr. P's attendance at interviews was reflective of an "all hands on deck" approach in a small not-for-profit workplace – Board noted that if Mr. P was found to be a manger the ratio of managers to employees in the work place would be 2:3 – Board found that Mr. P never made any decisions that impacted the workplace or the employees – Board found that Mr. P did not exercise any authority in the workplace as therefore an employee under the *Act* – Application allowed

NIAGARA FURNITURE BANK; RE: WORKERS UNITED CANADA COUNCIL; OLRB File No. 2707-18-M; Dated June 12, 2019; Panel: Matthew R. Wilson (11 pages)

Grievance Referral – Practice and Procedure – Grievance Referral for a determination under section 133 of the Act – Responding Party raised a number of preliminary issues including a request that he be permitted to record the proceedings – Applicant opposed Responding Party's request to record proceedings as it would have potential impact on witnesses – In the alternative the Applicant requested that conditions be imposed on the recording – Board noted that there are reasons why it may not permit a party to make an audio recording – Board noted that audio recording could interfere with the conduct of a hearing or could be used for an improper purpose – Board noted it controls its own process and is entitled to allow or disallow the proceedings to be recorded – Board followed its decision in *John Kohut* and allowed the recording – Board imposed conditions on the recording: it cannot be referred to or relied upon as a transcript in the proceeding; Neither party is to make reference to the recording or play the recording back at any point in the proceeding; where there is a difference between a party's summary of the evidence and the Chair's notes, the Chair's notes will prevail; Both parties shall the right to record the proceedings; and The recording must be unobtrusive and cannot interfere with the Board's conduct of the hearing – Matter continues

REGIONAL ELEVATOR; RE: INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96; OLRB File No. 3050-18-G; Dated June 10, 2019; Panel: Adam Beatty (5 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – Applicant sought judicial review of a Board decision dismissing his application under section 74 of the *Labour Relations Act* alleging that the Board's decision was unreasonable and violated principles of procedural fairness and natural justice – Applicant was employed by the University of Toronto as a research officer – Applicant was laid off as his research program lost funding – Applicant elected to terminate his employment and receive enhanced severance – After his employment ended applicant alleged that his research program was granted the funding the employer alleged to have lost – Union filed three grievances: a policy grievance and two individual grievances – Union withdrew the grievances on the basis of a legal opinion – Applicant filed an application with the Board alleging that the Union mishandled the grievances – The Board dismissed the application – Court held that the standard of review was reasonableness – Court held that it is not for the Divisional Court to reweigh the evidence on a

judicial review – Court held that Board's decision plainly and appropriately deal with the issues and the evidence presented by the applicant – Court held that the result reached was transparent, intelligible and among the alternatives available to the Board – Accordingly, the Decision was not unreasonable – Court held that section 99 of the *Act*, does not require the Board to hold a formal oral hearing in a section 74 application – Board's consultation process in a duty of fair representation proceeding is consistent is consistent with requirements for procedural fairness – Board did not violate the doctrine of procedural fairness and did not deny the Applicant natural justice – Application dismissed

ROBERT DANIEL LAPORTE; RE: UNITED STEEL WORKERS, LOCAL 1998; RE: ONTARIO LABOUR RELATIONS BOARD; RE: GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; Divisional Court File No. 037/18; Dated June 27, 2019; Panel: Backhouse, M. Edwards, Favreau, JJ. (11 pages)

Employment Standards – Judicial Review – Applicant filed an application for judicial review of a Board Decision dismissing an Application for Review a compliance order issued by the Director of Employment Standards requiring that the Applicant pay overtime to employees working at the Applicant's Gormley Location – Applicant filed an application for review pursuant to section 116 of the *Employment Standards Act*, asserting that those employees at the Gormley Location were covered by the farm worker exemption – In its decision, the Board dismissed the application for review held that the employees at the Gormley Location were not covered by the Farm worker exemption and therefore the Applicant was required to comply with various minimum standards - Rouge River grows corn for the Ontario market on various properties in Ontario and in the United States – The Applicant sells corn in packaged trays – It purchased and modified the Gormley Location for cord production – Approximately 40% of the Corn processed at the Gormley Location is grown in Ontario while roughly 60% is grown in the United States – At the Gormley Location, the employees engage in harvesting, sorting, hydro-cooling, secondary cooling, grading, de-shanking, de-husking, tray packing and transporting corn – Parties agreed that the standard of review is reasonableness – Court held that the Board's Decision that the Gormley Location is not a farm is unreasonable – Court held that it was unreasonable for the Board to disregard without explanation certain portions of expert evidence introduced by the Applicant that farms commonly operate on non-contiguous tracts of land – Court held that the Board's was unreasonable as it would lead to the result that notwithstanding that the work is the same workers would only be covered by the exemption if they were working on certain tracts of land and not others – Court held that the Gormley Location was a farm for the purposes of the farm worker exception – Application Allowed

ROUGE RIVER FARMS INC.; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 637/17; Dated June 6, 2019; Panel: Kiteley, Del Frate and Rady, JJ. (22 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
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
Audio Visual Services (Canada) Corporation Divisional Court No. 732/18	2694-16-R	Dismissed (Reasons to Follow)
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
Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	November 14, 2019

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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
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	Dismissed
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	Granted
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	Application for Leave to Appeal Granted – Appeal 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	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	Pending
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