ISSN 1712–4506 (Online)

Ontario Labour Relations Board

HIGHLIGHTS

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March 2019

SCOPE NOTES

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

Application for certification – Unfair labour practice – Practice and procedure – *Rules of Procedure* – Union filed an application for certification and an unfair labour practice ("ULP") complaint against the employer – Employer objected to documents the union intended to put to the Employer's witness in cross-examination – Disputed documents were notes and a PowerPoint presentation from a meeting in October 2017 – Union counsel provided the documents to Employer counsel in January 2019 immediately after becoming aware of the documents – Employer argued admitting the documents violated Rules 2.4 and 5.1 of the Board's *Rules of Procedure* – Employer argued the documents and the use of the documents was a new set of allegations not included in the original application – Employer took the position it was entitled to particulars of how the union intended to use the documents – Union argued the documents were relevant and did not constitute a new allegation – ULP application attracts a reverse onus under section 96(5) of the *LRA* – Employer in possession of the bulk of the information – Employer's objection dismissed – Board accepted the union's position – Board should consider the type of application in assessing whether to permit a party to raise facts not previously pleaded – Rule 2.4 grants the Board discretion to allow a party to file material or make representations not contained in the original application if appropriate – Notes and PowerPoint presentation do not constitute a new allegation – Documents constitute new evidence that fits within the union's pleadings that the Employer is engaged in ULPs – Employer not entitled to particulars respecting the use of the documents – No procedural unfairness – Employer could still ask witness questions respecting meeting as documents provided during examination in chief of witness – Union did not know and could not have reasonably known about meeting and documents – No prejudice to the Employer in admitting the documents – Preliminary objection dismissed

AMAZON CANADA FULFILLMENT SERVICES INC.; RE: UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, LOCAL 175; OLRB File No. 1301-18-R; Dated February 27, 2019; Panel: Adam Beatty (8 pages)

Application under section 96 of the *Labour Relations Act* – Unlawful strike – Employer filed an application under section 96 of the *LRA* – Employer alleged the Labourers and its business representative ("B") engaged in an unlawful strike – Labourers and B made preliminary objection that Board should exercise discretion not to hear complaint – Labourers and B argued no labour relations purpose to hearing unlawful strike complaint – Employer is construction company engaged to perform construction work on casino project – Employer bound to collective agreement with BUC – BUC members perform work at project

– B approached Employer's foreman in mid-January 2019 to inquire about union members performing work – B returned to the site on February 11, 2019 – Employer's foreman overheard B say to site supervisor that if he did not get Employer off site, B would bring 300 workers and shut down the site – Employer filed application on February 14, 2019 – Accepting material facts pleaded by Employer as true and provable, Labourers and B engaged in unlawful conduct by threatening an unlawful strike – No material facts pleaded by Employer to support assertion it requires relief – No unlawful strike occurred – Threat not repeated – No steps taken to cause an unlawful strike to occur – No pattern of unlawful strikes – No reason to fear recurrence of threatened unlawful strike – No implications extending beyond the parties – Employer relied on previous decision of the Board finding a different Labourers local engaged in unlawful strike to have Employer removed from two construction sites – Employer argued this demonstrated history of unlawful strikes between parties – Board rejected argument – Two different locals are separate and distinct trade unions – Preliminary objection allowed

CLONARD GROUP INC; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506; RE: MAMADOU BAH; RE: CARPENTERS AND ALLIED WORKERS LOCAL 27; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: THE BUILDING UNION OF CANADA; OLRB File No. 3434-18-U; Dated February 27, 2019; Panel: Lee Shouldice (6 pages)

Duty of fair representation – *Charter of Rights and Freedoms* – Seven applications alleging a breach of the duty of fair representation ("DFR") under section 74 of the *LRA* – Applicants are members of USW, Local 8748 and employed by the Employer – Board made earlier order to hear representative DFR complaint – Applicants allege USW International and USW, Local 8748 (collectively, the "USW") breached its DFR when it entered into Minutes of Settlement ("July 2015 MOS") with the Ironworkers – July 2015 MOS states that the USW International would not assert bargaining rights if there was an overlap with pre-existing Ironworkers bargaining rights with the Employer – Ironworkers were previously certified for the Employer's ironworkers and apprentices – USW International filed an application for certification for an all employee unit but subsequently withdrew its application – A second application for certification was filed which carved out employees for whom another trade union held bargaining rights – The Board issued a certificate to the USW International for the requested bargaining unit – Ironworkers filed a ULP against the USW International and the Employer – The USW International and the Ironworkers entered into the July 2015 MOS concerning the Ironworkers ULP complaint – Applicants take position the USW breached its DFR by entering into the July 2015 MOS – The Applicant also alleged the USW breached its DFR by failing to communicate the existence, content and ramifications of the July 2015 MOS and based on the USW's choice to be an "observer" in ongoing litigation at the Board – Applicants also argued the July 2015 MOS infringed sections 2 and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") – Employer supported representative DFR applicant's position – Ironworkers and USW argued the application should be dismissed for delay and for not disclosing a *prima facie* case – Ironworkers argued in the alternative there has been no section 74 breach nor breach of the *Charter* – The USW argued in the alternative the complaint has no merit – The USW did not act in an arbitrary, discriminatory or bad faith fashion when it entered into the July 2015 MOS – The Board held the application should not be dismissed for delay – Representative DFR complainant did not become aware of July 2015 MOS until December 2016 when he sought legal advice – Application brought within a matter of weeks afterwards – The Board dismissed the Applicant's assertion of a *Charter* violation for failing to make a *prima facie* case – Applicant failed to identify the legislative provisions and/or common law rule that violates the *Charter* – No legal argument as to how section 7 was breached – No allegation of government action – The Board did not dismiss the section 74 allegations on the basis of a no *prima facie* case and dealt with it on its merits – The USW representative who signed the July 2015 MOS was not grossly negligent, nor did he act in an arbitrary, discriminatory or bad faith manner – The Board was not provided with jurisprudence that a union must consult with its membership prior to making decisions that may affect its institutional bargaining rights – Many of the members may not have known about the July 2015 MOS the members, but when ratifying the collective agreement, must have been aware of the issues with the Ironworkers and the potential negative impact on the work they performed – The USW's lack of communication did not breach its DFR – The Board dismissed the allegations relating to the USW's "observer" status – The USW put its mind to whether it needed to participate in the litigation – The Board does not view "observer" status as the USW failing to

advocate for its members – All DFR complaints dismissed

JOE MANCUSO; RE: UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 8748; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; RE: S & T INDUSTRIAL INC.; RE: IRON WORKERS DISTRICT CONCIL OF ONTARIO; RE: INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; OLRB File Nos. 2499-16-U, 2500-16-U, 2501-16-U, 2502-16-U, 2503-16-U, 2504-16-U, 2505-16-U, 2750-16-U; Dated February 27, 2019; Panel: John D. Lewis (53 pages)

Application for certification – Practice and procedure – Reconsideration – Application for certification under the construction industry provisions of the *Labour Relations Act* ("*LRA*") – Carpenters asserted interest in the application for certification – Carpenters sent request to Board for copies of application for certification – Request granted – Board ordered the parties to send Carpenters copies of pleadings – Labourers filed a reconsideration request of the Board's order – Board denied reconsideration request – Labourers argued the Carpenters did not attempt to obtain the documents from the parties before writing to the Board – Board dismissed argument – Other parties were aware the Carpenters sought a copy of the application because representatives were copied on correspondence to the Board – Labourers argued the Board's order required it to produce confidential information – No merit to this argument – Labourers argued the Board breached its *Procedures on Access to Documents and Exhibits contained in Board Adjudication Files* (the "Policy") by failing to request submissions in response to the Carpenters' request – The Policy did not require the Board to seek submissions from the parties on this issue or hold a conference call – There is urgency when an interested party seeks to determine whether to intervene – Request for reconsideration denied

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: LIFETIME DEVELOPMENTS; RE: LIFETIME EDWARD STREET INC.; RE: LIFETIME JACKES INC.; RE: LIFETIME DEVELOPMENTS YONGE STREET INC.; RE: LIFETIME KING DUFFERIN STREET INC.; RE: BLVD DEVELOPMENTS INTERNATIONAL LTD.; OLRB File No. 3175-18-R; Dated February 11, 2019; Panel: Geneviève Debané (4 pages)

Appeal of an Inspector's Order – Time limit under section 61(1) of the *Occupational Health and Safety Act* – Application under section 61(1) of the *Occupational Health and Safety Act* ("*OHSA*") seeking an appeal of an Inspector's Order – Appeal filed one day after statutory 30-day time limit – Union served the employer before the time limit expired – Union sent application to the Board to arrive on the 30th day, but it did not arrive until the 31st day – Whether the Board can extend the time limit in section 61(1) –Legal question is whether the legislature intended that, in the appropriate circumstances, an appeal could proceed even though it is brought outside the 30-day time limit – The 30-day time limit for an appeal under section 61(1) is not mandatory – *OHSA* is critically important public welfare legislation – Purpose of *OHSA* is to preserve the health and safety of workers in a multi-strategic and comprehensive fashion – *OHSA* is to be interpreted broadly and technical interpretations that would frustrate the purposes of *OHSA* are to be avoided – Directory time limit consistent with the purpose of an appeal of an Inspector's Order – Quasi-judicial process protects the integrity of inspections where the Inspector has broad administrative authority – An appeal permits a more extended and thorough inquiry into the merits than an Inspector can conduct – Appeal process ensures that parties are heard and principles of natural justice satisfied – The protection of worker health and safety is the fundamental purpose of *OHSA* – Missing a time limit for an appeal should not automatically prevent an appeal from being heard – The only interpretation of section 61(1) compatible with the object and purpose of *OHSA* is that the time limitation is directory – Delay in this case is minimal and there is no prejudice – Mandatory time limit may negatively impact reputation of system as a whole and willingness of parties to participate in process – Textual interpretation of *OHSA* also consistent with conclusion that time limit is directory – Changes to appeal process over the years and added complexity suggests there will be some delay and that the legislature did not intend for the time limit to be absolute – The legislature has given the Board tools to deal with the need for expedition in hearings even where there has been delay – Legislature did not preclude the Board from relieving against the section 61(1) time limit – 30-

day time limit for an appeal is not mandatory – The Board has jurisdiction to allow the appeal to proceed – The appeal should proceed

MINISTRY COMMUNITY SAFETY CORRECTIONAL SERVICES VANIER CENTRE FOR WOMEN; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION LOCAL 234; RE: DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB File No. 0294-18-HS; Dated February 21, 2019; Panel: C. Michael Mitchell (41 pages)

COURT PROCEEDINGS

Judicial Review – Stay of Board's order – Union sought certification of all house crew audio/visual technicians and house crew riggers regularly employed by the employer at the Sheraton Centre Toronto Hotel – Union was certified – Employer and Union agreed 14 individuals in the bargaining unit – 71 status disputes – An employee must be "regularly employed" to be in the bargaining unit – The Board held 57 employees who worked less than 35% of time for Employer were excluded from bargaining unit – Employer sought reconsideration – Reconsideration request dismissed – Employer sought judicial review – Employer sought stay of Board's certification decision pending the final determination of the judicial review application – Test for a stay pending judicial review from *RJR Macdonald Inc. v Canada* – Under second branch of test Employer must demonstrate it will suffer irreparable harm if stay is not granted – Employer argued it would suffer irreparable harm if forced to choose between obligation to bargain in good faith or pursuing judicial review – Employer also argued it would expend resources in collective bargaining that will be unrecoverable if judicial review was successful – Court rejected both arguments – Employer can bargain in good faith while simultaneously pursuing judicial review – Employer failed to expedite judicial review application – Collective bargaining often not concluded before judicial review decision issued – No decision of the Board or Court supporting argument that employer's judicial review rights could be frustrated by collective bargaining process – Both employer and union will incur unrecoverable costs if judicial review application is successful – Mutual prejudice does not constitute irreparable harm – Applicant did not demonstrate it would suffer irreparable harm – Unnecessary to consider first and third branches of test to grant stay – Motion dismissed

AUDIO VISUAL SERVICES (CANADA) CORPORATION; RE: INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES; RE: MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 58; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 752/18; Dated February 19, 2019; Panel: Corbett J. (5 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
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
Hector Yao Divisional Court No. 063/19	1841-18-ES	Pending
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	June 25, 2019
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
The Daniels Group Inc. Divisional Court No. 535/18	0279-16-R	May 23, 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	Pending
Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	Pending
Trisect Construction Corporation Divisional Court No. 087/18	2553-15-R	March 19, 2019
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	May 22, 2019
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	April 3, 2019

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Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	June 18, 2019
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	June 13, 2019
Highcastle Homes Inc. Divisional Court No. 7/18	3196-15-R 3282-15-U	March 11, 2019
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	January 24, 2019
Dennis McCool Divisional Court No. 566/17	0402-16-U	March 7, 2019
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	Pending
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Pending
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