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Ontario Labour Relations Board

HIGHLIGHTS

Editors: Aaron Hart, Solicitor

October 2019

NOTICES TO THE COMMUNITY

Holiday Season Board Schedule

The Board's holiday operations schedule is attached and can be found on the Board's website.

New full-time Vice-Chair

The Board welcomes **Peigi Ross** as a full-time Vice-Chair. Prior to her appointment to the Board, Ms. Ross had extensive experience as counsel on labour relations and employment matters. She was a Partner at Dunsmore Law P.C., Counsel for the Employment Law Group at the Bank of Nova Scotia and was an Associate at Hicks Morley Hamilton Steward Storie. Ms. Ross' community involvement includes serving as a Founding Member for 100 Women Toronto.

SCOPE NOTES

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

Practice and Procedure – **Interim Decision** – Two applications under s. 96 of the *Labour Relations Act* ("*LRA*") alleging parties violated s. 162 of the *LRA* – Provincial Employers' Bargaining Agency – Labourers ("PEBAL") and Ontario Masonry Contractors Association ("OMCA") Brought "PEBAL complaint" alleging unions violated s. 162 of the *LRA* – BACU Local 2 and IUBAC brought the "MCAT complaint" alleging unions violated s. 162 of the *LRA* – Board addressed remaining preliminary issues raised by parties at the case management hearing – Unions requested Board dismiss PEBAL complaint because it was not properly particularized and the Applicants did not comply with a Board direction – Board reasoned that while the Applicants did not fully comply with Board order, they did for the most part – Board did not dismiss the Application in its entirety but, to the extent they did not comply with the Board direction, precluded the Applicants from relying upon unparticularized allegations – Union stated BACU Local 2 did not have status to bring the complaint and it should therefore be dismissed – Board held BACU Local 2 had status to bring the complaint – Unions alleged MCAT complaint should be dismissed because: 1) No harm was suffered and no labour relations purpose would be served by inquiring into the allegations and 2) Applicants were seeking similar relief to that sought in the *Prescott Masonry* applications – Board reasoned if conduct asserted in the Application was established, the Applicants would have suffered harm and the labour relations community would benefit from a final decision on the issue – Board further reasoned an application should only be dismissed on a *prima facie* basis where plain and obvious it has no chance of success – Board dismissed these motions to dismiss MCAT complaint – Board considered whether issue estoppel or a similar concept ought to apply to the PEBAL complaint since the Board made findings of fact in the related decision of *Prescott Masonry*

– Board reasoned P*rescott Masonry* dealt with issue in dispute only as it related to one employer – Board acknowledged argument unions did not raise contradictory evidence that was irrelevant in *Prescott Masonry* but would be relevant to these proceedings, and would have, had they known that decision would be used as the factual basis for this proceeding – Board held the evidence should be heard anew but took steps to ameliorate resulting inefficiencies – Board held MEICO, as the designated employer bargaining agency party to the OPC ICI agreement, and the OBBC, the entity that represents employers bound to the BACU ICI agreement, have standing to participate based on their direct legal interests in the MCAT complaint – Board held BACU Local 2 and IUBAC Local 2 are provided leave to amend the MCAT complaint, as it would not result in meaningful prejudice to other parties – Matter Continues

MASONRY CONTRACTORS' ASSOCIATION OF TORONTO; RE: BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2 INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 2; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; OLRB File Nos. 1446-16-U & 2221-15-U; Dated September 12, 2019; Panel: Lee Shouldice (39 pages)

School Board Collective Bargaining – Two applications under s. 28 of the *School Board Collective Bargaining Act, 2014* ("*SBCBA*") requesting the Board determine whether outstanding issues are to be bargained centrally or locally – Applications related to teacher and education worker bargaining – Board canvassed legislative history, statutory framework, and established jurisprudential principles of collective bargaining in the education sector – Ontario Secondary School Teachers' Federation ("OSSTF") argued that, despite the *SBCBA*, local bargaining was protected or presumptively favoured over central bargaining – Board rejected this premise – Board reasoned legislative history and statutory purpose suggest otherwise, as the *SBCBA* imposed provincial bargaining over local bargaining – OSSTF argued educational bargaining should continue largely as before *SBCBA* with the minor "tweaking" provincial bargaining may impose – Board rejected this argument – Board reasoned *SBCBA* enumerates factors to be considered when determining the central-local issue, the importance of local bargaining is not one of them – Board reasoned educational bargaining is not to continue as before and while local boards and bargaining continue to exist, they exist in a "new world" that includes provincial bargaining which now involves the Crown – OSSTF further argued since s. 27 of the *SBCBA* includes a "default" provision such that if a matter is not within the scope of central bargaining it is within the scope of local bargaining, there exists an onus on the party asserting an issue should be the subject of central bargaining – Board rejected this argument and stated the notion of onus is of little, if any, assistance in this context – With the exception of one issue for which the position of the parties was reversed, OSSTF argued outstanding issues should be bargained locally and the Employer and Crown argued they should be bargained centrally – Board applied the factors enumerated in s. 28(8) of the *SBCBA* – Board held all disputed matters were to be bargained centrally

THE CROWN IN RIGHT OF ONTARIO; RE: ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; RE: ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION; OLRB File Nos. 0907-19-M & 0906-19-M; Dated September 6, 2019; Panel: Bernard Fishbein (35 pages)

Sector Dispute – Application under s. 166 of the *Labour Relations Act* – Disputed work related to the construction of access roads as part of a windfarm construction project which included the assembly, erection and installation of wind turbine generators – General contractor engaged Northec, a subcontractor wholly owned by EBC Inc. ("EBC"), the Applicant – CLAC had bargaining rights with Northec but the Operating Engineers did not – Operating Engineers had bargaining rights with EBC in the roads industry but not the electrical power systems sector ("power sector") – EBC argued the construction of access roads fell within the power sector because it was part of the same project as the wind farm, which no party disputed fell under the power sector, and the Board prefers a single construction project to fall in one sector to maintain predictability and consistency – EBC also argued Board already held in another decision the modification of existing roads and construction of new roads as part of a windfarm construction project fell within the power sector – EBC also argued the end use of the roads was to provide access to wind turbines and were not public roads – CLAC adopted EBC's arguments and specifically argued consistency and predictability are important values not only for the Board's decisions, but also for the positions taken by parties in sector disputes – Operating Engineers argued the road construction

was distinct, severable, and fell under the roads sector – Board acknowledged earlier decision that found modification of existing roads and construction of new roads fell within the power sector was persuasive in this case, and agreed that predictability and consistency are important, if not paramount – Board considered whether there were compelling reasons to find the construction of access roads were in a different sector but found the entire project fell within the power sector – Board did not exercise its discretion to sever the construction of the access roads – Board held disputed work fell within power sector

EBC INC.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 79; RE: LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 0952-18-R; Dated September 27, 2019; Panel: M. David Ross (13 pages)

COURT PROCEEDINGS

Jurisdictional Dispute – Judicial Review – Carpenters sought judicial review of a Board decision confirming the allocation of work to the Labourers alleging there was no evidence to support the Board's finding that the economy and efficiency factor favoured the Labourers and the decision was procedurally unfair – Employer was bound to collective agreements with the Labourers and Carpenters – Employer assigned work related to erecting and dismantling scaffolding to the Carpenters and the bundling and delivery of the bundled scaffolding to the Labourers – Carpenters grieved and argued the bundling and delivery work should have been assigned to its workers – Board dismissed the application – Court held the standard of review was reasonableness – On review, Labourers brought two preliminary arguments: 1) Application was moot because even if economy and efficiency was a neutral factor, the work assignment would prevail and 2) Application was premature because the Carpenters did not first seek reconsideration – Court dismissed both preliminary arguments – Court held the Application was not moot as there was no change in circumstances that rendered the issue raised academic – Court held the application was not premature as reconsideration is not a mandatory step in the Board's proceedings, but rather a discretionary power conferred on the Board – Further, while it may be appropriate to require reconsideration before an application for judicial review in some cases, this was not one – Court reasoned it is not for the Divisional Court to reweigh the evidence on judicial review – Court held the Board's finding economy and efficiency favoured the Labourers for bundling and transporting scaffolding was supported by the evidence in the record – Accordingly, Court held the Board's decision was well within the range of reasonable outcomes – Carpenters argued decision was procedurally unfair because parties were not given opportunity to make submissions on a Board finding – Court reasoned Board's finding in question was not necessary to its conclusion – Further, while the Carpenters did not address whether the bundling and movement of scaffolding forms part of the scaffolding work, the Board was in a position to consider this issue based on the Labourers submissions – Therefore, Court held there was no breach of procedural fairness – Application dismissed

MATRIX NORTH AMERICAN CONSTRUCTION CANADA; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 249; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 51/18; Dated September 30, 2019; Panel: Thorburn, D. Edwards, and Favreau JJ. (14 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
Audrey Thomas Divisional Court No. 436/19	2508-18-U	Pending
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
Kuehne + Nagel Ltd. Divisional Court No. 393/19	0433-18-R	Pending
Kuehne + Nagel Ltd. Divisional Court No. 392/19	1172-18-R	November 22, 2019
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	November 21, 2019
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	February 20, 2020
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
Kelly White Divisional Court No. 671/18	2032-17-ES	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
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019

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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	Dismissed
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	December 18, 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