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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 available on-line through the Canadian Legal Information Institute www.canlii.org.

Application for Certification – Construction Industry – Delivery to Employer - Union maintained that it successfully faxed the application materials to the Employer, within the time limit prescribed in the Board's Rules - The fax went through and the Union received a "complete" fax transmission report – Fax number used by the Union did belong to the Employer at one time, but the Employer had discontinued use of that number several years earlier – Employer was an accredited member of the Better Business Bureau (BBB) and had originally listed the fax number as part of its contact information – Although the Employer discontinued use of the fax number, it did not change its BBB listing – Board found that the Employer held out the fax number to the public as a valid means of contact for it for literally years after it ceased to be operational – Board held that it had discretion to extend the time limit for the Union to deliver the application to the Employer, and exercised that discretion in the Union's favour on the facts of this case – Union took reasonable steps to obtain a valid fax number, and was not careless or reckless – Employer was able to mount a vigorous defence, and had not identified any prejudice from the delay such as the unavailability of any witness or material documents.

HONEY CONSTRUCTION LIMITED, HONEY GLASS & WINDOW LTD AND HONEY CONSTRUCTION MANAGEMENT LTD; RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 1857-19-R; Dated June 16, 2020; Panel: Jack J. Slaughter (17 pages)

Application for Certification – Construction Industry – Status Dispute – Managerial Challenge – Motion by applicant to proceed by way of Rule 41.3 in determining a challenge to the status of three employees – Board considered 1,097 pages of emails, text messages, and other documents all contained in 24 volumes – Board determined, on the basis of these materials, that the employees were excluded from the applied for bargaining unit on the basis of section 1(3)(b) of the *Labour Relations Act* – In the Board's jurisprudence, the term "overall responsibility for a project" is used interchangeably with "overall responsibility for a job-site", but differentiates between "overall responsibility" and "ultimate authority" – In applying the "eyes and ears" principle to exclude an individual from the bargaining unit, the Board need to not find evidence of an actual conflict of interest between the individual and the bargaining unit – Rather, it is sufficient if the Board is faced with facts that create the potential for conflict of interest when certain functions are exercised – The Board noted that "overall responsibility" for a project or job-site is far more significant where the employer is a general contractor.

BERKIM CONSTRUCTION INC., BERKIM GROUP INC., AND BERKIM HOLDINGS LIMITED; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 0029-19-

R; Dated June 17, 2020; Panel: Maurice A. Green (17 pages)

Construction Industry – Termination Application – Timeliness – Group of employees filed termination application to terminate certain bargaining rights of union – Conciliation officer was appointed on May 24, 2019 – Union argued that termination was untimely pursuant to sections 67, 126.1 and 132 of the *Labour Relations Act* – Applicant and Employer argued that section 132(1) permits a termination application to be filed if the affected trade union does not make a collective agreement with the employer within six months of the Union's certification – In the alternative, the Employer argued that 2014 amendment to the *Act* to include section 132(3) demonstrates the legislative intent that section 132(1) not be subject to section 67 as the Board found in *Halminen* – Board followed *Halminen* and applied reasoning in *Halminen* with respect to statutory interpretation concluding that section 132(1) is subject to section 67 – Board noted that the legislature did not amend the working of 67(1), 126.1(2) or 132(1) following *Halminen a*nd other similar decisions – Board held that the amendment moved the existing language in section 63(2) into the construction provisions of the *Act* – Board noted that the 2014 amendment was not enacted in the context of expanding the rights of termination applicants – Finally Board found that sound labour relations considerations support continuing the approach in *Halminen* – Board finds Application untimely – Application dismissed.

ASL AGRODRAIN LIMITED; RE: MARK HALL AND ANTHONY HOARE ON THEIR OWN BEHALF AND ON BEHALF OF A GROUP OF EMPLOYEES OF ASL AGRODRAIN LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, Responding Party; OLRB File No. 3067-19-R; Dated June 26, 2020; Panel: Jack J. Slaughter (15 pages)

Employee Status – Labour Relations Act – Prima Facie Case – Employer asked the Board to rule on the employment status and inclusion or exclusion of an individual from the bargaining unit under subsection 114(2) of the *Labour Relations Act* – Union argued application should be dismissed on a no *prima facie* case basis – Board concluded the Employer had not established a *prima facie* case for the relief requested – Act allows the Board to make a decision where "a question arises as to whether a person is an employee…" – In this case, there was "no question" as to whether the individual was an employee for purposes of the Act – Rather, the real issue between the parties was whether the individual was a member of a particular bargaining unit – Board noted that was a question of interpretation of the scope clause of the collective agreement, and was to be determined by a board of arbitration – Application dismissed.

THE CORPORATION OF THE MUNICIPALITY OF MARKSTAY-WARREN; RE: UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; OLRB Case No: 3152-19-M; Dated June 12, 2020; Panel: Lee Shouldice (9 pages)

Interim Order – Jurisdictional Dispute – Labourers filed two jurisdictional disputes against the Responding Parties claiming that certain handling and moving of scaffolding assigned to the Carpenters at the Bruce Nuclear Power Development should is work in their jurisdiction and should have been assigned to the labourers – Following a decision from the Board awarding the Labourers certain scaffolding work, Labourers filed an application seeking an interim order granting them the order sought in the jurisdictional disputes on an interim basis – Labourers argued that the outstanding jurisdictional disputes are indistinguishable from the decision recently released by the Board and therefore the result should be ordered on an interim basis – Board held that principle of jurisdictional disputes is that the employer is to maintain the work assignment until dispute is finally determined – Board finds that the panel has yet to determine that the work at issue is the same as the work at issue in the decision already issued – According, Board fines that the assignment is not "patently wrong" – Board also finds lack of a labour relations purpose to the Interim Order application – Interim Order Application Dismissed.

ALUMASAFWAY INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; RE: BRUCE POWER LP; RE: BLACK & MCDONALD LIMITED; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2222; OLRB File Nos: 0279-20-IO; 0119-19-JD; 0472-19-JD; Dated: June 11, 2020; Panel: Jack J. Slaughter (12 pages)

Remedial Certification – Remedy – Union sought remedial certification pursuant to section 11 in an application for certification – Union commenced organizing campaign in October 2017 – Three inside organizers assisted the Union in having membership cards signed – All three inside organizers were terminated at the end of October 2017 and were reinstated approximately one month after their termination – Board found that the employer did not adequately explain the basis for the termination of the inside organizers – Consequently, Board found that the termination of the inside organizers was tainted by anti union animus and violated the act – Board found that direction to organizers that they were not permitted to organize in the workplace is contrary to the Act – Board also found that specific instances of increased management presence violated the Act – Board found the employer's conduct made it impossible for the union to obtain requisite support of 40% of employees – Board considered whether the Employer's conduct after the organizers returned to work cured the effect of the terminations such that the true wishes of the employees can be reflected in a representation vote - Board concluded that employer violations of the act were not so significant, pervasive or connected to job security that the true wishes of the employees could not be ascertained – Board held that robust remedial orders are appropriate – Board directed employer to provide union with names, e-mail addresses and telephone numbers of any agency it deal with, of all of its employees inducing agency workers, to make available to the union a meeting room at the workplace for representatives of the union to meet with employees not more than once a month and to allow the union to request a representation vote any time within 6 months following the decision.

FGF BRANDS INC.; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); OLRB FILE Nos: 2081-17-U; 2470-17-R; 2471-17-U; Dated June 26, 2020; Panel: Paula Turtle, William Cook, Heino Nielsen (52 pages)

Unfair Labour Practice – Practice and Procedure – Video Hearing – Hearing had started and evidence had been called by two parties – Subsequent hearing dates were adjourned due to the pandemic – Applicant supported and responding parties objected to continuing the proceeding by way of video hearing – Board directed that the proceeding continue by video hearing – Historically the Board has been hesitant to use video technology where the Board would be required to make meaningful credibility determinations – However, none of the factors typically considered by the Board when assessing credibility is absent in a video hearing - Having regard to the technological resources available, the Board ought not be precluded from hearing evidence by way of video hearing – Although the proceeding involved many documents, in the Board's view it was possible to deal with any documentary issues in an effective manner – Although a witness may not be comfortable with video hearing technology, most witnesses are not professional witnesses and may be nervous or uncomfortable – The technology used is intuitive and relatively easy to use and steps could be taken to address technical issues, where a witness may experience difficulty – In a perfect world, a hearing would begin and end in the same format, but the Board was required to move proceedings along and doing so created no unfairness or inequality of opportunity.

INNOVATIVE CIVIL CONSTRUCTORS INC., EIFFAGE INNOVATIVE CANADA INC. AND/OR EIFFAGE INFRASTRUCTURES CANADA INC., HIRED RESOURCES, AND THE BUILDING UNION OF CANADA; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No: 2788-17-U; Dated: June 22, 2020; Panel: Lee Shouldice (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
Aluma Systems Inc. Divisional Court	2739-18-JD	Pending
Anthony Hicks Federal		
Capital Sports & Entertainment Inc. Divisional Court No. DC-20-2593	1226-19-ES	Pending
Rochelle Sherwood Divisional Court No. 074/20	1551-19-U 1557-19-UR	Pending
Joe Mancuso Divisional Court No. 28291/19 **(Sudbury)**	2499-16-U – 2505-16-U	Pending
Abdul Aziz Samad Divisional Court No. 019/20	3009-18-ES	Pending
Daniels Group Inc. Divisional Court No. 018/20	0279-16-R	Pending
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
Todd Elliott Speck Divisional Court No. 371/19	1476-18-U	Adjourned due to pandemic
New Horizon Divisional Court No. 264/19	0193-18-U	May 7, 2020
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	Adjourned due to pandemic
Hector Yao Divisional Court No. 063/19	1841-18-ES	Dismissed
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Adjourned due to pandemic

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Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Adjourned due to pandemic
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	October 21, 2019
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