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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 January of this year. These decisions will appear in the January/February 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.

Certification – Bargaining Unit – Status Disputes – Dispute as to whether there should be an "office and clerical" exclusion to the appropriate bargaining unit, and various status disputes (managerial exclusion and "office and clerical" exclusion) – Employer engaged in business of delivering organic and prepared foods to customers in the Greater Toronto Area – Employer argued that persons working in Toronto operation and performing office and clerical tasks were so functionally integrated with those properly included in the proposed bargaining unit such that it would be inappropriate to exclude them, and that their exclusion would result in serious labour relations harm – Board found that the primary positions of employees identified as having office or clerical duties were distinct from the positions of persons recognized as properly within the scope of the bargaining unit – Evidence did not disclose persons engaged in office or clerical functions doing anything in their purely clerical or office function that made them any more integral to the main processes of the employer's delivery business than would be the case with clerical staff in any other enterprise – Rather, clerical and office staff sometimes served as substitutes or supplements to packers, etc. – Board noted that an office or clerical employee who provides "coverage" for a differently classified employee for part of her day in the absence of the person who regularly performs the work is not thereby integrated with the person for whom she is providing coverage – Clerical employee who occupies space in an office on the warehouse floor and spends part of the day or several days a week packing bins is not integrated with packers but rather is a packer for those hours or days – Location of warehouse offices "on the warehouse floor" was not relevant to determination of integration – Office and clerical exclusion resulted in description of an appropriate bargaining unit – On issue of managerial status disputes, Board reviewed jurisprudence on the exercise of managerial functions – Individuals all fell squarely into the description of persons who regularly performed work similar to persons in the bargaining unit without "independent discretionary powers" but with "merely incidental reporting functions which are subject to the discretion and authority of higher persons in management" – Board found that more than 50 percent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant – Certificate issued to the applicant.

MAMA EARTH ORGANICS INC; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); OLRB File No.: 3290-18-R; Dated January 10, 2020; Panel: Derek L. Rogers, Carol Phillips, Wayne Zachar (38 pages)

Certification – Unfair Labour Practice – Union alleged that employer violated ss. 70, 72, 76, 86, and 87 of the *Labour Relations Act* during organizing campaign – Alleged unlawful coercion, threats, reprisals, and changes in working conditions, demonstrated by series of captive audience meetings, one-on-on meetings with employees, employer's communication with employees, the termination of certain employees, and a recognition ceremony held immediately before the vote – Union argued that nothing short

of remedial certification could remedy the effects of the employer's conduct – Board noted that it must draw inferences from evidence before it in order to reach a conclusion as to the existence of anti-union animus – Question to be answered is whether the employer has satisfied the Board that the terminations at issue were not tainted by anti-union animus – Here, terminations were part and parcel of many other terminations both preceding and following the application for certification – Wage increases implemented well before organizing campaign underway – Reduction in overtime also pre-dated organizing campaign – Terminations resulted from significant reduction in plant volume following loss of two major customers – Board satisfied that employer did not know that terminated employees were inside organizers at time of termination – Board found it significant that none of the employees contacted the union immediately following their termination, suggesting they did not link the terminations to their organizing efforts – Board found other allegations of improper conduct did not have merit – Changes to working conditions of employees were part of series of changes initiated before application was filed – Meetings that took place were not captive, nor was anything said that would support conclusion that employer was coercing, intimidating, or threatening the employees – Certification not discussed at one-on-one meetings – Union's witnesses not credible as to content of meetings – Recognition ceremony for long-service employees was planned well before organizing campaign – Nothing was said during the ceremony that could reasonably link the ceremony to the certification application and subsequent vote – Application for remedial relief dismissed – Based on outcome of representation vote, application for certification dismissed.

RENIN CANADA CORP., RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB File No.: 1439-17-U; Dated January 16, 2020; Panel: Adam Beatty, Wayne Zachar, Jawara Gairey (71 pages)

Certification – Construction Industry – Managerial exclusion – Conflict of Interest – Applicant argued that individual be excluded from the Schedule "A" list of employees on the basis that he was an owner, director, and the treasurer and secretary of the responding party – Applicant submitted that the conflict of interest was obvious and no *viva voce* evidence needed to be heard as owners are presumed to exercise managerial authority – No dispute between the parties that a sole owner of a company is excluded from a bargaining unit solely because he or she is an owner-operator – Board cited past jurisprudence holding that the purpose of the s. 1(3)(b) exclusion is to ensure that persons within a bargaining unit do not find themselves with a conflict of interest between their managerial responsibilities and their responsibilities as bargaining unit members – Board acknowledged it had not yet fully considered whether the obligations imposed by the *Business Corporations Act* create a conflict of interest between directors and bargaining unit employees – Board concluded that the BCA imposes obligations on directors of corporations that create the inherent conflict of interest and divided loyalties that underpin the purpose of the managerial exclusion in s. 1(3)(b) of the *Labour Relations Act* – Party seeking exclusion of individual pursuant to s. 1(3)(b) has met onus of proof once it is established that the individual is a corporate director who is bound by the statutory obligations of the BCA – Onus then shifts back to party asserting that the individual should be included – Bar for overcoming conclusion that director should not be included in a bargaining unit is high – Board held that responding party had not established a basis for why the Board should not determine the individual's status based solely on the materials before it pursuant to Rule 41.3 of the Board's Rules of Procedure – Based on materials filed, Board found that individual was excluded from the Schedule "A" list pursuant to s. 1(3)(b) of the Act and from the applied-for bargaining unit because he held a rank above non-working foreman with the responding party.

C&E MECHANICAL LTD., RE: ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA; OLRB File No.: 1741-19-U; Dated January 22, 2020; Panel: M. David Ross (21 pages)

Construction – Accreditation – Practice and Procedure – Application for accreditation pursuant to s. 134 of the *Labour Relations Act* included a request for reconsideration of the Board's prior decision from over two decades ago – Board commented on procedure to be followed – Board held that it is neither efficient nor productive to deal with reconsideration requests of decisions from decades ago – An applicant should simply file an accreditation application for the "new area" and at the same time include in its application a request to vary in the "old area" if the application is successful – Board went on to deal with application in the manner proposed by the parties – Board noted that

s. 135 of the Act requires the Board to determine "the unit of employers that is appropriate for collective bargaining in a particular geographic area and sector" and that in doing so it is not confined to one geographic area or sector – Board directed applicant to publish Notice to Employers in geographic area affected by application – Board directed applicant to send Board's decision and associated materials to employers on List of Employers – Determinations under ss. 134 and 136 of the LRA to be made after Employer Filing Date or after any subsequently scheduled hearing.

THE RESIDENTIAL LOW RISE FORMING CONTRACTORS ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY, RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, RE: METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION, RE: TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU; RE: THE RESIDIENTIAL FRAMING CONTRACTORS' ASSOCIATION OF METRO TORONTO & VICINITY INC.; OLRB File No.: 2176-19-R; Dated January 24, 2020; Panel: Jack J. Slaughter (8 pages)

Construction Industry Certification – Practice and Procedure – Application for certification pursuant to s. 128.1 of the *Labour Relations Act* — Dispute as to the sufficiency of the pleadings filed by the employer – Board held that standard of pleading expected in employee status disputes is well-known; specifically, an employer must properly plead exactly what work tasks it states each individual performed on the application filing date did, for how long each of those work tasks were performed, and, when appropriate, the tools that each individual used to perform those work tasks – In the Board's view, the names of the individuals in dispute ought to be removed from the Schedule "A" list because the employer did not satisfy the standard of pleading outlined in the Board's case law — Analysis developed by the Divisional Court in *ASL Agrodrain* was directly applicable to the facts of the proceeding before the Board – Large body of Board jurisprudence establishes that the passage of time corrodes the ability of the parties to investigate factual disagreements which usually arise during the litigation of construction industry status disputes, and the prejudice created by the passage of time occurs very quickly – Employer's complaint that union did not itself particularize the grounds upon which it challenged one individual's inclusion was without merit – Purpose of the union submission in a card-based construction industry certification is to identify for the employer the identity of those persons whose names the union believes should and should not be on Schedule "A" list – Union's only obligation is to identify those individuals – Employer put together Schedule "A" list in the first place and should be able to explain in its subsequent filing why it is that any given individual has been included on Schedule "A" list it filed – In instant case, prejudice to the union was obvious – Employer provided new information seven weeks after the application filing date, such that there was no reasonable possibility the applicant could secure witnesses to swear under oath the amount of time to the minute that the individual in dispute spent performing particular tasks – Employer's submissions highlighted the potential mischief that the Board seeks to avoid by insisting that detailed status submissions be filed early on in the status dispute process – Employer added new tasks which all favoured the position it took with respect to employee status – Impression left is that responding party altered its pleadings to minimize or eliminate the risk of a negative result – As a result, the Board concluded that the applicant would be irreparably prejudiced should the responding party be permitted to rely upon its late-filed particulars – Employer raised risk of disenfranchisement from participation in a certification application as a result of a deficient proceeding –Permitting employers to file vague status submissions and particularize them at a later date would be to encourage employers to plead bald legal conclusions for the purpose of extending the time before a certificate may issue by the Board – Board held that individuals in question were to be removed from Schedule "A" list.

KINTEL CONSTRUCTION LTD AND/OR 20/20 GENERAL CONTRACTORS INC AND/OR ANGELO CONTI AND VANDA CONTI O/A A.C.E. FLOORING; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 2000-19-R; Dated January 17, 2020; Panel: Lee Shouldice (29 pages)

Interim Relief – Unfair Labor Practice – Union alleged that the TDSB breached section 86 of the *Labour Relations Act* when it redeployed educational assistants (EAs) and special needs assistants (SNAs) working in secondary schools to elementary schools when the TDSB closed its secondary schools due to a one-day strike by the

Ontario Secondary School Teachers Federation – Board canvassed approach to be taken when faced with request for interim order – Board noted that *National Judicial Institute* (*NJI*) (2018 CanLII 51312) set out factors to be considered when exercising powers pursuant to s. 98(1) of the Act – In *NJI*, the Board stated that "the fundamental question is: does the making of an interim order, of whatever kind, make labour relations sense in all of the circumstances?" – Factors to be considered in this determination are: the purposes of the Act; the nature of the interim order sought; the urgency of the matter; the apparent strength of the applicant's case and defence that the responding party may have; the balance of convenience / inconvenience; the balance of labour relations and other harm; whether the alleged damage is irreparable or not; delay; and any other labour relations considerations – Board held that question of which factors are most important naturally flows from an analysis of the facts – Union alleged violation of the statutory freeze by redeploying workers to perform the duties of striking employees – On the facts, EAs/SNAs not redeployed to perform the work of striking employees – Board found that collective agreement provisions relied upon by the Union simply did not address the unprecedented events faced by the TDSB – Thus, central rationale underpinning application for an interim order by alleging a breach of s. 86 presented difficulties sufficient to dismiss the application for an interim order – Regarding the purposes of the Act, the relevant section was s. 86, and the applicant had not shown an arguable case – Regarding the urgency of the matter, it was not apparent from the materials that subsequent strikes were likely to re-occur, and there was no evidence that an order protecting the EAs/SNAs constituted an urgent matter – Regarding the "balance of convenience" and "balance of labour relations and other harm" factors, the evidence of alleged personal irreparable harm was mostly speculative, and the alleged collective bargaining harm that may have occurred (the Union applying for conciliation) could not be undone by an interim order – Any individual monetary loss for additional travel more appropriately dealt with via grievance and arbitration procedure – Nature of interim order sought did not favour union as the Board was not convinced it should exercise its discretion to grant interim relief for a one-time violation – Application for interim order dismissed.

TORONTO DISTRICT SCHOOL BOARD; RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4400; OLRB File No.: 2566-19-IO; Dated January 3, 2020; Panel: Maurice A. Green (17 pages)

Practice and Procedure – Health and Safety – Inspector – Harassment – Production of harassment investigation report – Application under s. 61(1) of *Occupational Health and Safety Act* appealing Inspector's Order – Extent of Inspector's power to require production of unredacted copy of employer's investigation report into allegation of workplace harassment – Employer had declined to reveal content of interviews with any witnesses, materials identified as relevant by participants in the investigation, the investigator's assessment of compliance with workplace policies, and the investigator's findings of fact and recommendations – Board reviewed Inspector's role and powers under OHSA – Inspectors have discretion to issue range of orders where a violation is found, including, at s. 54(1), requiring the production of documents – Board noted that powers under s. 54(1) are broad in scope but limited insofar as they may only be exercised by inspectors for purposes of carrying out their statutory duties and powers – Act of inquiring into a worker's complaint obviously an exercise of Inspector's statutory power of enforcement – Employer argued that OHSA's workplace harassment provisions are entirely aimed at procedural compliance by employers in response to workplace harassment complaints – Board held that even if this position were accepted, the Inspector was entitled to see the entirety of what was clearly a relevant document in the determination of whether the employer's investigation was appropriate in the circumstances – Once the employee's complaint concerning the company commissioned investigation of the workplace harassment complaints was assigned to the Inspector for determination, the Inspector was carrying out her statutory duty to inquire into and investigate those complaints and was thereby entitled to exercise her discretion to require production and examine all the content of the Findings report – Appeal dismissed.

WAL-MART CANADA LOGISTICS ULC, RE: Gail Stewart; RE: A Director under the Occupational Health and Safety Act; OLRB File No.: 2969-18-HS; Dated January 10, 2020; Panel: Patrick Kelly (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
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	April 29, 2020
New Horizon Divisional Court No. 264/19	0193-18-U	April 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	May 19, 2020
Hector Yao Divisional Court No. 063/19	1841-18-ES	February 20, 2020
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	May 13, 2020
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
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	December 18, 2019

(February 2020)

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	Appeal Allowed SCC 38979
Front Construction Industries Divisional Court No. 528/17	1745-16-G	May 12, 2020
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